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3 STANDARD PROC.

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ARSON

I. DEFINITION AND DISTINCTIONS. — A. At Common Law. — At common law, arson is defined as the wilful and malicious burning of the dwelling or outhouse of another. It was peculiarly an offense against the habitation and its possession. Hence the burning of one's own house, of which he had possession, was not arson at common law;[1] although if the house was in a town, or so near to the houses of others as to endanger them, it was a high misdemeanor.[2]

B. Statutes. — **1. In General.** — Not only in England,[3] but in most of the United States, however, statutes are to be found defining the crime of arson;[4] or if not, denouncing the offense *eo nomine*,[5] at least providing a punishment for an offense consisting of all the constituent elements of arson, and extending the offense probably to buildings and property not recognized by the common law definition as being the subjects of arson.[6]

2. Statute Prescribing Punishment Merely. — If the statute provides only for the punishment of the crime of arson, without defining it, the offense is left as it stood at common law, to which resort must be had for its definition.[7]

3. Degrees of Offense. — These statutes not only enlarge the subjects of arson, but make it a felony, or a misdemeanor, visited with punishment differing in severity according to the circumstances attending the act and the character of the subject.[8] Thus, in some of the states, the crime of arson is by express statute divided into three degrees: the first having reference specially to the protection of human life; the second having reference to the character of

1. 4 Bl. 220; 1 Hale P. C. 566; 2 East P. C. 1015. See also: **Ala.** — Davis *v.* State, 52 Ala. 357. **Ark.** — Mary *v.* State, 24 Ark. 44, 81 Am. Dec. 60. **Conn.** — State *v.* Toole, 29 Conn. 342; State *v.* McGowan, 20 Conn. 245, 52 Am. Dec. 336. **Md.** — Kellenbeck *v.* State, 10 Md. 431, 69 Am. Dec. 166. **N. Y.** — People *v.* Fanshawe, 137 N. Y. 68, 73, 32 N. E. 1102.

2. 2 Russ. Crimes, 9th ed. 1024, *et seq.*; Bouv. Law Dict. (Rawle's ed.).

3. 24 & 25 Vict., c. 97. See Queen *v.* Newboult, L. R. 1 C. C. (reserved) 344.

4. "Arson is the wilful and malicious burning of a building, with intent to destroy it." Cal. Penal Code, § 447.

"Under our statutes as was the case at the common law, arson is an offense against the possession, rather than the property." Johnson *v.* State (Ala.), 55 So. 268.

5. **As in Louisiana,** where it is held that under the generic term arson are included the offenses prescribed in the Louisiana statute, each of which is but one class of arson, and to which different measures of punishment are attached. State *v.* Fulford, 33 La. Ann. 679.

6. Lipschitz *v.* People, 25 Colo. 263, 53 Pac. 1111 (compare the statutes of other states on this question); Com. *v.* Smith, 151 Mass. 491, 24 N. E. 677.

As for Example in Wisconsin.—Sanb. & B. Ann. St., § 4399 *et seq.* See State *v.* Kroscher, 24 Wis. 64; Lacy *v.* State, 15 Wis. 13.

7. **Ky.** — Aikman *v.* Com., 12 Ky. L. Rep. 894, 18 S. W. 937. **Md.** — Cochrane *v.* State, 6 Md. 400. **Vt.** — State *v.* Hannett, 54 Vt. 83.

8. **Ala.** — Davis *v.* State, 52 Ala. 357. **Cal.** — Penal Code, § 453. See People *v.* Coch, 53 Cal. 627. **La.** — State *v.* Gregory, 33 La. Ann. 737; State *v.* Fulford, 33 La. Ann. 679. **N. Y.** — Debren *v.* People, 22 N. Y. 178. *Compare* Freund *v.* People, 5 Park Cr. 198.

the property to which fire is set, or which is burned, and the third having reference essentially to the protection of property merely.[9]

C. Distinction Between Arson and Burning With Intent To Defraud Insurer. — The crime of burning insured property with intent to defraud the insurer is a different offense from arson, either under the common law or under the statute, both in respect of the essential elements which constitute the offense and the punishment to be inflicted for its commission.[10]

II. THE INDICTMENT, INFORMATION, ETC. — A. Arson. — **1. Statements of Rules as to Pleading the Offense.** — a. *In General.* — Of course, in charging arson, or its equivalent offense as defined by the statute, the indictment or information must allege all of the constituent elements of the offense. This rule is so well settled as to need the special citation of no authority in its support.[11]

b. *Test of Sufficiency.* — **(I.) Generally.** — The sufficiency of the indictment or information, however, is to be determined by whether or not it is intended thereby to charge the offense as defined at common law or by statute. Of course, as previously stated, where the statute does not define the offense, but merely prescribes the punishment for its commission, the indictment or information must charge the offense as defined at common law.[12]

(II.) Statute Same as Common Law. — If the elements of the crime are the same by the common law and by statute, the indictment may follow either, as a general rule.[13]

9. **As In Alabama.** — See Davis *v.* State, 52 Ala. 357.

10. Mai *v.* People, 224 Ill. 414, 79 N. E. 633.

11. See cases cited in the various succeeding sections of this title, and the title "Indictment and Information."

12. Cochrane *v.* State, 6 Md. 400; State *v.* Hannett, 54 Vt. 83.

A mere clerical mistake, which does not mislead or result to the purjudice of the accused, does not have the effect of vitiating an information otherwise sufficient. People *v.* Duford, 66 Mich. 90, 33 N. W. 28, where the word "was" was used instead of the word "did" as describing the act of firing. The omission of the word "fire" after the words "did set" is not fatal if it is further alleged that "the same house then and there, by the spreading of such fire, did feloniously, wilfully and maliciously burn and consume." Polsten *v.* State, 14 Mo. 463.

13. State *v.* Snellgrove, 71 Ark. 101, 71 S. W. 266, where the court said: "An indictment good under the common law would be good under our statute, though it may be that, under the common law form of indictment, one could not be convicted of arson for burning a bridge or for burning certain other structures which the statute covers. But though, under the allegation that the defendant burned a house, the state would not be permitted to prove that he burned a bridge, still the indictment would be a good indictment for burning a house, and not subject to demurrer on the ground that it stated no offense, or that it was too indefinite and uncertain. Now the form of indictment for arson at common law, says Bishop, charges that the defendant at a time and place 'a certain house of one B., there situate, did feloniously, wilfully and maliciously set fire to and burn.' 2 Bishop, Crim. Proc. (3d ed.), § 33. It will be noticed that it was not necessary to describe the building as a dwelling house, as in indictments for burglary, the word 'house' in indictments for arson being sufficiently descriptive of the structure burned. Comparing this form of the common law indictment with the indictment in this case, we

(III.) Charging in Language of Statute. — But where the indictment or information is brought under a statute which defines the offense, it must clearly state all the facts and circumstances which constitute the offense as defined by the statute.[14] And ordinarily it is sufficient to charge the offense in the language of the statute creating and defining it.[15] But this is not sufficient where the statute merely names a common law offense and fixes punishment but does not define or enumerate the elements of the crime.[16] The precise language of the statute, however, need not be used, provided words of equivalent import or meaning are employed.[17]

e. *Duplicity.* — Of course the pleader must not charge two separate and distinct offenses.[18]

d. *Naming the Offense.* —[19]

e. *Joinder of Counts.* — Where the offenses charged in the several counts of an indictment are not repugnant, but grow out of the same transaction, and are mere variations of the statement of the same act, such counts may be joined, although some of them charge the offense as a felony and others as misdemeanor.[20]

see that the latter contains at least some surplusage; for, having alleged that the defendant did feloniously, wilfully and maliciously burn a certain house, it was unnecessary to allege that he did so with the intention to injure and destroy it."

14. May *v.* State, 85 Ala. 14, 5 So. 14; People *v.* Fairchild, 48 Mich. 31, 11 N. W. 773.

An indictment should pursue the precise and technical language employed in the statute in the definition or description of the offense. Lewis *v.* State, 49 Miss. 354.

15. Cal. — People *v.* Russell, 81 Cal. 616, 23 Pac. 418; People *v.* Giacamella, 71 Cal. 48, 12 Pac. 302. Ga. — Hester *v.* State, 17 Ga. 130. Md. — Gibson *v.* State, 54 Md. 447. N. C. — State *v.* Hall, 93 N. C. 571.

State *v.* Brand, 77 N. J. L. 486, 72 Atl. 131, *affirming* 69 Atl. 1092. "An indictment under Act June 14, 1898 (P. L. P. 829), § 126, charging that the defendant did 'wilfully and maliciously aid, counsel, procure, and consent to the setting fire to and burning of certain goods, etc., which at the time were insured against loss or damage by fire, with intent to prejudice' certain insurance companies mentioned, *held* sufficient, without any more specific averment that a fire actually occurred."

An indictment for arson in the second degree in the language of the form prescribed by the code is sufficient. Cheatham *v.* State, 59 Ala. 40.

16. May *v.* State, 85 Ala. 14, 5 So. 14.

17. Childress *v.* State, 86 Ala. 77, 5 So. 775; Hester *v.* State, 17 Ga. 130.

18. An indictment is not double which charges as a single act the burning of a number of designated dwelling-houses. Woodford *v.* People, 62 N. Y. 117, 20 Am. Rep. 464.

A charge of burning "one house and tenement" does not charge two offenses. State *v.* Snellgrove, 71 Ark. 101, 71 S. W. 266.

Charging burning on a certain day of certain articles of merchandise, separately specified, charges but a single act of burning. Com. *v.* Goldstein, 114 Mass. 272.

Charging that the defendant "set fire to and burned" the building does not charge two crimes conjunctively. State *v.* Jones, 106 Mo. 302, 311, 17 S. W. 366.

19. Where the statute defines arson, and various degrees thereof, an information accusing defendant of arson and charging facts constituting arson in one of the specified degrees, "is sufficiently specific as to the crime charged, and does not accuse of one crime and state facts constituting a different crime." State *v.* Young, 9 N. D. 165, 82 N. W. 420.

20. Ala. — Washington *v.* State, 68 Ala. 85. N. Y. — People *v.* Fansham, 137 N. Y. 68, 32 N. E. 1102, *affirming* 65 Hun 77, 19 N. Y. Supp. 865. Pa. —

f. *Degree of Crime.* — (I.) Not Necessary To Allege. — If arson is charged in the language of the statute the degree of the crime need not be alleged; that question is for the jury to determine from all the facts and circumstances developed in evidence.[21]

The test for ascertaining to which degree the offense belongs, both according to the forms given and the well settled rules of pleading, is the statement of facts contained in the indictment. By these the law fixes its character and pronounces the degree of offense charged. If the facts are stated which are necessary to constitute arson in the first degree, the indictment is a charge for that offense.[22] And if circumstances are stated in connection with the arson charged, which make a case within the second degree, the indictment is necessarily a charge for that offense.[23] So, too, if facts are charged which constitute any kind of arson, and nothing is averred as to any circumstances which would make the offense arson in the first or second degree, the indictment, if otherwise sufficient, is an indictment for arson in the third degree.[24]

Staeger *v.* Com., 103 Pa. 469. Vt. — State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Different Houses and Owners. — An indictment for arson containing four counts, each of which charges the offense in the first degree, and complying with the form prescribed by the code, although it alleges a different house and different ownership, is not subject to demurrer for misjoinder of counts. Miller *v.* State, 45 Ala. 24.

21. People *v.* Russell, 81 Cal. 616, 23 Pac. 418.

22. See Brown *v.* State, 52 Ala. 345.

An indictment charging that defendant "wilfully set fire to or burned in the night-time the jail of Wilcox County, which was occupied at the time by persons lodged therein at night, against the peace, etc.," charges with certainty arson in the first degree under the Alabama statute. Sands *v.* State, 80 Ala. 201.

23. See Brown *v.* State, 52 Ala. 345.

Form of Indictment for Arson in Second Degree Under Alabama Statute. "The grand jury of said county charge that before the finding of this indictment Dan Hennigan, *alias* Dan Hannigan, wilfully set fire to or burned a store of the Alabama Consolidated Coal and Iron Company, a corporation, which with the property therein contained was worth more than five hundred dollars, against the peace and dignity of the state of Alabama." Hannigan *v.* State, 131 Ala. 29, 31 So. 89.

Indictment for Arson in Second Degree Under the Alabama Statute. — In Smoke *v.* State, 87 Ala. 143, 6 So. 376, the indictment charged that the defendant "'Wilfully set fire to or burned the cotton-house containing cotton of Montgomery Beasley;' in the second count, 'the cotton-pen containing cotton of Montgomery Beasley;' in the third, 'the cotton-house containing cotton of Bettie Beasley;' and in the fourth, 'the cotton-pen containing cotton of Bettie Beasley.'" In holding the indictment demurrable the court said: "The indictment, in our opinion, was bad, in failing to aver with sufficient clearness the ownership of the 'cotton-house,' or 'cotton-pen,' alleged to have been set fire to, or burned. Crim. Code, 1888, § 3781. Each of the four counts must be construed to aver only the ownership of the cotton contained in the house or pen, and not the structure itself which contained the cotton."

24. Brown *v.* State, 52 Ala. 345.

Form of Indictment for Arson in Third Degree Under Alabama Statute. "State of Alabama, Etowah County, City Court of Gadsden, January Term, A. D. 1892. The grand jury of said county charge that before the finding of this indictment Arthur Leonard, under such circumstances as did not constitute arson in the first or second degree, did wilfully set fire to or burn a building of York Rogers, to-wit, a corncrib, or cornpen, containing corn, against the peace and dignity of the State of Alabama." Leonard *v.* State, 96 Ala. 108, 11 So. 307.

(II.) Negativing Aggravating Circumstances. — In an indictment for arson of a lesser degree as defined by statute, it is not necessary to negative the aggravating circumstances which would constitute arson of a higher degree.[25]

g. *Conclusion of Indictment, etc.* —An indictment for the statutory crime must, of course, as in the case of other offenses, conclude "against the form of the statute," etc. A common law indictment must conclude "against the peace and dignity," etc.[26]

2. Particular Elements of Offense. — a. *In Respect of the Burning, Setting Fire, etc.* — **(I.) The Fact.** — (A.) NECESSITY. — The fact of burning is a material element of the offense of arson, and must be alleged,[27] although it is not necessary, in order to sustain this obligation, to prove that any part of the house, much less the entire building, was wholly consumed.[28] And sometimes this is expressly so provided by statute.[29]

Charging Disjunctively. — Although the statute defining the offense of arson be in the disjunctive, viz., burn or cause to be burned,

An indictment charging that "defendant wilfully set fire to or burned a cotton-house of R. H., within the curtilage of the dwelling-house of said R. H., by the burning whereof the said dwelling-house was burned," charges arson in the third degree as defined by the Alabama statute. Cheatham *v.* State, 59 Ala. 40.

25. **Mass.** — Com. *v.* Hamilton, 15 Gray 480; Com. *v.* Squire, 1 Met. 258. **N. H.** — State *v.* Emerson, 53 N. H. 619. **N. Y.** — People *v.* Pierce, 11 Hun 633; People *v.* Dunkin, 5 Park. Cr. 243. **Wis.** — State *v.* Kroscher, 24 Wis. 64; Lacy *v.* State, 15 Wis. 13.

Where the statute in enumerating the various subjects of arson uses the words "or any other building not embraced and provided for in" the other sections of the statute defining arson, the indictment, in describing the building, need not show that it was not embraced in such other sections of the statute. State *v.* Gregory, 33 La. Ann. 737.

26. Chapman *v.* Com., 5 Whart. (Pa.) 427. And see, generally, the title "**Indictment and Information.**"

If there is only one statute, an indictment concluding "against the form of the statutes," etc., is bad. And so where there is more than one statute, a conclusion against the form of "the statute" is bad. State *v.* Sandy, 25 N. C. 570.

But when one count is against certain defendants as principals, and another against others as accessories, it is sufficient that the indictment close with the usual words "contrary to the form of the statutes," etc.; these words need not be repeated after each count. State *v.* Travis, 39 La. Ann. 356, 1 So. 817.

27. **Ark.**—Mary *v.* State, 24 Ark. 44, 81 Am. Dec. 60. **Md.** — Cochrane *v.* State, 6 Md. 400. **Va.** — Howell *v.* Com., 5 Gratt. 664.

At common law neither an intention nor an actual attempt to burn a house will amount to a felony if no part be actually burned, and the word "burn" is necessary to a sufficient indictment; "set fire" is not enough. Cochrane *v.* State, 6 Md. 400.

An information for burning a dwelling-house by setting fire to another building whereby the dwelling is burned should set forth the firing of the one building and that by means thereof the particular dwelling was burned. People *v.* Fairchild, 48 Mich. 31, 11 N. W. 773.

28. Mary *v.* State, 24 Ark. 44, 81 Am. Dec. 60.

29. "**Burning**" **Defined.** — To constitute a burning it is not necessary that the building set on fire should have been destroyed. It is sufficient that fire is applied so as to take effect upon any part of the substance of the building. Cal. Penal Code, § 451.

charging the offense in the conjunctive, viz. "burn and cause to be burned," is proper.[30]

(B.) Sufficiency. — It is not necessary to allege that the building was consumed or destroyed by the fire.[31]

"Set Fire," "Burn," etc. — Where the statute uses the word "burn," it is not sufficient to charge that the defendant "set fire to" the building in question.[32] In some of the statutes, however, the words "burn" and "set fire to" are used synonymously, and of course in such case either term may be used in alleging the fact of burning.[33] It is not necessary to allege in terms that the defendant "set fire" to the building, if the burning is otherwise sufficiently alleged.[34]

(II.) Force and Arms. — It is not necessary that an indictment for arson should allege that the offense was committed *vi et armis*.[35]

(III.) Time. — In some jurisdictions the time of the act, as in the night-time, is one of the elements which determine the degree of the offense, and in order to authorize a conviction for an offense of that degree, the fact that the act was committed in the night-time must be alleged.[36] But where the time of the act is not a constituent element of the offense, it is of course not necessary to allege it.[37]

30. State *v.* Price, 11 N. J. L. 203, 215. See also State *v.* Mitchell, 27 N. C. 350. See generally, the title "Indictment and Information."

31. Ala. — Luke *v.* State, 49 Ala. 30, 20 Am. Rep. 269. Cal. — Clugston *v.* Garretson, 103 Cal. 441, 37 Pac. 469. Ga. — Hester *v.* State, 17 Ga. 130, holding that the word "burn" must be presumed to have been used in the sense of "consume with fire." Ind. — Lavelle *v.* State, 136 Ind. 233, 36 N. E. 135. See also People *v.* Haggerty, 46 Cal. 355.

32. Ark. — Mary *v.* State, 24 Ark. 44, 81 Am. Dec. 60. Cal. — People *v.* Myers, 20 Cal. 76. N. C. — State *v.* Hall, 93 N. C. 571. Va. — Howel *v.* Com., 5 Gratt. 664.

33. State *v.* Taylor, 45 Me. 322.

34. People *v.* Myers, 20 Cal. 76, where the allegation was that the defendant feloniously, "wilfully and maliciously did burn or cause to be burned," and the court after an extensive review of the question said: "The words 'set fire to' are not a part of the definition of the offense, either by our statute, or as it would seem at common law; and their use in addition to the allegation that 'he burned and caused to be burned,' would not aid at all in apprising the defendant of the charge made against him. We believe it is not claimed that it was requisite to set forth the mode or manner of setting the fire or causing the burning." *Overruling* People *v.* Hood, 6 Cal. 236.

35. State *v.* Temple, 12 Me. 214.

36. La. — State *v.* Gregory, 33 La. Ann. 737. Miss. — Dick *v.* State, 53 Miss. 384. N. C. — State *v.* England, 78 N. C. 552. Va. — *In re* Curran, 7 Gratt. 619.

37. State *v.* Spiegel, 111 Iowa 701, 83 N. W. 722; Com. *v.* Uhrig, 167 Mass. 420, 45 N. E. 1047.

Although the statute may expressly define "night-time" as being between certain hours, an indictment, in changing the time of the act, as in the night-time, which varies from that defined by the statute, although not sufficient as charging arson in the night-time, is nevertheless sufficient where the punishment for the offense charged is the same regardless of the time of the act. Com. *v.* Lamb, 1 Gray (Mass.) 493.

Under the Maine statute an indictment for burning a barn "in the daytime" need not allege that the barn was within the curtilage of a dwelling-house, that fact being immaterial, except where the burning is in the

(IV.) The Intent — Malice, etc. — (A.) Generally. — Where the offense is made a felony by the statute, the indictment must charge that the act was done "feloniously."[38] And where the statute uses certain words to express the intent, the indictment must use those words or words of equivalent import.[39]

Malice. — So, too, malice being one of the constituent elements of the offense of arson, that fact must be charged by appropriate allegation.[40]

(B.) Intent To Burn or Destroy. — Unless expressly so provided by statute,[41] an intent to burn or destroy the building is not an element

night-time. State *v.* Taylor, 45 Me. 322.

38. Mott *v.* State, 29 Ark. 147; State *v.* Roper, 88 N. C. 656.

The charge that the defendant "wilfully and feloniously" set fire to the house is equivalent to a charge that the act was done "wilfully, maliciously and unlawfully," since it could not be felonious without being both malicious and unlawful. Young *v.* Com., 12 Bush (Ky.) 243. But *compare* State *v.* Gove, 34 N. H. 510, which holds that where the statute makes criminal the doing of the act "wilfully and maliciously," it is not sufficient to charge that it was done "feloniously and unlawfully" or "feloniously, unlawfully and wilfully;" the latter terms not being synonymous, equivalent, of the same legal import or substantially the same as the former.

39. That the words "unlawfully, wilfully and feloniously" are not synonymous with "wantonly and maliciously," see State *v.* Pierce, 123 N. C. 745, 31 S. E. 847. See also State *v.* Morgan, 98 N. C. 641, 3 S. E. 927, where the court said: "The words, 'unlawfully and maliciously,' used, cannot supply the place of the word 'wantonly,' omitted, which, by the amendment mentioned, was in part substituted for them, as was decided in State *v.* Masses, *supra*. Nor does the word 'feloniously' supply the omission. This word implies that the act charged to have been done proceeded from an evil heart and wicked purpose. It is a highly technical term, and is employed particularly in criminal pleadings to describe and charge offences that proceed from a depraved heart and import wicked purpose; that such offences are felonious in their nature, and are done with a deliberate intent to commit a crime. Wantonly, in a criminal sense, implies that the act was done of a licentious spirit, perversely, recklessly, without regard to propriety or the rights of others, careless of consequences, and yet without settled malice. The meaning and application of the term is well considered by the Chief Justice in State *v.* Brigman, 94 N. C. 888. It is essential that the indictment shall charge that the defendant 'wantonly' as well as 'wilfully set fire to,' etc., and as this is not done in terms or effect, it is fatally defective — it does not charge the offense intended, and the judgment must therefore be arrested."

Charging that defendant "unlawfully, maliciously, and feloniously," etc., amounts to a charge that the burning was wilfully done. People *v.* Haynes, 55 Barb. (N. Y.) 450.

If the indictment charges "wantonly and maliciously," as required by statute, the additional words "unlawfully, wilfully and feloniously" may be disregarded as surplusage. State *v.* Battle, 126 N. C. 1036, 35 S. E. 624.

40. State *v.* Keena, 63 Conn. 329, 28 Atl. 522; Jesse *v.* State, 28 Miss. 100.

The word "feloniously" sufficiently charges malice. Aikman *v.* Com., 12 Ky. L. Rep. 894, 18 S. W. 937.

The word "malicious" is not necessary when it is charged that the act was done wilfully and feloniously (State *v.* McCoy, 162 Mo. 383, 62 S. W. 991), or wilfully, wrongfully, unlawfully and feloniously (State *v.* Ross, 77 Kan. 341, 94 Pac. 270). *Compare* Kellenbeck *v.* State, 10 Md. 431, 69 Am. Dec. 166, holding that the indictment must charge that the burning was done "maliciously," it not being enough to charge that it was done "feloniously, wilfully and unlawfully."

41. When the statute makes intent to injure or defraud some person a constituent element of the offense, there

of the offense of arson.[42] And an allegation that the defendant committed the crime with intent to destroy the property may be treated as surplusage, and does not invalidate an otherwise sufficient indictment.[43] But where the defendant is charged with setting fire to one building, in consequence whereof another building was burned, such an intent must be alleged.[44]

b. *In Respect of the Building Burned.* — (I.) Character. — Of course the indictment should allege the character of the building burned.[45]

must be an allegation of such intent. State *v.* Porter, 90 N. C. 719.

The California statute makes the "intent to destroy" one of the necessary elements of the crime of arson, and it is accordingly necessary that this essential element should be averred in the information. People *v.* Mooney, 127 Cal. 339, 59 Pac. 761.

The averment of the "intent to destroy" must be either in the language of the statute or in language that will clearly make it appear that the defendant had this specific intent and purpose, and that the building was burned by him to carry into execution such intent and purpose. People *v.* Mooney, 127 Cal. 339, 59 Pac. 761.

And the mere use of the words "wilfully, unlawfully, feloniously and maliciously," although proper, is not enough. People *v.* Mooney, 127 Cal. 339, 59 Pac. 761, where the court said: "Such words import only that criminal intent which is a necessary part of every felony or other crime, but they do not necessarily include the specific purpose to destroy the building which is an element of the crime of arson."

Felonious, etc. — The intent to burn is sufficiently alleged by the words "feloniously, wilfully and maliciously" (State *v.* Bean, 77 Me. 486), or "wilfully and feloniously" (State *v.* McCoy, 162 Mo. 383, 62 S. W. 991).

Intent to Injure. — Under a statute making it a misdemeanor to set fire to any building or tenement of another with intent to burn the same, etc., it is not enough to allege an "intent to injure the owner." Mary *v.* State, 24 Ark. 44, 81 Am. Dec. 60.

42. Me. — State *v.* Watson, 63 Me. 128; State *v.* Hill, 55 Me. 365. N. Y. — People *v.* Fanshawe, 137 N. Y. 68, 32 N. E. 1102, under a statute declaring guilty of arson in the first degree one who wilfully burns or sets on fire in the night-time a dwelling in which there is a human being. N. C. — State *v.* Rogers, 94 N. C. 860.

43. State *v.* Snellgrove, 71 Ark. 101, 71 S. W. 266.

In Iowa a statute (§ 4780) provides that if any person wilfully and maliciously burn, either in the day or night-time, the building of another, he shall be imprisoned, etc.; and another statute (§ 4781) declares that if any person set fire to any building with intent to cause such building to be burned, he shall be imprisoned, etc. And in State *v.* Spiegel, 111 Iowa 701, 83 N. W. 722, it was alleged that: "The said Charles A. Spiegel, on the 21st day of February, A. D. 1899, in the county of Polk aforesaid, and state of Iowa, in the night-time of said day, did wilfully, feloniously, and maliciously set fire to and burn a certain store building then and there situated in Polk county, Iowa, then and there occupied by the Hub Show Company and by I. W. Cramer as a store building, and then and there owned by one C. H. Martin, with a wilful, malicious, and felonious intent then and there on the part of him, the said Charles A. Spiegel, the defendant, to cause the store building aforesaid to be then and there burned and consumed." The court said: "This indictment contains some matter which is surplusage. It charges in clear and direct terms the burning of the building, and then adds, what is needless, a charge of intent to accomplish what was done. It seems to us obvious that the indictment charges an offense under section 4780. It was for this offense that defendant was tried, and of which he was convicted. He has no just ground of complaint as to the manner in which the charge was made."

44. State *v.* Watson, 63 Me. 128; State *v.* McCoy, 162 Mo. 383, 62 S. W. 991.

45. Com. *v.* Smith, 151 Mass. 491, 24

Following Language of Statute. — The rule that it is sufficient to follow the language of the statute defining and creating the offense applies in respect of the allegations describing the nature of the property burned.[46]

Negativing Exception. — Where the statute creating and defining the crime of arson contains an exception so incorporated with its enacting clause that one cannot be read without the other, the indictment must negative the exception. Thus the qualifying words "not parcel of any dwelling-house" are essential parts of the description of the subject of the arson, and cannot be omitted from the indict-

N. E. 677; Com. *v.* Hayden, 150 Mass. 332, 23 N. E. 51.

A building, which has been usually occupied by persons lodging therein at night, may be charged as a "dwelling-house," although not so in the ordinary and popular acceptation of the term. People *v.* Orcutt, 1 Park. Cr. (N. Y.) 252.

A schoolhouse is a house (**Ky.** — Wallace *v.* Young, 5 T. B. Mon. 155. **Md.** — Jones *v.* Hungerford, 4 Gill & J. 402. **Mass.** — Com. *v.* Horrigan, 2 Allen 159); so is a court house (Lavelle *v.* State, 136 Ind. 233, 36 N. E. 135); a factory (State *v.* Morgan, 98 N. C. 641); a jail (**Ala.**—Lockett *v.* State, 63 Ala. 5. **Mo.** — State *v.* Johnson, 93 Mo. 73, 5 S. W. 699. **N. Y.** — People *v.* Van Blarcum, 2 Johns. 105. **Tex.** — Willis *v.* State, 32 Tex. Crim. 534, 25 S. W. 123; Smith *v.* State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773. **Va.** Stevens *v.* Com., 4 Leigh 683; Com. *v.* Posey, 4 Call 109, 2 Am. Dec. 560). See also: **Ohio.** — Allen *v.* State, 10 Ohio St. 287, warehouse. **Tenn.** — Pike *v.* State, 8 Lea 577, barrel house. **Vt.** State *v.* Ambler, 56 Vt. 672, sugar house.

The word "house" is ordinarily in this connection synonymous with dwelling house, and in the usual acceptation covers everything appurtenant and accessory to the main building. Workman *v.* Ins. Co., 2 La. 507, 22 Am. Dec. 141.

"If the building set on fire is one appropriated to ordinary domestic uses, and is situated so near to the dwelling house as probably to endanger it, then it is arson to burn it, and not otherwise." Gage *v.* Shelton, 3 Rich. (S. C.) 242.

In Carter *v.* State, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262 (annotated case), the body of a freight car had been taken off the wheels and placed near the railway track at a station, and was supported upon permanent posts and was used as a freight warehouse. It was held that this structure was a house and it was properly charged in the indictment as an outhouse.

In Spears *v.* State, 92 Miss. 613, 46 So. 166, 16 L. R. A. (N. S.) 285, it was held that an indictment charging arson of a dwelling house was properly drawn where the building to which the fire was set was a store house connected with the dwelling house proper by a passage way roofed over, but otherwise unenclosed.

46. Gibson *v.* State, 54 Md. 447.

In California the statute describes a "building" as any house, edifice, structure, vessel or other erection, capable of affording shelter for human beings, or appurtenant to or connected with an erection so adapted. Cal. Penal Code, § 448.

Under a statute providing that if any person shall wilfully and unlawfully burn a barn where wheat, corn or other grain is usually kept, he shall be punished, etc., an indictment charging that defendant did unlawfully, wilfully, feloniously and maliciously set fire to, burn and destroy a barn of a certain person in which corn and oats were usually kept, and were then and there stored, is sufficient. De Shazer *v.* Com., 12 Ky. L. Rep. 453, 14 S. W. 542.

Florida Gen. St. 1906, § 3273, provides as follows: "Whoever wilfully and maliciously burns the dwelling house or any building adjoining such dwelling house, by the burning whereof such dwelling house is burnt, shall be punished by imprisonment in the state prison for life, or for such term as

ment.[47] So, too, if the statute expressly describes the character of the building which may be the subject of arson, the description of the building should come within the purview of the statute.[48]

the court may direct.'' In Knight *v.* State (Fla.), 53 So. 541, ''the indictment charged that the defendant '. . . did wilfully and maliciously set fire to and burn a certain building, to wit, a barn, . . .' adjoining the dwelling house of one George Hagans there situate, and by the kindling of said fire and the burning of said building the said dwelling house of the said George Hagans was then and there wilfully and maliciously burned and consumed.''' The court said: ''It is shown in evidence that the building was used as a dwelling house as alleged, and the court properly limited the consideration to the charge as made under the quoted statute. Hicks *v.* State, 43 Fla. 171, 29 South. 631.''

Under a statute making the act of wilfully and maliciously setting fire to or attempting to burn a house in a city, town or village, an offense, such a house is sufficiently described in an indictment averring that it was a ''certain guard and jail-house'' in a named village and was the property of that village. Howard *v.* State, 109 Ga. 137, 34 S. E. 330.

47. Gibson *v.* State, 54 Md. 447; Kellenbeck *v.* State, 10 Md. 431, 69 Am. Dec. 166.

48. In California an inhabited building is defined as ''any building which has usually been occupied by any person lodging therein at night.'' Cal. Penal Code, § 449.

Under a statute making the wilful setting fire to or burning of a corn-crib arson in the second degree, an indictment is not defective for failing to state that the crib contained corn at the time it was burned. Davis *v.* State, 152 Ala. 82, 44 So. 545.

In Childress *v.* State, 86 Ala. 77, 5 So. 775, the defendant was indicted for arson in setting fire to a ''house used as a prison, which was at the time occupied by Alfred Phillips, who was lodged therein,'' etc. It was objected that the indictment did not sufficiently charge the specific act of burning a prison. ''On this assumption of the legal effect and meaning of the indictment, it was contended, that the words *used as a prison* are not equivalent of an averment that the structure was in fact a prison.'' The court said: ''The contention arises from a misconception of the purposes and scope of the statute, and the purport of the indictment. At common law, the offense is regarded as an offense peculiarly against property and its possession. In defining arson in the first degree, and prescribing the penalty, the statute has special reference to the protection of human life—Davis *v.* State, 54 Ala. 357. It enlarges the subjects of arson, and extends them beyond those which the offense was considered, at common law, to reach. It not only designates particular kinds of structures, but, by comprehensive language, includes any house or building, not of the specified kinds, 'which is occupied by a person lodged therein,' without respect to the uses to which it may be otherwise appropriated. The words, *used in a prison*, were not employed as an allegation of the fact necessary to a conviction of the offense. They are merely descriptive, employed to identify the house burned, the ownership being unknown. They are surplusage. Without them, the indictment charges arson in the first degree, substantially in the words of the statute. A house or building, whatever may be its character or use, if occupied at the time of the burning by a person lodged therein, comes within the statutory definition.''

In McLane *v.* State, 4 Ga. 335, the indictment charged that the house burned was used as a dwelling-house, the property of the prosecuting witness; and it was held good.

An indictment describing the property as a ''millhouse'' is not bad for uncertainty. Ford *v.* State, 112 Ind. 373, 14 N. E. 241. The court said: '' 'Mill-house' is not the most happy description of a building enclosing mill machinery, or used for milling purposes, but any one understands from that description that such a building is meant. The word 'house' clearly means a building, in the ordinary use of the word, and such building or house is not necessarily the habitation of

(II.) Contents. — Where the statute provides for the punishment of the offense only when the building contains other property, the indictment must allege that the building contained such other property.[49]

(III.) Location of Property. — The indictment or information must,

man or beast. There are slaughter-houses, packing-houses, smoke-houses, etc., indicating houses in which animals are slaughtered, meats packed and smoked, etc. So, a 'mill-house,' we think, would readily be understood to be a building or house used for milling purposes."

A description of the property as a "certain frame building, commonly called a stable," sufficiently indicates the purpose for which the building is, or is intended to be, used. Dugle *v.* State, 100 Ind. 259.

In Levy *v.* People, 80 N. Y. 327, *affirming* 19 Hun 383, the indictment charged the prisoner as accessory to the crime of arson in the first degree, in burning the dwelling-house of K., in which he then was. As a matter of fact the building was a tenement-house, in which the prisoner's family and K. and his family occupied separate apartments, and the fire which was set in the prisoner's rooms, burned through. It was held proper to describe the apartment as the dwelling-house of K. See also Shepherd *v.* People, 19 N. Y. 537.

An information charging defendant with burning "a two-story wooden warehouse building" is sufficiently definite in description, although in fact the lower story only of the building was used as a warehouse and the upper story as a lodging-house. Slate *v.* Biles, 6 Mont. 186.

An indictment for burning "a certain barn and an outhouse thereto adjoining" need not separately charge the burning of each. Com. *v.* Lamb, 1 Gray (Mass.) 493.

Under a statute punishing the burning of "any other house or building not embraced or provided for in the preceding sections" of this chapter, an indictment describing the building as an "abandoned dwelling house" is good. Banks *v.* State, 93 Miss. 700, 47 So. 437.

If the statute declares that "every house, prison, jail," etc., shall be deemed a dwelling-house, an indictment charging the burning of a jail, must charge it as a dwelling-house. State *v.* Whitmore, 147 Mo. 78, 47 S. W. 1068.

49. State *v.* Porter, 90 N. C. 719; Mulligan *v.* State, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435.

Under a statute making it a felony to set fire to or burn a corn-pen containing corn" an indictment charging the defendant with arson in setting fire to or burning a "corn-crib containing corn" is good. Cook *v.* State, 83 Ala. 62, 3 So. 849, 3 Am. St. Rep. 688, where the court said: "The argument in support of the demurrer is, that the statute specifies 'corn-pen containing corn,' as the offense it denounces and punishes as arson in the second degree, while the indictment is for 'setting fire to or burning a corn-crib containing corn.' On this ground it is claimed, that the burning of a 'corn-crib containing corn,' falls within the residuary clause in reference to the crime of arson, and is only arson in the third degree,—a misdemeanor.—Code, of 1886, § 3784. The phrase 'corn-crib' is not found in the act of January 30, 1885. We hold, that when the offense in this case was committed, the terms, 'corn-pen containing corn,' and 'corn-crib containing corn,' had substantially the same popular signification; or, at least, that the phrase, 'corn-crib containing corn,' included corn-pen containing corn. Each of the counts charges a felony."

Under a statute making it a felony to wilfully and unlawfully burn a stable, barn or any house or place where wheat, corn or other grain is usually kept, or any other house whatever, an indictment charging the accused with burning a "barn the property of," etc., is sufficient, although it does not allege that wheat, corn or some article named in the statute was usually kept in it. Evans *v.* Com., 11 Ky. L. Rep. 573, 12 S. W. 769. The court said: "The enumeration of certain articles in storage is to be read in connection with the words 'any house or place' only. Granting counsel's contention that if the evidence had shown the

by proper allegation, show that the property burned was within the jurisdiction of the court.[50]

Although the words "there situate," usually found in indictments for arson, following the description of the property alleged to have been burned, are undoubtedly the better method of stating the location of the property,[51] yet their omission is not fatal to the indictment if the location of the property is otherwise sufficiently described.[52]

(IV.) Presence of Human Being. — Where the statute makes the presence of a human being in the building at the time an element of the offense, that fact must be distinctly alleged,[53] and not left to in-

structure to have been a stable, instead of a barn (provided there be any distinctions), there would have been a variance between the proof and the indictment, yet the testimony is that it was a barn."

50. State *v.* Gaffrey, 3 Pinn. (Wis.) 369.

An indictment alleging that defendants "in the county of Spokane, state of Washington, did then and there . . . burn a certain storehouse building," etc., plainly notifies the defendants that the building in question was in the county of Spokane, and state of Washington. State *v.* Meyers, 9 Wash. 8, 36 Pac. 1051. See also State *v.* McLain, 43 Wash. 267, 86 Pac. 390.

An indictment for burning a barn situate at a certain place within the jurisdiction of the court, and alleged to be within the curtilage of a dwelling-house of a person named, need not also allege that the dwelling-house was at that place. Com. *v.* Barney, 10 Cush. (Mass.) 478.

In an indictment, under the Georgia statute, for burning an "outhouse," it is not necessary to allege whether or not the house was in a city, town or village, in so far as concerns the legal character of the offense. That is a matter affecting the punishment only. Carter *v.* State, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262.

Under a statute defining arson as a wilful and malicious burning of "any other house (except the dwelling-house) or elsewhere," an indictment for burning a church not located in a city, town or village is good. Watt *v.* State, 61 Ga. 66.

51. An indictment charging "that the defendant then and there being in the county in which the indictment was found *then* and *there* burned" the property in question sufficiently shows that the crime was committed at a place within the jurisdiction of the court. People *v.* Wooley, 44 Cal. 494.

In State *v.* Hunt, 190 Mo. 353, 88 S. W. 719, the words "then and there" together with the words "there situate" were held to indicate clearly that the offense was committed in the county of Douglas, state of Missouri, since the caption showed that it was filed and the prosecution had in that county.

An allegation that defendant, "late of, etc., at the township aforesaid, etc., one barn of the property, etc.," there situate, is a sufficient allegation of the locality of the barn. State *v.* Price, 11 N. J. L. 203, 215.

52. Com. *v.* Lamb, 1 Gray (Mass.) 493, where it was held: "The offense is here sufficiently charged as to its locality, by the previous averment, 'that Philip Lamb, of Palmer in said county, at Palmer aforesaid,' etc., taken in connection with the further averment, 'and the said barn and outhouse did then and there voluntarily burn and consume.' Where the place is material, the place alleged in the venue, taken in connection with the allegation that the defendant then and there did the act, sufficiently designate the locality of the buildings set on fire. It is to be taken in the present case to be equivalent to an allegation that the buildings were situate in Palmer. This view of the sufficiency of such an indictment seems to be directly sustained by the case of Rex *v.* Napper, 1 Mood. C. C. 44. That case was reserved for the opinion of all the judges, who held the indictment sufficient. The principle is, that if it is not expressly stated where the building is situated, it shall be taken to be situated at the place named in the indictment by way of venue."

53. **Ala.** — Stoudenmire *v.* State,

ference from averments made.[54] But the indictment need not strictly pursue the statute in the use of the words "in which there was at the time a human being;" words conveying the same meaning are sufficient.[55] And where the statute does not make such fact an element of the offense, it need not be alleged.[56]

Naming Person.— But an indictment or information which avers the presence of a human being need not also name the person or persons in the house at the time of the fire.[57] Where the statute expressly provides that building may be "occupied or unoccupied" it is of course unnecessary for the indictment to allege who was the occupant.[58]

(V.) Ownership, Possession, Etc. — (A.) NECESSITY. — At common law, it was always necessary, in charging arson, to allege the ownership of the building burned in another than the defendant.[59] And such is the rule generally recognized by the courts of this country where not changed by express statutory provision.[60] And for this purpose,

144 Ala. 85, 40 So. 321; Childress *v.* State, 86 Ala. 77, 5 So. 775. **Minn.** — State *v.* Grimes, 50 Minn. 123, 52 N. W. 275. **Miss.** — Dick *v.* State, 53 Miss. 384.

In Woodford *v.* People, 62 N. Y. 117, 20 Am. Rep. 464, the indictment for burning several houses, alleged that there were, 'within the said dwelling-houses, some human being.' This was held to import that there was a human being in each. The court said: "It would be awkward and very unnatural to allege that there was only one human being in thirty-five dwelling houses. Considerable strictness is required in criminal pleading, but a strained or technical construction should never be resorted to, to defeat the reasonable import of the language, especially when the prisoner has not been prejudiced. This construction of the pleading is an answer also to the objection of uncertainty, and also the objection that all the allegations specifying the various houses, with a human being in each, are matters of description of the offence and must be proved. It follows from the views expressed that they are matters of aggravation. The offence is complete under the allegation as to either house. Nothing more was necessary to charge the crime of arson in the first degree, and the other matters define the extent of crime. The prosecution was entitled to prove the extent of the crime, showing that all the houses were burned by the act of the defendant, and that there was a human being in each, and if he proved one it was sufficient."

54. Lacy *v.* State, 15 Wis. 13.

55. Childress *v.* State, 86 Ala. 77, 5 So. 775, where the averment was "which was occupied by Alfred Phillips lodged therein."

So it is not necessary to allege, in the language of the statute, that the building was "one capable of affording shelter to human beings, or appurtenant thereto, or connected with an erection so adapted." People *v.* Russell, 81 Cal. 616, 23 Pac. 418. See also People *v.* Giacamella, 71 Cal. 48, 12 Pac. 302, where the court said: "The offense was stated in accordance with the language of section 447, Penal Code, and was sufficiently stated. As well might the provisions of sections 449 to 452 be held necessary to be stated as those of 448. Section 447 declares the offense; and the following sections relate to circumstances of its commission."

56. Garrett *v.* State, 109 Ind. 527, 10 N. E. 570; State *v.* Meyers, 9 Wash. 8, 36 Pac. 1051.

57. State *v.* Jones, 171 Mo. 401, 71 S. W. 680, 94 Am. St. Rep. 786; State *v.* Hayes, 78 Mo. 304; State *v.* Aguila, 14 Mo. 130.

58. **As in Indiana.** — Garrett *v.* State, 109 Ind. 527, 10 N. E. 570.

59. State *v.* Keena, 63 Conn. 329, 28 Atl. 522; State *v.* Lyon, 12 Conn. 487; Rex *v.* Rickman, 2 East P. C. (Eng.) 1034.

60. **Ala.** — Martha *v.* State, 26 Ala. 72; Smoke *v.* State, 87 Ala. 143, 6 So.

one in possession or occupancy of the premises at the time of the offense was deemed the owner, but it was essential that this be averred to be other than the accused.[61] And most of the statutes do not change this common law rule.[62]

376. **Ark.** — Mott *v.* State, 29 Ark. 147. **Cal.** — People *v.* DeWinton, 113 Cal. 403, 45 Pac. 708, 54 Am. St. Rep. 357, 33 L. R. A. 394. **Ind.** — Kruger *v.* State, 135 Ind. 573, 35 N. E. 1019; Garrett *v.* State, 109 Ind. 527, 10 N. E. 570; Ritchey *v.* State, 7 Blackf. 168. **Miss.** — Avant *v.* State, 71 Miss. 78, 13 So. 881. **Mo.** — State *v.* Whitmore, 147 Mo. 78, 47 S. W. 1068; State *v.* Wacker, 16 Mo. App. 417. **Neb.** — Burger *v.* State, 34 Neb. 397, 51 N. W. 1027. **N. Y.** — McGary *v.* People, 45 N. Y. 153.

"An indictment for the statutory offense must aver the ownership of the house or other property which was burned or set fire to; but the ownership to be proved relates to the actual occupancy, the dominion in fact over the thing, not to the nature of the estate or claim of the occupant. It is the possession, not the tenure or interest in the property which should be described. This being true, an indictment which, following the Code form, charges that A. B. wilfully set fire to or burned a barn of C. D., imports, not necessarily that the fee was in C. D., but that the barn was his to occupy, that the possession was his, without regard to the questions as to how he acquired the possession or whether he holds under another, so long as the property is his to possess and enjoy. Peinhardt *v.* State, 161 Ala. 70, 49 So. 831; Adams *v.* State, 62 Ala. 177; Davis *v.* State, 52 Ala. 357; May *v.* State, 85 Ala. 14, 5 So. 14." Johnson *v.* State (Ala.), 55 So. 268.

In Thomas *v.* State, 116 Ala. 461, 22 So. 666, the indictment charged "conspiracy between defendant and one Banks 'to unlawfully and wilfully set fire to or burn a corn crib, containing corn, said corn crib being the property of Fayette Allrid,' etc." The defendant demurred to the indictment for failure to aver ownership of the corn alleged to have been in the crib. The court in disposing of this question said: "It is arson in the second degree to burn any *corn crib* whether it contains corn or not, or any *corn pen containing corn*. — Code of 1886, § 3781; Cook *v.* State, 83 Ala. 62. If we hold that the terms 'corn crib containing corn' includes a 'corn pen containing corn,' in line with the decision just cited, the indictment would be bad, it would seem, on the ground taken by the demurrer that it fails to allege the ownership of the corn."

Where the statute expressly provides punishment for setting fire to certain buildings, whether such buildings shall be in the possession of the offender or any other person, it is not necessary to allege that the building burned was in the possession of some person named. State *v.* Daniel, 121 N. C. 574, 28 S. E. 255.

Ownership of Land, But Not of House. — In State *v.* Thurston, 77 Kan. 522, 94 Pac. 1011, the court said that location answered the purpose. The information "in addition to the formal parts, charges 'that on or about the 26th day of November, 1906, in the night-time, in said county of Ellis and State of Kansas, Leonard Stanton, Philip Thurston, Chet Thurston, Frank Thurston and Clarence Clarkson did then and there unlawfully, feloniously, wilfully, and maliciously set fire to and burn a certain frame building, to wit, a chicken house, situated on the southwest quarter of section 11, township 11, range 17, in Ellis County, Kan., the property of R. G. Finch.' "

61. State *v.* Keena, 63 Conn. 329, 28 Atl. 522.

62. People *v.* DeWinton, 113 Cal. 403, 45 Pac. 708, 54 Am. St. Rep. 357, 33 L. R. A. 394. In this case the indictment was that the defendant "did wilfully, maliciously and feloniously, in the night-time, set fire to and burn a building, namely, a house there situate," etc., "the property of (naming the defendant) with the malicious, wilful and felonious intent then and there to destroy said building;" followed by "an averment that said house was situated in such immediate proximity to inhabitated buildings, occupied by human beings, as to endanger life, etc., and did, then and there, threaten the lives of said beings from said fire, etc." The court in holding the indictment bad said: "Giving effect to the pre-

Matters Judicially Noticed. — The rule that matters of which judicial notice is taken need not be stated in the indictment applies in respect of the ownership of the property burned.[63]

Public Buildings. —Sometimes the statute expressly excepts certain buildings in respect of which it is not necessary to allege ownership.[64]

(B.) SUFFICIENCY. — Ordinarily an allegation that the building was the property of the occupant in possession in his own right is sufficient; it is not necessary to allege real ownership.[65]

Tenant. — In arson the house may be alleged to have been the property of the tenant in possession.[66]

sumption which the law raises, of identity of person from identity of name (Code Civ. Proc., sec. 1963, subd. 25), and it will be observed that the indictment charges the defendant with the burning of his own building. . . . It describes the building burned as the property of the defendant, and fails to aver its occupancy or possession by any one; and, being silent, the presumption is that it was in possession and occupancy of the owner. Nor is the pleading in any way aided in this respect by the averment that the house was so situated as that the burning thereof endangered the lives of inhabitants of other dwellings. It may be that this matter would make the indictment good as a charge of attempt to commit arson, but it does not help out the statement of the principal offense."

63. To describe the property burned as the "jail of Wilcox County" is a sufficient averment of ownership. Sands *v.* State, 80 Ala. 201.

64. As in Missouri, where the statute excepts houses of public worship, colleges, schools and other public buildings. State *v.* Hunt, 190 Mo. 353, 88 S. W. 719; State *v.* Johnson, 93 Mo. 73, 5 S. W. 699. *Compare* State *v.* Whitmore, 147 Mo. 78, 47 S. W. 1068. And see Mott *v.* State, 29 Ark. 147.

65. **Ala.** — Davis *v.* State, 52 Ala. 357. **Cal.** — People *v.* DeWinton, 113 Cal. 403, 45 Pac. 708, 54 Am. St. Rep. 357, 33 L. R. A. 394; People *v.* Wooley, 44 Cal. 494. **Conn.** — State *v.* Toole, 29 Conn. 342, 76 Am. Dec. 602. **Ind.** — Wolf *v.* State, 53 Ind. 30. **Ky.** — Young *v.* Com., 12 Bush. 243. **Mich.** — People *v* Fairchild, 48 Mich. 31, 11 N. W. 773; Snyder *v.* People, 26 Mich. 106, 12 Am. Rep. 302. **Neb.** — Burger *v.* State, 34 Neb. 397, 51 N. W. 1027. **N. Y.** — Woodford *v.* People, 62 N. Y. 117, 20 Am. Rep. 464; People *v.* Van Blarcum, 2 Johns. 105. **Vt.** — State *v.* Hannett, 54 Vt. 83.

Hence, in an indictment under the statute for arson of a crib, ownership is properly laid in one tenant who had actual possession and occupancy of the premises on which it was situate, under contract with the co-tenant, although the fee was in the two jointly as tenants in common. Adams *v.* State, 62 Ala. 177.

An information that the building which was burned was "the property of . . . a corporation," and that it was "then and there occupied by" certain persons named, is good. People *v.* Fong Hong, 120 Cal. 685, 53 Pac. 265.

The ownership may be laid in the widow of the deceased owner, who had occupied and used it since her husband's death, although there are living heirs and no dower had been allotted to her. State *v.* Gailor, 71 N. C. 88, 17 Am. Rep. 3.

If the accused is a mere cropper, the ownership may be laid in the landlord. People *v.* Smith, 3 How. Pr. (N. Y.) 226.

A house consisting of distinct tenements occupied in severalty need not be described in the indictment as the dwelling-house of both occupants, since such a description implies a joint occupancy. State *v.* Toole, 29 Conn. 342, 76 Am. Dec. 602.

Under the California statute in force before the adoption of the Penal Code it was held that if the arson was committed by a tenant in possession, it was sufficient to allege the property to have been in the landlord. People *v.* Simpson, 50 Cal. 304.

66. State *v.* Barret, 2 Penne. (Del.) 297, 47 Atl. 381; Young *v.* Com., 12

Trustee. — As the legal title of property conveyed by deed of trust to secure a debt is in the trustee, an indictment for burning such property properly lays the ownership thereof in such trustee.[67]

Property in Servant. — Ownership is properly laid in the name of a servant who occupied the house, under a contract of hiring which bound the owner to furnish such servant with a house in which to live during the term of service.[68]

Ownership in Wife. — The ownership of the property burned may be laid in the wife if she is the occupier and the husband is not.[69]

Bush (Ky.) 243. In the latter case the house was alleged to have been occupied by H. T. as a residence, and the court said: "This, for the purposes of an indictment for arson, is equivalent to an averment that it was her house. The rule that the ownership of the house must be stated does not require that the name of the owner in fee should be given. It may be alleged to have been the property of the tenant in possession, for the tenant has a special property in the house during his term. There can be no reason for requiring the name of the owner of a house charged to have been burned by the defendant to be stated in the indictment, except to enable the accused to prepare for his defense and to plead an acquittal or conviction in bar of a second prosecution. These objects are accomplished by stating who the tenant was at the time of the burning."

In People *v.* Fisher, 51 Cal. 319, the court said: "The house alleged to have been burned is described as the property of one B. W. Bours. It was proven that it was his property, but that one Capurro was in possession of it under a lease from Bours; and the point is made that, in this respect, there is a variance between the indictment and the proof; in other words, that, in an indictment for arson, the house should be described as the house of the occupant. Arson, as defined by the common law, is an offense against the security of the habitation, rather than against the property which was burned (2 Bish. Cr. Law, Sec. 24); but by the Penal Code, sections four hundred and forty-seven and four hundred and forty-eight, the scope of the definition is materially extended. 'Any house, edifice, structure, vessel or other erection, capable of affording shelter for human beings,' is a 'building' within the meaning of the chapter of the Code defining arson, and providing for its punishment. It is not necessary that the 'house, edifice, structure, vessel, or other erection,' should have been intended for, or have been used as, a habitation; but it is sufficient if it be 'capable of affording shelter for human beings;' and for that reason it is not true that the willful and malicious burning of a building, which was not intended, or was not used, as a habitation, is an offense against the person rather than the property. It is not necessary, therefore, in an indictment for arson of the second degree, to describe the building as the building of the occupant or tenant; but it will be sufficient to describe it as the building of the owner, though it may have been held by a tenant, under a lease from the owner."

67. Lipschitz *v.* People, 25 Colo. 261, 53 Pac. 1111.

68. Davis *v.* State, 52 Ala. 357, *following* People *v.* Van Blarcum, 2 Johns. N. Y.) 105; and *citing*, 1 Bish. Crim. Proc., § 573; 2 Whart. Cr. Law, § 1579.

In State *v.* Lyon, 12 Conn. 487, the information for burning a shop alleged, in one count, that it was the property of B and C, as trustees of D, and in another, that it was owned by B and C jointly; no evidence whatever was offered in support of the former allegation; and in support of the latter, the only evidence was the testimony of one witness, that at the time the shop was burned, he was employed at work therein, by B; and of another witness, that at the same time, the prisoner, was at work in the shop in the employment of E; it was held, that this evidence was insufficient to justify a conviction of the prisoner, and a verdict against him was set aside, as a verdict without evidence."

69. May *v.* State, 85 Ala. 14, 5 So.

Alternative Allegations. — On an indictment for arson, or for attempted arson, the ownership of the property, it has been held, may be alleged to be in either of several persons named.[70]

Certainty of Allegation. — The allegations as to the ownership of the building which the defendant is accused of burning is part of the description of the offense; it must be direct and certain, and not leave the question to rest upon conjecture or to be made out by argument; it must be direct that the building was the property of the person who was at the time occupying it in his own right.[71] An allegation describing the property as "belonging to" a person named is a sufficient allegation of ownership.[72]

(VI.) Value of Property. — The value of the building burned is not ordinarily an element of the offense of arson,[73] unless expressly so made by statute, in which case of course it must be alleged.[74] An allegation of value is necessary, however, where the punishment depends upon the value.[75]

B. Burning With Intent To Defraud Insurer. — **1. Certainty.** — This being purely a statutory offense, the indictment or information must bring the defendant within the terms of the statute by alleging the acts which are charged as constituting the offense with such certainty as to identify and distinguish it from other transactions, and that he may know what offense he is called upon to answer.[76]

14, an indictment for burning a corn pen containing corn, where the wife had raised and gathered the corn, and had built the pen on land belonging to her husband, but on which she resided, he being absent in another estate.

Under various modern statutes it is held, contrary to the rule at common law (Snyder *v.* People, 26 Mich. 106, 12 Am. Rep. 302), that a husband may be guilty of arson in burning a house owned by his wife. Thus in State *v.* Shaw, 79 Kan. 396, 100 Pac. 78, 131 Am. St. Rep. 298, 21 L. R. A. (N. S.) 27, it was held that the wife was "another" within the meaning of the "house of another" in the statute, and that the husband could be convicted of arson in burning her property. See also: **Ind.** — Garrett *v.* State, 109 Ind. 527, 10 N. E. 570. **Ohio.** — Hutchinson *v.* State, 28 Ohio C. C. 595. **Wis.** — Kopcyznski *v.* State, 137 Wis. 358, 118 N. W. 863.

70. Brown *v.* State, 79 Ala. 51.

71. People *v.* Myers, 20 Cal. 76, where an indictment was held bad which alleged that "said dwelling-house was then and there the property of one Lemon, and was then and there the dwelling-house of one Chinaman, a human being, whose real name is to the jurors unknown."

72. Com. *v.* Hamilton, 15 Gray (Mass.) 480.

73. James *v.* State, 104 Ala. 20, 16 So. 94; Brown *v.* State, 52 Ala. 345.

74. Clark *v.* People, 2 Ill. 117, where the court said: "The indictment does not allege the value of the building charged to have been burned. This would probably be unnecessary at common law, as a fine formed no part of the punishment for the offense. The statute, however, under which the indictment is found, has changed the common law in this respect; a fine equal in value to the property burned, is imposed as part of the punishment for the offense. The indictment, then, should have charged the value of the property destroyed, otherwise it could not properly have been inquired into by the jury. It would form no part of the issue which they were sworn to try. In this respect, then, the indictment is defective; and the Court erred in overruling the motion to quash it, and in rendering judgment upon the verdict of the jury." See also Ritchey *v.* State, 7 Blackf. (Ind.) 168.

75. State *v.* Temple, 12 Me. 214; Com. *v.* Hamilton, 15 Gray (Mass.) 480.

76. Heard *v.* State, 81 Ala. 55, 1 So.

2. Ownership of Property. — An allegation of ownership is not necessary unless the statute expressly makes ownership an element of the offense.[77]

3. Intent To Defraud. — The intent to defraud the insurer must be alleged.[78]

4. Fact of Insurance. — The fact that the property was insured against fire must be alleged.[79] It is not necessary to set forth the policy of insurance according to its tenor.[80] Nor is it necessary to allege that insured held a valid policy, or any policy at all.[81]

Failure to allege the fact of insurance should be taken advantage of before verdict; and an information, although defective in this respect, if otherwise sufficient, will be held sufficient after verdict to support sentence against a motion in arrest of judgment.[82]

640; Carncross *v.* People, 1 N. Y. Crim. 518.

If the specific acts alleged show the commission of the offense, the fact that it is also designated as arson is not material (People *v.* Morley, 8 Cal. App. 372, 97 Pac. 84); nor the failure to insert the statutory appellation of the crime in accordance with the form prescribed by statute (People *v.* Phipps, 39 Cal. 326).

Form of Information for Burning Insured Property. — "That said parties (naming them) 'on the 3d day of August, 1907, at and in the county of Los Angeles, state of California, did wilfully, unlawfully, and feloniously and maliciously burn, injure, and destroy certain property, to wit, certain household furniture and other personal effects then and there in house (premises described), which was then and there the property of Henry Sanderson, and was then and there insured against loss and damage by fire by the Royal Insurance Company of Liverpool, a corporation, with intent then and thereby to defraud, prejudice, and damage the said Royal Insurance Company of Liverpool, a corporation; contrary,' etc." People *v.* Morley, 8 Cal. App. 372, 97 Pac. 84.

77. United States *v.* McBride, 7 Mackey (D. C.) 371.

78. Heard *v.* State, 81 Ala. 55, 1 So. 640; Martin *v.* State, 29 Ala. 30; Mai *v.* People, 224 Ill. 414, 79 N. E. 633; Staaden *v.* People, 82 Ill. 432, 25 Am. Rep. 333; McDonald *v.* People, 47 Ill. 533.

The intent to defraud the insurer is quite as essential to constitute the offense as the intent to destroy the insured building by fire. See People *v.* Trim, 39 Cal. 75.

Knowledge of Insurance. — An allegation of an intent to injure the insurer is a sufficient allegation of the defendant's knowledge that the property was insured. Com. *v.* Goldstein, 114 Mass. 272.

79. Ala. — Heard *v.* State, 81 Ala. 55, 1 So. 640; Martin *v.* State, 29 Ala. 30. Cal. — People *v.* Hughes, 29 Cal. 257. Ill. — Staaden *v.* People, 82 Ill. 432, 25 Am. Rep. 333. N. Y. — People *v.* Henderson, 1 Park. Crim. 560. *Compare* United States *v.* McBride, 7 Mackey (D. C.) 371.

In Martin *v.* State, 29 Ala. 30, the court said: "The statute aims to punish the wilful burning of any building, or other property, which is at the time insured *against fire*. It may be true, as charged in the indictment, that the property was insured, and yet it may also be true that it was not insured against fire. Everything in the indictment may be true, and nevertheless the offense condemned by the statute may not have been committed, for the fact that the insurance was against fire is indispensable to constitute the offense."

80. Com. *v.* Goldstein, 114 Mass. 272.

81. McDonald *v.* People, 47 Ill. 533.

82. State *v.* Jessup, 42 Kan. 422, 22 Pac. 627, where the court said: "The contention is, that the following words of said § 57, 'which shall at the time be insured against loss or damage by fire,' are omitted from the information, and therefore that it is fatally defective. Upon a motion in arrest, we do not think the objection well taken. It was necessary at the trial, under the alle-

5. Description of Insurer. — An information or indictment for burning an insured building with intent to defraud the insurer should allege that the insurer is a corporation, if such be the fact, or that it is a copartnership, if such be the fact, composed of certain persons, giving their names, and that the act was done with intent to injure and defraud them in their associate capacity.[83] But a description of the insurer by a name apparently indicating it to be a corporation need not affirmatively aver its corporate existence, nor whether it is a domestic or foreign corporation.[84]

C. Attempts To Commit Arson. — The offense of attempt to commit arson, being usually a statutory one, may be sufficiently charged in the language of the statute.[85] Where the statute defining the attempt to commit arson contemplates the employment of some physi-

gations of the information, to prove that the barn was insured against loss or damage by fire, in order to establish the intent of the defendant to defraud the insurers. The insurers were named as the German Insurance Company, of Freeport, Illinois, and the Fireman's Fund Insurance Company, of San Francisco, California. So the testimony that was presented, and was necessarily presented under the information, was the same as if the omitted words were embraced therein. There could be no intent to defraud the insurers in burning the barn described in the information, unless at the time of the fire the property was insured against loss or damage, by the companies named. We think that the averments of the information as made, were in legal effect equivalent to a charge that the barn, at the time of its destruction, was insured against loss or damage by fire. It is a principle of pleading that whatever is included in, or necessarily implied from, an express allegation, need not be otherwise averred."

83. People *v.* Schwartz, 32 Cal. 160 (holding further that the mere allegation of the insurer as a company amounts in a legal sense to an entire absence of any allegation as to the party intended to be injured or defrauded); Staaden *v.* People, 82 Ill. 432, 25 Am. Rep. 333.

An allegation that the insurer is a corporation having a right to do business is unnecessary, where the law recognizes the legality of insurance by individuals and by unincorporated associations. People *v.* Jones, 24 Mich. 215.

84. Johnson *v.* State, 65 Ind. 204.

An allegation that defendant, at a time and place named, burned certain property "being then and there insured," in a corporation, "theretofore duly established," sufficiently alleges an insurance by a corporation legally existing and bound by the policy at the time of the fire. Com. *v.* Goldstein, 114 Mass. 272, holding further that it is unnecessary to allege whether the insurer, a corporation, is a domestic corporation, or a foreign corporation, that it has complied with the statutes relating to foreign insurance companies.

85. People *v.* Giacamella, 71 Cal. 48, 12 Pac. 302.

An indictment charging that accused in the night-time did unlawfully, wilfully and maliciously set fire to and attempt to burn a certain building owned by A and occupied by B as a dwelling house, sufficiently charges an attempt to commit arson. Kinchien *v.* State, 50 Fla. 102, 39 So. 467. The court said: "The statute denounces 'whoever wilfully and maliciously burns the dwelling house or any building adjoining such dwelling house, or wilfully and maliciously sets fire to any building, by the burning whereof such dwelling house is burned.' — sec. 2426 Rev. Stat. 1892— and the contention of the plaintiff in error is that the pleader confounded the words 'set fire to' and 'burn.' We need not pass upon this distinction. The count does not charge the consummated crime, but the attempt to commit the crime and the overt act of 'setting fire' that accompanied the attempt to 'burn.' The count is needlessly prolix and assumed a greater burden of proof than might have

cal means, and not merely the soliciting of a third person to set the fire, the indictment or information must set out the means employed; it is not enough merely to allege the soliciting.[86]

Joinder of Counts. — A count charging the defendant with attempt to burn another person's house may properly be joined in the same indictment with a count charging the defendant with setting fire to his own property with intent to defraud an insurance company, where the offenses grow out of the same act; and the fact that dif-

been prudent, but it fully apprized the defendant of the accusation against her and the denial of the motion to quash will not be held error.''

In Howard *v.* State, 109 Ga. 137, 34 S. E. 330, where the charge was an attempt to commit arson, the court in holding the indictment good as against the objection that it did not charge a crime under the laws of Georgia, said: ''Section 136 of the Penal Code defines arson as 'the malicious and wilful burning of the house or outhouse of another.' The next section declares that 'the wilful and malicious burning, or setting fire to, or attempting to burn, a house in a city, town or village, whether the house be the property of the perpetrator or of another, shall be punished' as a capital offense. It will thus be seen that the act of 'setting fire to,' or the act of 'attempting to burn,' a house in a city, town or village, if wilfully and maliciously committed, is made by law an offense punishable in the same manner as the wilful and malicious burning of such a house. In the first count of the indictment both Ford and Howard are accused of setting fire to and attempting to burn the jail house in Patterson. Logically, and from the standpoint of common sense, the charge thus made against these persons really meant that they set fire to the house and in this manner attempted to burn it. In the second count Ford was charged with setting fire to and attempting to burn the house, and this count contained the further averment that Howard procured, counseled, and commanded Ford 'to commit said crime as aforesaid.' The plain meaning of this is, that Howard incited Ford to set fire to and attempt to burn the jail. Inasmuch as setting fire to this house was a distinct offense, and as it was an act the doing of which could be incited by another, we have no difficulty in holding that the indictment was good. It is true that no section of the Penal Code may contain the phrase 'attempt to commit arson,' but, as we have shown, section 137 does make punishable the act either of feloniously setting fire to, or attempting to burn, a house in a city, town, or village, the doing of either of which necessarily constitutes an attempt to commit arson. So far, therefore, as the first three grounds of the demurrer are concerned, it deals with a mere play upon words and is entirely without merit.''

Under a statute providing for the punishment of one who ''attempts to commit an offense prohibited by law,'' and in such attempt does any act toward the commission of such offense, when the offense alleged is an attempt to set fire to property with intent to injure the insurer, and the offense is to be made out by showing a preparation and a solicitation of someone else to set the fire, the solicitation must be alleged as one of the overt acts. Com. *v.* Peaslee, 177 Mass. 267, 59 N. E. 55.

86. McDade *v.* People, 29 Mich. 50, holding also that ''the additional allegation in an information charging such an attempt by solicitation, that the defendant also furnished oil and matches to the person solicited to do the firing, does not help to fill up the measure required by the statute, and the charge would be equally as valid without it.''

Under an indictment for arson, the defendant can be convicted of an attempt to commit arson. Benbow *v.* State, 128 Ala. 1, 29 So. 553. See also Young *v.* Com., 12 Bush (Ky.) 243; People *v.* Long, 2 Edm. Sel. Cas. (N. Y.) 129.

ferent penalties are attached to the two offenses is immaterial.[87]

D. Conspiracy To Commit Arson. — When the charge is a conspiracy to commit arson, the indictment must allege felonious intent in respect of the fact of the burning; it is not enough to allege merely a felonious conspiracy.[88] A count in an indictment charging that the defendants agreed to burn the property of a certain person, and that in pursuance of that agreement did burn it, is not double.[89]

III. VARIANCE BETWEEN ALLEGATIONS AND PROOF. — A. In General. — Of course, as in all criminal cases, the proof of the essential elements of the offense of arson, or burning with intent to defraud the insurer, must correspond with the allegation of such ele-

87. Posey *v.* United States, 26 App. Cas. (D. C.) 302, where the court said: "We are clearly of the opinion that the counts were properly joined, and that, had separate indictments been returned, the court could have properly consolidated them. The gravamen of both offenses is burning, or attempting to burn. Such acts in the District of Columbia are statutory offenses, and may be set out as separate counts in the same indictment. It is difficult to state a case where two offenses grow out of the same transaction if the present case does not disclose one. The mere fact that the penalties are not the same is not controlling. The penalty provided by section 820 is imprisonment for not less than one year nor more than ten years, while, under section 821, the penalty is imprisonment for not more than fifteen years." *Following* Cortola *v.* United States, 24 App. Cas. (D. C.) 229.

88. Lipschitz *v.* People, 25 Colo. 261, 53 Pac. 1111. In this case the indictment charged that the defendants " 'feloniously, wilfully and maliciously did conspire, co-operate and agree together to burn and cause to be burned a certain residence building of the property of Peter Winne, trustee, situate . . . in the town of Colfax, in said Arapahoe county, in the state of Colorado.' " In holding that the indictment was insufficient, the court said: "The mere burning of the house of another is not arson at the common law or under our statute. It is only the wilful and malicious burning that constitutes the crime. In this all the authorities agree. State *v.* Carroll, 85 Iowa, 1. The attorney general recognizes this, and so would have us decide that the word 'felonious' characterizes the conspiracy, and the words 'wilful and malicious' qualify its object, viz: the burning; but no rule of construction that we know of will permit such an arbitrary transposition, and forced interpretation, of words as this decision would require. All three of these words evidently were intended by the pleader to apply to the conspiracy; and, taking them in their connection, we can come to no other conclusion than that they do apply to the conspiracy, and not to the arson. It follows that this indictment is not merely faulty in form, but fatally defective in substance in that it fails to aver an unlawful act as the object of the conspiracy. It is good neither under our statute nor at the common law."

89. "The conspiracy to burn is merged in the consummated act of burning, and so the offense charged is that of arson only, and not the independent offenses of a conspiracy to commit arson, and arson." Hoyt *v.* People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 597.

An information charging defendant with aiding and abetting his wife in the commission of arson is not insufficient in that it attempts to charge a conspiracy by a husband and wife. State *v.* Mann, 39 Wash. 144, 81 Pac. 561, where the court said: "The information charges a consummated offense, not a conspiracy to commit an offense. And while it may be true that a husband and wife cannot be convicted of having conspired together to commit an offense, yet if they commit an indictable offense, although the offense is the result of a con-

ments.[90] Thus the character of the building must be proved as laid.[91]

spiracy on their part, they can be tried and convicted for the consummated offense."

90. Under an indictment for wilfully burning insured property with intent to defraud the insurer, proof that defendant burned the property by the owner's procurement to enable him to obtain the insurance will not support a conviction. Heard *v.* State, 81 Ala. 55, 1 So. 640, *following* Com. *v.* Makely, 131 Mass. 421.

In People *v.* Davis, 135 Cal. 162, 67 Pac. 59, a prosecution for arson in burning a barn, the evidence showed that the barn was located at the place alleged, and that it was generally known by the name alleged; and it was held that the identification of the barn burned was sufficiently established, though there was no proof of the ownership of the barn as alleged.

In People *v.* Fong Hong, 120 Cal. 685, 53 Pac. 265, an information for arson, there was evidence that defendant had in the building some property which was insured, and defendant asked the court to charge the jury that "if the intent was to defraud the insurance company the defendant could not be convicted under this information," which was refused. In holding this to be correct, the court said: "The proposition contended for seems to be that a man may feloniously burn a building not his own, and yet not be guilty of arson if he does it with intent to defraud an insurance company; and that in such case he must be prosecuted under the provisions of section 548 of the Penal Code. But this is not the law. If certain acts constitute arson in all other respects, the crime committed is arson whether the motive be gain, or revenge, or any other kind of malicious mischief. The main purpose of section 548 is to make criminal certain wrongful and malicious acts which do not constitute arson. Arson can only be committed on a 'building;' section 548 does not mention building, and the crimes there created may be committed upon any kind of 'property.' Arson cannot be committed on a building by one who exclusively owns and occupies it, notwithstanding the fact that it is insured; but burning his own insured building would be a crime under section 548. That section makes it a crime to either burn or 'in any other manner' injure 'any property' insured against damage by fire, or by 'any other casualty.' Its purpose is to prevent the 'fraudulent destruction of property insured.' It does not deal with 'arson,' and does not undertake to change the character of that crime. Arson is the same crime that it was before section 548 was enacted. Whether a party might commit guilty acts under such peculiar circumstances as would subject him to prosecution for either arson or the crime created by said last-named section of the code is a question now calling for consideration."

Proof that the policy of insurance on the property burned was payable to the mortgagee is not inconsistent with the allegation that the insurer insured the property to the accused. State *v.* Byrne, 45 Conn. 273.

A variance between the name of the insurance company as charged and as proved on the trial is no ground for arrest of judgment under the provisions of Cr. Pr. Act, §§ 289, 442. People *v.* Hughes, 29 Cal. 257.

91. In State *v.* Tennery, 9 Iowa 436, the indictment contained two counts. The first charged "that defendant did, in a certain store of one Hervey, situate, &c., on, &c., . . . with intent then and there feloniously, &c., to cause the said store of said Hervey to be burnt, &c. The second charges that the fire was set in a room within a store building of the value, &c., of one Hervey, with intent then and there to cause, &c. Upon the trial it was shown that Hervey was the owner in fee of the premises named; that there were four rooms in the house, two of which were occupied by the said Hervey, and two by one Pease, under a lease from Hervey; that there was no communication between the rooms occupied by said Pease, that the said building was frame, and the fire was set in one of the rooms occupied by the tenants. Defendant claimed that the testimony did not sustain the indictment, in that the fire was set in the room occupied by Pease, and therefore not in the store

building of Hervey, as charged. An instruction to this effect was refused." The court said: "If the case stood alone upon the first count, there might be great doubt whether the proof sustained the charges. Giving to the word *store*, as there used, its usual signification, the reasonable construction of the pleading would be that the fire was set in the store—that is, the store room occupied by Hervey. And this would not be sustained by proof that it was set in the store of another, in the same building. Conceding the rule, however, contended for by appellant, that under our statute this is an offense, as at common law, to the possession, we think the language of the second count meets the proof. It is there charged that the fire was applied in a room *within* a store building of said Hervey, and not in his store. If Hervey owned the building and occupied a part of the same, and the fire was set in a room of the same building, occupied by another, with intent to burn the store of such owner, the pleader would be justified in stating the charge, as was done in the case. It could make no difference that the material and necessary consequence of the act, was to injure and to destroy at the same time, the possession of the tenant."

On a charge of burning a corn-crib, proof of the burning of a barn or frame building of two stories, with shingle roof and sheds all around, in which were kept wagons, stock, fodder, farming utensils and other things used about the plantation, and in which was one room partitioned off as a corn-crib is a fatal variance. Jackson *v.* State, 145 Ala. 54, 40 So. 979.

In Thomas *v.* State, 116 Ala. 461, 22 So. 666, an indictment charging conspiracy "to unlawfully and wilfully set fire to or burn a corn-crib containing corn . . . the evidence shows that it was a cabin for the habitation of tenants, with chimney, doors and windows and all the other characteristics of a cabin or dwelling house, that it has always been used for human habitation up to within a month or two before the attempt to burn it, and that being then untenanted, the owner deposited there some corn and forage which continued in the building up to the time of the alleged offense." The court in holding that there was a fatal variance, said: "The words 'corn-crib' and 'corn-pen' have well understood and definite meanings. Everybody understands what a corn-crib is and what a corn-pen is, and nobody would speak of a dwelling house of even the humble class, called cabins, as either a corn-pen or corn-crib though it should be temporarily used for the storage of corn. And we conclude that the evidence did not sustain the averment of the indictment that defendant and Banks conspired to burn a corn-crib containing corn; there was a fatal variance between the allegation and the proof."

An allegation describing the building burned as an outbuilding adjoining a dwelling house is not supported by proof that the building was near to but did not touch the dwelling house. State *v.* Downs, 59 N. H. 320.

Under an allegation describing the building as an outhouse used as a storehouse, proof that it was an old building located at a crossroads and occupied as a storehouse, but not enclosed or used in any way as a dwelling house, is a fatal variance. State *v.* Roper, 88 N. C. 656, where the court said: "Now, an outhouse has a technical meaning. The house occupied by Dowd, as a store, was not an outhouse in the meaning of the law. An outhouse is one that belongs to a dwelling house, and is in some respects parcel of such dwelling house and situated within the curtilage. Such was the meaning of the term at common law, and under the English statutes, similar to ours, in relation to the burning of houses."

An allegation describing the property burned as an "outhouse" is supported by proof that the house was a freight car detached from the wheels and placed upon permanent posts near a railway track at a station, and to which a platform had been attached. Carter *v.* State, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262. The court said: "There was no evidence showing that the Southern Railway Company had or owned any other building at this station; and counsel for the accused thereupon insisted that the house in question could not, in legal contemplation, be an 'outhouse,' and accordingly, that there was a fatal

B. OWNERSHIP. — So, too, as a general rule, the ownership of the building burned must be proved as laid;[92] although not all variances

variance between the allegations of the indictment and the proof. It is true that the word 'outhouse' primarily means a building adjacent to a dwelling house and subservient thereto, but distinct from the mansion itself. See 2 Bouv. Law. Dic. 341; Black's Law Dic. 859; Anderson's Law Dic. 515. After careful consideration, however, we have reached the conclusion that the word 'outhouse' as used in sections 136, 141 and 142 of our Penal Code, as applied to a structure not located within a city town or village, is intended to embrace a house of any description which is not a dwelling house. . . . The status of a railway warehouse, located elsewhere than in a city, town or village, cannot be legally different from that of a country church similarly situated. That all houses other than dwelling houses, thus located, were intended to be regarded as 'outhouses,' seems manifest from the provisions of section 142 of the Penal Code, which declares that 'setting fire to an outhouse of another, as described in the preceding section, shall be punished,' etc.; for unless this meaning be given to the word 'outhouse' as used in section 142, we would have no penalty whatever for the offense of setting fire to a house of the kind described in the present indictment. The truth is, the prefix 'out' was totally unnecessary in this connection, except for the exclusive purpose of distinguishing dwelling houses from other houses; but the use thereof should not, we think, be given the effect of defeating the legislative will, which clearly was to include buildings other than those which would ordinarily be understood as falling within the class designated by the word 'outhouse.' ''

Where the indictment describing the property as a millhouse refers to it as personal property, proof that the building was real estate and that it was a grist mill or mill building, if a variance at all, is not fatal. Ford *v.* State, 112 Ind. 373, 14 N. E. 241.

92. **Ala.** — Boles *v.* State, 46 Ala. 204; Graham *v.* State, 40 Ala. 659; Martha *v.* State, 26 Ala. 72. **Conn.** — State *v.* Lyon, 12 Conn. 487. **Fla.** — Hicks *v.* State, 43 Fla. 171, 29 So. 631. **Ga.** — Weaver *v.* State, 116 Ga. 550, 42 S. E. 745. **Me.** — State *v.* Taylor, 45 Me. 322. **Mass.** — Com. *v.* Wade, 17 Pick. 395. **Miss.** — Morris *v.* State 8 So. 295. **Mo.** — State *v.* Moore, 61 Mo. 276. **Neb.** — Burger *v.* State, 34 Neb. 397, 51 N. W. 1027. **N. J.** — State *v.* Fish, 27 N. J. L. 323. **N. Y.** McGary *v.* People, 45 N. Y. 153; Hennessey *v.* People, 21 How. Pr. 239; People *v.* Gates, 15 Wend. 159. **Wis.** Carter *v.* State, 20 Wis. 647.

Under an indictment laying the ownership of the store alleged to have been burned in a certain corporation, proof that the house set fire to was the property of such corporation and was used by it as a general merchandise storehouse will support a conviction. Hannigan *v.* State, 131 Ala. 29, 31 So. 89.

In People *v.* Butler, 62 App. Div. 508, 71 N. Y. Supp. 129, where the defendant was charged with burning his barn, which was insured, with intent to prejudice the insurer, it was held that proof that he burned his wife's barn was a fatal variance and not sufficient on which to convict.

In Com. *v.* Elder, 172 Mass. 187, 51 N. E. 975, the building was described as the '' 'barn of the property of one S. L. W. then and there situate and being within the curtilage of the dwelling house of him, the said S. L. W. there also situate;' and the proof is that the barn was the property of S. L. W., situated within the curtilage of a dwelling house owned by him, but in which he had never dwelt, and which at the time of the burning was occupied by his tenant who dwelt with his family in the house and occupied the barn and the curtilage.'' In holding that there was no variance, the court said: ''Whether there was a variance depends upon whether the words 'within the curtilage of the dwelling house of her, the said Sarah L. Wright,' are an averment that the barn was within the curtilage of a dwelling house in which Sarah L. Wright then lived. There is no reason why they must be so construed.

in this connection are regarded as fatal.[93] Where the ownership of the property is alleged to be in either of two or more persons, proof that it was owned by such persons and another jointly is not a ma-

The offense is statutory, and while the facts that the barn was the barn of another and that it was within the curtilage of a dwelling house must be averred, there is no statute requirement that the dwelling house must be alleged to have been the dwelling house of the person who there dwelt. On the contrary, the offense is one in relation to real estate, and the provisions of Pub. Sts. c. 214, § 14, are applicable, under which in such prosecutions it is enough if it is proved on the trial that when the offense was committed 'either the actual or constructive possession or the general or special property' was in the person alleged to be the owner."

Under an allegation of ownership in the defendant, proof that the building was owned by the defendant, but stood on land owned by a third person who collected rent for the land from the defendant, is no variance. Com. *v.* Wesley, 166 Mass. 248, 44 N. E. 228.

Proof that the property burned was that of a co-partnership of which the defendant was a member, and was insured as such, is not a variance from an allegation of ownership in the defendant. Com. *v.* Goldstein, 114 Mass. 272. The court said: "It is not material in whose name the goods were insured; the crime consisting in burning them with intent to injure the insurer, whether the defendant or any other person owned or procured them to be insured. It is true that the indictment alleges the goods to be the property of Philip Goldstein, and the proof was that they belonged to Davis & Company. But the statute provides that in prosecution of offences in relation to or affecting real or personal estate, it shall be sufficient and shall not be deemed a variance, if it is proved on the trial that at the time when the offence was committed, either the actual or constructive possession, or the general or special property in the whole or any part of such real or personal estate was in the person or community alleged to be the owner thereof. Gen. Sts. c. 172, § 12. As it was proved that Goldstein was a member of the firm of Davis & Company, this case falls within the statute."

An allegation of burning the dwelling house of another is not sustained when the proof is that the person charged to have been the owner never dwelt in or occupied the building. People *v.* Handley, 93 Mich. 46, 52 N. W. 1032. *Compare* People *v.* Mix, 149 Mich. 260, 112 N. W. 907.

In People *v.* Eaton, 59 Mich. 559, 26 N. W. 702, "on the argument it was urged, although no assignment of error was based thereon, that the conviction was wrong, because the information charged the property as the property of Melissa E. Gleason and Ida May White, and it is claimed that the proof shows that it was the property of Ida May White. The proof shows that prior to 1861, the legal title and possession were in Salem C. Gleason, the husband of Melissa E. Gleason, and father of Ida May White. Gleason enlisted in the army in 1861, and went into the war of the rebellion and was reported to have died in the army. He has never been seen alive or heard from by his family since. Ida May was his only child and heir. The legal title was therefore cast upon Ida May by descent, subject to Mrs. Gleason's dower interest. The description of ownership in the information is therefore correct."

Under an information for burning the dwelling house of a person named, proof that part of the second story of the building was occupied by such person and his family as their dwelling, and that a portion of the lower story was used as a drug store, does not constitute a variance. State *v.* Jones, 171 Mo. 401, 71 S. W. 680, 94 Am. St. Rep. 786.

93. Where the property is described as the property of, and in the possession of, a certain person, proof that the actual possession was in a tenant of such person is not a material variance. Harvey *v.* State, 67 Ga. 639.

It is not necessary to prove the ownership as alleged in the indictment, provided the house is otherwise sufficiently described for purposes of identification and is otherwise identi-

terial variance.[94] In some of the states a statute specifically provides that in the prosecution of any offense affecting real property, it shall not be deemed a variance if it be proved on the trial that any part of such estate was in the person alleged in the indictment to be the owner thereof.[95]

C. Location of Property. — Where the location of the property is matter of local description, any variance between the description in the indictment and the evidence is fatal.[96]

D. Value of Property. — It is not necessary that the prosecution prove the property to have been of the exact value alleged in the indictment.[97]

IV. INSTRUCTIONS. — The instructions defining the offense should state all the essential elements.[98]

fied by the evidence. People *v.* Laverty, 9 Cal. App. 756, 100 Pac. 899.

In State *v.* Kroscher, 24 Wis. 64, it was alleged that the building was occupied by the accused and owned by another, in consequence whereof the dwelling house of a third person was burned. It was held that proof that the building set on fire was owned by the person named, the lower part occupied by defendant as a shop, and the upper part by a fourth person, as a dwelling, was not a material variance.

94. Brown *v.* State, 79 Ala. 51.

95. Com. *v.* Harvey, 10 Met. (Mass.) 421, where the proof was that the alleged owner was joint lessee with another person. See also State *v.* Grimes, 50 Minn. 123, 52 N. W. 275.

In Kentucky a statute provides that if the offense involve an injury to property and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the ownership of the property is not material. And in Com. *v.* Napier, 27 Ky. 131, 84 S. W. 536, where the indictment alleged the property to be in C, it was held that proof that he only had possession or control of it, while the title to it and the adjoining house, where he lived with his wife, belonged to her, was not a variance.

96. People *v.* Slater, 5 Hill (N. Y.) 401, where the building was described in sixth ward, and the proof was that it was in the fifth. See also Rex *v.* Woodward, Moody Cr. Cas. (Eng.) 323.

97. Cunningham *v.* State, 117 Ala. 59, 65, 23 So. 693. In this case an indictment for arson in the second degree in burning a warehouse with the property therein contained, of the value of fifteen hundred dollars, it was held that proof that the value of the warehouse alone was more than five hundred dollars was no variance.

98. Boone *v.* State (Miss.), 33 So. 172 (holding the omission of the word "maliciously" to be fatal error); Erwin *v.* State (Tex. Crim.), 61 S. W. 390.

An instruction that "'arson is the wilful and malicious burning of a building with intent to destroy it;' and that 'there must be, to constitute the crime of arson, a wilful and malicious burning of the building, and, as contained in the definition of the crime, there must exist an intent to destroy it,'" is sufficiently full on the question of intent to destroy. People *v.* Fong Hong, 120 Cal. 685, 53 Pac. 265.

In People *v.* Hiltel, 131 Cal. 577, 63 Pac. 919, an information for burning a dwelling, it was held that the court properly charged the jury that while they could not find the defendant guilty of arson for burning a wine cellar, inasmuch as he was not charged with burning that building, still if they should find from the evidence, beyond any reasonable doubt, that he set fire to the wine cellar wilfully and maliciously, and that it "was situate so close to the building alleged in the information as having been burned by defendant as that the burning of said wine cellar necessarily caused, and did then and there cause, the flames from said wine cellar to be communicated to said house charged

V. FORM OF VERDICT. — A verdict is sufficient which clearly and without reasonable doubt informs the court of the finding of the jury.[99]

Where different degrees are charged in different counts, it is the better practice for the verdict to state under which count the defendant is found guilty.[1]

. . . as having been burned by defendant, and that said fire was then communicated from said wine cellar to said alleged house alleged to have been burned, and then and there caused said house to take fire and be consumed, this would constitute a burning within the meaning of the law of the crime of arson."

After the jury has been given the statutory definition of arson, it is not error to refuse to charge that "arson is a crime against the security of the dwelling house as such and the possession, and not against the building as property." People *v.* Lee Hung (Cal.), 1 Pac. 155.

When the court has instructed the jury that in order to find the defendant guilty they must be satisfied from the evidence, beyond a reasonable doubt, that he set fire to the building with the intent to destroy it, refusal of instructions asked by defendant bearing upon the burning of the building and its contents, with intent to defraud an insurance company and without intent to destroy the building, is not improper, especially when such instructions were not as clear and explicit as they should have been. People *v.* Mooney, 132 Cal. 13, 63 Pac. 1070.

99. In Davis *v.* State, 52 Ala. 357, "the indictment contained a single count charging specifically every fact necessary to constitute the offense of arson in the first degree. The verdict is of guilty, and the punishment is by the jury affixed at ten years' imprisonment in the penitentiary. This verdict is necessarily an ascertainment of the degree of the defendant's guilt as certainly and expressly as if the jury had declared in so many words that arson in the first degree was the offense found by them."

1. Carter *v.* State, 20 Wis. 647.

Where an indictment in one count charges statutory arson in the third degree, which is a misdemeanor, and in another count charges arson in the second degree, which is a felony, there is a misjoinder; and upon a general verdict of "guilty as charged in the indictment," which cannot be referred to either count, a motion in arrest of judgment should be sustained. James *v.* State, 104 Ala. 20, 16 So. 94; Gibson *v.* State, 54 Md. 447.

In the case of an indictment of two counts, one of which is good and the other bad, and the verdict is general, the judgment will not be set aside. If no demurrer has been interposed, a general verdict of guilty will be referred to the good count, and the conviction will be sustained. May *v.* State, 85 Ala. 14, 5 So. 14.

Where the indictment charges arson in the second and third degrees, a general verdict of guilty in manner and form as charged, without specifying the degree, is sufficient. State *v.* Sivils, 105 Mo. 530, 16 S. W. 880.

Under a statute declaring that when "a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty," it is error to charge that if the jury find the defendant guilty the form of their verdict should be: "We, the jury in the above cause, find the defendant guilty as charged in the indictment." People *v.* Coch, 53 Cal. 627.

If only the lowest degree of the crime is charged, it is not necessary for the jury to specify the degree of the crime of which the defendant is guilty. People *v.* Fisher, 51 Cal. 319.

Under an indictment charging that the defendant did "wilfully set fire to or burn a dwelling-house," a verdict finding the defendant guilty of an attempt to commit arson will be referred to the indictment and be held as finding defendant guilty of an attempt to commit arson in the first or second degree; and such verdict is not subject to the objection of indefiniteness, in that it does not find ex-

Fact of Insurance. — It seems that the verdict should find the fact of insurance, where the charge is of arson with intent to defraud insurer.[2]

pressly whether the attempt was to commit the offense in the first or second degree. Benbow *v.* State, 128 Ala. 1, 29 So. 553.

2. In People *v.* Morley, 8 Cal. App. 372, 97 Pac. 84, a prosecution for burning certain property with intent to defraud the insurer, the verdict was as follows: "We, the jury in the above entitled action, find the defendants guilty of wilfully and maliciously burning the personal property named in the information with intent to defraud the insurance company as charged in the information." In holding the verdict sufficient the court, by Allen, P. J., said: "It is true that the verdict is to a degree informal. There is no express finding that the property destroyed was, in fact, insured. But the verdict should be construed in connection with the pleadings and the information (People *v.* Tilley, 135 Cal. 62, 67 Pac. 42); and construed so as to give effect to the manifest intention of the jury (People *v.* Holmes, 118 Cal. 448, 50 Pac. 675). The information charged that the property so burned was insured by a designated corporation. . . . The fraud upon the company as charged in the information was the burning of insured property. The verdict, when read in connection with the information, is certain in the intent to find that the property burned was insured."

ASSAULT AND BATTERY

By A. P. RITTENHOUSE,

Sometime Judge of the Eighth Judicial District of Colorado.

I. DEFINITION. —Assault. — An assault is an attempt or offer, with force and arms, to do a corporal hurt to the person of another, whether from malice or wantonness, with such circumstances as

denote, at the time, an intention, coupled with the present ability, of using actual violence against the person.[1]

Battery. — Every battery includes an assault. They generally go together, the assault being the initiation or offer to commit the act of which the battery is the consummation. A battery is the unlawful wilful touching of the person of another, by the aggressor, or by some substance put in motion by him.[2]

II. CRIMINAL PROSECUTION. — A. ORIGINAL JURISDICTION. — Generally, justices of the peace and police justices have original jurisdiction of simple assaults and assault and battery.[3]

B. CONCURRENT JURISDICTION. — In some states courts of record have original concurrent jurisdiction with justices of the peace and police justices.[4]

1. **U. S.**—Price *v.* United States, 156 Fed. 950, 85 C. C. A. 247, 15 L. R. A. (N. S.) 1272, annotated case. **Ala.**—Tarver *v.* State, 43 Ala. 354. **Del.** — State *v.* Pepe, 76 Atl. 367; State *v.* Mills, 6 Penne. 497, 69 Atl. 841; State *v.* Brown, 5 Penne. 440, 63 Atl. 328; State *v.* Truitt, 5 Penne. 466, 62 Atl. 790; State *v.* Wilson, 5 Penne. 77, 62 Atl. 227. **Ia.** — State *v.* Cody, 94 Iowa 169, 62 N. W. 702. **Md.** — Handy *v.* Johnson, 5 Md. 450. **Mass.** — Com. *v.* White, 110 Mass. 407. **Mich.** — People *v.* Carlson, 125 N. W. 361. **Minn.** — Cressy *v.* Republic Creosoting Co., 108 Minn. 349, 122 N. W. 484. **Miss.** — Smith *v.* State, 39 Miss. 521. **Mo.** — State *v.* Hines, 148 Mo. App. 289, 128 S. W. 248; Burley *v.* Menefee, 129 Mo. App. 518, 108 S. W. 120. **N. Y.** — Hayes *v.* People, 1 Hill 351. **Okla.** — Clark *v.* State (Okla. Crim.), 106 Pac. 803; Tyner *v.* United States, 2 Okla. Crim. 689, 103 Pac. 1057, 1059. **S. D.** — State *v.* Archer, 22 S. D. 137, 115 N. W. 1075. **Tenn.** — Bloomer *v.* State, 3 Sneed 66. **Tex.** — Drake *v.* State (Tex. Crim.), 136 S. W. 1064, quoting Pen. Code, Art. 502, Subd. 3. **Wash.** — Howell *v.* Winters, 58 Wash. 436, 108 Pac. 1077; State *v.* Heath, 57 Wash. 246, 106 Pac. 756. **Wis.** — Donner *v.* Graap, 134 Wis. 523, 115 N. W. 125; Degenhardt *v.* Heller, 93 Wis. 662, 68 N. W. 411.

An assault is defined to be an inchoate violence to the person of another with the present means of carrying the intent into effect. Threats are not sufficient; there must be proof of violence actually offered, and this within such distance as that harm might ensue if the party was not prevented. People *v.* Lilley, 43 Mich. 521, 526, 5 N. W. 982.

Facts Must Be Averred. — In an action for assault the petition must allege the facts which constitute the assault. Reed *v.* Maley, 115 Ky. 816, 74 S. W. 1079.

2. **Ala.** — Hyde *v.* Cain, 159 Ala. 364, 47 So. 1014; Engelhardt *v.* State, 88 Ala. 100, 7 So. 154. **Del.** — Armstrong *v.* Little, 4 Penne. 255, 54 Atl. 742; Armstrong *v.* Rhoads, 4 Penne. 151, 53 Atl. 435. **Ill.** — Wineberger *v.* Bliss, 53 Ill. App. 112; Westcott *v.* Arbuckle, 12 Ill. App. 577, 580. **Ind.** — Kirland *v.* State, 43 Ind. 146, 153, 13 Am. Rep. 386, *citing* 3 Cooley's Bl. Com. 120. **Mass.** — Com. *v.* McKie, 1 Gray 61, 61 Am. Dec. 410; Com. *v.* Clark, 2 Metc. 23. **Eng.** — Cole *v.* Turner, 6 Mod. 149, 87 Eng. Reprint 907.

And see Bacon's Abridgment, title "**Assault and Battery;**" Waterman on Trespass 146; 1 Hawk. Pl. Cr. 62.

Any violence committed on the person of another with intent to injure is a battery. Cox *v.* State (Ark.), 136 S. W. 989.

3. **Ark.** — State *v.* Cox, 8 Ark. 436, 447. **Ia.** — State *v.* Lee, 37 Iowa 403; State *v.* Carpenter, 23 Iowa 506. **N. H.** State *v.* Hilton, 32 N. H. 285, 288; State *v.* Barrett, 17 N. H. 268. **N. C.** — State *v.* Stafford, 113 N. C. 635, 18 S. E. 256; State *v.* Huntley, 91 N. C. 617; State *v.* Watts, 85 N. C. 517. See State *v.* Thornton, 136 N. C. 610, 616, 48 S. E. 602. **S. C.** — State *v.* McKettrick, 14 S. C. 346.

4. Kennedy *v.* People, 122 Ill. 649, 13 N. E. 213; Hinkle *v.* State, 127 Ind. 490, 26 N. E. 777; Virginia Code, § 4106.

C. Affidavits, Informations and Indictments. — 1. Venue. — It is sufficient to charge the offense to have been committed in the county where the defendant is prosecuted.[5]

2. Charging Offense. — In some jurisdictions it is sufficient to charge the offense in the language of the statute, without stating the manner of it, or specifying the means whereby it was committed.[6] It should be charged, however, that the act was committed in an unlawful manner.[7]

In Maine the supreme judicial court has concurrent jurisdiction with municipal and police courts and trial justices, of the offense of assault and battery. State *v.* Jones, 73 Me. 280. So in Hawaii. The Queen *v.* Young Quai, 8 Hawaii 282.

As an offense at common law assault and battery is cognizable by the circuit courts of West Virginia. State *v.* McKain, 56 W. Va. 128, 49 S. E. 20.

5. Ky. — Kennedy *v.* Com., 3 Bibb 490. Minn. — State *v.* Bell, 26 Minn. 388, 5 N. W. 970. Mo. — State *v.* Foye, 53 Mo. 336.

6. Cal. — People *v.* Perales, 141 Cal. 581, 583, 75 Pac. 170. Ia. — State *v.* Douglass, 1 G. Gr. 550. Ind. — State *v.* Turlock, 46 Ind. 289. Kan. — State *v.* Finley, 6 Kan. 222. Mo. — State *v.* Clayton, 100 Mo. 516, 13 S. W. 819; State *v.* Edward, 19 Mo. 674, 677; State *v.* Cox, 43 Mo. App. 328. Tenn. — Bloomer *v.* State, 3 Sneed 66. Tex. — Roberson *v.* State, 15 Tex. App. 317.

An indictment for assault and battery, which charges that the accused made an assault upon a named person, and him did unlawfully beat, is sufficiently specific, though it does not allege what acts constituted the assault, nor in what manner the beating was done. Sims *v.* State, 118 Ga. 761, 45 S. E. 621.

In charging the commission of an assault under the Arizona statute it is not necessary to allege that defendant had the "present ability to commit a violent injury." The word assault is sufficiently defined by law, and by usual acceptance in common language. Mapula *v.* Territory, 9 Ariz. 199, 80 Pac. 389. But in State *v.* Heath, 57 Wash. 246, 106 Pac. 756, it was held that the phrase "did assault," in a complaint for assault with intent, etc., did not sufficiently charge the crime of assault, the court saying the complaint should have alleged that the appellant had the present ability to carry the attempt into execution, either in the language of the statute or in equivalent words. Fullerton, J., dissented, saying *inter alia:* "This holding, I will undertake to show, is not only contrary to the rule of the common law, but contrary to the rule of every state of the Union that has passed upon the question, save the state of Indiana. . . . From the earliest times, it has been held sufficient at common law to charge a simple assault with the words, 'did make an assault,' without further definition or description of the offense, or further statement of the facts constituting the assault; the governing principle being that the word 'assault' carried with it its definition, and hence, to allege that one person assaulted another, was to allege that he did those acts which the law defined as constituting an assault."

An information charging that defendants "did then and there violently beat, bruise, wound and ill-treat the complainant contrary to the statute, etc.," is sufficient under the Iowa statute without charging that the acts complained of were done in an angry and wilful manner, and with a purpose to hurt or inflict corporal injury. State *v.* Boynton, 75 Iowa 753, 38 N. W. 505.

The charge in an information that the defendant did beat, wound and ill-treat the prosecutor does not charge an aggravated assault. The use of the word "wound" does not change the offense from a simple assault and battery to an aggravated assault. Com. *v.* Dunmire, 38 Pa. Super. 155.

7. State *v.* Murphy, 21 Ind. 441.

In Badger *v.* State, 5 Ga. App. 477, 63 S. E. 532, the defendant was convicted of assault and battery, under an accusation which charged defendant as follows: "'The said Dennis Badger . . . with force and arms did assault and beat one C. D. Fields, in the state and county aforesaid, con-

3. Force and Arms. — The words "force and arms" are not necessary in describing an assault and battery in an indictment.[8] But it has been held that the information or indictment must charge that the offense was committed in a rude, insolent or angry manner.[9]

4. Variance. — There must be no variance between the affidavit and the information based upon it, in the description of the offense.[10]

5. Description of Person Assailed. — The information or indictment must give the name of the person upon whom the offense was committed, if known, or state that it is unknown.[11]

trary to the laws, good order, peace, and dignity of said state.'" Defendant moved in arrest of judgment because it was not distinctly charged that the assault and battery was "unlawful." The accusation was held sufficient, as the allegation that the offense was contrary to the laws of the state, the good order, peace and dignity thereof, was tantamount to charging that it was unlawful.

Intent. — It has been held that in charging an assault and battery it is necessary to allege an intent to injure. Grayson *v.* State, 37 Tex. 228, where it was said that the injury and the intent to injure constitute the gravamen of the action, and both must be alleged. And see Cromwell *v.* State (Tex. Crim.), 131 S. W. 595, where, however, it was held that in charging an aggravated assault an intent to injure need not be alleged.

But in Moore *v.* State (Okla. Crim.), 111 Pac. 822, the court, referring to the statute, said: "The act which constitutes the assault and battery must be intentional and wrongful, and it must be committed with the intent to kill. That is all the statute requires in that respect, and those facts the information explicitly avers. Nor can we understand what act would be sufficient to constitute an intent. An intent is a fact and not an act. It may be evidenced by acts, but the information need not set out the evidence. Also this information charged that plaintiffs in error did intentionally and wrongfully assault, beat, cut, stab, and wound one John Chee with a knife; and, if that does not allege a battery, we are at a loss to understand how one could be alleged. Section 2333, Snyder's Comp. Laws, 1909."

The word "unlawfully," in an information, necessarily implies a criminal intent. State *v.* Koonse, 123 Mo. App. 655, 664, 101 S. W. 139.

8. State *v.* Elliott, 7 Blackf. (Ind.) 280.

9. Slusser *v.* State, 71 Ind. 280; State *v.* Wright, 52 Ind. 307; Cranor *v.* State, 39 Ind. 64.

10. In Smith *v.* State, 57 Tex. Crim. 609, 124 S. W. 665, the affidavit alleged that the assault was made on one Young by striking him with a knife and a chair. There was a fatal variance, for the information based on said affidavit alleged that the assault was committed by striking Young with the fist and with a chair.

In Harrison *v.* State, 48 Tex. Crim. 44, 85 S. W. 1058, the complaint charged an assault upon "Pierce Mount," and the information alleged it to have been committed upon "Pierce Mounts." This was fatal upon a motion in arrest of judgment.

11. **U. S.** — United States *v.* Davis, 4 Cranch C. C. 333, 25 Fed. Cas. No. 14,924. **Ind.** — Brooster *v.* State, 15 Ind. 190. **Ia.** — State *v.* Bitman, 13 Iowa 485. **Miss.** — Grogan *v.* State, 63 Miss. 147. **N. Y.** — White *v.* People, 32 N. Y. 465. **Tex.** — State *v.* Elmore, 44 Tex. 102; State *v.* Snow, 41 Tex. 596; Rutherford *v.* State, 13 Tex. App. 92; Ranch *v.* State, 5 Tex. App. 363.

But an information is good if it charges an assault upon the person of the informant, and is subscribed and sworn to by him, though his name does not appear in the charging part of the affidavit. State *v.* McKinley, 82 Iowa 445, 48 N. W. 804.

A description of the person injured as Mary R., wife of the complainant, is sufficient. Com. *v.* Gray, 2 Cush. (Mass.) 535.

Alias. — The name of the person alleged to have been assaulted is used only for the purpose of identification.

6. Description of Defendant. — In a prosecution for assault and battery the name of the defendant should be properly stated.[12]

7. Committed on Several Persons. — Assault and battery may be charged to have been committed on two or more persons at the same time.[13]

8. Committed by Several Persons. — An information or indictment may charge several defendants jointly with assault and battery.[14]

9. Joinder of Offenses. — Several assaults may be joined in one indictment.[15]

10. Conclusion. — In some states an indictment for assault and battery should conclude "contrary to the form of the statute in such case made and provided."[16] But it will not be quashed for want of such conclusion.[17] In others the conclusion must be "against the peace and dignity of the state."[18]

11. Verification. — In Missouri an information for assault and

When such person is known equally well by two names, either of them is sufficient. State *v.* Bundy, 64 Me. 507, 509.

Person Since Deceased. — In Com. *v.* Ford, 5 Gray (Mass.) 475, the indictment averred that the defendant "in and upon the body of one Richard Pappoon, late of Marblehead, in said county of Essex, deceased, in the peace of said Commonwealth then and there being did make an assault, and him the said Richard Pappoon, with a large and heavy whip, which the said John Ford then and there in his right hand had and held, did then and there strike divers grievous and dangerous blows upon the head of him the said Richard Pappoon, whereby the said Richard Pappoon was then and there cruelly and dangerously beaten and wounded, and his life greatly endangered." This was held to charge an assault and battery upon the living body of Richard Pappoon, since deceased.

12. State *v.* Seely, 30 Ark., 162 (holding initial letters of christian name sufficient); Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121 (where initial of defendant's middle name is stated in one part of the indictment, and omitted in another part. See the title "Indictment and Information."

13. **Mass.** — Com. *v.* O'Brien, 107 Mass. 208; Com. *v.* McLaughlin, 12 Cush. 615. **Mich.** — People *v.* Ellsworth, 90 Mich. 442, 51 N. W. 531. **R. I.** — Kenney *v.* State, 5 R. I. 385. **Tex.** State *v.* Bradley, 34 Tex. 95. **Eng.** — Rex *v.* Benfield, 2 Burr. 980, 984, 97 Eng. Reprint 664; Reg. *v.* Giddins, Car. & M. 634, 41 E. C. L. 344; Anon., Lofft 27, 98 Eng. Reprint 515.

In Com. *v.* O'Brien, 107 Mass. 208, the court said: "It is now well settled, though it was once held otherwise, that a man who assaults two persons at the same time may be charged in a single count with the assault upon both, as one breach of the peace."

14. **Ala.** — Thompson *v.* State, 25 Ala. 41. **Ga.** — Lewis *v.* State, 33 Ga. 131. **Ky.** — Bosleys *v.* Com., 7 J. J. Marsh. 599, 23 Am. Dec. 439. **N. Y.** — White *v.* People, 32 N. Y. 465. **Pa.** Shouse *v.* Com., 5 Pa. 83. **Tenn.** — Buchanan Fowler *v.* State, 3 Heisk. 154.

An information or indictment may properly charge several persons with assault and battery upon two or more persons, in the same count, if the offense was committed by the same act or acts. People *v.* Ellsworth, 90 Mich. 442, 447, 51 N. W. 531.

15. Com. *v.* Malone, 114 Mass. 295, 298; State *v.* Sims, 3 Strobh. (S. C.) 137 (where an election was required after the evidence).

16. State *v.* McKettrick, 14 S. C. 346. See the title "Indictment and Information."

17. State *v.* Berry, 9 N. J. L. 374, where it was moved to quash because the conclusion was "contrary to the form of the statute," instead of "statutes."

18. Treadaway *v.* State (Tex. Crim.), 135 S. W. 147.

battery must be verified, or based upon a verified complaint.[19]

12. Approved Forms.[20]

D. TRIAL. — **1. Right to Jury Trial.** — In a prosecution for assault and battery the defendant has a right to be tried by a jury.[21]

19. State *v.* Calfer (Mo.), 4 S. W. 418.

The complaint of the prosecutor filed with the justice of the peace is part of the proceedings. State *v.* Foye, 53 Mo. 336.

In State *v.* Ostmann, 123 Mo. App. 114, 100 S. W. 696, an information was signed and filed in the circuit court by the prosecuting attorney. It was based upon an affidavit made by the party assaulted, and recited that fact, and also that such complaint was filed with the information, and was held sufficient.

Before a Notary. — An affidavit to a complaint for assault and battery, when sworn to before a notary public, will authorize a justice of the peace to issue a warrant. State *v.* Mullen, 52 Mo. 430.

20. **Form of affidavit** before a justice of the peace adapted from State *v.* McKinley, 82 Iowa 445, 48 N. W. 804.

State of Iowa, }
Mitchell County. } ss.

Harry Jones being duly sworn, on his oath accuses Richard Roe of said county, of the crime of assault and battery committed in —— Township, Mitchell County, Iowa, on the —— day of ——, 1910, upon the person of him the said Harry Jones, by said Richard Roe then and there unlawfully, maliciously striking, kicking, beating, bruising and injuring the person of this informant, Harry Jones, contrary to the statutes of the state of Iowa, and this informant asks for the arrest and punishment of said Richard Roe according to law.

(Signed) Harry Jones.

Subscribed and sworn to before me this the —— day of ——, 1910.

Robert Smith,
Justice of the Peace.

Form of indictment, adapted from Harne *v.* State, 39 Md. 552.

State of Maryland,
Carroll County, towit:

The Grand Jurors of the State of Maryland, for the body of Carroll County do on their oaths present, that John Doe, late of Carroll County aforesaid, on the —— day of ——, in the year of our Lord Nineteen Hundred and Ten, with force and arms at the county of Carroll, aforesaid, in and upon one Richard Roe, in the peace of God, and the said state then and there being, did make an assault, and him the said Richard Roe, did then and there beat, bruise and wound, to the great damage of the said Richard Roe, and against the peace, government and dignity of the state.

Form of indictment, adapted from Evans *v.* State, 24 Ohio St. 208.

After the title: The Jurors of the Grand Jury of the State of Ohio, within and for the body of the county of Harrison, impaneled, sworn and charged to inquire of crimes and offenses committed within said County of Harrison, in the name and by the authority of the State of Ohio, on their oaths do find and present, that John Doe, late of said county, on the —— day of ——, A. D., 1910, at the county aforesaid, did unlawfully make an assault in and upon one Richard Roe, then and there being and him, the said Richard Roe, then and there beat, wound and illtreat, and other wrongs to the said Richard Roe then and there did, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

James M. Pierce,
Prosecuting Attorney.

Form of indictment, adapted from Reg. *v.* Richardson, 46 U. C. Q. B. 375. Title and Court.

Charging part. — For that the said defendant —— on the —— day of ——, A. D., at —— did in and upon one —— make an assault, and him said——did then and there beat, wound and illtreat, thereby then occasioning to the said —— actual bodily harm, and other wrongs to the said —— then and there did, to the great damage of the said ——, against the form of the statute in such case made and provided, and against the peace, etc.

21. Miller *v.* State, 3 Okla. Crim. 457, 106 Pac. 810.

2. Several defendants may be tried jointly, but the verdicts and judgments must be several.[22]

Conviction and Acquittal. — Some may be convicted, and others acquitted.[23]

3. Burden of Proof. — The burden of showing justification is upon the defendant.[24]

4. Jury Judges of Self-Defense. — In a prosecution for assault and battery the jury are the judges of the necessity for the degree and amount of force used in self-defense.[25]

5. Adequate Cause. — Under a statute prescribing that certain things shall be adequate cause for an assault it is for the court to determine whether the things shown amounted to adequate cause.[26]

III. CIVIL ACTIONS. — A. Jurisdiction. — An action for damages for assault and battery is transitory, and may be brought in any jurisdiction where the defendant can be found.[27]

B. Pleading. — **1. Facts Should Be Stated.** — The facts constituting the assault and battery complained of should be set forth in the complaint or declaration.[28]. It has been held not necessary to

22. Bosleys *v.* Com., 7 J. J. Marsh. (Ky.) 599, 23 Am. Dec. 439.

If one of several defendants pleads guilty, the others cannot claim as a matter of right to be tried separately from him. Thompson *v.* State, 25 Ala. 41.

23. Lewis *v.* State, 33 Ga. 131; Shouse *v.* Com., 5 Pa. 83.

Some may be convicted of assault and battery and others of an assault only. White *v.* People, 32 N. Y. 465.

24. Badger *v.* State, 5 Ga. App. 477, 63 S. E. 532.

25. Mass. — Com. *v.* Bush, 112 Mass. 280. Minn. — Gallagher *v.* State, 3 Minn. 270. Tex. — Aycock *v.* State, (Tex. Crim.), 133 S. W. 683.

26. Morrison *v.* State (Tex. Crim.), 135 S. W. 551, where Davidson, P. J., said: "Where the statute prescribes that certain things constitute adequate cause, the court should instruct the jury that such constitute adequate cause, and not leave it, as a matter of fact, to be ascertained by the jury. Insulting conduct of or toward a female relative as a matter of law is prescribed by the Legislature as adequate cause. The court would not be justified in submitting the issue to the jury to determine whether such was insulting language, but must charge the jury, as a matter of law, that such insulting language is adequate cause."

27. Conn. — Lillibridge *v.* Barber, 55 Conn. 366, 11 Atl. 850. Kan. — McAnarney *v.* Caughenaur, 34 Kan. 621, 9 Pac. 476. Ky. — Watts *v.* Thomas, 2 Bibb 458. Md. — Redgrave *v.* Jones, 1 H. & McH. 195.

A wife cannot maintain an action against her husband for assault and battery, though the statute gives her the right to sue in her own name for damages to her person. Schultz *v.* Schultz, 89 N. Y. 644, *reversing* 27 Hun 26.

28. Ricketts *v.* Sandifer, 69 Ind. 318, that the defendant committed the assault.

Facts. — The petition must allege the facts which constitute the assault; it is not sufficient to allege that the defendant "unlawfully set upon and assaulted" the plaintiff, this being a legal conclusion. Stivers *v.* Baker, 87 Ky. 508, 9 S. W. 491.

"A petition which contains averments to the effect that defendant wilfully and maliciously with force and violence pushed and shoved plaintiff across a room to a door, and out of the door to the ground, a distance of six feet, and that as a result plaintiff's leg was broken and his knee crushed, and to his damage in the sum of $5000.00, states a cause of action for damages

allege in terms that an assault and battery was unlawful,[29] nor that it was wilful or malicious,[30] nor that plaintiff was without fault,[31] nor that opprobrious language was used at the time.[32] And the place where it was committed need not be particularly stated.[33]

2. Against Principal for Act of Agent. — Where it is sought to hold a defendant liable for an assault and battery committed by his agent it must be alleged that the agent was at the time engaged in the defendant's business.[34]

for assault and battery." Fink *v.* Busch, 83 Neb. 599, 120 N. W. 167.

But in Mitchell *v.* Mitchell, 45 Minn. 50, 47 N. W. 308, it was held that a general allegation that the defendant assaulted the plaintiff sufficiently charged an assault without specifying the acts.

Inducement. — All the circumstances accompanying the act, and that constitute a part of the occurrence, may be pleaded so as to show the purpose and extent of the injury. Dornsife *v.* Ralston (Ore.), 106 Pac. 13, where the complaint set out that plaintiff owned certain real property enclosed by a fence in which was a gate, across which defendant fastened a wire, and that when plaintiff was removing the wire the assault occurred, etc.

"Force and Arms." — It is not necessary to allege in so many words that the acts complained of were committed "with force" or "with force and arms." If facts are stated showing an actual infliction of violence on the person, it is sufficient. Greenman *v.* Smith, 20 Minn. 418.

29. Schlosser *v.* Griffith, 125 Ind. 431, 25 N. E. 459; Benson *v.* Bacon, 99 Ind. 156.

A petition for damages which alleged that the assault was committed with force and arms, but omitted to allege in terms that it was wrongful, was held good after verdict. McKee *v.* Calvert, 80 Mo. 348.

30. Andrews *v.* Stone, 10 Minn. 72.

An intent to injure is not a necessary element of assault and battery in a civil action. Ala. — Seigel *v.* Long, 53 So. 753. Ind. — Mercer *v.* Corbin, 117 Ind. 450, 20 N. E. 132, 10 Am. St. Rep. 76, 3 L. R. A. 221. Ia. — Luttermann *v.* Romey, 143 Iowa 233, 121 N. W. 104. Minn. — Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. (N. S.) 439. Wis. Vosburg *v.* Putney, 80 Wis. 523, 50 N. W. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226, annotated case.

The rule is otherwise in the case of a mere assault. Degenhardt *v.* Heller, 93 Wis. 662, 68 N. W. 411.

The intent to injure is presumed if the injury is caused by violence to the person. Johnson *v.* Daily, 136 Mo. App. 534, 118 S. W. 530; Sumner *v.* Kinney (Tex. Civ. App.), 136 S. W. 1192.

31. Steinmetz *v.* Kelly, 72 Ind. 442, 37 Am. Rep. 170; Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724.

32. Vest *v.* Speakman, 153 Ala. 393, 44 So. 1017.

33. **Place is not of the essence of** this action. It may be alleged to have been committed in one place, and proved to have been committed in another place, provided it is within the jurisdiction of the court. Lillibridge *v.* Barber, 55 Conn. 366, 11 Atl. 850.

34. Coal Belt Electric R. Co. *v.* Young, 126 Ill. App. 651.

In Anderson *v.* Schesinger, 38 N. Y. Supp. 296, the complaint alleged that on July 20, 1893, the defendant and two of his agents entered the apartments of the plaintiff, and that one of said agents violently assaulted the plaintiff, striking her on the shoulder, and pushing her backward, whereby she was injured to her damage $1000. This was insufficient, because it was not alleged that the agent was engaged in the defendant's business when the acts were done, or that defendant participated.

Amendment and Form. — In Marbury Lumb. Co. *v.* Wainwright, 150 Ala. 405, 43 So. 733, it was held that a complaint charging an assault could be amended so as to charge an assault and battery. In this case the "complaint was amended in three particulars: First, by inserting immediately after the word 'premises,' and before the words 'all against the protest,' etc., the words, 'and plaintiff avers, that

3. **Allegations of General Damages.** — General damages consist of the natural and necessary consequences of an assault and battery, and need not be specifically set forth in a complaint or declaration.[35]

4. **Special Damages Must Be Pleaded.** — Injuries resulting from an assault and battery, which are not the natural and necessary consequences of it, must be specially pleaded in order to warrant a recovery therefor.[36]

the said trespass was wilful, and that by said conduct of said defendants, plaintiff was subjected to great humiliation, indignity and shame;' second, by inserting after the words, 'Marbury Lumber Company, a corporation,' where they appear in the body of the complaint, the words, 'the said defendant Marbury Lumber Company, in all things acting by and through its servants, agents and employees;' and third, by striking out the word, 'assaulted' in the complaint, and inserting in lieu thereof, the words, 'committed an assault and battery on plaintiff.' The complaint after these amendments were made, reads as follows: 'Georgia Ann Wainwright, plaintiff, claims of Marbury Lumber Company, a corporation — the said defendant, Marbury Lumber Company in all things acting by and through its servants, agents and employes,—W. J. Bozeman and John Culpepper the defendants, two thousand dollars as damages for this, to-wit: That heretofore, to-wit, on the 3d of February, 1904, the plaintiff, being the wife of John Wainwright, was living in the residence of said husband, with her family, and at the homestead of said John Wainwright, in said state of Alabama, and was occupying said residence and premises, personally with her effects, consisting of household furniture, clothing, cooking utensils, etc., and that said defendants, on the 3d day of February, with divers other persons, to plaintiff unknown, assisting, came upon said premises unlawfully, and entered the said residence and homestead, and with force and arms, committed an assault and battery on plaintiff, and ejected plaintiff from the said premises and residence, and put her off said premises, and plaintiff avers, that said trespass was wrongful, and that by said conduct of said defendants, plaintiff was subjected to great humiliation, indignity and shame; all against the protest and will of the plaintiff, to the damage of two thousand dollars, for which she sues.' ''

35. **Ind.** — Morgan *v.* Kendall, 124 Ind. 454, 24 N. E. 143. **Kan.** — McClenny *v.* Inverarity, 80 Kan. 569, 103 Pac. 82. **Ky.** — Pepper *v.* Twyman, 6 Ky. L. Rep. 426. **Md.** — Sloan *v.* Edwards, 61 Md. 89. **Mo.** — Yeager *v.* Berry, 82 Mo. App. 534.

If special damages are not alleged the plaintiff is not confined to the recovery of merely nominal damages, but may recover such general damages as he may prove to have resulted from the injury. Andrews *v.* Stone, 10 Minn. 72.

In Pennington *v.* Caughey, 145 Cal. 10, 78 Pac. 227, there was a demurrer because the complaint did not allege damage. "But it is alleged in the complaint not only that the defendant assaulted the plaintiff and knocked him down, and kicked him in the face and on the body, but that he 'thereby seriously wounded and bruised the plaintiff and rendered him sick, sore, and lame, to his damage in the sum of $5,000.' This is but to say, in language technically defined by long use, that by reason of the acts complained of the plaintiff suffered damage in, or sustained damage to, the amount of five thousand dollars. (Stephen on Pleadings, 33 *et seq.*, 38; Baker *v.* Hope, 49 Cal. 598.) Nor can the language used be otherwise construed. The complaint is entirely sufficient. (Childers *v.* Mercury, etc. Co., 105 Cal. 289; Hearne *v.* De Young, 132 Cal. 360.)''

36. **Ala.** — Sloss-Sheffield Steel and Iron Co. *v.* Dickenson, 52 So. 594; Vest *v.* Speakman, 153 Ala. 393, 44 So. 1017; Irby *v.* Wilde, 150 Ala. 402, 43 So. 574. **Mo.** — O'Leary *v.* Rowan, 31 Mo. 117. **N. D.** — Shoemaker *v.* Sonju, 15 N. D. 578, 108 N. W. 42. **Wis.** — Birchard *v.* Booth, 4 Wis. 85.

5. Exemplary Damages. — Facts To Be Pleaded. — Where an assault and battery is wanton, reckless or malicious, exemplary damages may be recovered, if such facts are pleaded.[37]

To recover for loss of time, or labor, or service, or for money paid out in doctor's bills incurred during the sickness resulting from the battery, the petition must state the facts. Pepper *v.* Twyman, 5 Ky. L. Rep. 426.

Mental Suffering. — Damages may be awarded for mental suffering, even though there be no unlawful touching of the body of the plaintiff and no physical injury. Lonergan *v.* Wm. Small & Co., 81 Kan. 48, 105 Pac. 27.

In Morgan *v.* Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445, the complaint alleged "that by reason of the injuries inflicted by the appellants he was hurt and injured and became and was sick. Under these allegations we think the appellee might prove the extent of his injuries as well as the extent of his physical and mental suffering resulting immediately from the assault and battery alleged in his complaint. Such physical and mental suffering was not the subject of special damages within the legal meaning of that term, and it was not necessary to specifically set them out in the complaint."

Indignity and Humiliation.—In Bonneval *v.* American Coffee Co. (La.), 53 So. 426, the court said: "We are not prepared to say that the allowance of damages is excessive. Besides physical pain and suffering, an indignity was inflicted on plaintiff's son, which must be considered. See Carrick *v.* Joachim, 126 La. 5, 52 So. 173."

37. **Colo.** — McConathy *v.* Deck, 34 Colo. 461, 83 Pac. 135. **Conn.** — Shupack *v.* Gordon, 79 Conn. 298, 64 Atl. 740; Hanna *v.* Sweeney, 78 Conn. 492, 62 Atl. 785. **Ga.** — Berkner *v.* Dannenberg, 116 Ga. 954, 43 S. E. 463. **Ill.** — Coal Belt Electric R. Co. *v.* Young, 126 Ill. App. 651. **Ky.** — Crocker *v.* Haley, 2[illegible] Ky. [illegible]. Rep. 174, 92 S. W. 574. **Mo.** Williams *v.* St. Louis, etc. R. Co., 119 Mo. App. 663, 96 S. W. 307; Happy *v.* Pritchar[illegible], 111 Mo. App. 6, 85 S. W. 655; Sloan *v.* Speaker, 63 Mo. App. 321, 324. **N. J.** — Blackmore *v.* Ellis, 70 N. J. L. 264, 57 Atl. 1047. **W. Va.**—Fink *v.* Thomas, 66 W. Va. 487, 66 S. E. 650; Smith *v.* Fahey, 63 W. Va. 346, 60 S. E. 250.

In Fleming *v.* Loughren, 139 Iowa 517, 115 N. W. 506, exemplary damages were warranted under a petition which alleged that the defendant "wilfully and wantonly made a vicious and brutal assault upon the plaintiff," inflicting physical injury and causing great "mental and physical pain."

In Iaeger *v.* Metcalf, 11 Ariz. 283, 94 Pac. 1094, the complaint charged that the plaintiff Metcalf during the year 1906 worked for the defendant Iaeger as cook in the latter's hotel in the city of Tucson, and "that on or about July 10th, 1906, while the plaintiff was engaged in the performance of his duties as cook under said contract, and without cause or provocation, the defendant made an attack upon the plaintiff, striking the plaintiff in the eye with false knuckles, knocking him down, and otherwise beating and bruising this plaintiff, causing the loss of one of plaintiff's eyes, and causing him to suffer great physical pain and anguish, and further causing him the loss of two months' time, and causing him to incur liabilities for medical attendance in the sum of $200.00, in the effort to save the said eye," and that as a result of said assault the plaintiff suffered general damages in the sum of $15,000, wherefore he prays damages for said amount of $15,000. The complaint was sufficient to sustain an award of exemplary damages, the court saying, "All the elements of wantonness, malice, and deliberate violence are present, if not by express averment, yet by proper implication from the facts alleged."

In Morgan *v.* Langford, 126 Ga. 58, 61, 54 S. W. 818, the plaintiff alleged in his petition that the assault and battery complained of was without cause and was aggravated both in the act and in the intention, and claimed punitive damages therefor. The allegation was held sufficient to support a claim for damages for humiliation caused by the assault and battery, under section 3606 of the Civil Code of Georgia.

In Missouri, if exemplary damages are sought, the petition must state separately the amount of exemplary damages sought to be recovered. Bax-

6. Forms of Complaints and Declarations. — The forms given below are adapted from forms approved by the courts.[88]

7. General Denial. — Generally a defendant may answer the charge of assault and battery by a general denial, which puts in issue every material allegation in the complaint or declaration.[89]

ter *v.* Magill, 127 Mo. App. 392, 397, 105 S. W. 679.

But in North Dakota, if the complaint alleges that the assault was wilful and malicious, exemplary damages may be awarded even though they are not prayed for in terms. Shoemaker *v.* Sonju, 15 N. D. 518, 108 N. W. 42.

38. Form of complaint, adapted from Morris *v.* Casel, 90 Ind. 143.

Title of action and court.

The plaintiff complains of the defendant, and says that on or about the —— day of ——, A. D. ——, at ——, the defendant with force and arms assaulted the plaintiff, and with great force and violence struck the plaintiff with ——, and beat, bruised, wounded and ill-treated him, and other wrongs to him, then and there did, by means whereof the plaintiff was greatly hurt, bruised, and wounded, and became and was sick, sore and disordered, and was permanently disabled and injured, and so remains and continues,—whereby he was and is hindered and prevented from transacting any business, and has been obliged to lay out and expend a large sum of money, to-wit, the sum of $—— in and about endeavoring to cure and heal himself of his aforesaid hurts, bruises, wounds, sickness, etc., by reason of all which he is damaged to the amount of $———, for which sum and costs he prays judgment.

———————

Attorney for Plaintiff.

Verification.

Form of petition, adapted from Sloan *v.* Speaker, 53 Mo. App. 323.

Title of action and court.

"Plaintiff states that on or about the —— day of ——, 1910, in the county of —— and state of Missouri the defendant did unlawfully assault plaintiff, and did then and there rudely, violently and with great force, push and slam a large gate against plaintiff's arm and leg, and with said gate did strike, beat, bruise and wound her, the said plaintiff, upon the leg and arm, and did then and there, in a rude, insolent and angry manner seize hold upon plaintiff with his hands and did violently shake plaintiff, and bruise and wound her upon the arms; that by reason of said beating, bruising and wounding, plaintiff was crippled in her leg and arms, and was for several days lame, and unable to attend to her business affairs and was caused great bodily and mental suffering, and was thereby greatly humiliated and insulted, to her damage in the sum of $5,000, for which she asks judgment."

Form of declaration, adapted from Ricker *v.* Freeman, 50 N. H. 420, 9 Am. Rep. 267.

Title of action and court.

Plaintiff alleges that the said ——, defendant, at ——, in the county of —— and state of New Hampshire, on the —— day of ——, 1910, with force and arms did make an assault upon plaintiff, and beat, bruised, wounded and ill-treated him, and cast and threw him with great violence against and upon a coat and hat-hook, which penetrated the left side of the neck of the plaintiff, severely wounding and lacerating the skin, muscles and blood vessels, causing violent bleeding, great pain, soreness and swelling, in so much that the plaintiff's life was despaired of for a long space of time, viz., for the space of two months; and in consequence of said injuries the plaintiff became greatly deformed, weakened and disabled in his spine, neck, face, eyes and other parts of his head and greatly injured in his hearing, voice, and speech, all of which continues and are likely to become permanent, to his damage in the sum of $———. And also the plaintiff was put to great expense for nursing and medical attendance while laboring under the effects of said injuries, viz.: the sum of $——— and other injuries to the plaintiff the defendant then and there did against the peace, etc. Wherefore the plaintiff prays judgment against the defendant for the sum of $———.

39. Roe *v.* Rogers, 1 How. Pr. (N.

8. Justification Must Be Pleaded. — The general issue does not suffice to put matters of justification to trial; such matters must be specially pleaded.[40]

Son Assault Demesne — Self-defense is properly set up as a defense to an action for assault and battery, by the plea of *son assault demesne,* which admits the assault and battery, but avers that it was committed in self-defense, the defendant using no more force than was necessary for that purpose.[41]

Y.) 356; Cogdell *v.* Yett, 1 Coldw. (Tenn.) 230.

To a complaint for an assault and battery an answer stated that "the defendant is not guilty of the grievances in the plaintiff's complaint alleged, or any or either of them, or any part thereof." This was held a good general denial. Hoffman *v.* Eppers, 41 Wis. 251, 257.

40. **Ala.** — Mitchell *v.* Gambill, 140 Ala. 316, 37 So. 290. **Ga.** — Kerwich *v.* Steelman, 44 Ga. 197; Brooks *v.* Ashburn, 9 Ga. 297. **Ill.** — Grabile *v.* Ren, 110 Ill. App. 587. **Ind.** — Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724; Lair *v.* Abrams, 5 Blackf. 191. **Mass.** — Hathaway *v.* Hatchard, 160 Mass. 296, 35 N. E. 857; Cooper *v.* McKenna, 124 Mass. 284. **Mo.** — Thomas *v.* Werremeyer, 34 Mo. App. 665. **Neb.** Fink *v.* Busch, 83 Neb. 599, 120 N. W. 167, holding that otherwise the defense cannot go to the jury. **N. H.** — Wheeler *v.* Whitney, 59 N. H. 197; Jewell *v.* Goodall, 19 N. H. 562. **N. J.** Blackmore *v.* Ellis, 70 N. J. L. 264, 57 Atl. 1047. **N. Y.** — Coles *v.* Carter, 6 Cow. 691. **N. C.** — Meeds *v.* Carver, 29 N. C. 273. **Ore.** — Konigsberger *v.* Harvey, 12 Ore. 286, 7 Pac. 114. **Vt.** Wright *v.* Page, 2 Tyler 80. **Wash.** — Neilsen *v.* Hovander, 56 Wash. 93, 105 Pac. 172. **W. Va.** — Shires *v.* Boggess, 69 S. E. 466. **Wis.** — Price *v.* Grzyll, 133 Wis. 623, 114 N. W. 100; Yeska *v.* Swendrzynski, 133 Wis. 475, 113 N. W. 959; Atkinson *v.* Harran, 68 Wis. 405, 32 N. W. 756.

Admission. — The plea of justification must admit the allegations of the plaintiff. If a plea admits such allegations only in part, it is not a good plea of justification. Seymour *v.* Bailey, 76 Ga. 338, 340.

The plea of the general issue alone, does not enable the defendant to justify his assault and battery. Thomas *v.* Riley, 114 Ill. App. 520.

41. **Ill.** — Wells *v.* Englehart, 118 Ill. App. 217, 220. **Ind.** — Morris *v.* Casel, 90 Ind. 143; Smith *v.* Wickard, 42 Ind. App. 508, 85 N. E. 1030. **Mo.** Rhine *v.* Montgomery, 50 Mo. 566; Happy *v.* Pritchard, 111 Mo. App. 6, 85 S. W. 655. **N. H.** — Dole *v.* Erskine & Chase, 35 N. H. 503, 510. **N. J.** — Lutlopp *v.* Heckmann, 70 N. J. L. 272, 57 Atl. 1046. **N. Y.** — Lansingh *v.* Parker, 9 How. Pr. 288; Collier *v.* Moulton, 7 Johns. 109. **Tenn.** — Cogdell *v.* Yett, 1 Coldw. 230. **Vt.** — Bartlett *v.* Churchill, 24 Vt. 218. **W. Va.** — Shires *v.* Boggess, 69 S. E. 466.

Such a plea is a good answer, although the assault and battery was of an aggravated character. Mellen *v.* Thompson, 32 Vt. 407.

In civil actions for assault and battery self-defense is an excuse, the same as in criminal prosecutions, and under precisely the same principles. "In civil actions, as well as in criminal, the rule obtains that if the defendant was the aggressor, and brought on the difficulty, he cannot invoke the doctrine of self-defense, because it would be allowing him to take the advantage of his own wrong." Thomason *v.* Gray, 82 Ala. 291, 293, 3 So. 38.

The plea should aver every element or fact necessary under the law to constitute self-defense. Morris *v.* McClellan, 154 Ala. 639, 45 So. 641, 645.

Amendment. — Where the defendant pleaded that the assault and battery was committed in defense of one son, and the evidence showed that it was actually committed in defense of another son, it was prejudicial not to allow an amendment to correspond with the evidence. Downs *v.* Jackson (Ky.), 128 S. W. 339, where the court said that it was simply a case of mistaken identity, which should not deprive him of such defense as he had when he believed that he was acting in the necessary defense of one of his sons.

9. Preserving the Peace, etc. — The plea of *molliter manus imposuit* substantially sets forth that the plaintiff was committing, or about to commit, some unlawful act, and that the assault and battery complained of consisted in the defendant gently laying his hands on the plaintiff to preserve the peace, or prevent the act, without hurting him.[42]

10. Several Defenses May Be Pleaded. — Generally the pleas general denial, *son assault demesne* and *molliter manus imposuit* may be joined in an answer to a complaint for assault and battery.[43] But it has been held otherwise.[44]

C. Replication De Injuria. — To a plea of *son assault demesne* the plaintiff may by a replication *de injuria* aver that the defendant used more force than was necessary for his self-defense.[45]

It is for the jury to determine whether or not defendant acted in self-defense. Newton *v.* Shivers (Tex. App.), 136 S. W. 805.

Plea of son assault demesne adapted from Gaither *v.* Blowers, 11 Md. 536.

Title of court and action.

For plea to the declaration of the plaintiff the defendant alleges "that the said plaintiff just before the time when, etc., to-wit, on the day and year in the said declaration mentioned, at the county aforesaid with force and arms made an assault upon him, the said defendant, and would then and there have beaten, ill-treated, and greatly injured him the said defendant, if he had not immediately defended himself against the said plaintiff; wherefore the said defendant did then and there defend himself against the said plaintiff, as he lawfully might, for the cause aforesaid; and, in so doing, did necessarily and unavoidably a little beat, wound and ill-treat the said plaintiff, doing no unnecessary damage to the said plaintiff on the occasion aforesaid. And the said defendant saith, that if any hurt or damage then and there happened to the said plaintiff, the same was occasioned by the said assault made by the said plaintiff on him, the said defendant, and in the necessary defense of himself, the said defendant, against the said plaintiff, which are the supposed trespasses whereof the said plaintiff hath above complained."

42. A plea of *molliter manus imposuit* is a good answer to a declaration for simple assault and battery, but not good where the declaration alleges a wounding of the plaintiff. Mellen *v.* Thompson, 32 Vt. 407, 410. There must be a request to depart, refusal, resistance and damage to defendant after such request. Cox *v.* Cooke, 1 J. J. Marsh. (Ky.) 360.

43. In Rhine *v.* Montgomery, 50 Mo. 566, an action for damages, the defendant pleaded three defenses amounting in substance to the old pleas, not guilty, *son assault demesne*, and *molliter manus imposuit*. The last two mentioned defenses were in justification of the defendant's acts, and in no sense express or implied admissions that they were unlawful, and the three defenses were clearly consistent both at common law and under the statute.

In Lansingh *v.* Parker, 9 How. Pr. (N. Y.) 288, the answers pleaded: 1st, a general denial; 2nd, that plaintiff committed the first assault; 3rd, that plaintiff was in defendants' inn making a great noise, etc., and defendants requested him to leave, and he refusing, they gently laid their hands on him to remove him. The defenses were not inconsistent.

Where *son assault demesne* is pleaded together with the plea of not guilty, the latter plea puts the plaintiff upon proof of every material allegation in the declaration. Cogdell *v.* Yett, 1 Coldw. (Tenn.) 230.

44. Roe *v.* Rogers, 8 How. Pr. (N. Y.) 356, where it was held that a general denial was inconsistent with matter of justification.

45. Fisher *v.* Bridges, 4 Blackf. (Ind.) 518; Dole *v.* Erskine & Chase, 35 N. H. 503, 510; Curtis *v.* Carlson, 2 N. H. 539.

In Abney *v.* Mize, 155 Ala. 391, 46

D. Trial. — **1. Burden of Proof.** — Where justification is pleaded, the burden is upon the defendant to establish it by evidence.[46]

2. Right To Open and Close. — Under a plea of justification the defendant has a right to open and close,[47] but not under a plea in mitigation of damages.[48]

3. Effect of Abusive Language. — The effect of opprobrious words or abusive language upon the question of damages is for the jury to determine.[49]

E. Judgment. — Several Defendants. — In an action against several defendants[50] judgment may be taken against all or any of

So. 230, the defendants interposed several pleas of justification and self-defense, to which the plaintiff replied as follows: "'That defendants committed the assault and battery in said complaint mentioned to a greater extent and degree, and with more force than was reasonably necessary for the purpose in the pleas mentioned.'"

In an action for assault and battery the plea *son assault demesne* and the replication *de injuria* present two questions of fact to be tried and decided. "First, did the plaintiff commit the first assault; secondly, if so, did the defendant use more force than was necessary in his defense?" Bartlett *v.* Churchill, 24 Vt. 218.

A replication *de injuria* to a plea of *son assault demesne* puts in issue all the averments of the plea. Harrison *v.* Harrison, 43 Vt. 417.

46. Cal. — Marriott *v.* Williams, 152 Cal. 705, 93 Pac. 875. Ill. — Wells *v.* Englehart, 118 Ill. App. 217. Mo. — Johnson *v.* Daily, 136 Mo. App. 534, 538, 118 S. W. 530. Wis. — Monson *v.* Lewis, 123 Wis. 583, 101 N. W. 1094.

If the defendant sets up self-defense, the burden is upon him to make it affirmatively appear that he used no more force upon the plaintiff than reasonably appeared to him, under all the circumstances, to be necessary for his own personal safety. McQuiggan *v.* Ladd, 79 Vt. 90, 97, 64 Atl. 503, 14 L. R. A. (N. S.) 689.

Cassidy *v.* Cody, 97 N. Y. Supp. 1046, was an action brought for an assault and battery upon plaintiff, alleged to have been committed without just cause or provocation. The answer was a general denial. Under the pleadings, justification was not an affirmative defense which put the burden of proof upon the defendant.

47. Seymour *v.* Bailey, 76 Ga. 338. And see Givens *v.* Berkley, 108 Ky. 236, 56 S. W. 158. See generally the title "Opening and Closing Statements."

48. Doerhoeper *v.* Shoemaker, 122 Ky. 646, 97 S. W. 7. If the defendant pleads *son assault demesne* and plaintiff replies *de injuria*, the latter retains the right to open and close. Johnson *v.* Josephs, 75 Me. 544.

49. Beckworth *v.* Phillips, 6 Ga. App. 859, 65 S. E. 1075; Garrett *v.* Herrigdrine, 7 Ga. App. 744, 67 S. E. 1049.

The question whether opprobrious words amount to justification, or only affect the amount of damages, is for the jury. The court has no right to charge that particular words are opprobrious. Thompson *v.* Shelverton, 131 Ga. 714, 63 S. E. 220.

Contra. — Words, however insulting or aggravating, will not justify an assault, and cannot be considered by the jury for the purpose of mitigating or reducing the amount of the actual damages. Burley *v.* Menefee, 129 Mo. App. 518, 522, 108 S. W. 120.

50. Lovelace *v.* Miller, 150 Ala. 422, 43 So. 734; Rand *v.* Butte Elec. R. Co., 40 Mont. 398, 107 Pac. 87, 91.

In Little *v.* Tingle, 26 Ind. 168, the jury was instructed that if the defendants jointly committed the battery they were equally liable, and the damages must be assessed against them jointly. Held correct on principle.

Joint Recovery.—To authorize a joint recovery against two or more persons for assault and battery, the jury must find as a fact that there was concert of action by the defendants in doing the acts complained of. Schafer *v.* Ostmann, 148 Mo. App. 644, 129 S. W. 63.

them. But there can be but one judgment and satisfaction for the same wrong.[51]

51. Page *v.* Freeman, 18 Mo. 421.

There can be but one verdict, for a single sum, and not two or more verdicts for different sums against different defendants. Marriot *v.* Williams, 152 Cal. 705, 93 Pac. 875.

In an action against several defendants, where several verdicts are rendered, the plaintiff may take judgment against all, upon the verdict he may select. Cox v. Cook, 1 J. J. Marsh. (Ky.) 360.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS

By EDWARD W. TUTTLE.*

*See the title "Admiralty."

I. EFFECT ON PENDING ACTIONS. — Since an assignment for the benefit of creditors does not destroy the assignor's interest in the property, as would an absolute assignment,[1] such assignment by the plaintiff in a pending action does not therefore abate the action[2] or necessitate the substitution of the assignee.[3] The assignee may,[4] and should,[5] however, be made a party. The defendant cannot defeat the plaintiff's right of continuing an action against him by making a voluntary assignment pending the action.[6] His assignee may, however, be made a party defendant,[7] though not without leave of court first obtained.[8]

The jurisdiction of the court in a pending action is not affected by an assignment for the benefit of creditors.[9]

II. ACTIONS AND PROCEEDINGS BY CREDITORS. — A. In Disregard of Assignment. — **1. Generally.** — The fact that an assignment has been made for the benefit of creditors does not sus-

1. **Effect of assignment generally on necessity of substitution or bringing in of plaintiff's or defendant's assignee.** See Sedgwick *v.* Cleveland, 7 Paige (N. Y.) 287; and the title "Assignments."

2. **Mich.** — Bedford *v.* Penney, 65 Mich. 667, 32 N. W. 888. **Pa.** — Thomson *v.* Dougherty, 12 Serg. & R. 448. **S. C.** — Cleverly *v.* McCullough, 6 Rich. 517. **Wis.** — Evans *v.* Virgin, 69 Wis. 153, 33 N. W. 569.

See also Hauser, etc. Co. *v.* Tate, 105 Ky. 701, 49 S. W. 475; and the title "Abatement, Pleas of."

An assignment by one partner does not extend to partnership assets and does not therefore prevent the remaining partners from continuing an action already begun on a debt due the firm. Cunningham *v.* Munroe, 15 Gray (Mass.) 471.

3. Stewart *v.* Spaulding, 72 Cal. 264, 13 Pac. 661.

By statute in Wisconsin it is provided that the action may be continued by the original party, or the court may direct that his assignee be substituted. Evans *v.* Virgin, 69 Wis. 153, 33 N. W. 569.

Effect of Assignment in Bankruptcy. See The Pittsburgh, C. & St. L. R. Co. *v.* Nuzum, 60 Ind. 533; Kinnear *v.* Tarrant, 15 East 622, 104 Eng. Reprint 978; and the title "Bankruptcy Proceedings."

4. Cleverly *v.* McCullough, 6 Rich. (S. C.) 517, but should be compelled to suggest the assignment on the record, and enter into a stipulation to pay costs.

Notice to the defendant of the action of the court making the assignee a party is unnecessary. Jewel *v.* Porter, 11 Ky. L. Rep. 162, 11 S. W. 717.

5. Judson *v.* Metropolitan W. Mach. Co., 33 Conn. 467.

6. **Mich.** — Detroit Stove-Wks. *v.* Osmun, 74 Mich. 7, 41 N. W. 845; Barnum Wire & I. Wks. *v.* Speed, 59 Mich. 272, 26 N. W. 802. **Minn.** — Smith *v.* St. Paul German F. Ins. Co., 56 Minn. 202, 57 N. W. 475. **Ohio.** — Collier *v.* Bickley, 33 Ohio St. 523. **Wis.** — Howitt *v.* Blodgett, 61 Wis. 376, 21 N. W. 292, holding that such an assignment is not a devolution of liability upon the assignee within the meaning of § 2801 Rev. St.

See also Sedgwick *v.* Cleveland, 7 Paige (N. Y.) 287.

The filing of a claim in the assignment proceedings will not prevent the creditor from continuing to judgment his suit previously commenced. Detroit Stove-Wks. *v.* Osmun, 74 Mich. 7, 41 N. W. 485. *Compare* Smith *v.* St. Paul F. Ins. Co., 56 Minn. 202, 57 N. W. 475.

The assignor cannot stay the continuance of an action by a creditor against him. Butler *v.* Thompson, 4 Abb. N. C. (N. Y.) 290.

7. Eureka Steam-Heat Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241.

Right of Assignee To Intervene. — See *infra*, III, C.

8. Howitt *v.* Blodgett, 61 Wis. 376, 21 N. W. 292.

9. E. T. Barnum, etc. Wire Wks. *v.* Speed, 59 Mich. 272, 26 N. W. 802.

pend the latter's right to sue the assignor,[10] even though they have accepted and claimed the benefits of the assignment, if their claims have not actually been satisfied.[11] An inhibition against such actions

10. **Cal.** — George *v.* Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 52; Francisco *v.* Aguirre, 94 Cal. 180, 29 Pac. 495. **Ind.** — Lawrence *v.* McVeagh, 106 Ind. 210, 6 N. E. 327. **Kan.** — Limbocker *v.* Higinbotham, 52 Kan. 696, 35 Pac. 783. See Bobb *v.* Bancroft, 13 Kan. 123. **Ky.**—Trotter *v.* Williamson, 6 T. B. Mon. 38. **Md.** — National Park Bank *v.* Lanahan, 60 Md. 447. **Mass.** — Rice *v.* Catlin, 14 Pick. 221. **Mich.** — Detroit Stove-Wks. *v.* Osmun, 74 Mich. 7, 41 N. W. 845; Parsons *v.* Clark, 59 Mich. 414, 26 N. W. 656. **Minn.** — Smith *v.* St. Paul German F. Ins. Co., 56 Minn. 202, 57 N. W. 475. **Neb.** — Morehead *v.* Adams, 18 Neb. 569, 26 N. W. 242. **Nev.** — Empey *v.* Sherwood, 12 Nev. 355. **Ohio.** — Haskins *v.* Alcott, 13 Ohio St. 210. **Ore.** — Thompson *v.* Reeves, 26 Ore. 46, 37 Pac. 46. **S. D.** Grigsby *v.* Day, 9 S. D. 585, 70 N. W. 881.

As Ground for Delay. — An assignment for the benefit of creditors "may, under certain circumstances, afford ground for a claim on the Court, in its discretion, for a delay of judgment, to give reasonable time for the assigned effects to be converted into money and applied according to the terms of the trust." Rice *v.* Catlin, 14 Pick. (Mass.) 221.

11. **Kan.** — Smith *v.* Higinbotham, 53 Kan. 250, 36 Pac. 336. **Mass.** — Rice *v.* Catlin, 14 Pick. 221. **N. H.** — First Nat. Bank *v.* Newman, 62 N. H. 410. **Ohio.** — See Haskins *v.* Alcott, 13 Ohio St. 210.

See also: **Ind.** — New Albany Mfg. Co. *v.* Sulzer, 29 Ind. App. 89, 63 N. E. 873. **Ky.** — Trotter *v.* Williamson, 6 T. B. Mon. 38. **Mo.** — Simpson *v.* Schulte, 21 Mo. App. 639.

Where a creditor is also assignee and accepts the trust he may nevertheless sue the assignor and reduce his claim to judgment. Watson *v.* Shuttleworth, 53 Barb. (N. Y.) 357.

The filing of a claim with the assignee does not prevent a suit against the assignor. Harrison *v.* Shaffer, 60 Kan. 176, 55 Pac. 881 (*following* Limbocker *v.* Higinbotham, 52 Kan. 696, 35 Pac. 783); Shullsburg Bank *v.* Eastern Kansas Bldg. Co., 3 Kan. App. 150, 42 Pac. 835; Smith *v.* St. Paul German F. Ins. Co., 56 Minn. 202, 57 N. W. 475. *Compare* Detroit Stove-Wks. Co. *v.* Osmun, 74 Mich. 7, 41 N. W. 845.

The allowance of the claim and payment of dividends thereon by the assignee does not defeat the right of action against the assignor. Johnson *v.* Somerville Dyeing & B. Co., 15 Gray (Mass.) 216. See also Cator *v.* Blount, 41 Fla. 138, 25 So. 283. But such payments should be deducted from the amount of the judgment. Limbocker *v.* Higinbotham, 52 Kan. 696, 35 Pac. 783.

The disallowance of the claim by the assignee from which no appeal is taken is conclusive so far as the assignment proceedings are concerned (State *v.* Kansas Ins. Co., 32 Kan. 655, 5 Pac. 130); but does not affect the creditor's right to sue the assignor and subject property not covered by the assignment to the judgment. Limbocker *v.* Higinbotham, 52 Kan. 696, 35 Pac. 783.

Where a creditor signs an acceptance by the terms of which he agrees to forbear suit till an accounting is made by the assignee, this constitutes a temporary bar to an action by him against the debtor. Kingsbury *v.* Deming, 17 Vt. 367 note. But after an accounting, or what amounts to an accounting, or after the lapse of a reasonable time for an accounting, the bar is removed. Foster *v.* Deming, 19 Vt. 313. And if a creditor does not sign such acceptance his assent thereto will not be implied because he receives from the assignee out of the trust fund a payment upon his claim before commencing suit against the debtor. Bank of Bellow Falls *v.* Deming, 17 Vt. 366. Where the assignment or acceptance signed by the creditor contains no provision for a release or discharge of the debt his right of action is not affected thereby, though he has received a dividend on his claim. Hammond *v.* Pinkham, 149 Mass. 356, 21 N. E. 871.

An assignment by an insolvent corporation to which the creditors are parties, which while releasing attachments by them and their right to attach or levy execution on the property, contains no release of their right to

will not be implied from a statute regulating assignments for creditors where not expressly provided for therein.[12] But a statute amounting to an insolvency act, compliance with which discharges the debtor from further liability, does bar an action by the creditor against the debtor.[13]

2. **Attachment, Garnishment and Execution.** — a. *Generally.* — Neither property that has been assigned,[14] nor the proceeds there-

sue but expressly provides that persons contingently liable for the corporation's debts shall not be thereby discharged, does not destroy a creditor's right to sue the corporation as a preliminary to suing its stockholders or officers. Nonantum Worsted Co. *v.* Holliston Mills, 149 Mass. 359, 21 N. E. 670.

12. Haskins *v.* Alcott, 13 Ohio St. 210. See also: **Ind.** — Lawrence *v.* McVeagh, 106 Ind. 210, 6 N. E. 327. **Minn.** — Smith *v.* St. Paul German F. Ins. Co., 56 Minn. 202, 57 N. W. 475. **Tex.** — Keller *v.* Smalley, 63 Tex. 512.

13. Cosh-Murray Co. *v.* Bothell, 10 Wash. 314, 38 Pac. 1118. See Shullsburg Bank *v.* Eastern Kansas Bkg. Co., 3 Kan. App. 150, 42 Pac. 835.

Such statutes sometimes expressly prohibit the prosecution of actions against the debtor. Hayne *v.* Justice's Court, 82 Cal. 284, 23 Pac. 125, 16 Am. St. Rep. 114.

14. **U. S.** — Reed *v.* McIntyre, 98 U. S. 507, 25 L. ed. 171. **Cal.** — Hecht *v.* Green, 61 Cal. 269; Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610. **Dak.** — Straw *v.* Jenks, 6 Dak. 414, 43 N. W. 491. **D. C.** — Smith *v.* Herrell, 11 App. Cas. 425. **Ill.** — Wilson *v.* Aaron, 132 Ill. 238, 23 N. E. 1037; Ninno *v.* Kuykendall, 85 Ill. 476; Kimball *v.* Mulhern, 15 Ill. 205; Woodard *v.* Brooks, 18 Ill. App. 150; Dehner *v.* Helmbacher & C. Mills, 7 Ill. App. 47. **Iowa.** — Hamilton-Brown Shoe Co. *v.* Mercer, 84 Iowa 537, 51 N. W. 415, 35 Am. St. Rep. 331. **Kan.** — Case *v.* Ingersoll, 7 Kan. 367. **Ky.** — Throckmorton *v.* Monroe, 22 Ky. L. Rep. 1450, 60 S. W. 721; Nethercutt *v.* Herron, 10 Ky. L. Rep. 247, 8 S. W. 13. **Md.** — Strauss *v.* Rose, 59 Md. 525. **Mass.** — Reddy *v.* Raymond, 194 Mass. 367, 80 N. E. 484; Cardany *v.* New England Furniture Co., 107 Mass. 116; Foster *v.* Saco Mfg. Co., 12 Pick. 451; Guild *v.* Holbrook, 11 Pick. 101; Gore *v.* Clisby, 8 Pick. 555; Lupton *v.* Cutter, 8 Pick. 298; Dickinson *v.* Strong, 4 Pick. 57. **Mich.** — Geer *v.* Trader's Bank, 132 Mich. 215, 93 N. W. 437; Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680. **Minn.** — Noyes *v.* Beaupre, 36 Minn. 49, 30 N. W. 126; Lord *v.* Meacham, 32 Minn. 66, 19 N. W. 346. **Neb.** Morehead *v.* Adams, 18 Neb. 569, 26 N. W. 242; Schlueter *v.* Raymond Bros. & Co., 7 Neb. 281. **N. J.** — Garretson *v.* Brown, 26 N. J. L. 425. **N. C.** — Anderson *v.* Doak, 32 N. C. 295. **Pa.** — Gillespie *v.* Keating, 180 Pa. 150, 36 Atl. 641, 57 Am. St. Rep. 622; McNutt *v.* Strayhorn, 39 Pa. 269; Taylor *v.* Hulme, 4 Watts & S. 407; Lippencott *v.* Barker, 2 Binn. 174, 4 Am. Dec. 433. **R. I.** — Smith *v.* Millett, 11 R. I. 528. **S. C.** — Howard *v.* Cannon, 11 Rich. Eq. 23, 75 Am. Dec. 736. **Tenn.** — Wessell *v.* Gross (Tenn. Ch.), 57 S. W. 372. **Tex.** — Thaxton *v.* Smith, 90 Tex. 589, 40 S. W. 14; Moody *v.* Carroll, 71 Tex. 143, 8 S. W. 510, 10 Am. St. Rep. 734; Carter-Battle Gro. Co. *v.* Jackson, 18 Tex. Civ. App. 353, 45 S. W. 615; Southern Soda Works *v.* Vines (Tex. Civ. App.), 36 S. W. 942. **Vt.** — Hall *v.* Denison, 17 Vt. 310. **Va.** — Ford *v.* Watts, 95 Va. 192, 28 S. E. 179. **W. Va.** — Harrison's Exrs. *v.* Farmer's Bank, 9 W. Va. 424. **Eng.**—Pickstock *v.* Lyster, 3 Maule *v.* Selw. 371, 16 R. R. 300, 105 Eng. Reprint 650. **Can.** — Clarkson *v.* Ryan, 17 Can. Sup. Ct. 251; Breithaupt *v.* Marr, 20 Ont. App. 689.

See the following cases: **Ind.** — Wallace *v.* Milligan, 110 Ind. 498, 11 N. E. 599. **Ky.** — Robinson *v.* Worley, 19 Ky. L. Rep. 791, 42 S. W. 95. **Minn.** — Smith *v.* St. Paul German F. Ins. Co., 56 Minn. 202, 57 N. W. 475. **Miss.** — Grand Gulf, etc. Co. *v.* State, 10 Smed. & M. 428. **Ohio.** — Haldeman *v.* Hillsborough & C. R. Co., 2 Handy 101. **Ore.** Thompson *v.* Reeves, 26 Ore. 46, 37 Pac. 46. **Tenn.** — Gordonsville Mill. Co. *v.* Jones (Tenn. Ch.), 57 S. W. 630; Birdwell *v.* Cain, 1 Coldw. 301. **Tex.** — Park *v.* Johnson, 23 Tex. Civ. App. 46, 56 S. W. 759. **Wash.** — Jensen-King-

of[15] can be attached or levied upon in an action by a creditor begun either before or after the assignment, if no lien has accrued prior thereto,[16]

Byrd Co. *v.* Williams, 35 Wash. 161, 76 Pac. 934; Anderson *v.* Risdon-Cahn Co., 13 Wash. 494, 43 Pac. 337. Wis. — Gilbert Paper Co. *v.* Whiting Paper Co., 123 Wis. 472, 102 N. W. 20.

But see George *v.* Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 52.

The reason for this rule is that the property no longer belongs to the assignor (Reed *v.* McIntyre, 98 U. S. 507, 25 L. ed. 171; Lord *v.* Meachem, 32 Minn. 66, 19 N. W. 346), and under some statutes is regarded after assignment as *in custodia legis* (Lord *v.* Meachem, *supra*). Whether these statutes are in effect insolvency or bankruptcy acts placing the assigned property and its administration under the control of the court depends largely upon their form and interpretation. See: U. S. — Powers *v.* Blue Grass Bldg. & L. Assn., 86 Fed. 705; Lapp *v.* Van Norman, 19 Fed. 406. Ia. — Hamilton-Brown Shoe Co. *v.* Mercer, 84 Iowa 537, 51 N. W. 415, 35 Am. St. Rep. 331. Minn. — *In re* Mason, 32 Minn. 60, 19 N. W. 347; Lesher *v.* Getman, 28 Minn. 93, 9 N. W. 585. N. D. — State *v.* Rose, 4 N. D. 519, 58 N. W. 514, 26 L. R. A. 593. Wis. — Matthews *v.* Ott, 87 Wis. 399, 58 N. W. 774.

Property omitted from the deed and schedule but afterwards coming into the possession of the assignee is likewise protected from the attachment and levy. Hasseld *v.* Seyfort, 105 Ind. 534, 5 N. E. 675.

A creditor who has consented to an assignment for the benefit of creditors has such security for the payment of the debt that he cannot lawfully attach the assigned property, at least in the absence of an affidavit that his security is inadequate or has failed. Elling *v.* Kirkpatrick, 6 Mont. 119, 9 Pac. 900.

By statute in Texas it is provided that non-consenting creditors may garnish the assignee as to any fund which may remain after he has executed his trust. Schoolher *v.* Hutchins, 66 Tex. 324, 1 S. W. 266; Andrews *v.* State (Tex. App.), 14 S. W. 1014. See also Craddock *v.* Orand, 72 Tex. 36, 12 S. W. 208 (entitled to discovery as to condition of estate); Moody *v.* Carroll, 71 Tex. 143, 8 S. W. 510, 10 Am. St. Rep. 734; Patty-Joiner & Co. *v.* City Bank, 15 Tex. Civ. App. 475, 41 S. W. 173. *Compare* Merrill *v.* Englesby, 28 Vt. 150; Rogers *v.* Vail, 16 Vt. 327. In Maine trustee process is allowed by statute as to such excess fund, after the lapse of a given time. Thomas *v.* Clark, 65 Me. 296.

A statute providing that personal property shall in all cases be subject to execution on a judgment obtained for the purchase price, unless found in the hands of a purchaser for value without notice of the outstanding claim for the purchase price, does not entitle an unpaid vendor to levy on property assigned for the benefit of creditors. Boltz *v.* Eagon, 34 Fed. 521.

15. Mass. — Dewing *v.* Wentworth, 11 Cush. 499. N. Y. — McAllaster *v.* Bailey, 127 N. Y. 583, 28 N. E. 591; Lawrence *v.* Bank of the Republic, 35 N. Y. 320. N. C. — Coffield's Exrs. *v.* Collins, 26 N. C. 486.

16. See Dork *v.* Alexander, 117 Ill. 330, 7 N. E. 672; Moale *v.* Buchanan, 11 Gill & J. (Md.) 314.

An assignment made before the actual levy of a writ of attachment previously placed in the hands of the sheriff carries the property free from any lien which might have resulted from the attachment. Blakely *v.* Smith, 16 Ky. L. Rep. 109, 26 S. W. 584. But the lien of an attachment made previous to the assignment takes precedence over the latter (Robinson Bros. Shoe Co. *v.* Knapp, 82 Wis. 343, 52 N. W. 431), unless the statute provides that an assignment avoids attachments levied or liens acquired within a given time prior thereto. Beamer *v.* Freeman, 84 Cal. 554, 24 Pac. 169; Cerf *v.* Oaks, 59 Cal. 132; Boseli *v.* Doran, 62 Conn. 311, 25 Atl. 242. See Fairbanks *v.* Whitney, 36 Minn. 305, 30 N. W. 812; Johnson *v.* Bray, 35 Minn. 248, 28 N. W. 504; Alves *v.* Barber, 17 R. I. 712, 24 Atl. 528.

Where a lien arises upon the placing of an execution in the sheriff's hands, an assignment subsequent thereto is subject to such lien. Mo. — Frost *v.* Wilson, 70 Mo. 664. N. J. — Van Waggoner *v.* Moses, 26 N. J. L. 570; Moses *v.* Thomas, 26 N. J. L. 124. N. Y. — Slade *v.* Van Vechten, 11 Paige 21.

Where attachment precedes ratifica-

unless the assignment is void or voidable,[17] as where it is in fraud of creditors,[18] or is otherwise ineffective;[19] nor are the

tion of a partnership assignment previously executed by one partner, it is valid and binding as against the assignee. Mills *v.* Miller, 109 Iowa 688, 81 N. W. 169.

As to when the lien from an attachment, judgment or levy arises, see the titles "Attachment;" "Judgment."

The question of the priority in point of time of the assignment and the attachment is one of fact for the jury. Waples-Platter Co. *v.* Low, 54 Fed. 93.

Fractions of a day are considered in determining the actual priority of the assignment and attachment lien. Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680.

17. **U. S.** — Kennedy *v.* McKee, 142 U. S. 606, 12 Sup. Ct. 303, 35 L. ed. 1131; Lapp *v.* Van Norman, 19 Fed. 406. **Colo.** — Mosconi *v.* Burchinell, 7 Colo. App. 435, 43 Pac. 912. **Ill.** — Finlay *v.* Dickerson, 29 Ill. 9. **Ia.** — Bradley *v.* Bailey, 95 Iowa 745, 64 N. W. 758. **Md.** O'Connell *v.* Ackerman, 62 Md. 337; American Exch. Bank *v.* Inloes, 7 Md. 380. **Mass.** — Parker *v.* Kinsman, 8 Mass. 486; Stevens *v.* Bell, 6 Mass. 339. See Wyles *v.* Beals, 1 Gray 233. **Mich.** Kendall *v.* Bishop, 76 Mich. 634, 43 N. W. 645. **Minn.**—Lanpher *v.* Burns, 77 Minn. 407, 80 N. W. 361; Tarbox *v.* Stevenson, 56 Minn. 510, 58 N. W. 157; May *v.* Walker, 35 Minn. 194, 28 N. W. 252. **N. Y.**—Schlussel *v.* Willett, 34 Barb. 615, 12 Abb. Pr. 397, 22 How. Pr. 15. **N. D.** — State *v.* Rose, 4 N. D. 319, 58 N. W. 514, 26 L. R. A. 593. **Tex.** — Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719. **Vt.** — Kimball *v.* Evans, 58 Vt. 655, 5 Atl. 523; Bishop *v.* Trustees of Hart, 28 Vt. 71. **Wis.** — Keep *v.* Sanderson, 2 Wis. 42, 60 Am. Dec. 404. **Wyo.** — McCord-Brady Co. *v.* Mills, 8 Wyo. 258, 56 Pac. 1003, 46 L. R. A. 737.

But see **Ia.** — Hamilton-Brown Shoe Co. *v.* Mercer, 84 Iowa 537, 51 N. W. 415, 35 Am. St. Rep. 331. **Ky.** — Roberts *v.* Nicklies, 9 Ky. L. Rep. 651. **Wash.** — Mansfield *v.* First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999.

A void assignment does not place the property *in custodia legis*. **U. S.** — Lapp *v.* VanNorman, 19 Fed. 406. **Ia.** — Bradley *v.* Bailey, 95 Iowa 745, 64 N. W. 758. **Minn.** — May *v.* Walker, 35 Minn. 194, 29 N. W. 252. **Wis.** — Matthews *v.* Ott, 87 Wis. 399, 58 N. W. 774. **Wyo.** — McCord-Brady Co. *v.* Mills, 8 Wyo. 258, 56 Pac. 1003, 46 L. R. A. 737.

But see Hamilton-Brown Shoe Co. *v.* Adams, 5 Wash. 333, 32 Pac. 92.

Estoppel. — A creditor who has participated in the benefits of an assignment (**Md.** — Gottschalk *v.* Smith, 74 Md. 560, 22 Atl. 401. **Mass.** — Jones *v.* Tilton, 139 Mass. 418, 1 N. E. 741. **Mo.** Gutzwiller *v.* Lackman, 23 Mo. 168), or treated it as valid (First Nat. Bank *v.* Boyce, 15 Mont. 162, 38 Pac. 829), is estopped to deny its validity.

A statute authorizing trustee process against the assignee in a void assignment where the property is in his possession does not prevent such process, although the property under a void assignment has not been taken possession of by him. Avery *v.* Monroe, 172 Mass. 132, 51 N. E. 452, 70 Am. St. Rep. 250.

18. **Mo.** — Hungerford *v.* Greengard, 95 Mo. App. 653, 69 S. W. 602. **Neb.** Morehead *v.* Adams, 18 Neb. 569, 26 N. W. 242. **N. Y.** — Hess *v.* Hess, 117 N. Y. 306, 22 N. E. 956; Lux *v.* Davidson, 56 Hun 345, 9 N. Y. Supp. 816; Jacobs *v.* Remsen, 35 Barb. 384, 12 Abb. Pr. 390. **N. D.** — State *v.* Rose, 4 N. D. 319, 58 N. W. 514, 26 L. R. A. 593. **Ore.** — Dawson *v.* Coffey, 12 Or. 513, 8 Pac. 838. **Wis.** — Stannard *v.* Youmans, 100 Wis. 275, 75 N. W. 1002; Jones *v.* Alford, 98 Wis. 245, 73 N. W. 1012. **Wyo.** — McCord-Brady Co. *v.* Mills, 8 Wyo. 258, 56 Pac. 1003, 46 L. R. A. 737.

See: **U. S.** — Reed *v.* McIntyre, 98 U. S. 507, 25 L. ed. 171. **Ala.** — Covington *v.* Kelly, 6 Ala. 860. **Minn.**—Simon *v.* Mann, 33 Minn. 412, 23 N. W. 856.

But see **Ky.** — Roberts *v.* Nicklies, 9 Ky. L. Rep. 651. **Mich.** — Coots *v.* Radford, 47 Mich. 37, 10 N. W. 69. **N. Y.** Smith *v.* Longmire, 24 Hun 257. **Tex.** Blum *v.* Welborne, 58 Tex. 157. **Wash.** Mansfield *v.* First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999.

19. An unrecorded assignment is insufficient to prevent lawful attachment in some states. **U. S.**—Shufeldt *v.* Jenkins, 22 Fed. 359. **Ala.**—Schloss *v.* Inman, 129 Ala. 424, 30 So. 667. **Cal.** —

assignee[20] or the assignor's debtors[21] subject to garnishee process at the instance of the assignor's creditors.

b. *Collateral Attack by Attaching or Execution Creditor.* — It has been held that an assignment valid on its face, and made under statutes which make the proceedings judicial in their nature, cannot be collaterally attacked by an attaching or execution creditor.[22] This

Watkins *v.* Wilhoit, 35 Pac. 646. **Dak.** Farmer *v.* Colban, 4 Dak. 425, 29 N. W. 12. **Ill.** — Yates *v.* Dodge, 23 Ill. App. 338, *s. c.*, 123 Ill. 50, 13 N. E. 847. **Ind.** Fordyce *v.* Pipher, 84 Ind. 86. **N. Y.** — Hardmann *v.* Bowen, 39 N. Y. 196; McBlain *v.* Speelman, 35 Hun 263; Rennie *v.* Bean, 24 Hun 123. **N. C.** — Perry *v.* Merchants Bank, 70 N. C. 309. **Ohio.** — Wambaugh *v.* Northwestern Mut. L. Ins. Co., 59 Ohio St. 228, 52 N. E. 839. **Pa.** — Huey *v.* Prince, 187 Pa. 151, 40 Atl. 982. **R. I.** — Alves *v.* Barber, 17 R. I. 712, 24 Atl. 528. **S. D.** — Cannon *v.* Deming, 3 S. D. 421, 53 N. W. 863. **Tex.** — Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836.

But a reasonable time for recording must be allowed. Wise *v.* Wimer, 23 Mo. 237.

But the taking of possession by the assignee is a sufficient substitute for recording. **Ill.**—Feltenstein *v.* Stein, 157 Ill. 19, 45 N. E. 502. **Ia.** — Meeker *v.* Sanders, 6 Iowa 60. **Neb.** — Miller *v.* Waite, 59 Neb. 319, 80 N. W. 907. **Ore.** — Dawson *v.* Crossen, 10 Ore. 41. **Va.** — Clark *v.* Ward, 12 Gratt. 440. **Wash.** — Hamilton-Brown Shoe Co. *v.* Adams, 5 Wash. 333, 32 Pac. 922.

See Adams *v.* Haskell, 6 Cal. 113, 65 Am. Dec. 491; McBlain *v.* Speelman, 35 Hun 263. But see Hughes *v.* Ellison, 5 Mo. 463.

The failure of the assignee to qualify within the time required by law, as by neglecting to give bond **(Ky.** — Bank of Commerce *v.* Payne, 86 Ky. 446, 8 S. W. 856. **Mich.** — Fuller *v.* Hasbrouck, 46 Mich. 78, 8 N. W. 697. See also Beard *v.* Clippert, 63 Mich. 716, 30 N. W. 323. **Mo.** — Hardcastle *v.* Fisher, 24 Mo. 70. **S. C.** — See Regenstein *v.* Pearlstein, 32 S. C. 437, 11 S. E. 298, 17 Am. St. Rep. 865. *Contra,* Kingman *v.* Barton, 24 Minn. 295), or failing to file the required inventory (Hardcastle *v.* Fisher, 24 Mo. 70; Maul *v.* Drexel, 55 Neb. 446, 76 N. W. 163), will not justify an attachment, especially where it is expressly provided that such failure shall not invalidate the assignment (Price *v.* Parker, 11 Iowa 144).

Where There Is No Sufficient Change of Possession. — Rogers *v.* Vail, 16 Vt. 327. But see Mumper *v.* Rushmore, 14 Hun (N. Y.) 591; Mansfield *v.* First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999.

20. **Ala.** — Lightfoot *v.* Rupert, 38 Ala. 666. **Cal.** — Hecht *v.* Green, 61 Cal. 269. **Ill.** — Kimball *v.* Mulhern, 15 Ill. 205. **Kan.** — Case *v.* Ingersoll, 7 Kan. 367; Goodin *v.* Newcomb, 6 Kan. App. 431, 49 Pac. 821. **Mass.** — Massachusetts Nat. Bank *v.* Bullock, 120 Mass. 86. **Neb.** — Schlueter *v.* Raymond Bros. & Co., 7 Neb. 281. **Pa.** — *In re* McDaniel etc. Estate, 180 Pa. 52, 36 Atl. 567. **Tex.** — Moody *v.* Carroll, 71 Tex. 143, 8 S. W. 510, 10 Am. St. Rep. 734.

See also Covington *v.* Kelly, 6 Ala. 860.

21. Fenton *v.* Edwards, 126 Cal. 43, 58 Pac. 320, 77 Am. St. Rep. 141, 46 L. R. A. 832.

22. **Ia.** — McClaukless *v.* Hazen, 98 Iowa 321, 67 N. W. 256. **Minn.** — Lanpher *v.* Burns, 77 Minn. 407, 80 N. W. 361; Staples *v.* Schulenburg, etc. Lumb. Co., 62 Minn. 158, 64 N. W. 148; St. Paul Second Nat. Bank *v.* Schrank, 43 Minn. 38, 44 N. W. 524. **R. I.** — Warner *v.* Hedley, 1 . I. 357. **Wis.** — McCourt *v.* Bond, 64 Wis. 596, 25 N. W. 532.

See Hamilton-Brown Shoe Co. *v.* Mercer, 84 Iowa 537, 51 N. W. 415, 35 Am. St. Rep. 351; Coots *v.* Radford, 47 Mich. 37, 10 N. W. 69. *Contra,* Zimmerman *v.* Willard, 114 Ill. 364, 2 N. E. 70.

See also **U. S.** — Lapp *v.* Van Norman, 19 Fed. 406. **N. Y.** — Hess *v.* Hess, 117 N. Y. 306, 22 N. E. 956; Lux *v.* Davidson, 56 Hun 345, 9 N. Y. Supp. 816; Jacobs *v.* Remsen, 35 Barb. 384, 12 Abb. Pr. 390 **Tex.** — Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719. **Wyo.** — McCord-Brady Co. *v.* Mills, 8 Wyo. 258, 56 Pac. 1003, 46 **L. R. A.** 737.

rule, however, does not apply to common law assignments.[23]

c. *Remedies of Assignee and Assignor.* — The remedies which the assignee[24] or assignor[25] have against an illegal attachment or levy are elsewhere discussed.

B. PROPERTY NOT COVERED BY THE ASSIGNMENT,[26] such as subsequently acquired property,[27] may however, be proceeded against.

C. TO SET ASIDE ASSIGNMENT. — **1. What Creditors May Sue.** — a. *The General Rule.* — As a general rule[28] only those creditors[29] who have exhausted their legal remedies[30] are entitled to sue to set aside an assignment for the benefit of creditors. That is, a judgment must have been obtained,[31] and execution thereon returned unsatisfied.[32]

23. Lanpher *v.* Burns, 77 Minn. 407, 80 N. W. 361.

24. See *infra,* III, A, 2.

25. See *infra,* IV.

26. **Mass.** — Foster *v.* Saco Mfg. Co., 12 Pick. 451. **N. Y.** — Warner *v.* Jaffray, 96 N. Y. 248, 48 Am. Rep. 616. **Va.** — Miller *v.* Byers, 99 Va. 163, 37 S. E. 782.

See Creager *v.* Creager, 87 Ky. 449, 10 Ky. L. Rep. 424, 9 S. W. 380; Patty-Joiner & Co. *v.* Sherman City Bank, 15 Tex. Civ. App. 475, 41 S. W. 173.

Property reserved as exempt, but which is not exempt, may be proceeded against. Cator *v.* Blount, 41 Fla. 138, 25 So. 283.

27. Haskins *v.* Alcott, 13 Ohio St. 210.

28. For a detailed discussion of this rule and the exceptions to and qualifications of it, see the titles "Creditor's Suit;" "Fraudulent Conveyances."

29. Only creditors may attack an assignment as void because containing preferences. First Nat. Bank *v.* Garretson, 107 Iowa 196, 77 N. W. 856.

30. Patchen *v.* Rofkar, 12 App. Div. 475, 42 N. Y. Supp. 35. See Caswell *v.* Caswell, 28 Me. 232. But see Loving *v.* Pairo, 10 Iowa 282, 77 Am. Dec. 108.

31. **U. S.** — Cates *v.* Allen, 149 U. S. 451, 13 Sup. Ct. 883, 37 L. ed. 804. **Ala.** — Pennington *v.* Woodall, 17 Ala. 635. **Ark.** — Hunt *v.* Weiner, 39 Ark. 70. **Ga.** — Johnson *v.* Farnum, 56 Ga. 144; Oberholser *v.* Keefer, 47 Ga. 530. **Ill.** — Beach *v.* Bestor, 45 Ill. 341; Heacock *v.* Durand, 42 Ill. 230; Greenway *v.* Thomas, 14 Ill. 271. **Ia.** — Loving *v.* Pairo, 10 Iowa 282, 77 Am. Dec. 108. **Kan.** — Tennent *v.* Battey, 18 Kan. 324. **Ky.** — Moffatt *v.* Ingham, 7 Dana 495. **Me.** — Caswell *v.* Caswell, 28 Me. 232. **Miss.** — Berryman *v.* Sullivan, 13 Smed. & M. 65. **N. Y.** — Bowe *v.* Arnold, 31 Hun 256; McElwain *v.* Willis, 9 Wend. 548. **Ore.** — Dawson *v.* Coffey, 12 Ore. 513, 8 Pac. 838. **S. C.** — Ryttenberg *v.* Keels, 39 S. C. 203, 17 S. E. 441.

See Tuers *v.* Tuers, 131 Cal. 625, 63 Pac. 1008; Spelman *v.* Freedman, 130 N. Y. 421, 29 N. E. 765; King *v.* Baer, 31 Misc. 308, 64 N. Y. Supp. 228; and the title "Fraudulent Conveyances."

A foreign judgment is insufficient. Berryman *v.* Sullivan, 13 Smed. & M. (Miss.) 65; Patchen *v.* Rofkar, 12 App. Div. 475, 42 N. Y. Supp. 35.

A judgment for costs only, rendered after the assignment, is not sufficient. Ogden *v.* Prentice, 33 Barb. (N. Y.) 160.

The fact that some creditors are not judgment creditors will not defeat a suit by a judgment creditor on their behalf. State *v.* Foot, 27 S. C. 340, 3 S. E. 546.

32. **U. S.** — Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004. **Ark.** — Hunt *v.* Weiner, 39 Ark. 7. **Ill.** — Heacock *v.* Durand, 42 Ill. 230. **Me.** — Caswell *v.* Caswell, 28 Me. 232. **N. Y.** — Bowe *v.* Arnold, 31 Hun 256; McElwain *v.* Willis, 9 Wend. 548; Knauth *v.* Bassett, 34 Barb. 31. **S. C.** — Ryttenberg *v.* Keels, 39 S. C. 203, 17 S. E. 441.

See Freeman's Sav. & Tr. Co. *v.* Earle, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. ed. 301; Greenway *v.* Thomas, 14 Ill. 271. But see: **Ill.** — Beach *v.* Bestor, 45 Ill. 341. **Ia.** — Loving *v.* Pairo, 10 Iowa 282, 77 Am. Dec. 108. **N. Y.** — Wilson *v.* Forsyth, 24 Barb. 105.

The creditor need not wait until the expiration of the legal period within which the process may be returned if a return *nulla bona* has actually been

Where the circumstances are such that it is impossible for a creditor to reduce his claim to judgment, the necessity therefor is dispensed with, since he is only required to show that he is without legal redress.[33] And where the plaintiff's claim is fully acknowledged a judgment is unnecessary.[34] The statute may authorize a suit to be brought by any general creditor.[35]

b. *Estoppel.* — A creditor who with knowledge of the facts affecting his rights takes such action as to amount to a recognition of the validity of the assignment,[36] as by filing his claim with the

made. Knauth *v.* Bassett, 34 Barb. (N. Y.) 31.

33. Greenway *v.* Thomas, 14 Ill. 271 (*dictum*); Patchen *v.* Rofkar, 12 App. Div. 475, 42 N. Y. Supp. 35 (where it appeared that the assignor was a nonresident without other property than that assigned, and that no domestic judgment could therefore be obtained either by substituted service or otherwise).

34. Curtain *v.* Talley, 46 Fed. 580.

Where the assignment sets out that plaintiff is a creditor, and the amount of the debt due him is undisputed, reduction to judgment is unnecessary. Cohen & Co. *v.* Morris & Co., 70 Ga. 313.

35. **Ala.** — Bromberg Bros. *v.* Heyer, 69 Ala. 22. **Mass.** — Bernard *v.* Barley Myroleum Co., 147 Mass. 356, 17 N. E. 887. **N. M.** — Meyer *v.* Black, 4 N. M. 190, 16 Pac. 620. **N. C.** — Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466. **Ohio.** — Combs *v.* Watson, 32 Ohio St. 228. **S. C.** — Meinhard *v.* Strickland, 29 S. C. 491, 7 S. E. 838. **W. Va.** — Tuft *v.* Pickering, 28 W. Va. 332.

See Peters *v.* Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. ed. 696; Sanderson *v.* Stockdale, 11 Md. 563.

Where the statute makes an assignment containing preferences void as to "any creditor" not assenting thereto, a mortgage creditor may attack it although his claim is not yet due. Sabichi *v.* Chase, 108 Cal. 81, 41 Pac. 29, 30 L. R. A. 390.

Not Applicable to Federal Courts. — Cates *v.* Allen, 149 U. S. 451, 13 Sup. Ct. 883, 37 L. ed. 804.

36. **U. S.** — Memphis Sav. Bank *v.* Houchens, 115 Fed. 96, 52 C. C. A. 176; Johnson *v.* Rogers, 13 Fed. Cas. No. 7,403. **Ark.** — Martin *v.* Taylor, 52 Ark. 389, 12 S. W. 1011, by signing the instrument. **Me.** — Chafee *v.* Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345. **Mass.** — Jones *v.* Tilton, 139 Mass. 418, 1 N. E. 741. **Mich.** — *In re* Smith Middlings P. Co., 86 Mich. 149, 48 N. W. 864. **Minn.** — Aberle *v.* Schlichemeir, 51 Minn. 1, 52 N. W. 974; Scott *v.* Edes, 3 Minn. 377. **Miss.** Kaufman *v.* Simon, 80 Miss. 189, 31 So. 713. **N. Y.** — Groves *v.* Rice, 148 N. Y. 227, 42 N. E. 664; Rapalee *v.* Stewart, 27 N. Y. 310. **Pa.** — Kendall *v.* McClure Coke Co., 182 Pa. 1, 37 Atl. 823, 61 Am. St. Rep. 688. **Tex.** — Ohio Cultivator Co. *v.* People's Nat. Bank, 22 Tex. Civ. App. 643, 55 S. W. 765. **Vt.** — Merrill *v.* Englesby, 28 Vt. 150. **Wash.** — McAvoy *v.* Jennings, 39 Wash. 109, 81 Pac. 77. **Wis.** — *In re* Gilbert, 94 Wis. 108, 68 N. W. 863. **Can.** — Gardner *v.* Kloepfer, 7 Ont. 603.

Creditors not named in an assignment, or those who have not assented to it, alone have the right to claim that it shall inure to the benefit of all the creditors. Sampson *v.* Jackson, 103 Ala. 550, 15 So. 893.

Participation in Proceedings for the distribution of the proceeds of a sale by the assignee. Horsey *v.* Chew, 65 Md. 555, 5 Atl. 466; Lanahan *v.* Latrobe, 7 Md. 268.

His mere inquiry to determine what course of action would be most profitable to him is not sufficient to estop him. Hubbard *v.* McNaughton, 43 Mich. 220, 5 N. W. 293, 38 Am. Rep. 176.

Although a creditor fails to join with the other creditors in express assent to an assignment, if his conduct is such as to make them believe that he acquiesces therein he will not be permitted six months thereafter to attach the assigned property because of the invalidity of the assignment. Woolen Co. *v.* Longbottom, 143 Fed. 483.

But a foreign assignment valid where made, but void in the forum by virtue of statute, may be attacked by a creditor although he has acquiesced in the assignment in the foreign jurisdiction

assignee[37] or otherwise accepting benefits under it,[38] cannot thereafter sue to set it aside or take a position inconsistent with its validity.[39]

Claiming the benefit of a part of the assignment estops the creditor from attacking the remainder of it.[40] But where the assignment reserves property as exempt which is in fact not exempt, the creditor is not estopped to subject it to his debt by reason of his having claimed or accepted his *pro rata* of the assigned property.[41] The fact

by presenting his claim there and becoming surety for the assignor. Moore *v.* Church, 70 Iowa 208, 30 N. W. 855, 59 Am. Rep. 439. But see Chafee *v.* Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345; Kendall *v.* McClure Coke Co., 182 Pa. 1, 37 Atl. 823, 61 Am. St. Rep. 688.

37. **U. S.** — Frelinghuysen *v.* Nugent, 36 Fed. 229. **Ia.** — Loomis *v.* Griffin, 78 Iowa 482, 43 N. W. 296. **La.** Lowry *v.* Commercial Bank, 12 Rob. 193. **Md.** — Horsey *v.* Chew, 65 Md. 555, 5 Atl. 466. **Mich.** — *In re* Smith Middlings P. Co., 86 Mich. 149, 48 N. W. 864. **Ore.** — Kerslake *v.* Brower, Lumb. Co., 40 Ore. 44, 66 Pac. 437. **Wis.** — Keith *v.* Arthur, 98 Wis. 189, 73 N. W. 999; *In re* Gilbert, 94 Wis. 108, 68 N. W. 863; Boynton Furnace Co. *v.* Sorensen, 90 Wis. 594, 50 N. W. 773; Littlejohn *v.* Turner, 73 Wis. 113, 40 N. W. 621. *Compare* Segnitz *v.* Garden City, etc. Bkg. Co., 107 Wis. 171, 83 N. W. 327, 81 Am. St. Rep. 830, 50 L. R. A. 327.

Contra. — Mere filing of claim insufficient as an estoppel. Koechl *v.* Leibinger, etc. Brew. Co., 26 App. Div. 573, 50 N. Y. Supp. 568; Iselin *v.* Henlein, 16 Abb. N. C. (N. Y.) 73. See Franzen *v.* Hutchinson, 94 Iowa 95, 62 N. W. 698; Scott *v.* Strauss, 14 Ky. L. Rep. 892.

Filing Claim and Receiving Dividends. — Taylor *v.* Seiter, 100 Ill. App. 643, judgment *affirmed*, 199 Ill. 555, 65 N. E. 433.

38. **Ala.** — Adler *v.* Bell, 110 Ala. 357, 20 So. 83; White *v.* Banks, 21 Ala. 705, 56 Am. Dec. 283. **Me.** — Chafee *v.* New York Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345. **Md.** — Moale *v.* Buchanan, 11 Gill & J. 314. **Mich.** — *In re* Smith Middlings, etc. Co., 86 Mich. 149, 48 N. W. 864. **Minn.** — Olson *v.* O'Brien, 46 Minn. 87, 48 N. W. 453; Richards *v.* White, 7 Minn. 345; Scott *v.* Edes, 3 Minn. 377. **Mo.** — Moline Plow Co. *v.* Wenger, 95 Mo. 207, 8 S. W. 404; Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531. **Pa.** — Adlum *v.* Yard, 1 Rawle 163, 18 Am. Dec. 608. **S. C.** — Arnold *v.* Bailey, 24 S. C. 493. **Tenn.** — Smith *v.* Carmack (Tenn. Ch. App.), 64 S. W. 372. **Tex.** — Roberson *v.* Tonn, 76 Tex. 535, 13 S. W. 385; Whitehill *v.* Shaw (Tex. Civ. App.), 33 S. W. 886; Wright *v.* Euless, 12 Tex. Civ. App. 136, 34 S. W. 302. **Wash.** — Cerf, Schloss & Co. *v.* Wallace, 14 Wash. 249, 44 Pac. 264.

The mere fact that a subcontractor requests the general contractor's assignee to complete the work does not constitute such a recognition of the assignment as to amount to an estoppel; but such action does have this effect when coupled with the additional fact that his motive in so doing was to secure the performance by assignee of the assignor's agreement to discharge a debt due him from the subcontractor in consideration of the work done by the latter. "In order that a creditor shall be estopped by any act of his from impeaching the validity of an assignment, it must appear that he has accepted an actual benefit under it, or that he has assumed such an attitude as would be inconsistent with his taking such a position." Groves *v.* Rice, 148 N. Y. 227, 42 N. E. 664.

39. First Nat. Bank *v.* Boyce, 15 Mont. 162, 38 Pac. 829. See Young *v.* Hail, 6 Lea (Tenn.) 179.

40. **Ala.** — Hatchett *v.* Blanton, 72 Ala. 423. **Ark.** — Frierson *v.* Branch, 30 Ark. 453. **Ia.** — Loomis *v.* Griffin, 78 Iowa 482, 43 N. W. 296. **Mont.** — Kleinschmidt *v.* Steele, 15 Mont. 181, 38 Pac. 827. **Tenn.** — Swanson *v.* Tarkington, 7 Heisk. 612.

See also Ohio Cultivator Co. *v.* People's Nat. Bank, 22 Tex. Civ. App. 643, 55 S. W. 765.

41. Cator *v.* Blount, 41-Fla. 138, 25 So. 283. But see Hasty's Heirs *v.* Berry, 8 Ky. L. Rep. 55, 1 S. W. 8, *distinguished* in Creager *v.* Creager, 87 Ky. 449, 10 Ky. L. Rep. 424, 9 S. W. 380, holding that a creditor was not

that subsequent to a ratification he acquires other claims against the assignor does not give him any new standing to question the assignment.[42]

If the assignment is declared void at the suit of other creditors, those who have previously assented to it are estopped to ask for a receiver to administer the property of the insolvent assignor.[43] Assent to the assignment, however, if given in justifiable[44] ignorance of its invalidity, does not estop the creditor from attacking it upon the subsequent discovery of his rights,[45] if he tenders back whatever of value he has received under the assignment.[46] But where the action of the creditor in filing his claim is taken without inquiry as to his rights and has induced corresponding action by others, he will not thereafter be permitted to withdraw from the position so taken.[47]

2. Time To Sue. — Suit must not be unreasonably delayed, or it may be defeated by the charge of laches.[48] If not filed until the trust has been executed it is too late,[49] except perhaps as to property remaining in the assignee's hands.[50]

3. Parties. — In a suit by one or more creditors to set aside an assignment, other creditors whose interests are identical are proper[51] but not necessary[52] parties.

The only necessary parties defendant are the assignor and assignee,[53]

estopped to question a reservation of homestead in the assignment by thereafter accepting benefits under its provisions.

42. Groves *v.* Rice, 75 Hun 612, 29 N. Y. Supp. 1050, *affirmed* on this point in 148 N. Y. 227, 42 N. E. 664.

43. Matter of Walker, 37 Minn. 243, 33 N. W. 852, 34 N. W. 591.

44. Mere ignorance of the fraudulent character of the assignment is not sufficient if the creditor have the means of knowledge or notice of facts which should put him upon inquiry. Scott *v.* Edes, 3 Minn. 377.

45. **U. S.** — Johnson *v.* Rogers, 14 Alb. L. J. 427, 13 Fed. Cas. No. 7,408. **Kan.** — Hairgrove *v.* Millington, 8 Kan. 480. **Ky.** — Bank of Commerce *v.* Payne, 86 Ky. 446, 8 S. W. 856. **Minn.** Scott *v.* Edes, 3 Minn. 377. **N. Y.** — Stedman *v.* Davis, 93 N. Y. 32; Buffalo Third Nat. Bank *v.* Guenther, 1 N. Y. Supp. 753.

46. Scott *v.* Edes, 3 Minn. 377. *Compare* Alabama Warehouse Co. *v.* Jones, 62 Ala. 550.

47. Keith *v.* Arthur, 98 Wis. 189, 73 N. W. 999.

48. **Md.** — Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176. **Mass.** — Leland *v.* Drown, 12 Gray 437. **N. J.** — Kimball *v.* Lee, 40 N. J. Eq. 403, 2 Atl. 820.

See also Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239; Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

49. Hays *v.* Doane, 11 N. J. Eq. 84; McLean *v.* Prentice, 34 Hun (N. Y.) 504.

50. Knauth *v.* Bassett, 34 Barb. (N. Y.) 31.

51. **Ala.** — Dimmick *v.* Register, 92 Ala. 458, 9 So. 467. **Md.** — Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 17 L. R. A. 489. **N. Y.** Lentilhon *v.* Moffat, 1 Edw. Ch. 451. **N. C.** — Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466.

52. **U. S.** — Kerrison *v.* Stewart, 93 U. S. 155, 23 L. ed. 843. **Ga.** — Tucker *v.* Zimmerman, 61 Ga. 599. **Ky.** — Roberts *v.* Phillips, 11 Bush 11. **Mass.** Bernard *v.* Barney Myroleum Co., 147 Mass. 356, 17 N. E. 887. **N. J.** — White *v.* Davis, 48 N. J. Eq. 22, 21 Atl. 187. **N. Y.** — Wakeman *v.* Grover, 4 Paige 23; Rogers *v.* Rogers, 3 Paige 379; Bank of British North America *v.* Suydam, 6 How. Pr. 379; Riggs *v.* Murray, 2 Johns. Ch. 565. **N. C.** — Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466.

53. **Ark.** — Hunt *v.* Weiner, 39 Ark.

unless certain creditors are preferred in the assignment, in which case their adverse interest makes it necessary to join them as defendants.[54] But it has been held that such preferred creditors are only necessary parties where the suit is to defeat the preferences and enforce the deed as a general assignment.[55]

70. **Mich.** — Suydam *v.* Duquindre, Harr. 347. **Mont.** — Stevenson *v.* Matteson, 13 Mont. 108, 32 Pac. 291. **N. Y.** — Lawrence *v.* Bank of Republic, 35 N. Y. 320; Wakeman *v.* Grover, 4 Paige 23; Russell *v.* Lasher, 4 Barb. 232; Smith *v.* Payne, 56 N. Y. Super. 451, 3 N. Y. Supp. 826. **Pa.** — Hodge's Estate, 1 Ashm. 63. **Vt.** — Therasson *v.* Hickok, 37 Vt. 454.

See State *v.* Withrow, 141 Mo. 69, 41 S. W. 980; Passavant *v.* Bowdoin, 60 Hun 433, 15 N. Y. Supp. 8.

The assignee is a necessary party. McCutcheon *v.* Caldwell, 90 Ky. 249, 13 S. W. 1072; Journeay *v.* Brown, 26 N. J. L. 111.

The assignor's representatives must be made parties in their representative capacity in case of his death. Amsterdam First Nat. Bank *v.* Shuler, 153 N. Y. 163, 47 N. E. 262, 60 Am. St. Rep. 601.

A member of the firm making the assignment, being a necessary party, cannot by filing a disclaimer have the suit dismissed as to him. Bromberg Bros. *v.* Heyer, 69 Ala. 22.

54. **Ky.** — Stout *v.* Higbee, 4 J. J. Marsh. 632. **Miss.** — Allen *v.* Union, etc. Bank, 72 Miss. 549, 17 So. 442. **N. Y.** — Chandler *v.* Powers, 25 Hun 445. **Tenn.** — Masson *v.* Tarver, 3 Baxt. 290.

See Hamilton Nat. Bank *v.* Halsted, 56 Hun 530, 9 N. Y. Supp. 852; Garner *v.* Wright, 24 How. Pr. 144.

Preferred creditors are proper parties defendant.—**Ga.**—Old Hickory Distill. Co. *v.* Bleyer, 74 Ga. 201. **N. Y.** — Genesee County Bank *v.* Batavia Bank, 43 Hun 295; Chandler *v.* Powers, 25 Hun 445. **N. C.** — Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466.

55. See Bank of British North America *v.* Suydam, 6 How. Pr. (N. Y.) 379; Hudson *v.* Eisenmayer Mill., etc. Co., 79 Tex. 401, 15 S. W. 385; Collins *v.* Sanger, 8 Tex. Civ. App. 69, 27 S. W. 500.

In Lyons-Thomas Hdw. Co. *v.* Perry Stove Mfg. Co., 88 Tex. 468, 27 S. W. 100, the court says: "We believe that reason and authority sustain the proposition that, in a suit to set aside such an instrument, the beneficiaries in the deeds of trust were not necessary parties, and that the trustee represented all creditors for the purpose of sustaining the deeds under which he held for their benefit. Railroad Co. *v.* Butler, 56 Tex. 511; Ebell *v.* Bursinger, 70 Tex. 120, 8 S. W. 77; Kerrison *v.* Stewart, 93 U. S. 155. The reasons assigned in support of the rule requiring beneficiaries to be made parties where the object is to participate in the fund under the instrument by which the trust is created do not apply in this character of case. When it is sought to construe an instrument and enforce it, the trustee is entitled to have the rights of all the parties interested determined, in order that he may be protected in the execution of the trust. He does not represent any of the beneficiaries so far as the rights between them and other beneficiaries are concerned, but is supposed to be indifferent in this respect. The beneficiaries named in the deed, as well as all others entitled to participate in the fund, have the right to be heard for the purpose of establishing their own rights, as well as to contest the claim of any other asserting a right to any part of it. As before said, the object of this suit was not to distribute under, but to set aside, the deeds of trust, and make division according to law. In Ebell *v.* Bursinger, *supra*, the deed of trust conferred such limited powers upon the trustee that this court held that he was not empowered to institute and maintain suits alone with reference to the property. The general rule is announced in that case that, in a suit 'by or against the trustee for the recovery of the trust property, the beneficiary is a necessary party.' The decision recognizes the exceptions to this rule, and cites the case of a general assignment, in which it is held that the assignee may sue or be sued alone so far as the possession of the property is concerned. In that case the decision was placed distinctly upon the ground

The failure to object to the non-joinder of a necessary party is, however, a waiver thereof.[56]

4. The bill or complaint must aver the making of the assignment,[57] the facts justifying its being set aside,[58] as that it is in fraud of creditors,[59] and the facts showing plaintiff's right to sue.[60] Some courts hold a general averment of the intent to defraud is sufficient,[61] at least where an assignment fraudulent on its face is set out in the

that the trustee had not such power as would enable him to sue alone for the property, nor such as would authorize a suit against him alone. It cannot be doubted that a trustee with the authority granted by these instruments could sue for the possession of the property conveyed to him thereby. In Hudson *v.* Elevator Co., 79 Tex. 401, 15 S. W. 385, it was sought to have an instrument claimed by the trustee and beneficiaries named in it to be a mortgage declared to be a general assignment, and to annul the preference therein provided for. Plaintiffs sought to enforce this instrument as reformed, and claimed under it an interest in the fund antagonistic to the named creditors. It was held that the creditors named in the instrument were necessary parties to the suit. We adhere to this as a correct practice in that class of case; and in so far as Preston *v.* Carter, 80 Tex. 388, 16 S. W. 17, is in conflict with the doctrine announced in Hudson *v.* Elevator Co. upon this point, the former case is overruled."

56. Hurlbert *v.* Dean, 2 Abb. Dec. (N. Y.) 428, 2 Keyes 97.

57. **Neb.** — Morgan *v.* Bogue, 7 Neb. 429. **N. Y.** — Jessup *v.* Hulse, 29 Barb. 539; Wilson *v.* Forsyth, 24 Barb. 105; Mott *v.* Dunn, 10 How. Pr. 225. **N. C.** Roberts *v.* Lewald, 107 N. C. 305, 12 S. E. 279.

The delivery and acceptance of the deed need not be averred. Gasper *v.* Bennett, 12 How. Pr. (N. Y.) 307.

58. Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239 (solvency of assigning corporation); Keller *v.* Smith, 20 Tex. Civ. App. 314, 49 S. W. 263 (that there were no *bona fide* creditors who had accepted under the trust). See **Miss.** — Metcalfe *v.* Merchant's Bank, 89 Miss. 649, 41 So. 377. **N. C.** — Roberts *v.* Lewald, 107 N. C. 305, 12 S. E. 279. **W. Va.** — Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660.

The facts showing the illegality of the assignment must be averred. Metcalfe *v.* Merchant's Bank, 89 Miss. 649, 41 So. 377.

Inadequacy of remedy at law must be set out. Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105.

Separate Causes of Action. — A complaint alleging that an assignment is null and void on its face, and that it was made with intent to hinder, delay and defraud the assignor's creditors, does not state two causes of action, but merely two grounds of setting aside the assignment. Pittsfield Nat. Bank *v.* Tailer, 60 Hun 130, 14 N. Y. Supp. 557.

Misjoinder of Causes. — See Genesee County Bank *v.* Batavia Bank, 43 Hun (N. Y.) 295.

59. **Md.** — Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 17 L. R. A. 489. **Neb.** — Morgan *v.* Bogue, 7 Neb. 429. **N. Y.** — Booss *v.* Marion, 59 Hun 615, 12 N. Y. Supp. 765; Wilson *v.* Forsyth, 24 Barb. 105; Hastings *v.* Thurston, 18 How. Pr. 530. **N. C.** — Roberts *v.* Lewald, 107 N. C. 305, 12 S. E. 279. **W. Va.** — First Nat. Bank *v.* Prager, 50 W. Va. 660, 41 S. E. 363.

That the assignee participated in or had knowledge of the assignor's fraudulent purpose need not be alleged. Stevenson *v.* Matteson, 13 Mont. 108, 32 Pac. 291.

60. Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004. See *supra*, II, C, 1.

61. **Md.** — Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489. **N. Y.** — Durant *v.* Pierson, 8 N. Y. Supp. 904 (alleging merely that the assignment was fraudulent and void and made with intent to hinder, delay and defraud creditors); Jessup *v.* Hulse, 29 Barb. 539. **S. C.** — Verner *v.* Davis, 26 S. C. 609, 2 S. E. 114.

See Pine Cone Lumb. Co. *v.* White Sand Lumb. Co. (Miss.), 38 So. 188.

complaint.[62] Others require the facts showing fraud to be averred.[63] In the absence of such a general averment, however, the evidence will be confined to the specific facts alleged.[64]

5. Bill of Particulars. — The defendant may require plaintiff to furnish a bill of particulars,[65] unless he is already in possession of the means of ascertaining the facts.[66]

6. Injunction and Receiver. — Pending the suit, the sale of the assigned property may upon a proper showing be enjoined,[67] and a receiver may be appointed.[68]

7. Trial and Judgment. — a. *Generally.* — Whether an assignment is fraudulent on its face is a question of law for the court;[69] but where the alleged fraud can only be determined from evidence, it becomes a question of fact to be determined by the jury or by the judge acting as such,[70] unless the evidence is wholly insufficient as a matter of law.[71] Only those matters involved in the suit will be determined,[72] though the court may under a general prayer for re-

62. Hastings *v.* Thurston, 18 How. Pr. (N. Y.) 530.

63. Sullivan *v.* Sullivan, Brunn. Col. Cas. 642, 23 Fed. Cas. No. 13,598. See Fogg *v.* Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. ed. 104; Van Weel *v.* Winston, 115 U. S. 228, 6 Sup. Ct. 22, 29 L. ed. 384; Keller *v.* Smith, 20 Tex. Civ. App. 314, 49 S. W. 263; and the titles "Fraud;" "Fraudulent Conveyances."

Where the facts averred show fraud, a specific allegation of an intent to delay and defraud creditors is unnecessary. Stafford *v.* Merrill, 62 Hun 144, 16 N. Y. Supp. 467.

A demurrer is not a proper method of objecting to the failure to set out the facts, in some jurisdictions. Mott *v.* Dunn, 10 How. Pr. (N. Y.) 225.

64. East River Nat. Bank *v.* Adams, 4 N. Y. Supp. 366, 21 N. Y. St. 880.

65. Claflin *v.* Smith, 13 Abb. N. C. (N. Y.) 205.

66. Passavant *v.* Cantor, 21 Abb. N. C. 259, 48 Hun 546, 1 N. Y. Supp. 574.

67. Preiss *v.* Cohen, 112 N. C. 278, 17 S. E. 520. See also Oliver *v.* Victor, 74 Ga. 543.

Where it does not appear either that the assignees are insolvent or that there is danger of the dissipation of the property. City Nat. Bank *v.* Dunham, 18 Tex. Civ. App. 184, 44 S. W. 605.

Although fraud is denied by the answer, the injunction may be retained if the assignment on its face contains indications of fraud. Hastings *v.* Palmer, 1 Clark Ch. (N. Y.) 52.

68. Oliver *v.* Victor, 74 Ga. 543.

69. **U. S.** — Means *v.* Montgomery, 23 Fed. 421. **Mass.** — Harris *v.* Sumner, 2 Pick. 129. **Mich.** — Pierson *v.* Manning, 2 Mich. 445. **Mo.** — Johnson *v.* McAllister, 30 Mo. 327. **Mont.** — Rosenstein *v.* Coleman, 18 Mont. 459, 45 Pac. 1081. **N. Y.** — Sheldon *v.* Dodge, 4 Denio 217. **S. C.** — Stewart *v.* Kerrison, 3 S. C. 266. **Tex.** — Bailey *v.* Mills, 27 Tex. 434. **W. Va.** — Landeman *v.* Wilson, 29 W. Va. 702, 2 S. E. 203.

70. **U. S.** — Bickham *v.* Lake, 51 Fed. 892. **Conn.** — Warner Glove Co. *v.* Jennings, 58 Conn. 74, 19 Atl. 239. **Ill.** — Nimmo *v.* Kuykendall, 85 Ill. 476. **Ind.** Wynne *v.* Glidewell, 17 Ind. 446, fraudulent intent. **Mich.** — Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680. **Minn.** Mower *v.* Hanford, 6 Minn. 535. **Mo.** State *v.* Keeler, 49 Mo. 548; Johnson *v.* McAllister's Assignee, 30 Mo. 327. **N. Y.** — Fay *v.* Grant, 53 Hun 44, 5 N. Y. Supp. 910, *affirmed*, 126 N. Y. 624, 27 N. E. 410; Mathews *v.* Poultney, 33 Barb. 127; Cunningham *v.* Freeborn, 3 Paige 557. **N. C.** — Hodges *v.* Lassiter, 96 N. C. 351, 2 S. E. 923; Hardy *v.* Skinner, 31 N. C. 191. **Tex.** — Van Hook *v.* Walton, 28 Tex. 59; Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806.

See the titles "Fraud;" "Fraudulent Conveyances." But see Wright *v.* Lee, 10 S. D. 263, 72 N. W. 895.

71. Friedenwald Co. *v.* Sparger, 128 N. C. 446, 39 S. E. 64.

72. See Dudensing *v.* Jones, 27 Misc. 69, 58 N. Y. Supp. 178, attachments levied by the assignee are not affected by the suit.

lief, if it finds the assignment to be valid, enforce the trust thereby created.[73]

b. *Costs,* as in other equitable causes, are adjusted in the discretion of the court in accordance with the equities of the case.[74]

c. *Judgment.* — The judgment should not go against the assignee personally, unless he is a party to the fraud;[75] it is binding, however upon all persons represented by him, though they are not parties of record.[76]

8. **Appeal.** — On appeal objections which should have been raised below cannot be made for the first time.[77]

D. UNDER ASSIGNMENT. — 1. **Generally.** — The creditor's delay in accepting the provisions of an assignment will not prevent him from claiming its benefits,[78] unless it extends beyond the time fixed by the deed itself within which assent must be manifested;[79] and even in the latter event his excusable ignorance or mistake may excuse a tardy acceptance.[80]

Assent by creditors preferred in the assignment is unnecessary where the instrument does not require it.[81]

Estoppel. — In some jurisdictions a creditor may estop himself from claiming the benefits of an assignment by taking a position incon-

73. **Right to Alternative Relief.** — Hull *v.* Evans, 22 Ky. L. Rep. 1118, 59 S. W. 851. *Compare infra,* II, D, 3.

74. Matter of Barnes, 4 Misc. 136, 23 N. Y. Supp. 600; Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129; Murray *v.* Ballou, 1 Johns. Ch. 566; Nicoll *v.* Huntington, 1 Johns. Ch. 166; Lupin *v.* Marie, 2 Paige (N. Y.) 169; Cunningham *v.* Freeborn, 11 Wend. 240; Mackie *v.* Cairns, 5 Cow. 585.

Costs and a reasonable attorney's fee were allowed out of the proceeds, where the complainant, a non-preferred creditor, although the assignment was held good, defeated a fictitious claim and saved the property for preferred creditors. Martin-Brown Co. *v.* Morris, 1 Ind. Ter. 495, 42 S. W. 423. So also where the assignee's attorney secured the remanding of the case, which complainant had removed to a federal court, a similar allowance was made. Tishomingo Sav. Inst. *v.* Allen, 76 Miss. 114, 23 So. 305.

Where the assignee is unsuccessful in resisting a suit to set aside the assignment as fraudulent, his costs and disbursements will not be allowed out of the estate. Mead *v.* Phillips, 1 Sandf. Ch. (N. Y.) 83; Mayer *v.* Hazard, 49 Hun (N. Y.) 222 (he may demand indemnity from the creditors as a condition of interposing a defense). See also Tishomingo Sav. Inst. *v.* Allen, 76 Miss. 114, 23 So. 305.

Where a creditor has reasonable grounds for attacking an assignment costs will not be taxed against him. Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240.

75. Rouse *v.* Bowers, 108 N. C. 182, 12 S. E. 985.

76. Rejall *v.* Greenhood, 92 Fed. 945, 35 C. C. A. 97 (beneficiaries under the trust); Russell *v.* Lasher, 4 Barb. (N. Y.) 232 (creditors preferred by the assignment). But see *supra,* II, C, 3, and *In re* Thoesen, 62 App. Div. 87, 70 N. Y. Supp. 924.

77. **Kan.** — Scott *v.* Beard, 5 Kan. App. 560, 47 Pac. 986. **Tex.** — Carter-Battle Grocer Co. *v.* Jackson, 18 Tex. Civ. App. 353, 45 S. W. 615. **Tenn.** — Forshee *v.* Willis, 101 Tenn. 450, 47 S. W. 703, that exemptions were not allowed.

78. Beall *v.* Lowndes, 4 S. C. 258; Tennant *v.* Stoney, 1 Rich. Eq. (S. C.) 222.

79. Dedham Bank *v.* Richards, 2 Metc. (Mass.) 105; Battles *v.* Fobes, 21 Pick. (Mass.) 239. See Hudson *v.* Parker Mach. Co., 173 Mass. 242, 53 N. E. 867.

80. De Caters *v.* Le Ray de Chaumont, 2 Paige (N. Y.) 490.

81. New England Bank *v.* Lewis, 8 Pick. (Mass.) 113.

sistent therewith,[82] or by attacking its validity.[83] In other jurisdictions an attempt to set aside the assignment does not prevent the creditor from thereafter coming in under it and claiming its benefits.[84] Neither the reducing of the claim to a judgment[85] nor the pursuit of property not covered by the assignment[86] raises such an estoppel.

2. Allowance, Distribution and Payment of Claims. — a. *Finality.* An assignee's allowance or disallowance of a claim is in the nature of a judgment[87] and is final unless an appeal is made to the proper court,[88] or a suit brought to compel an allowance,[89] in accordance with procedure provided by statute.[90]

b. *Proceedings for Distribution or Payment.* — Creditors may maintain a suit to compel the assignee to account and to distribute the trust fund.[91] Where they are already parties to a suit by the assignee wherein the property has been sold, the court may order the distribution of the proceeds amongst them in the same suit.[92] Where

82. **Ark.** — Adler-Goldman Com. Co. *v.* People's Bank, 65 Ark. 380, 46 S. W. 536. **Colo.** — Beifeld *v.* Martin, 4 Colo. App. 578, 37 Pac. 32. **Ind.** — Combs *v.* Union Tr. Co., 146 Ind. 688, 46 N. E. 16. **Mass.** — New England Bank *v.* Lewis, 8 Pick. 113. **Mich.** — Farwell *v.* Myers, 59 Mich. 179, 26 N. W. 328. **Mo.** Valentine *v.* Decker, 43 Mo. 583. **N. H.** Fellows *v.* Greenleaf, 43 N. H. 421. **Pa.** Geist's Appeal, 104 Pa. 351; Williams' Appeal, 101 Pa. 474. **Tenn.** — Farquharson *v.* McDonald, 2 Heisk. 404. **Tex.** Moody *v.* Templeman, 23 Tex. Civ. App. 374, 56 S. W. 588. **Vt.** — Therasson *v.* Hickok, 37 Vt. 454.

83. **Ga.** — Wright *v.* Zeigler, 70 Ga. 501. **Ky.** — Vernon *v.* Morton, 8 Dana 247. **Ore.** — Kerslake *v.* Brower, Lumb. Co., 40 Ore. 44, 66 Pac. 437. **Tenn.** — O'Bryan *v.* Glenn, 91 Tenn. 106, 17 S. W. 1030, 30 Am. St. Rep. 862. **Tex.** — Lovenberg *v.* National Bank, 67 Tex. 440, 2 S. W. 874, 5 S. W. 816.

See Mills *v.* Parkhurst, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472.

84. **Ala.** — Jones *v.* Burgess, 115 Ala. 700, 19 So. 851. **Ia.** — Matter of Hobson, 81 Iowa 392, 46 N. W. 1095, 11 L. R. A. 255. **Mass.** — New England Bank *v.* Lewis, 8 Pick. 113. **Minn.** — Matter of Van Norman, 41 Minn. 494, 43 N. W. 334. **Mo.** — Eppright *v.* Kauffman, 90 Mo. 25, 1 S. W. 736. **N. Y.** — Sternfeld *v.* Simonson, 44 Hun 429; Jewett *v.* Woodward, 1 Edw. Ch. 195. **Va.** — Clark *v.* Ward, 12 Gratt. 440. **Wash.** — Anderson *v.* Risdon-Cahn Co., 13 Wash. 494, 43 Pac. 337.

See Clark *v.* Gibboney, 3 Hughes 391, 5 Fed. Cas. No. 2,821.

85. Richmond Sec. Nat. Bank *v.* Townsend, 114 Ind. 534, 17 N. E. 116.

86. Miller *v.* Byers, 99 Va. 163, 37 S. E. 782. See Patty-Joiner & Co. *v.* Sherman City Bank, 15 Tex. Civ. App. 475, 41 S. W. 173.

87. Eppright *v.* Kauffman, 90 Mo. 25, 1 S. W. 736.

After allowance the original debt is merged therein and no action can be brought upon it. Elsea *v.* Pryor, 87 Mo. App. 157; Rice *v.* McClure, 74 Mo. App. 379; Kendrick *v.* Guthrie Mfg. Co., 60 Mo. App. 22.

88. American Nat. Bank *v.* Branch, 57 Kan. 27, 45 Pac. 88; State *v.* Kansas Ins. Co., 32 Kan. 655, 5 Pac. 190; Oberlin Loan, etc. Co. *v.* Kitchen, 8 Kan. App. 445, 57 Pac. 494.

89. Osborn *v.* Colwell, 17 R. I. 196, 21 Atl. 103, suit in equity.

90. See Kohn *v.* Hine, 7 Kan. App. 776, 54 Pac. 117; Hayward *v.* Graham Book, etc. Co., 59 Mo. App. 453; Board of St. Louis Pub. Schools *v.* Broadway Sav. Bank, 12 Mo. App. 104; Real Estate Sav. Inst. *v.* Fisher, 9 Mo. App. 593.

91. Greene *v.* Sisson, 2 Curt. 17, 10 Fed. Cas. No. 5,768. See also Conrey *v.* His Creditors, 8 La. Ann. 371, and *infra*, II, D, 3.

92. Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567, without the filing of a

a dividend has been declared,[93] or all other claims have been satisfied,[94] a creditor may sue the assignee for his share in the assets. In such a suit the assignor is not a necessary party.[95]

3. To Enforce Trust. — a. *Equitable Remedy.* — In case of the neglect or refusal of the assignee to perform his trust a creditor may bring suit to compel performance.[96] The remedy is equitable rather

cross-bill by the creditors asking for such relief.

93. **Cal.** — Lockwood *v.* Canfield, 20 Cal. 126. **Ill.** — Hexter *v.* Loughry, 6 Ill. App. 362. **Neb.** — Nuckolls *v.* Tomlin, 9 Neb. 353, 2 N. W. 875. **N. Y.** — Peck *v.* Randall, 1 Johns. 165. **Pa.** — Rush *v.* Good, 14 Serg. & R. 226; Matter of Latimer, 2 Ashm. 520.

See Ward *v.* Lewis, 4 Pick. (Mass.) 518.

Assumpsit. — Brown *v.* Bissell, Dougl. (Mich.) 273.

Mandamus will not lie to secure payment where the creditor's right to immediate payment has not been fully determined. Hulse *v.* Marshall, 9 Mo. App.. 148.

Penalty for Non-Payment. — The statute may provide a penalty for failure to pay a dividend, recoverable by a motion in the assignment proceedings. Murdock *v.* Priest, 36 Mo. App. 399.

94. **Ala.** — Pinkson *v.* Brewster, 14 Ala. 315. **Mass.** — Frost *v.* Gage, 1 Allen 262; Fitch *v.* Workman, 9 Mete. 517; New England Bank *v.* Lewis, 8 Pick. 113. **Mich.** — Clark *v.* Craig, 29 Mich. 398. **N. Y.** — Ludington's Petition, 5 Abb. N. C. 307.

95. Scarf *v.* Johnson, 3 Wills. Civ. Cas., § 399.

96. **U. S.** — Thompson *v.* Rainwater, 49 Fed. 406, 4 U. S. App. 217, 1 C. C. A. 304. **Ala.** — Colgin *v.* Redman, 20 Ala. 650. **Ga.** — Bell *v.* McGrady, 32 Ga. 257; McDougald *v.* Dougherty, 11 Ga. 570; Jones *v.* Dougherty, 10 Ga. 273. **Ill.** — Preston *v.* Spaulding, 18 Ill. App. 341. **Ky.** — West *v.* Gribben, 23 Ky. L. Rep. 311, 62 S. W. 869; House *v.* Gebhart, 12 Ky. L. Rep. 843; Gerst *v.* Turley, 7 Ky. L. Rep. 217. **Mass.** — Andrews *v.* Tuttle-Smith Co., 191 Mass. 461, 78 N. E. 99; Noyes *v.* West, 3 Cush. 423. **Mich.** — Burnham *v.* Haskins, 72 Mich. 235, 40 N. W. 327; Sweetzer *v.* Higby, 63 Mich. 13, 29 N. W. 506; Wilhelm *v.* Byles, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113. **Minn.** — Goncelier *v.* Foret, 4 Minn. 13. **Miss.** — Wright *v.* Henderson, 7 How. 539. **Neb.** — Wilson *v.* Coburn, 35 Neb. 530, 53 N. W. 466; Nuckolls *v.* Tomlin, 9 Neb. 353, 2 N. W. 875. **N. J.** — White *v.* Davis, 48 N. J. Eq. 22, 21 Atl. 187; Pillsbury *v.* Kingon, 33 N. J. Eq. 287. **N. C.** — Ingram *v.* Kirkpatrick, 41 N. C. 463, 51 Am. Dec. 428. **Ohio.** — Mengert *v.* Brinkerhoff, 67 Ohio St. 472, 66 N. E. 530; Maas *v.* Miller, 58 Ohio St. 483, 51 N. W. 158. **Pa.** — Fallon's Appeal, 42 Pa. 235; Seal *v.* Duffy, 4 Pa. 274, 45 Am. Dec. 691; Read *v.* Robinson, 6 Watts & S. 329. **R. I.** — Peabody *v.* Tenney, 18 R. I. 498, 30 Atl. 456. **S. C.** — Brooks *v.* Brooks, 12 S. C. 422. **Tenn.** — Shyer *v.* Lockhard, 2 Tenn. Ch. 365; Galt *v.* Dibrell, 10 Yerg. 146; Weir *v.* Tannehill, 2 Yerg. 57. **Tex.** — McIlhenny Co. *v.* Todd, 71 Tex. 400, 9 S. W. 445, 10 Am. St. Rep. 753.

See Howell *v.* Moores, 127 Ill. 67, 19 N. E. 863; Timberlake *v.* Moore, 106 Va. 668, 56 S. E. 571.

Where the assignor is solvent the creditors cannot sue the assignee in equity. "No creditor has any lien upon or interest in it (the assigned property), unless it can be said that the creditors of any solvent debtor are interested in the debtor's estate. Under such circumstances the trustee is responsible, not to the creditors of the company, but to the company itself; and if he pays out the money of the company he does it at his peril. There is no occasion to invoke the aid of equity to reach the fund in the defendant's hands. The liability sought to be established is not against the fund, but against the owner of the fund." Ames & Harris *v.* Sabin, 107 Fed. 582.

The necessity of applying for leave to file the suit, where the statute provides for such an application, is not waived if no objection is made before answering fully to the merits. Funke *v.* Cone, 65 Mich. 581, 32 N. W. 826.

Jurisdiction. — The suit should be brought in the state where the assignment is made and accepted. *In re* Browning, 66 N. J. Eq. 302, 57 Atl. 869.

than legal in its nature,[97] and is open to any creditor who is a beneficiary under the trust.[98] It is not necessary that the creditor should have reduced his claim to judgment, the rule in this respect differing from that applied in case of an ordinary creditor's bill.[99] Although a suit is primarily filed to set aside the assignment, the court, if it holds the deed to be valid, may in the same suit enforce the trust created thereby.[1]

b. *Time To Sue.* — The complainant must not be guilty of laches, but must commence his suit within the statutory period,[2] which, however, does not begin to run until the termination or repudiation of the trust.[3]

c. *Parties.* — (I.) Plaintiff. — While the suit should be on behalf of all the creditors, who may thereafter become parties, it is not

97. Hexter *v.* Loughry, 6 Ill. App. 362; Bishop *v.* Houghton, 1 E. D. Smith (N. Y.) 566 (even under the code procedure). See Terry *v.* Tubman, 92 U. S. 156, 23 L. ed. 537; Beard *v.* Clippert, 63 Mich. 716, 30 N. W. 323.

An action at law by a creditor is only proper where he has become entitled to a specific sum which has been set aside for the payment of his claim by virtue of a dividend declared by the assignee (Hexter *v.* Loughry, 6 Ill. App. 362), or where the latter has paid all other claims in full and has a surplus sufficient to pay plaintiff but refuses to do so. Fitch *v.* Workman, 9 Met. (Mass.) 517.

An action for conversion cannot be maintained by a creditor against an assignee for the amount of his debt upon allegation and proof that defendant had converted the assigned estate and that the value of the estate was sufficient to pay plaintiff and all other creditors. De Walt *v.* Zeigler, 9 Tex. Civ. App. 82, 29 S. W. 60.

98. Putnam *v.* Timothy Dry-Goods & C. Co., 79 Fed. 454; Weir *v.* Tannehill, 2 Yerg. (Tenn.) 57 (though not a party to the deed). See also Noyes *v.* West, 3 Cush. (Mass.) 423.

Creditors whose claims have been allowed may sue, but those who have not presented their claims may not sue, since they are not entitled to share in the benefits of the assignment. Loucheim *v.* Casperson, 61 N. J. Eq. 529, 48 Atl. 1107.

99. **Mich.** — B. Brockett & Sons *v.* Lewis, 144 Mich. 560, 108 N. W. 429. **Minn.** — Goncelier *v.* Foret, 4 Minn. 13. **N. Y.** — Spelman *v.* Freedman, 130 N. Y. 421, 29 N. E. 765.

See Kalmus *v.* Ballin, 52 N. J. Eq. 290, 28 Atl. 791, 46 Am. St. Rep. 520; Brooks *v.* Brooks, 12 S. C. 422, 461.

1. Lexington L., etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165 (where such alternative relief was prayed for); Davis *v.* White, 49 N. J. Eq. 567, 25 Atl. 936 (under the prayer for general relief). See also Hull *v.* Evans, 22 Ky. L. Rep. 1118, 59 S. W. 851.

Contra. — A bill seeking to set aside a conveyance as fraudulent cannot properly ask in the alternative that the deed be declared to be and enforced as a general assignment for the benefit of all creditors. Moog *v.* Talcott, 72 Ala. 210, *following* Lehman *v.* Meyer, 67 Ala. 396, *overruling* Crawford *v.* Kirksey, 50 Ala. 590.

2. **Ill.** — Gibson *v.* Rees, 50 Ill. 383. **Mass.** — Andrews *v.* Tuttle-Smith Co., 191 Mass. 461, 78 N. E. 99. **Pa.** — Adlum *v.* Yard, 1 Rawle 163, 18 Am. Dec. 608. **S. C.** — Martin *v.* Price, 2 Rich. Eq. 412. **Tex.** — McCord *v.* Nabours, 101 Tex. 494, 109 S. W. 913, 111 S. W. 144.

See Shyer *v.* Lockhard, 2 Tenn. Ch. 365.

3. Andrews *v.* Tuttle-Smith Co., 191 Mass. 461, 78 N. E. 99. See Jackson *v.* Cornell, 1 Sandf. Ch. (N. Y.) 348. See the title "Trusts and Trustees."

There is no cause of action against the trustee until he has violated the trust. Dimmock *v.* Bixby, 20 Pick. (Mass.) 368.

necessary to join them in the first instance,[4] though it is proper and desirable that it should be done.[5]

In a suit by one or more creditors to have an assignment giving preferences declared a general assignment for the benefit of all creditors, those creditors who are given a preference over plaintiffs by the terms of the instrument are necessary parties, their interests being antagonistic.[6]

(II.) **Defendant.** — Where there is more than one assignee all should be joined as defendants, though some are innocent of wrongdoing.[7] The assignee's sureties[8] and third persons who have profited at the expense of the complaining parties through the alleged maladministration may properly be joined as defendants.[9]

(III.) **An objection for non-joinder** must be properly raised by demurer or answer, or it is waived.[10]

(IV.) **Intervention.** — A creditor who has not been made a party may intervene for the purpose of sharing in the trust fund, upon the payment of his proportionate share of the costs and disbursements.[11]

4. **U. S.** — Putnam *v.* Timothy Dry-Goods & Carp. Co., 79 Fed. 454; Door *v.* Gibboney, 3 Hughes 382, 7 Fed. Cas. No. 4,006. **Mich.** — Wilhelm *v.* Byles, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113, statute permits suit by a creditor. **Minn.** — Goncelier *v.* Foret, 4 Minn. 13. **N. Y.** — Crouse *v.* Frothingham, 97 N. Y. 105; Wakeman *v.* Grover, 4 Paige 23; Lewis *v.* Hake, 42 Hun 542. **N. C.** — Patton *v.* Bencini, 41 N. C. 204. **Tex.** — Blum *v.* Wettermark, 56 Tex. 80.

See Bell *v.* McGrady, 32 Ga. 257; Brooks *v.* Peck, 38 Barb. (N. Y.) 519; Bishop *v.* Houghton, 1 E. D. Smith (N. Y.) 566. But see Barrett *v.* Brown, 86 N. C. 556; Geisse *v.* Beall, 3 Wis. 367, 393. *Compare* Hunt *v.* Weiner, 39 Ark. 70, and *supra*, II, C, 3.

The interest of the creditors being alike, it is sufficient that some sue on behalf of themselves and the others. Lochte *v.* Blum, 10 Tex. Civ. App. 385, 30 S. W. 925. See De Walt *v.* Zeigler, 9 Tex. Civ. App. 82, 29 S. W. 60.

Preferred creditors need not be made parties to a bill by a general creditor which concedes their right to be first paid. Page *v.* Olcott, 28 Vt. 465.

5. **U. S.** — Greene *v.* Sisson, 2 Curt. 171, 10 Fed. Cas. No. 5,768. **Ind.** — Wright *v.* Mack, 95 Ind. 332. **N. Y.** — Crouse *v.* Frothingham, 97 N. Y. 105. **N. C.** — Symons *v.* Reid, 58 N. C. 327.

See also Conrey *v.* His Creditors, 8 La. Ann. 371.

All creditors must be made parties or one must sue on behalf of all others who may come in.

Me. — Haughton *v.* Davis, 23 Me. 28. **Mass.** — Bryant *v.* Russell, 23 Pick. 508; Dimmock *v.* Bixby, 20 Pick. 368. **N. Y.** — Wakeman *v.* Grover, 4 Paige 23; Bank of Brit. N. Am. *v.* Suydam, 6 How. Pr. 379.

See also, Bouve *v.* Cottle, 143 Mass. 310, 9 N. E. 654; Johnson *v.* Johnson, 120 Mass. 465.

Amendment to bring in other creditors. Haughton *v.* Davis, 23 Me. 28; Bryant *v.* Russell, 23 Pick. (Mass.) 508.

6. **Ark.** — Hunt *v.* Weiner, 39 Ark. 70. **N. Y.** — Wakeman *v.* Grover, 4 Paige 23. **Tex.** — Hudson *v.* Eisenmayer Mill, etc. Co., 79 Tex. 401, 15 S. W. 385.

7. Andrews *v.* Tuttle-Smith Co., 191 Mass. 461, 78 N. E. 99.

8. Blum *v.* Wettermark, 56 Tex. 80.

9. Andrews *v.* Tuttle-Smith Co., 191 Mass. 461, 78 N. E. 99 (the bill is not rendered multifarious by such joinder); Blum *v.* Wettermark, 56 Tex. 80. See Loucheim *v.* Casperson, 61 N. J. Eq. 529, 48 Atl. 1107.

10. Page *v.* Olcott, 28 Vt. 465; Gundry *v.* Vivian, 17 Wis. 436.

11. Martin *v.* Rainwater, 56 Fed. 7. But see Lewis *v.* Hake, 42 Hun (N. Y.) 542, denying a petition by other creditors to be permitted to intervene, on the ground that such intervention was unnecessary, the suit being for the

d. *Bill or Complaint.* — The bill or compaint must set forth the facts showing plaintiff's right to sue,[12] the defendant's dereliction,[13] and all other facts essential to the cause of action.[14]

e. *Appointment of Receiver.* — In a suit to compel the assignee to perform his trust the creditors may ask for the appointment of a receiver.[15]

f. *Reference.* — In such a suit a reference should be directed where necessary.[16]

E. To Set Aside Prior Fraudulent Conveyance. — **1. Right of Creditor.** — In the absence of a statute the right to sue to set aside a conveyance by the assignor prior to the assignment, as in fraud of creditors, is vested in the creditors rather than in the assignee,[17] who

benefit of all creditors and the petitioners having the right to prove their claims before the referee.

12. Presentation of his claim within the time prescribed by law must be averred by complainant. Peabody *v.* Tenney, 18 R. I. 498, 30 Atl. 456.

Averment of Assent to Deed. — Where a bill is filed by creditors to enforce the trust created by an assignment providing that the creditors must assent thereto within six months, an averment by complainants that they have assented to the provisions of the deed is a sufficient allegation of compliance with the deed within the time prescribed. Colgin *v.* Redman, 20 Ala. 650. But see Shyer *v.* Lockhard, 2 Tenn. Ch. 365.

13. See Page *v.* Olcott, 28 Vt. 465.

A creditor seeking to compel the assignor to turn over his alleged share of the assets must aver that sufficient property was received to pay his claim and must set out the provisions of the assignment as to the performance of the trust. Nuckolls *v.* Tomlin, 9 Neb. 353, 2 N. W. 875.

14. See Blum *v.* Wettermark, 56 Tex. 80, containing the substance of a bill.

The failure to describe the defendant as assignee in the title of the cause is immaterial where he is sued in fiduciary capacity as such. Gundry *v.* Vivian, 17 Wis. 436.

Petition based upon fraudulent appropriation of the property of an estate through a pretended sale, held sufficient against general demurrer. McCord *v.* Nabours, 101 Tex. 494, 109 S. W. 913.

15. U. S. — Bell *v.* Ohio Life Ins. Co., 3 Fed. Cas. No. 1,261. Mich. — Olcott *v.* Chambers, 62 Mich. 532, 29 N. W. 94. See Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680. N. Y. — Keyes *v.* Brush, 2 Paige 311.

16. McCloskey *v.* Standard Oil Co. (Ky.), 26 S. W. 1101. See the title "Reference."

17. U. S. — Clapp *v.* Nordmeyer, 25 Fed. 71; Sandwich Mfg. Co. *v.* Wright, 22 Fed. 631; Hahn *v.* Salmon, 20 Fed. 801. Cal. — Miller *v.* Kehoe, 107 Cal. 340, 40 Pac. 485; Francisco *v.* Aguirre, 94 Cal. 180, 29 Pac. 495. Hinkley *v.* Reed, 182 Ill. 440, 55 N. E. 337. Ill. — Bouton *v.* Dement, 123 Ill. 142, 14 N. E. 62; Ide v. Sayer, 129 Ill. 230, 21 N. E. 810. Ia. — Prouty *v.* Clark, 73 Iowa 55, 34 N. W. 614. Ky. — Maiders *v.* Culver's Assignee, 1 Duv. 164. Mich. Wilhelm *v.* Byles, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113; Root *v.* Potter, 59 Mich. 498, 26 N. W. 682. Mo. — Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736; Harris *v.* Harris, 25 Mo. App. 502. Neb. — Moorhead *v.* Adams, 18 Neb. 569, 26 N. W. 242. N. J. — Lee *v.* Cole, 44 N. J. Eq. 318, 15 Atl. 531. Ore. — Dawson *v.* Sims, 14 Ore. 561, 13 Pac. 506; Jacobs Bros. & Co. *v.* Ervin, 9 Ore. 58. Pa. — Vandyke *v.* Christ, 7 Watts & S. 373. Tex. — Dittman *v.* Weiss, 87 Tex. 614, 30 S. W. 863; Keller *v.* Smalley, 63 Tex. 512. Wash. — Fidelity Nat. Bank *v.* Adams, 38 Wash. 75, 80 Pac. 284. Wis. — Hawks *v.* Pritzlaff, 51 Wis. 160, 7 N. W. 303; Estabrook *v.* Messersmith, 18 Wis. 545.

See Brown *v.* Brabb, 67 Mich. 17, 34 N. W. 403, 11 Am. St. Rep. 549; Wakeman *v.* Barrows, 41 Mich. 363, 2 N. W. 50; Clarkson *v.* McMaster & Co., 25 Can. Sup. 96; Hyman & Co. *v.* Howell, 13 Ont. 400; Doull *v.* Kopman, 22 Ont. App. 447.

Though a statute provides that an assignment shall be effective as a

at common law was merely the representative of the debtor and endowed with the latter's rights.[18] An assignee cannot sue to set aside, as in fraud of creditors, a mortgage upon the assigned property.[19] But he may defend against the enforcement of a mortgage on that ground.[20] Before he is entitled to proceed in equity to set aside an alleged fraudulent conveyance the creditor must have established his claim in law and exhausted his legal remedies.[21] The judgment entitling a creditor to sue must be a valid[22] domestic[23] judgment. An allowance of his claim by the assignee is sufficient to satisfy this requirement where the statute gives to such allowance the force of a judgment.[24]

2. Statutes. — a. *Generally.* — Statutes in many states either expressly confer upon the assignee the right to sue to set aside transfers fraudulent as to creditors[25] or are construed to do so because of

transfer of all of the assignor's property to the assignee, whether mentioned therein or not, it does not operate to pass title to property previously owned and conveyed in fraud of creditors, nor the right to sue to set aside such conveyance. Dittman *v.* Weiss, 87 Tex. 614, 30 S. W. 863.

Prior attachment suffered by assignor—assignee cannot sue to set it aside. Howitt *v.* Blodgett, 61 Wis. 376, 21 N. W. 292.

18. **U. S.** — Clapp *v.* Nordmeyer, 25 Fed. 71. **Ill.** — Hinkley *v.* Reed, 182 Ill. 440, 55 N. E. 337; Bouton v. Dement, 123 Ill. 142, 14 N. E. 62. **Eng.** Jones *v.* Yates, 9 Barn. & C. 532, 17 E. C. L. 436, 109 Eng. Reprint 198.

See Hanes *v.* Tiffany, 25 Ohio St. 549.

"It is a general rule of law, that a person cannot, by any voluntary act of his own, transfer to another a right which he does not himself possess. And where an insolvent debtor has made a fraudulent transfer of his property, or has discharged his own debtor from liability for the purpose of defrauding his creditors, so that he cannot reclaim the property, or sustain a suit for the debt in his own name, I think he cannot, by an assignment which is wholly voluntary on his part, take away the right of his creditors generally, to set aside the fraudulent transfer, or to recover the debt fraudulently discharged, and transfer that right to his own assignee, or for the benefit of preferred creditors; or even for the benefit of all his creditors equally." Brownell *v.* Curtis, 10 Paige (N. Y.) 210.

19. Flower *v.* Cornish, 25 Minn. 473. See Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084. See also Wakeman *v.* Barrows, 41 Mich. 363, 2 N. W. 50.

20. Sandwich Mfg. Co. *v.* Wright, 22 Fed. 631. See also Hamilton *v.* Colt, 14 R. I. 209. But see Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084.

21. **Mich.**—Root *v.* Potter, 59 Mich. 498, 26 N. W. 682. **Mo.** — Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736; Turner *v.* Adams, 46 Mo. 99; Luthy *v.* Woods, 1 Mo. App. 167. **N. Y.** — Dunlevey *v.* Tallmadge, 32 N. Y. 457. **Va.**—Rhodes *v.* Cousins, 6 Rand. 188, 18 Am. Dec. 715.

See Adee *v.* Bigler, 81 **N. Y.** 349; Leonard *v.* Clinton, 26 Hun (N. Y.) 292; Clarkson *v.* McMaster, 22 Ont. App. 138; Parkes *v.* St. George, 10 Ont. App. 496.

See fully the title "**Fraudulent Conveyances.**"

Contra, Austin *v.* Morris, 23 S. C. 393. See also **U. S.** — Clapp *v.* Dittman, 21 Fed. 15 Dahlman *v.* Jacobs, 16 Fed. 614. **Pa.** — *In re* Hogan's Estate, 181 Pa. 500, 37 Atl. 548; *In re* Wenger's Estate, 2 Pa. Super. 611. **Can.** — Clarkson *v.* McMaster & Co., 25 Can. Sup. 96.

A creditor's bill may be maintained in support of an attachment lien; a judgment lien is unnecessary. Dawson *v.* Sims, 14 Ore. 561, 13 Pac. 506.

22. **A judgment void for want of jurisdiction is insufficient** Millar *v.* Babcock, 29 Mich. 526.

23. Crim *v.* Walker, 79 Mo. 335.

24. Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736. *Compare* Terhune *v.* Sibbald, 55 N. J. Eq. 236, 37 Atl. 454.

25. **Colo.** — Bailey *v.* American Nat. Bank, 12 Colo. App. 66, 54 Pac. 912. **Me.** — Simpson *v.* Warren, 55 Me. 18. **Mich.** — Burnham *v.* Dillon, 100 Mich. 352, 59 N. W. 176; Brown *v.* Brabb, 67

their manifest purpose to make the assignee a trustee for the benefit of all the assignor's creditors and to distribute all of the debtor's property equitably among them.[26] The right of the assignee to sue is exclusive and suspends the former right of the creditors in this respect.[27] The fact that the assignee has executed the trust and been discharged does not give to a creditor the right to sue to set aside a conveyance subsequently discovered to be fraudulent.[28] But

Mich. 17, 34 N. W. 403, 11 Am. St. Rep. 549. **Minn.** — Thomas Mfg. Co. *v.* Drew, 69 Minn. 69, 71 N. W. 921; Merrill *v.* Ressler, 37 Minn. 84, 33 N. W. 117. **Wis.** Crocker *v.* Huntzicker, 113 Wis. 181, 88 N. W. 232; Valley Lumb. Co. *v.* Hogan, 85 Wis. 366, 55 N. W. 415; Batten *v.* Smith, 62 Wis. 92, 22 N. W. 342.

See: **Ky.** — Hall's Assignee *v.* Rothchild, 19 Ky. L. Rep. 1621, 44 S. W. 108. **Mass.** — Freeland *v.* Freeland, 102 Mass. 475. **Miss.** — Allen & Co. *v.* Montgomery, 48 Miss. 101.

Conveyances in Contemplation of Assignment. — A statutory provision entitling the assignee to sue to recover property fraudulently conveyed "in contemplation of" the assignment does not cover all fraudulent conveyances previously made by the assignor, but applies only to those made in contemplation of the assignment. Dittman *v.* Weiss, 87 Tex. 614, 30 S. W. 863. "An act may be said to be done 'in contemplation of the assignment;' if done at the time the debtor is insolvent, and intends or purposes to make an assignment, or has under consideration whether he shall make an assignment knowing that he is insolvent." Keller *v.* Smalley, 63 Tex. 512, 522.

26. **Ind.** — Voorhees *v.* Carpenter, 127 Ind. 300, 26 N. E. 838. **Ia.** — Mehlop *v.* Ellsworth, 95 Iowa 657, 64 N. W. 638; Schaller *v.* Wright, 70 Iowa 667, 28 N. W. 460. **Kan.** — Walton *v.* Eby, 53 Kan. 257, 36 Pac. 332; Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084. **Md.** — Waters *v.* Dashiell, 1 Md. 455. **Mich.** — Kinter *v.* Pickard, 67 Mich. 125, 34 N. W. 535; Sweetzer *v.* Higby, 63 Mich. 13, 29 N. W. 506; Scott *v.* Chambers, 62 Mich. 532, 29 N. W. 94; Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680; Root *v.* Potter, 59 Mich. 498, 26 N. W. 682. **N. J.** — Grant *v.* Crowell, 42 N. J. Eq. 524, 5 Atl. 201; Pillsbury *v.* Kingon, 33 N. J. Eq. 287, 36 Am. Rep. 556 (reviewing authorities); Garretson *v.* Brown, 26 N. J. L. 425. **N. Y.** — McNancy *v.* Hall, 159 N. Y. 544, 54 N. E. 1093; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250; Spring *v.* Short, 90 N. Y. 538. **Ohio.** — Kilbourne *v.* Fay, 29 Ohio St. 264, 278, 23 Am. Rep. 741; Hanes *v.* Tiffany, 25 Ohio St. 549; Cornell *v.* Sulter, 23 Ohio C. C. 384; Wachtel *v.* Campbell, 21 Ohio C. C. 731. **Wash.** — Mansfield *v.* First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999.

See the following cases: **Ill.** — Taylor *v.* Seiter, 199 Ill. 555, 65 N. E. 433; Preston *v.* Spaulding, 120 Ill., 208, 10 N. E. 903. **Neb.** — Brown *v.* Farmers' etc. Bkg. Co., 36 Neb. 434, 54 N. W. 671. **N. Y.** — Wile *v.* Cauffman, 39 App. Div. 206, 57 N. Y. Supp. 240. **Pa.** — Tams *v.* Bullitt, 35 Pa. 308; Klapp *v.* Shirk, 13 Pa. 489. **Can.** — Brown *v.* Grove, 18 Ont. 311; Campbell *v.* Hally, 22 Ont. App. 217.

But see Prouty *v.* Clark, 73 Iowa 55, 34 N. W. 614; Van Patten *v.* Burr, 52 Iowa 518, 3 N. W. 524.

A general assignment by a corporation vests in the assignee the exclusive right to sue to set aside fraudulent transfers. Creteau *v.* Foote & Thorne Glass Co., 54 App. Div. 168, 66 N. Y. Supp. 370.

Distinction between statutes which merely regulate the common law assignment and those which are in effect insolvency acts designed to equitably distribute an insolvent debtor's estate. Mansfield *v.* First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999. See also Pillsbury *v.* Kingon, 33 N. J. Eq. 287, 36 Am. Rep. 556.

Fraudulent Mortgage. — Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084; Sweetzer *v.* Higby, 63 Mich. 13, 29 N. W. 506.

27. — Valley Lumb. Co. *v.* Hogan, 85 Wis. 366, 55 N. W. 415. *Compare* Minnesota Thresher Mfg. Co. *v.* Langdon, 44 Minn. 37, 46 N. W. 310.

28. Voorhees *v.* Carpenter, 127 Ind. 300, 26 N. E. 888. But see Fidelity Nat. Bank *v.* Adams, 38 Wash. 75, 80

where the assignment is void or voidable a creditor may sue to set it aside and thereby restore to himself the right to attack a fraudulent conveyance by the assignor.[29]

b. *Dereliction of Assignee.* — The neglect or refusal of the assignee,[30] or his participation in the fraud,[31] entitles creditors,[32] upon a proper showing of such facts, to attack an alleged fraudulent conveyance.

c. *Parties and Pleadings.* — The assignee should be made a party defendant in such a suit;[33] so also, under some statutes, should the assignor.[34]

Pac. 284. *Compare* Loucheim *v.* Casperson, 61 N. J. Eq. 529, 48 Atl. 1107.

29. Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1. L. R. A. 250.

30. **Ill.** — Preston *v.* Spalding, 120 Ill. 208, 10 N. E. 903. **Ind.** — Wright *v.* Mack, 95 Ind. 332. **Ky.** — Hall's Assignee *v.* Rothschild, 102 Ky. 582, 44 S. W. 108. **Mich.** — Burnham *v.* Dillon, 100 Mich. 352, 59 N. W. 176; Funke *v.* Cone, 65 Mich. 581, 32 N. W. 826; Sweetzer *v.* Higby, 63 Mich. 13, 29 N. W. 506. **N. J.** — Kalmus *v.* Ballin, 52 N. J. Eq. 290, 28 Atl. 791, 46 Am. St. Rep. 520; White *v.* Davis, 48 N. J. Eq. 22, 21 Atl. 187; Lee *v.* Cole, 44 N. J. Eq. 318, 15 Atl. 531. **N. Y.** — Maass *v.* Falk, 146 N. Y. 34, 40 N. E. 504; Kessell *v.* Drucker, 23 Abb. N. C. 1, 6 N. Y. Supp. 945; Swift *v.* Hart, 35 Hun 128. **Ohio.** — Saxton *v.* Seiberling, 48 Ohio St. 554, 29 N. E. 179; Cornell *v.* Sulter, 33 Ohio C. C. 384. **Wis.** — Valley Lumb. Co. *v.* Hogan, 85 Wis. 366, 55 N. W. 415. **Can.** — Campbell *v.* Hally, 22 Ont. App. 217.

Contra, John Deere Plow Co. *v.* Emporia Nat. Bank, 59 Kan. 38, 51 Pac. 892, holding that upon the assignee's refusal a creditor's only remedy is to apply to the court for an order compelling the assignee to act. See also West *v.* Gribben, 23 Ky. L. Rep. 311, 62 S. W. 869.

If the assignee has not qualified as such, his refusal to sue does not justify a suit by a creditor. Mills *v.* Goodenough, 18 N. Y. Civ. Proc. 151, 9 N. Y. Supp. 764.

Death of Assignee. — Loucheim *v.* Casperson, 61 N. J. Eq. 529, 48 Atl. 1107.

31. **Ind.**—Doherty *v.* Holiday, 137 Ind. 282, 32 N. E. 315; Wright *v.* Mack, 95 Ind. 332. **Mich.**—Burnham *v.* Haskins, 72 Mich. 235, 40 N. W. 327. **N. J.**—Terhune *v.* Sibbald, 55 N. J. Eq. 236, 37 Atl. 454. See Loucheim *v.* Casperson, 61 N. J. Eq. 529, 48 Atl. 1107. **N. Y.** — Markell *v.* Hill, 34 Misc. 133, 69 N. Y. Supp. 537; Kendall *v.* Mellen, 13 N. Y. Supp. 207.

Interest of assignee in alleged prior fraudulent mortgage. See Sweetzer *v.* Higby, 63 Mich. 13, 29 N. W. 506.

32. **Simple Contract Creditors May Sue.** — A judgment is unnecessary. Spelman *v.* Freedman, 130 N. Y. 421, 29 N. E. 765. See Brockett & Sons *v.* Lewis, 144 Mich. 560, 108 N. W. 429.

A creditor who has presented his claim has sufficient standing to sue. Kalmus *v.* Ballin, 52 N. J. Eq. 290, 28 Atl. 791, 46 Am. St. Rep. 520. See Hamlin's Admr. *v.* Bennett, 52 N. J. Eq. 70, 27 Atl. 651. So has a judgment creditor though he has not presented his claim (White *v.* Davis, 48 N. J. Eq. 22, 21 Atl. 187); or though his judgment was rendered after the assignment. Lee *v.* Cole, 44 N. J. Eq. 318, 15 Atl. 531.

The creditors collectively or one alone in behalf of the others may institute the suit. Crouse *v.* Frothingham, 97 N. Y. 105, 113. *Compare* Merwin *v.* Richardson, 52 Conn. 224.

All creditors may join in the suit, since they have a unity of interest. Wright *v.* Mack, 95 Ind. 332.

The proceeds of the suit, though prosecuted by one creditor, become the assets of the insolvent estate to be distributed to all creditors. **Ky.** — Roberts *v.* Phillips, 11 Bush 11. **N. J.** Hamlin's Admr. *v.* Bennett, 52 N. J. Eq. 70, 27 Atl. 651. **N. Y.** — Crouse *v.* Frothingham, 97 N. Y. 105. **Can.** — Doull *v.* Kopman, 22 Ont. App. 447.

See *In re* Wilson, 138 Iowa 225, 114 N. W. 551. *Contra*, Greffet *v.* Goressling, 81 Mo. App. 633.

33. Burnham *v.* Dillon, 100 Mich. 352, 59 N. W. 176; Hamlin's Admr. *v.* Bennett, 52 N. J. Eq. 70, 27 Atl. 651. See Swift *v.* Hart, 35 Hun (N. Y.) 128; Saxton *v.* Leiberling, 48 Ohio St. 554, 29 N. E. 179.

34. **Loving *v.* Arnold, 84 Fed. 214.**

Demand. — The making of a demand or request that the assignee bring suit should be averred,[35] unless the pleadings show that such a request would have been useless.[36]

A prior tender to the alleged fraudulent vendee need not be averred.[37]

Relief. — The bill may ask as alternative relief that the conveyance, if held valid, be enforced as a general assignment for the benefit of all creditors.[38]

Objection to the creditor's right to sue is waived if not questioned by demurrer before answering to the merits.[39] Such objection cannot be made by the debtor.[40]

Permission of Court. — The failure to apply to the court for permission to sue, as required by statute,[41] cannot be questioned for the first time on appeal.[42]

3. Limitations. — The suit to set aside a prior conveyance as fraudulent must be commenced within the statutory period[43] after the discovery of the fraud,[44] or other act[45] setting the statute in motion.

35. Hall's Assignee *v.* Rothchild, 102 Ky. 582, 44 S. W. 108. See Sweetzer *v.* Higby, 63 Mich. 13, 29 N. W. 506.

The absence of such an averment is waived if not objected to by demurrer. Wisdom *v.* Russell, 21 Ky. L. Rep. 881, 53 S. W. 284.

Nature and Form of Request. — See Kalmus *v.* Ballin, 52 N. J. Eq. 290, 28 Atl. 791, 46 Am. St. Rep. 520.

36. An averment of a request that the assignee bring the suit need not be made where his participation in the fraud is alleged. Terhune *v.* Sibbald, 55 N. J. Eq. 236, 37 Atl. 454; Kendall *v.* Mellen, 59 Hun 623, 13 N. Y. Supp. 207. See Fort Stanwix Bank *v.* Leggett, 51 N. Y. 552.

37. It is sufficient to offer, in the petition or complaint, "to pay into court such sum as the court may find the defendant entitled to as a condition of setting the sale and conveyance aside." Saxton *v.* Leiberling, 48 Ohio St. 554, 29 N. E. 179.

38. See *supra*, II, D, 3, a.

39. Wisdom *v.* Russell, 21 Ky. L. Rep. 881, 53 S. W. 284 (where both the assignee, who was a party defendant, and the fraudulent grantee failed to demur on this ground). See Barnham *v.* Dillon, 100 Mich. 352, 59 N. W. 176.

A special demurrer must be interposed on this ground. Saxton *v.* Seiberling, 48 Ohio St. 554, 29 N. E. 179, distinguishing incapacity to sue from lack of cause or right of action.

40. Fidelity Nat. Bank *v.* Adams, 38 Wash. 75, 80 Pac. 284.

41. **Necessity of Order of Court.**— See Sweetzer *v.* Higby, 63 Mich. 13, 29 N. W. 506; Doull *v.* Kopman, 22 Ont. App. 447; Campbell *v.* Hally, 22 Ont. App. 217.

42. Funke *v.* Cone, 65 Mich. 581, 32 N. W. 826.

43. **Ky.** — Montgomery *v.* Allen, 107 Ky. 298, 53 S. W. 813. **N. J.**—Smith's Admr. *v.* Wood, 42 N. J. Eq. 563, 7 Atl. 881, suit in equity is governed by the analogy of the statute governing similar actions at law. **N. M.**—Early Times Distil. Co. *v.* Zeiger, 11 N. M. 221, 67 Pac. 734.

See **Ky.** — Zeman *v.* Steinberg, 21 Ky. L. Rep. 1152, 54 S. W. 178; Butler *v.* Monks, 4 Ky. L. Rep. 996; Whitehead *v.* Woodruff, 11 Bush 209. **N. J.** Red Bank Second Nat. Bank *v.* Farr, (N. J. Eq.) 7 Atl. 892. **Ohio.**—Maas *v.* Miller, 58 Ohio St. 483, 51 N. E. 158.

44. Fidelity Nat. Bank *v.* Adams, 38 Wash. 75, 80 Pac. 284. But see Voorhees *v.* Carpenter, 127 Ind. 300, 26 N. E. 833.

45. Downer *v.* Porter, 116 Ky. 422, 76 S. W. 135 (delivery of property); Julius Locheim & Co. *v.* Eversole, 29 Ky. L. Rep. 464, 93 S. W. 52 (filing for record). See Howard *v.* Maloney, 15 Ky. L. Rep. 654.

III. ACTIONS AND PROCEEDINGS BY AND AGAINST ASSIGNEE. — A. By Assignee. — **1. Generally.** — In the absence of statute the assignee acquires by the assignment only those rights of action which could have been exercised by the assignor but for the assignment.[46] In addition to these rights of action the assignee may invoke those remedies which accrue to him by virtue of his ownership and trust capacity.[47] Upon the removal or death of an assignee the rights of action which he possessed vest in his successor as assignee,[48] and not in his executor or administrator.[49]

Statutes, however, frequently vest in the assignee all rights of action which would otherwise be available to creditors.[50] But even under such statutes the neglect or refusal of the assignee to sue justifies action by the creditors.[51]

46. **U. S.**—Stewart *v.* Platt, 101 U. S. 731, 25 L. ed. 816; Hahn *v.* Salmon, 20 Fed. 801. **Conn.**—Central Bank *v.* Curtis, 26 Conn. 533. **Ga.** — Fouche *v.* Brower, 74 Ga. 251. **Mich.** — Wakeman *v.* Barrows, 41 Mich. 363, 2 N. W. 50. **Minn.** — Flower *v.* Cornish, 25 Minn. 473. **N. J.** — Anderson *v.* Tuttle, 26 N. J. Eq. 144. **N. Y.** — Minier *v.* Elmira Sec. Nat. Bank, 13 N. Y. St. 222; Brownell *v.* Curtis, 10 Paige 210. **Wis.**—Hawks *v.* Pritzlaff, 51 Wis. 160, 7 N. W. 303; Estabrook *v.* Messersmith, 18 Wis. 545.

The members of a partnership cannot be sued by the assignee of the firm for alleged conspiracy to defraud the partnership and its creditors, since this in effect would be an action by the partners against themselves, even though the statute gives the assignee authority to prosecute such actions for property and make such defense to claims against the assigned property as a trustee in a deed of trust or an attaching or execution creditor with a writ levied upon such property could prosecute or make. Haseltine *v.* Messmore, 18 Mo. 298, 82 S. W. 115. *Compare* Lund *v.* Skanes Enskilda Bank, 96 Ill. 183.

Rights of action personal to the assignor and which do not pass by assignment cannot be exercised by the assignee. Slauson *v.* Schwabacher, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948.

The assignor cannot sue upon any claims or rights of action covered by the assignment. Smith *v.* Chicago & N. W. R. Co., 23 Wis. 267.

47. **N. Y.** — Whittaker *v.* Merrill, 30 Barb. 389. **Pa.**—Wilmarth *v.* Mountford, 8 Serg. & R. 124. **Tex.**—Roby *v.* Meyer, 84 Tex. 386, 19 S. W. 557, action for wrongful attachment.

See also the sections following herein.

He may invoke the aid of equity in the enforcement of the trust. Louisville Mfg. Co. *v.* Brown, 101 Ala. 273, 13 So. 15. See also Dimmock *v.* Bixby, 20 Pick. (Mass.) 368. He may maintain a bill of discovery against the assignor who has failed to furnish the required inventory. Keyes *v.* Brush, 2 Paige (N. Y.) 311.

A suit for partition can be maintained by the assignee only when necessary to the proper execution of his trust. Wheeler *v.* Hawkins, 101 Ind. 486.

The assignee of a corporation may bring an action for an unpaid subscription on stock. Shockley *v.* Fisher, 75 Mo. 498; Lionberger *v.* Broadway Sav. Bank, 10 Mo. App. 499.

48. Mitchell *v.* Stoddard Co. Bank, 23 Ky. L. Rep. 1562, 65 S. W. 839; Perry *v.* Stephens, 77 Tex. 246, 13 S. W. 984.

49. An executrix, as such, has no right to be substituted in place of a deceased assignee, Steinhouser *v.* Mason, 135 N. Y. 635, 32 N. E. 69.

50. See *supra,* II, E, 2, and Farrell Foundry, etc. Co. *v.* Preston Nat. Bank, 93 Mich. 582, 53 N. W. 831; Sweetzer *v.* Higby, 63 Mich. 13, 29 N. W. 506; Valley Lumb. Co. *v.* Hogan, 85 Wis. 366, 55 N. W. 415.

51. See Sweetzer *v.* Higby, 63 Mich. 13, 29 N. W. 506, and *supra,* II, E, 2, b.

A foreign assignee may sue in the domestic state, if by so doing he does not infringe the rights of local creditors,[52] without the necessity of executing a bond at the forum.[53] And an assignee appointed in one state may sue in the federal courts of the same or other states.[54] But a non-resident assignee may be required to furnish security for costs.[55]

2. Against Unlawful Attachment or Levy. — The prosecution of a levy may be enjoined,[56] and a suit may be maintained by the assignee to dissolve or avoid it.[57] The assignee may also seek relief in accordance with the method provided for the relief of third persons whose property has been wrongfully attached,[58] or he may replevy the property taken by the attachment or levy,[59] or sue for its conversion,[60] or wrongful attachment.[61]

52. **Ala.** — M Dougald's Adm. *v.* Carey, 38 Ala. 320. **Conn.** — Upton *v.* Hubbard, 28 Conn. 274, 73 Am. Dec. 670. **Mich.** — Graydon *v.* Church, 7 Mich. 36. **N. Y.** — Hoyt *v.* Thompson, 5 N. Y. 320. **Pa.** — Milne *v.* Moreton, 6 Binn. 353, 6 Am. Dec. 466. **Tex.** — Miller *v.* Goodman, 15 Tex. Civ. App. 244, 40 S. W. 743. **Wash.** — Happy *v.* Prickett, 24 Wash. 290, 64 Pac. 528.

See the following cases: **D. C.** — Matthai *v.* Conway, 2 App. Cas. 45, **Kan.** — Rogers *v.* Coates, 38 Kan. 232, 16 Pac. 463. **N. Y.** — Abraham *v.* Plestoro, 3 Wend. 538, 20 Am. Dec. 738.

53. Peach Orchard Coal Co. *v.* Woodward, 20 Ky. L. Rep. 1613, 49 S. W. 793.

54. Greaves *v.* Neal, 57 Fed. 816; Cover *v.* Claflin, 57 Fed. 513. But see Sere *v.* Pitot, 6 Cranch (U. S.) 332, 3 L. ed. 240.

55. Ranney *v.* Stringer, 4 Bosw. (N. Y.) 663.

56. Thorington *v.* Gould, 59 Ala. 461; Howard *v.* Cannon, 11 Rich. Eq. 23, 75 Am. Dec. 736. See also Haynes *v.* Rizer, 14 Lea (Tenn.) 246; Ford *v.* Watts, 95 Va. 192, 28 S. E. 179. *Compare* Ashton *v.* Jones, 14 Neb. 426, 16 N. W. 434.

57. Emerson *v.* Detroit Steel & Spring Co., 100 Mich. 127, 58 N. W. 659; Gott *v.* Hoschna, 57 Mich. 413, 24 N. W. 123; Smith *v.* Jones, 18 Neb. 481, 25 N. W. 624.

58. See Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397, and the titles "Attachment," "Garnishment."

A garnishment may be dissolved on motion and without a disclosure by the assignee. Lord *v.* Meachem, 32 Minn. 66, 19 N. W. 346. See also Cox Mfg. Co. *v.* August, 51 Kan. 59, 32 Pac. 636; Wichita Wholesale Groc. Co. *v.* Records, 40 Kan. 119, 19 Pac. 346; *In re* Van Norman, 41 Minn. 494, 43 N. W. 334, and the title "Garnishment."

The assignee cannot by a mere motion, in an action to which he is not a party, have an attachment of the assigned property dissolved. Copeland *v.* Piedmont & A. L. Ins. Co., 17 S. C. 116; Metts *v.* Piedmont & A. L. Ins. Co., 17 S. C. 120. See also Rowe *v.* Kellogg, 54 Mich. 206, 19 N. W. 957. *Compare* Quebec Bank *v.* Carroll, 1 S. D. 372, 381, 47 N. W. 397.

The assignee cannot without leave of court, traverse the attachment affidavit in a suit against his assignor where the assignment was made after the attachment. Howitt *v.* Blodgett, 61 Wis. 376, 21 N. W. 292.

Interpleader. — See Sanger *v.* Flow, 48 Fed. 152, 1 C. C. A. 56; Farwell *v.* Jenkins, 18 Ill. App. 493.

Intervention. — See *infra*, III, C.

59. Nimmo *v.* Kuykendall, 85 Ill. 476. See Edwards *v.* Sumner, 4 Cush. (Mass.) 393; and *infra*, III, A, 3.

60. Anderson *v.* Risdon-Cahn Co., 13 Wash. 494, 43 Pac. 337. See Wheelock *v.* Hastings, 4 Met. (Mass.) 504; and *infra*, III, A, 3.

61. Roby *v.* Meyer, 84 Tex. 386, 19 S. W. 557.

In an action against a credito for damages for unlawfully attaching the assigned property, plaintiff need not negative the fact that defendant is the only creditor entitled to receive the money which might be recovered, this being defensive matter to be pleaded by defendant. Nave *v.* Britton, 61 Tex. 572.

3. Trover and Replevin. — The assignee under a valid assignment[62] many enforce his title to and right to possession of the assigned personalty by action of trover and replevin or their statutory equivalent.[63] But since the assignee does not take title to property previously transferred in fraud of creditors, he cannot maintain replevin or an action for the conversion thereof, but may proceed only in equity to set aside the transfer in so far as may be necessary to the execution of his trust.[64]

4. Action for Usury. — Whether an assignee may sue or become a party to an action for usury depends upon the form of the statute and whether it restricts the right of action to the injured party,[65] or contemplates an action by his representatives.[66]

5. Prerequisites to Suit. — It is not ordinarily necessary for an assignee to obtain leave of court to file a suit,[67] though such leave may be necessary to enable him to become a party to a pending action.[68] What steps, if any, must be taken to perfect the assignment before an action can be maintained by the assignee, depends upon the statute.[69]

62. But not where the assignment is void. Mosconi *v.* Burchinell, 7 Colo. App. 435, 43 Pac. 912.

63. **Ark.** — Clayton *v.* Johnson, 36 Ark. 406, 38 Am. Rep. 40. **Ill.** — Nimmo *v.* Kuykendall, 85 Ill. 476. **Ia.** — Price *v.* Parker, 11 Iowa 144. **Mich.** — Coots *v.* Radford, 47 Mich. 37, 10 N. W. 69. **N. J.** — Garretson *v.* Brown, 26 N. J. L. 425, 27 N. J. L. 644. **N. Y.** — Emerson *v.* Bleakley, 5 Abb. Pr. (N. S.) 350.

See **Ill.** — Boyden *v.* Frank, 20 Ill. App. 169. **Neb.** — Wells *v.* Lamb, 18 Neb. 352, 24 N. W. 682. **N. Y.** — Whittaker *v.* Merrill, 30 Barb. 389. **Ohio.** Bancroft *v.* Blizzard, 13 Ohio 30.

Right of Possession.—Where a chattel though covered by the assignment had been previously mortgaged, and while in the mortgagee's lawful possession attached, the right of possession not being in the assignee, it was held he could not maintain trover. Axford *v.* Mathews, 43 Mich. 427, 5 N. W. 377.

The death of an assignee suing for a tortious conversion of the assigned property does not abate the action. Emerson *v.* Bleakley, 5 Abb. Pr. N. S. (N. Y.) 350.

64. Frost *v.* Citizens' Nat. Bank, 68 Wis. 234, 32 N. W. 110; Baumbach Co. *v.* Miller, 67 Wis. 449, 30 N. W. 850; Kloeckner *v.* Bergstrom, 67 Wis. 197, 30 N. W. 118.

65. The assignee cannot properly be made a party to an action by the assignor for usury, nor substituted as plaintiff for the latter, where the statute restricts the right of action to the borrower himself. Richards *v.* Ludington, 60 Hun 135, 14 N. Y. Supp. 510.

66. Where the statute provides that double the amount of usurious interest may be recovered by the person for whom it has been paid or by his legal representatives, an assignee for the benefit of creditors is the representative of his assignor. Henderson Nat. Bank *v.* Alves, 91 Ky. 142, 15 S. W. 132.

67. Glenn *v.* Busey, McArthur & M. (D. C.) 454. See Rochford *v.* Doty, 37 Wash. 232, 79 Pac. 782. But see Jewett *v.* Perrette, 127 Ind. 97, 26 N. E. 685.

68. See *infra*, III, C. But see Platt *v.* McMurray, 63 How. Pr. (N. Y.) 149.

69. **Ark.** — Falconer *v.* Hunt, 39 Ark. 68 (filing schedule and bond); Thatcher *v.* Franklin, 37 Ark. 64. **Ind.** Forkner *v.* Shafer, 56 Ind. 120, recording assignment. **Ia.** — Price *v.* Parker, 11 Iowa 144, filing bond and inventory. **Mich.** — McCuaig *v.* City Sav. Bank, 111 Mich. 356, 69 N. W. 500, necessity of filing bond.

No demand is necessary to the maintenance of a suit against the assignor's transferee for the recovery of property fraudulently transferred,[70] or the value thereof,[71] nor is a demand[72] or notice of the assignment[73] an essential prerequisite to an action to recover the assigned property.

6. Parties. — The assignee may sue in his own name upon rights of action acquired from the assignor,[74] as well as upon those subsequently accruing by virtue of his ownership or right of possession.[75] But a foreign assignee may be compelled to sue in the name of his assignor where the obligation or claim is one which under the law of the forum cannot be assigned at all,[76] or only by a specific assignment.[77] The beneficiaries of the trust, the creditors[78] and the assignor,[79]

70. Bull *v.* Houghton, 65 Cal. 422, 4 Pac. 529.

71. Crampton *v.* Valido Marble Co., 60 Vt. 291, 15 Atl. 153, 1 L. R. A. 120.

72. Frazier *v.* Fredericks, 24 N. J. L. 162 (property attached before the time for taking possession thereof by the assignee has expired); Bancroft *v.* Blizzard, 13 Ohio 30.

73. Beckwith *v.* Union Bank, 9 N. Y. 211; Stewart *v.* National Sec. Bank, 6 *I.* N. C. (Pa.) 399.

74. **Conn.** — Stanton *v.* Lewis, 26 Conn. 44. **Fla.** — Robinson *v.* Nix, 22 Fla. 321. **Ill.** — Congress Const. Co. *v* Larson & Libby Co., 199 Ill. 398, 65 N. E. 357. **Ky.** — Tandy *v.* Hatcher, 6 Ky. L. Rep. 745. **Mo.** — Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181. **N. Y.** — Lewis *v.* Graham, 4 Abb. Pr. 106. **N. C.** — Hartness *v.* Wallace, 106 N. C. 427, 11 S. E. 259. **Ohio.** — Rossman *v.* McFarland, 9 Ohio St. 369. **S. C.** — Salas *v.* Cay, 12 Rich. 558; Ferrall *v.* Paine, 2 Strobh. 293.

But see Buckner *v.* Real Estate Bank, 5 Ark. 536, 41 Am. Dec. 105; Osborn *v.* First Nat. Bank, 175 Pa. 494, 34 Atl. 858.

"The assignee, under a general assignment for the benefit of creditors, is an assignee of an express trust; has the entire legal title, and may sue in his own name without referring to his character as assignee. He makes title under the assignment as in any other case of sale and transfer. Even executors and administrators are generally allowed to sue in their individual names, without declaring in their representative character. . . . In such cases they are generally charged, of course, with costs in case they fail in the suit." Butterfield *v.* Macomber, 22 How. Pr. (N. Y.) 150.

An action for breach of a contract of sale made by defendant and plaintiff's assignor is not within the code provisions requiring actions for breach of a contract for the payment of money to be brought in the name of the real party in interest and authorizing suit by an indorsee, and such an action cannot therefore be brought by the assignee in his own name. Snead *v.* Bell, 142 Ala. 449, 38 So. 259.

75. **Ariz.** — Cullum *v.* Paul, 8 Pac. 187. **Minn.** — Langdon *v.* Thompson, 25 Minn. 509. **R. I.** — Meyers *v.* Briggs, 11 R. I. 180.

See also Wilmarth *v.* Mountford, 8 Serg. & R. (Pa.) 124.

76. Kirkland *v.* Lowe, 33 Miss. 423, 69 Am. Dec. 355.

77. **Conn.** — Brush *v.* Curtis, 4 Conn. 312. **Miss.** — Orr *v.* Amory, 11 Mass. 25; Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72. **N. Y.** — Bird *v.* Caritat, 2 Johns. 342, 3 Am. Dec. 433.

78. **U. S.** — Kerrison *v.* Stewart, 93 U. S. 155, 23 L. ed. 843. **Ala.** — Louisville Mfg. Co. *v.* Brown, 101 Ala. 273, 13 So. 15; Walker *v.* Miller, 11 Ala. 1067. **Fla.** — Robinson *v.* Nix, 22 Fla. 321. **Ky.** — Robinson *v.* Robinson, 11 Bush 174. **Me.** — Jackson *v.* Candage, 31 Me. 28. **Minn.** — Langdon *v.* Thompson, 25 Minn. 409. **N. Y.** — Lewis *v.* Graham, 4 Abb. Pr. 106. **Pa.** Irwin *v.* Keen, 3 Whart. 347. **S. C.** — Salas *v.* Cay, 12 Rich. 558. **Tex.** — Simmons Hdw. Co. *v.* Kaufman, 77 Tex. 131, 8 S. W. 283. **Va.** — Buck *v.* Pennybacker's Exrs., 4 Leigh 5.

79. Tandy *v.* Hatcher, 6 Ky. L. Rep. 745.

need not be made parties to a suit by the assignee. They may, however, be proper parties to such proceedings,[80] and may intervene therein for the protection of their interests.[81] The assignee's sureties may under some circumstances become parties to a suit by the assignee.[82] Where only a portion of those persons who have been nominated as assignees of a debtor accept the trust they may sue without joining the others.[83]

7. Complaint. — The assignment must be averred in an action upon a claim passing to the assignee by virtue thereof,[84] but not in an action upon a cause of action accruing to the assignee by virtue of his ownership or right of possession.[85] A foreign assignee need not allege that the assignment is in accordance with the law of the state where made.[86]

8. Set-off and Counterclaim. — In an action by the assignee to enforce a debt or claim acquired by the assignment the defendant may plead the same set-offs or counterclaims which he could have used against the assignor.[87] But unless the counterclaim be one which had

80. Where it appears that the assignor, a partnership, is solvent and that there will therefore be a surplus for the partners, they are proper parties to a suit by the assignee to enforce the trust. McCampbell *v.* Brown, 48 Fed. 795.

81. Louisville Mfg. Co. *v.* Brown, 101 Ala. 273, 13 So. 15.

82. Sureties may become parties to a suit by the assignee to recover money unlawfully paid by him out of the trust funds under an agreement that it should be repaid if this action was not approved, where they have already reimbursed the estate. Wheeler *v.* Hawkins, 116 Ind. 515, 19 N. E. 470.

83. Shockley *v.* Fisher, 75 Mo. 498; Van Valkenburgh *v.* Elmendorf, 13 Johns. (N. Y.) 314.

84. Powell *v.* Williams, 99 Mich. 30, 57 N. W. 1041. See also Bell *v.* Mansfield, 1 Ky. L. Rep. 89, 13 S. W. 838.

An averment that plaintiff is the duly qualified and acting assignee of an incorporated bank of another state is sufficient, if not denied, to show his compliance with the law both of the foreign state and of the forum. Rogers *v.* Coates, 38 Kan. 232, 16 Pac. 463.

85. Cullum *v.* Paul (Ariz.), 8 Pac. 187; Wilmarth *v.* Mountford, 8 Serg. & R. (Pa.) 124 (where one is described as assignee in an action for the price of goods sold by him, this may be disregarded as surplusage). See also Hoogland *v.* Trask, 6 Robt. (N. Y.) 540, action on promissory note acquired by assignment. And see Wilhoit *v.* Cunningham, 87 Cal. 453, 25 Pac. 675.

Title may be averred generally and the assignment may be introduced in evidence to prove it. State *v.* Krug, 82 Ind. 58; Krug *v.* McGilliard, 76 Ind. 28; Langdon *v.* Thompson, 25 Minn. 509. But see Wheeler *v.* Hawkins, 101 Ind. 486.

Where unnecessarily averred the assignment must appear to be a valid one. State *v.* Krug, 82 Ind. 58. But defects which do not appear from the complaint must be set up in the answer. Wilhoit *v.* Cunningham, 87 Cal. 453, 25 Pac. 675.

A copy of the deed of assignment need not be set out where it is not the basis of the action. Jewett *v.* Perrette, 127 Ind. 97, 26 N. E. 685; Cooper *v.* Perdue, 114 Ind. 207, 16 N. E. 140. But see Wheeler *v.* Hawkins, 101 Ind. 486; Foster *v.* Brown, 65 Ind. 234.

86. Miller *v.* Goodman, 15 Tex. Civ. App. 244, 40 S. W. 743. See Rogers *v.* Coates, 38 Kan. 232, 16 Pac. 463.

But the petition of such an assignee intervening in an attachment suit should show an assignment valid on its face as against attaching creditors. Matthai *v.* Conway, 2 App. Cas. (D. C.) 45.

87. Conn.—Bulkeley *v.* Welch, 31 Conn. 339. Ky. — German Ins. Bank

matured[88] and become defendant's property[89] at the time the assignment was made, it is unavailable.

An equitable set-off may, however, be interposed although no legal obligation has yet matured.[90]

v. Jackson, 10 Ky. L. Rep. 1061. **Minn.** Laybourn *v.* Seymour, 53 Minn. 105, 54 N. W. 941, 39 Am. St. Rep. 579. **Mo.** — Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839; Smith *v.* Spengler, 83 Mo. 408. **Neb.** — Salladin *v.* Mitchell 42 Neb. 859, 61 N. W. 127. **N. Y.** — Richards *v.* La Tourette, 119 N. Y. 54, 23 N. E. 531; Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726. **Pa.** — Farmers' D. N. Bank *v.* Penn Bank, 123 Pa. 283, 16 Atl. 761, 2 L. R. A. 273; Meeder *v.* Gochring, 23 Pa. Super. 457. **S. C.** — Lowrie *v.* Williamson, 3 McCord 247. **Tenn.** — Litterer *v.* Berry, 4 Lea 193.

But see Miller *v.* Cherry, 56 N. C. 24.

One holding in trust money or property of the assignor cannot in an action for the recovery thereof set off a note of the assignor held by him. Detroit First Nat. Bank *v.* E. T. Barnum Wire, etc. Wks., 58 Mich. 124, 24 N. W. 543, 25 N. W. 202, 55 Am. Rep. 660.

A previous judgment against the assignor may be set off in an action begun by him before the assignment and to which the assignee has become a party. Foster *v.* Central Nat. Bank, 93 N. Y. Supp. 603.

88. **U. S.** — Brashear *v.* West, 7 Pet. 608, 8 L. ed. 801. **Ill.** — Taylor *v.* Weir, 63 Ill. App. 82. **Mo.** — Huse *v.* Ames, 104 Mo. 91, 15 S. W. 965; Storts *v.* Mills, 93 Mo. App. 201. **N. Y.** Fera *v.* Wickham, 135 N. Y. 223, 31 N. E. 1028, 17 L. R. A. 456. **Pa.** — Chipman *v.* Philadelphia Ninth Nat. Bank, 120 Pa. 86, 13 Atl. 707.

Contra. — **Ky.** — Kentucky Flour Co. *v.* Merchants' Nat. Bank, 90 Ky. 225, 13 S. W. 910, 9 L. R. A. 108; Chenault *v.* Bush, 84 Ky. 528, 2 S. W. 168; New Farmers & T. Bank *v.* Crowe, 26 Ky. L. Rep. 500, 82 S. W. 287. **Minn.** — Martin *v.* Pillsbury, 23 Minn. 175. **Tenn.** — Nashville Tr. Co. *v.* Nashville Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

"The reason of this is, that the assignee, in virtue of the assignment, becomes a trustee for the creditors. The status of the assignors, debtors and creditors is fixed by the assignment in trust for the creditors." Fidelity & Dep. Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652.

By Purchaser at Assignee's Sale. — One who is sued for the purchase price of property purchased at an assignee's sale cannot set off a claim against the assignor accruing after the assignment. **Colo.** — James *v.* McPhee, 9 Colo. 486, 13 Pac. 535. **N. J.** — Bateman *v.* Connor, 6 N. J. L. 104. **N. Y.** — Otis *v.* Shants, 128 N. Y. 45, 27 N. E. 955. **N. C.** — Capehart *v.* Etheridge, 63 N. C. 353. **Pa.** — Wilmarth *v.* Mountford, 8 Serg. & R. 124.

But one who purchases assigned goods from the assignor in possession, after the assignment and in ignorance thereof, may use any offset, in an action for the price by the assignee, which he could have used against the assignor. Warner *v.* Hedly & Co., 1 R. I. 357.

Although the debt sued upon had not matured when the assignment was made, the defendant may set off his debt against the assignor which had become due previous to that time. Homer *v.* National Bank of Commerce, 140 Mo. 225, 41 S. W. 790; *In re* Hatch, 155 N. Y. 401, 50 N. E. 49, 40 L. R. A. 664.

89. **N. C.** — Brown *v.* Brittain, 84 N. C. 552. **Pa.** — Collins *v.* McKee, 6 Atl. 396. **Va.** — Exchange Bank *v.* Knox, 19 Gratt. 739.

90. **Minn.** — St. Paul, etc. Tr. Co. *v.* Leck, 57 Minn. 87, 58 N. W. 826, 47 Am. St. Rep. 576. **N. Y.** — Groff *v.* Bliss, 19 Misc. 14, 42 N. Y. Supp. 843. **Tenn.** — Nashville Tr. Co. *v.* Nashville Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

The assignor's equitable obligation to indemnify the defendant for the latter's liability as surety on the assignor's bond may be set off, although the amount of such liability has not been determined at the time of the assignment. Momsen *v.* Noyes, 105 Wis. 565, 81 N. W. 860.

B. Against Assignee. — **1. Upon Superior Claims or Liens Upon Property.** — a. *Generally.* — A person having or claiming a title or lien superior to that of the assignee upon property claimed by the latter under the assignment may sue him to enforce such superior right.[91] One claiming title and right of possession to such property is not obliged to proceed by replevin or trover, but may intervene in the assignment proceedings and ask for an order of delivery,[92] or may seek relief from a court of chancery which has jurisdiction of the assignment proceedings.[93]

91. See **Cal.** — George *v.* Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53. **Fla.** Lockett *v.* Robinson, 31 Fla. 134, 12 So. 649, 20 L. R. A. 67. **Ky.**—Longdale Iron Co. *v.* Swift I. & S. Wks., 91 Ky. 191, 15 S. W. 183, to set aside sale to assignor. **Mich.** — Abbott *v.* Chaffee, 83 Mich. 256, 47 N. W. 216. **Mo.**—Page *v.* Gardner, 20 Mo. 507. **Ohio.**—Jones *v.* Kilbreth, 49 Ohio St. 401, 31 N. E. 346. **Ore.** — J. I. Case Thresh. Mach. Co. *v.* Campbell, 14 Ore. 460, 13 Pac. 324, trover for conversion of mortgaged personalty.

The assignee of a vendee is a proper party defendant in an action by a vendor to recover property fraudulently purchased and included in the assignment. Roome *v.* McGovern, 9 Daly (N. Y.) 60.

The statute giving supervision over assignments to the chancery court does not deprive a court of law of jurisdiction over an action to vindicate a title alleged to be superior to that of the assignor and his assignee. Edwards *v.* Symons, 65 Mich. 348, 32 N. W. 796.

Replevin Against Assignee. — Property claimed by an assignee under an assignment may be replevied, since it cannot be said to be *in custodia legis* if the assignor had no title—the assignee obtaining only such title as his assignor had. Matthews *v.* Ott, 87 Wis. 397, 58 N. W. 774. See also the following cases: **U. S.** — Jones *v.* McCormick Harv. Mach. Co., 82 Fed. 295, 27 C. C. A. 133. **Md.** — Ratcliffe *v.* Sangston, 18 Md. 383. **Mich.** — Farwell *v.* Myers, 59 Mich. 179, 64 N. W. 328; Coomer *v.* Gale Mfg. Co., 40 Mich. 691. **Minn.** — Thomas Mfg. Co. *v.* Drew, 69 Minn. 69, 71 N. W. 921. **N. Y.** — Underhill *v.* Ramsey, 2 N. Y. Supp. 451. **Ore.** — J. I. Case Thresh. Mach. Co *v.* Campbell, 14 Ore. 460, 13 Pac. 324. **Wash.** — Starke *v.* Paine, 85 Wis. 633, 55 N. W. 185.

But see Hanchett *v.* Waterbury, 115 Ill. 220, 32 N. E. 194; *In re* Wise, 121 Iowa 359, 96 N. W. 872. This right to replevy goods passing into the hands of the assignee is not lost by suing the assignor in trover for the previous conversion of the remainder of the same lot of goods, nor by filing a claim with the assignee for the value of the latter. Singer *v.* Schilling, 74 Wis. 369, 43 N. W. 101. See Rhinelander *v.* National City Bank, 36 App. Div. 11, 55 N. Y. Supp. 229. But an action of replevin being an election to treat a sale of the goods as fraudulent cuts off the right to maintain assumpsit on the theory of a sale. Farwell *v.* Myers, 59 Mich. 179, 26 N. W. 328. See Burrows *v.* Johntz, 57 Kan. 778, 48 Pac. 27; Hargadine-McKittrick Dry Goods Co. *v.* Warden, 151 Mo. 578, 52 S. W. 593.

The suit should be brought against the defendant in his individual name. Hampshire Paper Co. *v.* Hunt, 9 N. Y. St. 31.

A wrongful taking by the assignee need not be averred in an action of trover or conversion. King *v.* Fitch, 2 Abb. Dec. (N. Y.) 508, 1 Keyes 432.

Failure to answer on the part of a voluntary assignee is an admission of the averments of the complaint, since the statute relieving the assignee of the necessity of denying claims against the estate applies only to the case of estates that are assigned by operation of law. Longdale Iron Co. *v.* Swift Iron & S. Wks., 91 Ky. 191, 15 S. W. 183.

92. *In re* Wise, 121 Iowa 359, 96 N. W. 872; Herring-Hall-Marvin Co. *v.* Moore (Miss.), 17 So. 385 (as where the title has been reserved under a conditional sale).

93. Sawyer *v.* McAdie, 70 Mich. 386, 38 N. W. 292, having resorted

b. *Prerequisites.* — Where the legal title to property has passed to the assignee, the property in some jurisdictions is *in custodia legis*,[94] and the permission of the court must be secured before an independent suit can be instituted against him.[95] But where the action is based upon an alleged superior title or lien such consent is unnecessary.[96]

A demand is not a prerequisite to a suit against the assignee to recover property which his assignor obtained through fraud.[97]

Filing Claim. — It is not necessary that plaintiff should have filed his claim with the assignee,[98] and the fact that he has done so will not prevent his maintaining an independent suit on the same claim.[99]

Security for Costs. — A non-resident plaintiff in an action against an assignee may be required to furnish security for costs.[1]

c. *Parties.* — Creditors whose interests are antagonistic to those of the plaintiff are proper parties defendant,[2] and may intervene in the

to such court, he is bound by the decision.

94. See *supra*, II, A, 2, a, note.

95. Leuthold *v.* Young, 32 Minn. 122, 19 N. W. 652 (but the failure to obtain such cor nt is not ground for demurrer); Penn Mut. Life Ins. Co. *v.* Fife, 15 Wash. 605, 47 Pac. 27 (suit to foreclose chattel mortgage giving mortgagee the right to take possession of the property when his security is endangered). See Collins *v.* Brown, 12 Ky. L. Rep. 469, holding that a mortgagee of property subsequently assigned should not be permitted to enforce his lien in a separate suit where he would thereby burden the estate with unnecessary expense and sacrifice the interests of other creditors. But see Gilbert *v.* McCorkle, 110 Ind. 215, 11 N. E. 296; Julien *v.* Lalor, 47 Hun (N. Y.) 164.

An independent action cannot be maintained by the state for his refusal to pay taxes on the assigned property, the appropriate remedy being a motion or petition in the assignment proceedings. Marathon County *v.* Barnes, 86 Wis. 663, 57 N. W. 961.

A receiver who has been appointed upon the assignee's failure to qualify cannot be sued without leave of court. Scott *v.* Chambers, 62 Mich. 532, 29 N. W. 94.

Permission to sue once granted cannot be arbitrarily retracted after a suit has been begun in reliance thereon. Gilbert Hunt Mfg. Co. *v.* Wheeler, 15 Wash. 594, 47 Pac. 26.

96. Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943.

97. Koch *v.* Lyon, 82 Mich. 513, 46 N. W. 779; Hall *v.* Peckham, 8 R. I. 370. *Compare In re* Wise, 121 Iowa 359, 96 N. W. 872; J. I. Case Thresh. Mach. Co. *v.* Campbell, 14 Ore. 460, 13 Pac. 324. *Contra*, Goodwin *v.* Goldsmith, 49 N. Y. Super. 101, *affirmed* in 99 N. Y. 149, 1 N. E. 404; Cumiskey *v.* Lewis, 14 Daly (N. Y.) 466. See Roome *v.* McGovern, 9 Daly (N. Y.) 60 (an oral demand upon the custodian and leaving him a written demand upon the assignee are sufficient). Where before the assignment a sale has been rescinded for fraud no demand is necessary. Wolff *v.* Zeller, 31 Misc. 255, 64 N. Y. Supp. 129.

A demand and refusal where essential to the cause of action must be alleged. Cumiskey *v.* Lewis, 14 Daly 466, 15 N. Y. St. 364.

98. **It is optional with a mortagee** whether he foreclose or rely on appropriate orders of court f. the protection of his security. *In re* Windhorst, 107 Iowa 58, 77 N. W. 513.

99. Rumley Co. *v.* Moore, 151 Ind. 24, 50 N. E. 574, holding that he must first restore any payments made to him by the assignee out of the general fund.

1. Tyndall's Estate, 6 W. N. C. (Pa.) 562.

2. See Davies *v.* Fish, 19 Abb. N. C. (N. Y.) 24, creditors preferred by the assignment, where the plaintiff's claim would take all the assets.

action,[3] but they are not necessary parties,[4] where no relief is sought against them.[5]

2. By Creditors of Assignor. — Actions and proceedings against the assignee by the assignor's creditors are elsewhere treated in this title.[6]

C. Intervention by Assignee. — The assignee's right to intervene in pending actions is governed by the general rules applicable to that subject.[7] He cannot, except by statute,[8] intervene as a matter of right in an action begun against his assignor before the making of the assignment.[9] He may, however, intervene in a suit against his assignor in which the property previously assigned has been attached.[10]

D. Actions on Assignee's Bond. — **1. Who May Sue.** —Any person injured by a breach of the condition of an assignee's bond may sue thereon.[11] But before a creditor may sue there must have been a

3. Mills *v.* Swearingen, 67 Tex. 269, 3 S. W. 268, they are not bound to rely upon the assignee to defend their interests.

It is within the discretion of the court to permit creditors to intervene in a suit against the assignee. Jewett *v.* Tucker, 139 Mass. 566, 2 N. E. 680. But creditors cannot intervene as a matter of right if the assignee is defending in good faith. Davies *v.* Eish, 111 N. Y. 681, 19 N. F. 284.

4. Bircher *v.* St. Louis Sheet Metal O. Co., 77 Mo. App. 509, *reversed* on other grounds in 163 Mo. 461, 63 S. W. 691. See Walker *v.* Miller, 11 Ala. 1067.

5. Lockett *v.* Robinson, 31 Fla. 134, 12 So. 649, 20 L. R. A. 67; National Bank of Deposit *v.* Sardy, 26 Misc. 555, 57 N. Y. Supp. 625, *affirmed* in 44 App. Div. 357, 61 N. Y. Supp. 155, which is *affirmed* in 166 N. Y. 380, 59 N. E. 922.

He is a proper though not a necessary party, and should be brought in; but the failure to do so is not error. Wells *v.* Knox, 55 Hun 245, 8 N. Y. Supp. 58.

6. See *supra*, II, D.

7. Ashton *v.* Jones, 14 Neb. 426, 16 N. W. 434; McClurg *v.* State Bindery Co., 3 S. D. 362, 53 N. W. 428, 44 Am. St. Rep. 799. See generally the title "Intervention."

8. **Where the statute gives** to the assignee all the rights of the assignor, he may intervene in an attachment suit begun against the assignor before the assignment. Ringen Stove Co. *v.* Bowers, 109 Iowa 275, 80 N. W. 318.

9. **Md.** — Stockett *v.* Goodman, 47 Md. 54. **Mich.** — Emerson *v.* Detroit S. & S. Co., 100 Mich. 127, 58 N. W. 659; Gott *v.* Hoschna, 57 Mich. 413, 24 N. W. 123. **Neb.** — Ashton *v.* Jones, 14 Neb. 426, 16 N. W. 434. **N. M.** — Meyer *v.* Black, 4 N. M. 190, 16 Pac. 620. **R. I.** — Waterman *v.* A. &. W. Sprague Mfg. Co., 14 R. I. 43. **S. D.** McClurg *v.* State Bindery Co., 3 S. D. 362, 53 N. W. 428, 44 Am. St. Rep. 799. **Tenn.** — Haynes *v.* Rizer, 14 Lea 246; Lowenheim *v.* Ireland, 2 Baxt. 214.

See Richards *v.* Ludington, 60 Hun 135, 14 N. Y. Supp. 510.

With leave of court the assignee may intervene by interplea where the assignor has collusively failed to traverse the facts upon which the attachment is based. Farwell *v.* Jenkins, 18 Ill. App. 491. See Sanger *v.* Flow, 48 Fed. 152, 1 C. C. A. 56.

10. Commercial Nat. Bank *v.* Nebraska State Bank, 33 Neb. 292, 50 N. W. 157. But see Meyer *v.* Black, 4 N. M. 190, 16 Pac. 620.

Where assigned property is regarded as in the custody of the court, the assignee should not intervene in proceedings in which it is unlawfully attached, but should ask the court in the assignment proceedings to protect its custody in a summary manner. Sabin *v.* Adams, 5 Wash. 768, 32 Pac. 793. *Compare* Bradley *v.* Bailey, 95 Iowa 745, 64 N. W. 758; State *v.* Rose, 4 N. D. 319, 58 N. W. 514, 26 L. R. A. 593.

A foreign assignee may intervene in an attachment proceeding against his assignor. Matthai *v.* Conway, 2 App. Cas. (D. C.) 45.

11. State *v.* Boeppler, 63 Mo. App.

determination of the part of the fund to which he is entitled.[12] A creditor who repudiates the assignment cannot claim the protection of the bond.[13]

A substituted assignee[14] or receiver[15] may sue upon the bond of his predecessor.

The State. — The statute sometimes requires the action to be brought in the name of the state.[16]

2. Pleadings and Proof. — The complaint or petition must sufficiently aver a breach of the bond[17] and the facts entitling plaintiff to sue thereon.[18]

Where an affirmative defense is interposed, the facts constituting the same must be set out in the answer.[19]

151. See Ringenoldus *v.* Abresch, 110 Wis. 410, 96 N. W. 817; Marathon County *v.* Barnes, 86 Wis. 663, 57 N. W. 961 (action by state for refusal to pay taxes).

A creditor whose claim has been paid, but who has been compelled to give a refunding bond pending the final determination of his right to payment, may sue on the assignee's bond. German Bank *v.* Haller, 103 Tenn. 73, 52 S. W. 288.

A third person whose property has been converted by the assignee cannot sue his bondsmen. Best *v.* Johnson, 78 Cal. 217, 20 Pac. 415, 12 Am. St. Rep. 41, 3 L. R. A. 168. "The creditors and debtor are alone interested in the amount and sufficiency of the bond."

Though the bond covenants with the assignor alone, it is for the benefit of all persons entitled to share in the assets. Stone *v.* Hart, 23 Ky. L. Rep. 1777, 66 S. W. 191.

Any number of actions may be authorized by the statute. Matter of Stockbridge, 10 Daly (N. Y.) 33.

12. Stone *v.* Hart, 23 Ky. L. Rep. 1777, 66 S. W. 191; Yarbrough *v.* Colley, 5 Ky L. Rep. 683, 6 Ky. L. Rep. 121. But see Berryhill *v.* Peabody, 77 Minn. 59, 79 N. W. 651; Craddock *v.* Orand, 72 Tex. 36, 12 S. W. 208.

A purchaser at a sale by the assignee cannot sue the sureties for the assignee's failure to deliver the property, until he has obtained an order of court for the delivery. State *v.* Scott, 42 Mo. App. 203.

Where the assignee has abandoned the trust and left the state, a suit in equity may be maintained against the assignee and his sureties to enforce the trust and secure the allowance and payment of plaintiff's claim. And "having assumed jurisdiction for this purpose the court will not stop short of ascertaining and enforcing the liabilities of the sureties." Andrews *v.* Ford, 106 Ala. 173, 17 So. 446.

Statute otherwise providing. Universal Lock, etc. Co. *v.* Blake, 84 Mo. App. 478; Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

13. *In re* Cantor, 31 App. Div. 19, 52 N. Y. Supp. 382.

Non-consenting creditors are entitled by statute to sue under certain circumstances. See Craddock *v.* Orand, 72 Tex. 36, 12 S. W. 208.

14. Prosser *v.* Hartley, 35 Minn. 340, 29 N. W. 156; Phillips *v.* Ross, 36 Ohio St. 458. See Berryhill *v.* Peabody, 77 Minn. 59, 79 N. W. 651. *Contra,* State *v.* Boeppler, 63 Mo. App. 151.

15. Prosser *v.* Hartley, 35 Minn. 340, 29 N. W. 156.

16. Jackson *v.* Rounds, 59 Ind. 116; State *v.* Boeppler, 63 Mo. App. 151. See Prosser *v.* Hartley, 35 Minn. 340, 29 N. W. 156.

17. Mills *v.* Skinner, 13 Conn. 436; Craddock *v.* Orand, 72 Tex. 36, 12 S. W. 208. See Thompson *v.* Childress, 1 Tenn. Ch. 369. But see Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

18. Craddock *v.* Orand, 72 Tex. 36, 12 S. W. 208.

19. Morrill *v.* Richardson, 9 Pick. (Mass.) 84.

Plea in Abatement. — The defense that there has been no settlement of the assignee's account must be raised

The proof must conform to the pleading.[20]

3. Prior Adjudication. — The assignee's sureties are concluded by a prior adjudication as to the money or property for which he is accountable, and other matters connected with the trust,[21] even though they had no notice of the proceedings[22] or right to appeal.[23] Such an adjudication is likewise conclusive upon creditors or other parties seeking indemnity from the sureties.[24]

4. Damages and Costs. — The damages are the amount of the plaintiff's duly established claim,[25] or his proportionate share of the assets.[26]

Costs. — Plaintiff is also entitled to his costs, unless the suit is equitable in its nature.[27]

Creditors Not Parties. — Damages cannot be awarded to creditors who are not parties to the action.[28]

IV. REMEDIES OF ASSIGNOR. — A. GENERALLY. — The assignor may continue actions pending at the time of the assignment,[29] and he may also enforce rights of action not covered by the assignment.[30] But he cannot commence an action on claims or rights that have passed to the assignee,[31] unless they have for some reason reverted to him.[32] The assignor has, however, a sufficient interest in the property assigned to enable him to maintain a suit for the enforce-

by plea in abatement; it is waived by an answer to the merits. Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

20. Clark *v.* Mix, 15 Conn. 152; State *v.* McFarland (Tenn.), 35 S. W. 1007.

See generally 2 Encyclopædia of Evidence, 28 *et seq.*

21. **Ill.** — Moulding *v.* Wilhartz, 169 Ill. 422, 48 N. E. 189. **Ind.** — State *v.* Musser, 4 Ind. App. 407, 30 N. E. 944. **Ohio.** — Walsh *v.* Miller, 51 Ohio St. 462, 38 N. E. 381; Garver *v.* Tisinger, 46 Ohio St. 56, 18 N. E. 491. **Pa.** — Patterson's Appeal, 49 Pa. 342; Little *v.* Com., 48 Pa. 337; Com. *v.* Dumn, 17 Pa. Super. 90.

See State *ex rel.* Pruitt *v.* National Surety Co., 76 Mo. App. 227; and the title "**Principal and Surety.**"

Prima Facie Evidence Only. — Pierpoint *v.* McGuire, 13 Misc. 70, 34 N. Y. Supp. 100; People *v.* WLite, 28 Hun (N. Y.) 289.

22. National Surety Co. *v.* Arterburn, 110 Ky. 832, 62 S. W. 862.

23. State *v.* National Surety Co., 76 Mo. App. 227.

24. Arterburn *v.* National Surety Co., 23 Ky. L. Rep. 283, 62 S. W. 864.

25. State *v.* Hart, 38 Mo. 44. See also *In re* Stelle, 34 N. J. Eq. 199.

Interest. — The judgment bears interest, but no interest is allowable on the claim as part of the damages. State *v.* Hart, 38 Mo. 44.

26. Lahn *v.* Johnston, 32 Ohio St. 590, in estimating the proportion due plaintiff, only those claims which have been presented and allowed can be considered.

27. Boland *v.* Benson, 50 Wis. 225, 6 N. W. 819. See Merchants' Bank *v.* Chapin, 4 Ohio Dec. (reprint) 403.

28. Hays *v.* Comstock-Castle Stove Co., 70 Ark. 151, 66 S. W. 649, even though the plaintiffs are suing on behalf of themselves and all other creditors who may become parties.

29. See *supra*, I.

30. Hauser *v.* Tate, 20 Ky. L. Rep. 1716, 49 S. W. 475.

An assignment by a partnership does not deprive a partner of the right to sue with reference to his individual property. Cleveland *v.* Carr (Tex. Civ. App.), 40 S. W. 406.

31. Stoever *v.* Stoever, 9 Serg. & R. (Pa.) 434; Smith *v.* Chicago, etc. R. Co., 23 Wis. 267.

32. See Carlisle *v.* Dodds, 15 Ky. L. Rep. 784; Low *v.* Mussey, 36 Vt. 183.

ment of the trust,[33] to compel the assignee to make an accounting,[34] or to otherwise protect such reversionary interest.[35] But he cannot complain of the manner in which the fund is distributed amongst the various claimants.[36]

B. Against Unlawful Attachment. — The assignor has such a reversionary interest in the assigned property that he may move to dissolve an attachment,[37] but not, it has been held, on the ground that the property attached belongs to the assignee.[38] Nor can he sue to restrain an attachment suit on the ground that the plaintiff will thereby secure more than his equitable share of the assigned property.[39] And he cannot maintain an action for damages for a wrongful attachment of the assigned property.[40]

Where the assignor at the time of the assignment is in possession under a lease, and with the consent of the assignee and creditors he remains in possession and sublets a portion of the premises, he may maintain an action against such subtenants. Cunning *v.* Tittabawassee Boom Co., 88 Mich. 237, 50 N. W. 141.

33. Rutherford *v.* Rutherford, 14 Ky. L. Rep. 397. See Gschwend *v.* Estes, 51 Cal 134; Nodine *v.* Wright, 37 Ore. 411, 61 Pac. 734.

34. **U. S.** — Carpenter *v.* Robinson, 1 Holmes 67, 5 Fed. Cas. No. 2,431. **Minn.** — Clark *v.* Stanton, 24 Minn. 232. **N. Y.** — Matter of Townsend, 14 Daly 76. **N. C.** — Tomlinson *v.* Claywell, 57 N. C. 317. **Tex.** — Hunter *v.* Hubbard, 26 Tex. 537.

35. **He may sue to set aside a sale** upon the foreclosure of a mortgage executed by him prior to the assignment. Delaware & L. R. Co. *v.* Scranton, 34 N. J. Eq. 429. But he cannot sue to enforce a contract made with the mortgagee after the assignment. Monteith *v.* Hogg, 17 Ore. 270, 20 Pac. 327.

But he cannot sue for the conversion of the assigned property. Meyers *v.* Briggs, 11 R. I. 180.

36. Ashton *v.* Jones, 14 Neb. 426, 16 N. W. 434.

37. **Kan.** — Cox Mfg. Co. *v.* August, 51 Kan. 61, 32 Pac. 636. **Minn.** Winona First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. 799. **Pa.** — Holland *v.* Atzerodt, 1 Walk. 237. **S. D.** Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397. **Wis.** — Keith *v.* Armstrong, 65 Wis. 225, 26 N. W. 445.

Contra. — Chandler *v.* Nash, 5 Mich. 409. See also Price *v.* Reed, 20 Mich. 72. See the title "**Attachment.**"

38. Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397.

39. Ashton *v.* Jones, 14 Neb. 426, 16 N. W. 434.

40. Cleveland Coal Co. *v.* Sloan, 90 Ky. 308, 14 S. W. 279. Roby *v.* Meyer, 84 Tex. 386, 19 S. W. 557; Feeheimer *v.* Ball, 1 White & W. Civ. Cas. (Tex.) § 766.

ASSIGNMENTS

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CROSS-REFERENCES:

Assignment for the Benefit of Creditors;
Banks and Banking;
Bills and Notes;
Survival of Actions.

I. REMEDIES. — A. At Law. — **1. In General.** — By the early common law rule choses in action were not assignable, and consequently an assignee in an attempted assignment acquired no rights at law.[1] In equity, however, the assignee was regarded as the beneficial owner and his rights were recognized and protected.[2]

1. **Non-Assignable at Common Law.** The statement in the text is so generally established that exhaustive citation of authorities in support of it is unnecessary. The following cases are typical and state the rule with the reasons for it: **U. S.** — Tiernan *v.* Jackson, 5 Pet. 580, 8 L. ed. 234; Joseph Dixon Crucible Co. *v.* Paul, 167 Fed. 784, 93 C. C. A. 204. **Ala.** — Price *v.* Talley's Admr., 18 Ala. 21. **Ill.** — Olds *v.* Cummings, 31 Ill. 188. **Mass.** — Coolidge *v.* Ruggles, 15 Mass. 387. **Mo.** Isenhour *v.* Barton County, 190 Mo. 163, 88 S. W. 759. **N. Y.** — Thallhimer *v.* Brinckerhoff, 3 Cow. 623, 15 Am. Dec. 308. **Ore.** — Little *v.* Portland, 26 Ore. 235, 242, 37 Pac. 911. **Va.** — Stebbins *v.* Bruce, 80 Va. 389. **Eng.** — Wright *v.* Wright, 1 Ves. Sr. 409, 27 Eng. Reprint 1111. **Can.** — Eakins *v* Gawley, 33 U. C. Q. B. 178.

2. **Assignee Protected in Equity.** — **U. S.** — Union Tr. Co. *v.* Bulkeley, 150 Fed. 510, 80 C. C. A. 328; *In re* MaCauley, 158 Fed. 322; Mitchell *v.* Great Works Mill. Co., 2 Story 648, 17 Fed. Cas. No. 9,662. **Ala.** — Goodwyn *v.* Lloyd, 8 Port. 237. **Ill.** — Pearson's Exrs. *v.* Luecht, 199 Ill. 475, 65 N. E. 363; North Chicago St. R. Co. *v.* Ackley, 58 Ill. App. 572. **Ind.** — Slaughter *v.* Foust, 4 Blackf. 379. **Ky.** — Brenckenridge *v.* Churchill, 3 J. J. Marsh. 11. **Md.** — National Bank *v.* Baltimore, etc. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321. **Mass.** — Sawyer *v.* Cook, 188 Mass. 163, 74 N. E. 356. **Miss.** — Scott *v.* Metcalf, 13 Smed. & M. 563. **Mo.** — Dobyns *v.*

At an early date courts of law, following the rule in equity, also recognized assignments, and now universally protect[3] and make available the rights of assignees.[4] The protection thus afforded is

McGovern, 15 Mo. 662. **N. J.** — Sullivan *v.* Visconti, 68 N. J. L. 543, 53 Atl. 598; Cogan *v.* Conover Mfg. Co., 69 N. J. Eq. 358, 60 Atl. 408; Sperry, etc. Co. *v.* Hertzberg, 69 N. J. Eq. 264, 60 Atl. 368. **N. Y.** — Holmes *v.* Evans, 129 N. Y. 140, 29 N. E. 233. **Pa.** — Kountz *v.* Kirkpatrick, 72 Pa. 376, 13 Am. Rep. 687; Trexler *v.* Kuntz, 36 Pa. Super. 352 (holding that an entirely new title in equity arises, independent of the legal title of the assignor). **Tenn.** — Bradford *v.* Montgomery Furn. Co., 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. 979. **Tex.** — Campbell *v.* J. E. Grant Co., 36 Tex. Civ. App. 641, 82 S. W. 794. **Eng.** — Townshend *v.* Windham, 2 Ves. 1, 28 Eng. Reprint 1; Wright *v.* Wright, 1 Ves. Sr. 409, 27 Eng. Reprint 1111; Sq· ib *v.* Wyn, 1 P. Wms, 378, 24 Eng. Reprint 432; Tolhurst *v.* Associated Portland Cement Mnfrs. (1903) App. Cas. 414.

Origin of the Equity Rule. — "This equitable modification of the ancient common-law rule was the outgrowth of a commercial era, made necessary to adapt it to the condition of a trading people." *Per* Moore, J., in Little *v.* Portland, 26 Ore. 235, 242, 37 Pac. 911.

3. **Assignee Protected.** — **U. S.** — Welch *v.* Mandeville, 1 Wheat. 233, 4 L. ed. 79. **Ill.** — Hughes *v.* Trahern, 64 Ill. 48; Fitzpatrick *v.* Beatty, 6 Ill. 454. **Me.** — Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221. **N. H.** — Sanborn *v.* Little, 3 N. H. 539. **N. Y.** — Allen *v.* Hudson River Mut. Ins. Co., 19 Barb. 442; Boynton *v.* Clinton, etc. Mut. Ins. Co., 16 Barb. 254; Eels *v.* Finch, 5 Johns. 193. **Pa.** — Buchanan *v.* Taylor, Add. 155. **Vt.** — Halloran *v.* Whitcomb, 43 Vt. 306; Blin *v.* Pierce, 20 Vt. 25. **Va.** Mackie *v.* Davis, 2 Wash. 219, 1 Am. Dec. 482. **W. Va.** — Clarke *v.* Hogeman, 13 W. Va. 718.

4. **Assignee's Rights Enforceable at Law.** — **U. S.** — Platt *v.* Jerome, 19 How. 384, 15 L. ed. 623; Winchester *v.* Hackley, 2 Cranch 342, 2 L. ed. 299; Field *v.* Biddle, 2 Dall. 171, 1 L. ed. 335; Inglis *v.* Inglis, 2 Dall. 45, 1 L. ed. 282; McCullum *v.* Coxe, 1 Dall. 139, 1 L. ed. 72; Wheeler *v.* Hughes, 1 Dall. 23, 1 L. ed. 20; Greene *v.* Darling, 5 Mason 201, 10 Fed. Cas. No. 5,765; Corser *v.* Craig, 1 Wash. C. C. 624, 6 Fed. Cas. No. 3,255; Campbell *v.* Hamilton, 4 Wash. C. C. 92, 4 Fed. Cas. No. 2,359; Bholen *v.* Cleveland, 5 Mason 174, 3 Fed. Cas. No. 1,381. **Conn.** — Bishop *v.* Holcomb, 10 Conn. 444; Camp *v.* Tompkins, 9 Conn. 545; Lyon *v.* Summers, 7 Conn. 399; Colbourn v. Rossiter, 2 Conn. 503. **Ga.** — Sheftall *v.* Clay, R. M. Charlt. 7. **Ill.** — Morris *v.* Cheney, 51 Ill. 451; Mansfield *v.* Hoagland, 46 Ill. 359; Hodson *v.* McConnel, 12 Ill. 170; Chapman *v.* Shattuck, 8 Ill. 49; Creighton *v.* Hyde Park, 6 Ill. App. 272. **Ky.** — Talbot *v.* Cook, 7 T. B. Mon. 438; Clark *v.* Boyd, 6 T. B. Mon. 293; Rawlins *v.* Timberlake, 6 T. B. Mon. 225; Harrison *v.* Burgess, 5 T. B. Mon. 418; Sharp *v.* Eccles, 5 T. B. Mon. 67; M'Mormac *v.* Smith, 3 T. B. Mon. 429; Armstrong *v.* Flora, 3 T. B. Mon. 42; Schooling *v.* M'Gee, 1 T. B. Mon. 232; Robbins *v.* Holley, 1 T. B. Mon. 191. **La.** — Carlin *v.* Durmartrait, 8 Mart. (N. S.) 212. **Me.** Moody *v.* Towle, 5 Me. 415; Swett *v.* Green, 4 Me. 384; Robbins *v.* Bacon, 3 Me. 346; Clark *v.* Rogers, 2 Me. 143; Dunning *v.* Sayward, 1 Me. 366. **Md.** — Wallis *v.* Dilley, 7 Md. 237; Owings *v.* Low, 5 Gill & J. 83; Green *v.* Johnson, 3 Gill & J. 389. **Mass.** — Osborne *v.* Jordan, 3 Gray 277; Palmer *v.* Merrill, 6 Cush. 282, 52 Am. Dec. 782; Sargent *v.* Essex Marine R. Corp., 9 Pick. 202; Sprague *v.* Baker, 17 Mass. 589; Jenkins *v.* Brewster, 14 Mass. 291; Skinner *v.* Somes, 14 Mass. 107; Jones *v.* Witter, 13 Mass. 304; Cutts *v.* Perkins, 12 Mass. 206; Crocker *v.* Whitney, 10 Mass. 316; Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72; Boylston *v.* Greene, 8 Mass. 465; Gould *v.* Newman, 6 Mass. 239; Andrews *v.* Herring, 5 Mass. 210; Perkins *v.* Parker, 1 Mass. 117. **Miss.** — Tully *v.* Herrin, 44 Miss. 626; Tombigby R. Co. *v.* Bell, 7 How. 216; Fitch *v.* Stamps, 6 How. 487. **Mo.** — Loewenberg *v.* DeVoigne (Mo. App.), 123 S. W. 99. **N. H.** — Garland *v.* Harrington, 51 N. H. 509; Conway *v.* Cutting, 51 N. H. 409; Thompson *v.* Emery, 27 N. H. 269;

found in the refusal of a court of law to recognize a release by the assignor of the assigned chose subsequent to the assignment,[5] or in disallowing the debtor's plea of payment[6] or set-off,[7] after notice of the assignment; or in protecting the assignee against garnishment process by a creditor of the assignor,[8] or in permitting the assignee to enforce the chose in the name of the assignor.[9]

Duncklee *v.* Greenfield Steam Mill Co., 23 N. H. 245; Gordon *v.* Drury, 20 N. H. 353; Barrett *v.* Barron, 13 N. H. 150; Farnsworth *v.* Sweet, 5 N. H. 267; Sanborn *v.* Little, 3 N. H. 539; Sumner *v.* Stewart, 2 N. H. 39. **N. J.** — Parsons *v.* Woodward, 22 N. J. L. 196; Sloan *v.* Summers, 14 N. J. L. 509; Belton *v.* Gibbon, 12 N. J. L. 76; Barrow *v.* Bispham, 11 N. J. L. 110. **N. Y.** Thalimer *v.* Brinkerhoff, 20 Johns. 386; Briggs *v.* Dorr, 19 Johns. 95; Henry *v.* Brown, 19 Johns. 49; Dawson *v.* Coles, 16 Johns. 51; Martin *v.* Hawks, 15 Johns. 405; Anderson *v.* VanAlen, 12 Johns. 343; Raymond *v.* Squire, 11 Johns. 47; Tuttle *v.* Bebee, 8 Johns. 152; Andrews *v.* Beecher, 1 Johns. Cas. 411; Johnson *v.* Bloodgood, 1 Johns. Cas. 51; Wardell *v.* Eden, Col. & C. Cas. 137. **Ohio.** — M'Cutchen *v.* Keith, 2 Ohio 262; Clark *v.* Boyd, 2 Ohio 56; Numlin *v.* Westlake, 2 Ohio 24. **Pa.** — Kountz *v.* Kirkpatrick, 72 Pa. 376, 385; Ramsey's Appeal, 2 Watts 228; Metzgar *v.* Metzgar, 1 Rawle 227; Boulden *v.* Hebel, 17 Serg. & R. 312; Aldricks *v.* Higgins, 16 Serg. & R. 212; Brindle *v.* McIlvaine, 9 Serg. & R. 74; Morgan *v.* Bank of North America, 8 Serg. & R. 73, 11 Am. Dec. 575; Bury *v.* Hartman, 4 Serg. & R. 175; Solomon *v.* Kimmel, 5 Binn. 232; Steele *v.* Phoenix Ins. Co., 3 Binn. 306; Canby *v.* Ridgway, 1 Binn. 496; Rundle *v.* Ettwein, 2 Yeates 23; Stevens *v.* Stevens, 1 Ashm. 190; Wistar *v.* Walker, 2 Browne 166. **S. C.** — Smith *v.* Lyons, Harp. 334; Stoney *v.* McNeill, Harp. 156; Wadsworth *v.* Griswold, Harp. 17; Ware *v.* Key, 2 McCord 373; Farr *v.* Hemmingway, 2 Treadw. 753. **Vt.** — Stiles *v.* Farrar, 18 Vt. 444; Titchout *v.* Cilley, 3 Vt. 415; Lampson *v.* Fletcher, 1 Vt. 168, 18 Am. Dec. 676; Strong *v.* Strong, 2 Aik. 373. **Va.** — Stebbins *v.* Bruce, 80 Va. 389. **Wash.** — Dickerson *v.* Spokane, 26 Wash. 292, 66 Pac. 381. **W. Va.** — Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555. **Eng.** Master *v.* Miller, 4 T. R. 320, 340, 100 Eng. Reprint 1042.

5. **Release by Assignor Ineffective. U. S.** — Welch *v.* Mandeville, 1 Wheat. 233, 4 L. ed. 79. **Colo.** — Fassett *v.* Mulock, 5 Colo. 466. **Ky.** — Marr *v.* Hanna, 7 J. J. Marsh. 642, 23 Am. Dec. 449. **Mass.**—St. Johns *v.* Charles, 105 Mass. 262; Cutler *v.* Haven, 8 Pick. 489; Eastman *v.* Wright, 6 Pick. 316; Parker *v.* Grout, 11 Mass. 157, note. **Miss.** — Parker *v.* Kelly, 10 Smed. & M. 184. **Neb.** — Lipp *v.* South Omaha Land Syndicate, 24 Neb. 692, 40 N. W. 129. **N. H.** — Duncklee *v.* Greenfield Steam Mill Co., 23 N. H. 245; Webb *v.* Steele, 13 N. H. 230. **N. Y.** — Wheeler *v.* Wheeler, 9 Cow. 34; Briggs *v.* Dorr, 19 Johns. 95; Eels *v.* Finch, 5 Johns, 193. **Vt.** — Lampson *v.* Fletcher, 1 Vt. 168, 18 Am. Dec. 676.

6. **Md.** — Shriner *v.* Lamborn, 12 Md. 170. **Miss.** — Tombigbee R. Co. *v.* Bell, 7 How. 216. **N. Y.** — Hochberger *v.* Ludvigh, 63 Misc. 313, 116 N. Y. Supp. 696 (assignee permitted to sue the receiver of the assignor to whom the payment had been made); Ten Broeck *v.* DeWitt, 10 Wend. 617.

7. Pass *v.* McRhea, 36 Miss. 143; Bradt *v.* Koon, 4 Cow. (N. Y.) 416; Anderson *v.* Van Alen, 12 Johns. (N. Y.) 343.

8. **Garnishment or Attachment. — Ark.** — Campbell *v.* Sneed, 9 Ark. 118. **Colo.** — Chamberlin *v.* Gilman, 10 Colo. 94, 14 Pac. 107. **Ga.** — Haas *v.* Old Nat. Bank, 91 Ga. 307, 18 S. E. 188. **Ill.** — Savage *v.* Gregg, 150 Ill. 161, 37 N. E. 312; Dressor *v.* McCord, 96 Ill. 389; Morris *v.* Cheney, 51 Ill. 451; Carr *v.* Waugh, 28 Ill. 418; Dehner *v.* Helmbacher Forge & R. Mills, 7 Ill. App. 47. **Mass.** — Gardner *v.* Hoeg, 18 Pick. 168; Willard *v.* Sturtevant, 7 Pick. 193. **Tenn.** — Johnson *v.* Irby, 8 Humph. 654.

9. See *infra*, I, A, 2.

2. Actions in Name of Assignor. — In following the rule of equity and making assignments effective, courts of law do not consider the chose itself as capable of assignment. The legal title is regarded as still remaining in the assignor; the assignment, however, is treated as in the nature of a declaration of a trust by the assignor for the benefit of the assignee,[10] and confers upon the assignee an authority to bring an action at law in the name of the assignor, the holder of the legal title, and reduce the chose to possession.[11] Therefore, unless the rule is modified by statute,[12] or unless the chose is assignable at law,[13] or unless the right represented by the chose is equitable in its nature and cognizable only in equity,[14] the assignee

10. **Assignment a Declaration of Trust.** — **Ill.** — Chapman *v.* Shattuck, 8 Ill. 49; Phillips *v.* Wilson, 25 Ill. App. 427. **Mass.** — Foss *v.* Lowell Five Cents Savings Bank, 111 Mass. 285; Eastman *v.* Wright, 6 Pick. 316. See also Mosher *v.* Allen, 16 Mass. 451. **Mich.** Park *v.* Toledo, etc. R. Co., 41 Mich. 352, 1 N. W. 1032; Ellis *v.* Secor, 31 Mich. 185, 18 Am. Rep. 178. **N. J.** — Sullivan *v.* Visconti, 68 N. J. L. 543, 53 Atl. 598. **N. Y.** — Brown *v.* Feeter, 7 Wend. 301; Worden *v.* Orange County Bank, 2 Wend. 245. **Pa.** — Tritt *v.* Colwell, 31 Pa. 228; Pierce *v.* McKeehan, 3 Pa. 136, 45 Am. Dec. 635; Hartman *v.* Dowdel, 1 Rawle 279; Bury *v.* Hartman, 4 Serg. & R. 175. **Tenn.** Johnson *v.* Donohue, 113 Tenn. 446, 83 S. W. 360; Morrison *v.* Deaderick, 10 Humph. 342. **Can.** — Ham *v.* Ham, 6 U. C. C. P. 37.

11. **Ala.** — Haden *v.* Walker, 5 Ala. 860. **Conn.** — Smith *v.* Russell, 17 Conn. 105. **Ill.** — McKinney *v.* Alois, 14 Ill. 33; Orr *v.* Thompson, 9 Ill. 451; Phillips *v.* Wilson, 25 Ill. App. 427. **Ia.** — Roberts *v.* Smith, Morris 426. **Ky.** — Cobb *v.* Thompson, 1 A. K. Marsh. 507. **Me.** — Matherson *v.* Wilkinson, 79 Me. 159, 8 Atl. 684; Ballard *v.* Greenbush, 24 Me. 336. **Md.** — McNulty *v.* Cooper, 3 Gill & J. 214. **Mass.** — Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285; Riley *v.* Taber, 9 Gray 372; Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319; Amherst Academy *v.* Cowls, 6 Pick. 427, 17 Am. Dec. 387. **N. J.** — Parsons *v.* Woodward, 22 N. J. L. 196; Sloan *v.* Summers, 14 N. J. L. 509. **N. C.** — Waterman *v.* Williamson, 35 N. C. 198. **Tenn.** — East Tennessee, etc. R. Co. *v.* Henderson, 1 Lea 1; Simpson *v.* Moulden, 3 Coldw. 429. **Tex.** — Morris *v.* The Schooner Leona, 62 Tex. 35. **Eng.** — Pickford *v.* Ewington, 4 Dowl. P. C. 453; Winch *v.* Keeley, 1 T. R. 619, 99 Eng. Reprint 1284.

The assignee is entitled to all the remedies available to his assignor. **U. S.** — Hartford Fire Ins. Co. *v.* Erie R. Co., 172 Fed. 899, assignor's right to sue in federal courts. **Mich.** — Midland County Sav. Bank *v.* T. C. Prouty Co., 158 Mich. 656, 123 N. W. 549, 133 Am. St. Rep. 401, vendor's lien. **N. C.** — Anders *v.* Gardner, 151 N. C. 604, 66 S. E. 665, injunction against breach of the assigned contract.

The scope of the assignee's remedies is usually no greater than that of his assignor. Sullivan *v.* Ayer, 174 Fed. 199 (where the assignee was held to be under the same disability as his assignor in suing in the federal courts). An assignee, however, who is entitled to sue in his own name may pursue remedies unavailable to his assignor. Hartford Fire Ins. Co. *v.* Erie R. Co., 172 Fed. 899 (assignee of several claims amounting in the aggregate sufficient to give the court jurisdiction); Boyce *v.* Gordon, 11 Cal. App. 771, 106 Pac. 264 (assignee of a partnership claim may sue on it although the partnership could not).

12. See *infra*, I, C.

13. **Covenant To Pay Rent.** — Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586; Wineman *v.* Hughson, 44 Ill. App. 22; Van Rensselaer *v.* Read, 26 N. Y. 558; Willard *v.* Tillman, 2 Hill (N. Y.) 274; Demarest *v.* Willard, 8 Cow. (N. Y.) 206.

If the obligation is negotiable, the action must be in the assignee's name. Neyfong *v.* Wells, Hard. (Ky.) 561; Mosher *v.* Allen, 16 Mass. 451. See also the title "Bills and Notes."

14. **Assignee of Equitable Chose.** —

must, when enforcing the assigned chose at law, proceed in the name of the assignor.[15]

Ala. — Powell *v.* Powell, 10 Ala. 900; Graham *v.* Abercrombie, 8 Ala. 552. Ill. — Olds *v.* Cummings, 31 Ill. 188; Dixon *v.* Buell, 21 Ill. 203. Ind. — Slaughter *v.* Foust, 4 Blackf. 379. Me. Moor *v.* Veazie, 32 Me. 343, 52 Am. Dec. 655. Mass. — Bigelow *v.* Willson, 1 Pick. 485. Mo. — Dobyns *v.* McGovern, 15 Mo. 662. S. C. — Hopkins *v.* Hopkins, 4 Strobh. Eq. 207, 53 Am. Dec. 663. Vt. — Hagar *v.* Buck, 44 Vt. 285, 8 Am. Rep. 368.

15. U. S. — Glenn *v.* Marbury, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. ed. 790; New York Guar. etc. Co. *v.* Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. ed. 484; Tierman *v.* Jackson, 5 Pet. 580, 8 L. ed. 234; Winchester *v.* Hackley, 2 Cranch 342, 2 L. ed. 299; Cummings *v.* Lynn, 1 Dall. 444, 1 L. ed. 215; Guthrie *v.* White, 1 Dall. 268, 1 L. ed. 131; Joseph Dixon Crucible Co. *v.* Paul, 167 Fed. 784, 93 C. C. A. 204; Nederland L. Ins. Co. *v.* Hall, 84 Fed. 278, 55 U. S. App. 598, 27 C. C. A. 390; Massachusetts Constr. Co. *v.* Kidd, 142 Fed. 285. Ala. — Snead *v.* Bell, 142 Ala. 449, 38 So. 259; McNutt *v.* King, 59 Ala. 597. Ark. — Anderson *v.* Lewis, 10 Ark. 304; Buckner *v.* Greenwood, 6 Ark. 200. Conn. — Smith *v.* Russell, 17 Conn. 105; Sanford *v.* Nichols, 14 Conn. 324; Lyon *v.* Summers, 7 Conn. 399. Del. — Kinniken *v.* Dulaney, 5 Harr. 384. D. C. — Karrick *v.* Wetmore, 22 App. Cas. 487. Ga. — Durant Lumb. Co. *v.* Sinclair, etc. Lumb. Co., 2 Ga. App. 209, 58 S. E. 485. Ill. — Brownell Imp. Co. *v.* Critchfield, 197 Ill. 61, 64 N. E. 332; City of Carlyle *v.* Carlyle Water, etc. Co., 140 Ill. 445, 29 N. E. 556; Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586; Wey *v.* Dooley, 134 Ill. App. 244; Gray *v.* Bever, 122 Ill. App. 1; Independent Credit Co. *v.* South Chicago City R. Co., 121 Ill. App. 595; Mutual L. Ins. Co. *v.* Allen, 113 Ill. App. 89; Congress Const. Co. *v.* Parson, etc. Co., 101 Ill. App. 279. Ia. — McLott *v.* Savery, 11 Iowa 323; Howey *v.* Willtrout, 10 Iowa 105; Farwell *v.* Tyler, 5 Iowa 535. Ky. — Lee *v.* Chambers, 3 J. J. Marsh. 506; Boyd *v.* Snelling, 7 T. B. Mon. 416. La. — Dugue *v.* Levy, 120 La. 369, 45 So. 280. Me. — McDonald *v.* Laughlin, 74 Me. 480; Smalley *v.* Wight, 44 Me. 442, 96 Am. Dec. 112; Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221. Mass. — Moore *v.* Spiegel, 143 Mass. 413, 9 N. E. 827; Rogers *v.* Union Stone Co., 134 Mass. 31; Hunt *v.* Mann, 132 Mass. 53; Earl *v.* Bickford, 6 Allen 549, 83 Am. Dec. 651; Foss *v.* Nutting, 14 Gray 484; Hay *v.* Green, 12 Cush. 282; Palmer *v.* Merrill, 6 Cush. 282, 52 Am. Dec. 782; Hart *v.* Western R. Corp., 13 Met. 99, 46 Am. Dec. 719; Dyer *v.* Homer, 22 Pick. 253; Gibson *v.* Cooke, 20 Pick. 15, 32 Am. Dec. 194; Amherst Academy *v.* Cowls, 6 Pick. 427, 17 Am. Dec. 387; Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232. Mich. — Lamson *v.* Marshall, 133 Mich. 250, 95 N. W. 78. Miss. — Taylor *v.* Reese, 44 Miss. 89; Lee *v.* Gardiner, 26 Miss. 521; Oldham *v.* Ledbetter, 1 How. 43, 26 Am. Dec. 690. Mo. — Isenhour *v.* Barton County, 190 Mo. 163, 88 S. W. 759. N. H. — Page *v.* Thompson, 43 N. H. 373; Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307. N. J. — Sullivan *v.* Viscounti, 68 N. J. L. 543, 53 Atl. 598; Bouvier *v.* Baltimore, etc. R. Co., 67 N. J. L. 281, 51 Atl. 781, 60 L. R. A. 750; Todd *v.* Meding, 56 N. J. Eq. 83, 38 Atl. 349. N. Y. — Ontario Bank *v.* Mumford, 2 Barb. Ch. 596; Chase *v.* Chase, 1 Paige 198; Wheeler *v.* Wheeler, 9 Cow. 34; Thalimer *v.* Brinkerhoff, 20 Johns. 386; Ford *v.* Stuart, 19 Johns. 342. Ohio. — Townsend *v.* Carpenter, 11 Ohio 21. Pa. — Maginn *v.* Dollar Sav. Bank, 131 Pa. 362, 18 Atl. 901. R. I. — Clarke *v.* Thompson, 2 R. I. 146. Tenn. — Davis, etc. Bldg. Co. *v.* Caigle, 53 S. W. 240; East Tennessee, etc. R. Co. *v.* Henderson, 1 Lea 1; Simpson *v.* Moulden, 3 Coldw. 429; Mt. Olivet Cem. Co. *v.* Shubart, 2 Head 116; Hobbs *v.* Memphis Ins. Co., 1 Sneed 444; Marney *v.* Byrd, 11 Humph. 95. Vt. — Hagar *v.* Buck, 44 Vt. 285, 290, 8 Am. Rep. 368; Halloran *v.* Whitcomb, 43 Vt. 306. Va. — Tyler *v.* Ricamore, 87 Va. 466, 12 S. E. 799; Garland *v.* Richeson, 4 Rand. 266. W. Va. — Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555. Eng. — Winch *v.* Keeley, 1 T. R. 619, 99 Eng. Reprint 1284;

a. *Objection by Debtor.* — Where the assignee sues in the name of the assignor, the debtor cannot defend on the ground that the assignor is not beneficially interested in the recovery,[16] inasmuch as the action is founded upon the original chose, the legal title to which is still in the nominal plaintiff; nor can he question the validity of the assignment, as that is a collateral matter.[17] He may, however, take issue on the alleged beneficial interest of the party seeking to enforce the chose in the assignor's name.[18]

b. *Control of Action by Assignee.* — The authority of the assignee includes the right of entire control of the action,[19] and to the use of the assignor's name,[20] even against his objection.[21]

c. *Protection of Assignor.* — The assignor, however, is entitled to indemnity against costs.[22]

Rolt *v.* White, 31 Beav. 520, 54 Eng. Reprint 1240. **Can.**—Dennison *v.* Knox, 24 U. C. Q. B. 119; Ham *v.* Ham, 6 U. C. C. P. 37; Walsh *v.* Hart, 3 Nova Scotia 400.

16. **Ill.** — Chamberlain *v.* Fernbach, 118 Ill. App. 145. **Mo.** — Labeaume *v.* Sweeney, 17 Mo. 153. **N. Y.** — Raymond *v.* Johnson, 11 Johns. 488; Alsop *v.* Caines, 10 Johns. 396. **Pa.** — Memphis, etc. R. Co. *v.* Wilcox, 48 Pa. 161; Hamilton *v.* Brown, 18 Pa. 87; Armstrong *v.* Lancaster, 5 Watts 68, 30 Am. Dec. 293. **Tenn.** — See Trezevant *v.* McNeal, 2 Humph. 352.

17. **Fla.** — Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526. **Ga.** — Gilmore *v.* Bangs, 55 Ga. 403. **Ill.** — Chamberlain *v.* Fernbach, 118 Ill. App. 145. **Mass.** — Ensign *v.* Kellogg, 4 Pick. 1. **N. H.** — State *v.* Boston & M. R. Co., 58 N. H. 510. **Pa.** — Hamilton *v.* Brown, 18 Pa. 87; Blanchard *v.* Com., 6 Watts 309.

18. The right of a person claiming to be the equitable assignee to use the name of the person holding the legal title, in a suit on a chose in action, may be inquired into, and it may be shown that such person is not the party beneficially interested. Field *v.* Weir, 28 Miss. 56. See Wilson *v.* Turk, 10 Yerg. 247; Cage *v.* Foster, 5 Yerg. 261, 26 Am. Dec. 265; Lynn *v.* Glidwell, 8 Yerg. 1, as to the practice in Tennessee. But the assignment being established, the debtor cannot object that the assignee had not procured the assignor's consent to use his name. Rockwood *v.* Brown, 1 Gray (Mass.) 261. See further *infra*, III, C, 3.

19. **U. S.** — Mandeville *v.* Welch, 5 Wheat. 277, 5 L. ed. 87; Welch *v.* Mandeville, 1 Wheat. 233, 4 L. ed. 79. **Ky.** Marr *v.* Hanna, 7 J. J. Marsh. 642, 23 Am. Dec. 449. **Me.** — Southwick *v.* Hopkins, 47 Me. 362. **Miss.** — Anderson *v.* Miller, 7 Smed. & M. 586. **N. H.** — Gordon *v.* Drury, 20 N. H. 353. **N. C.** — Deaver *v.* Eller, 42 N. C. 24; Arrington *v.* Arrington, 2 N. C. 1. **Tenn.** — Wright *v.* McLemore, 10 Yerg. 234. **Tex.** — McFadin *v.* MacGreal, 25 Tex. 73. **Vt.** Halloran *v.* Whitcomb, 43 Vt. 306.

20. See cases cited under I, A, 2, *supra*.

Compelling Assignor's Consent. — Anderson *v.* Miller, 7 Smed. & M. (Miss.) 586. See, however, Ward *v.* Audland, 8 Beav. 201, 50 Eng. Reprint 79.

21. **U. S.** — Massachusetts Constr. Co. *v.* Kidd, 142 Fed. 285. **Ark.**—Clark *v.* Moss, 11 Ark. 736. **D. C.** — Karrick *v.* Wetmore, 22 App. Cas. 487. **Mass.** — Walker *v.* Brooks, 125 Mass. 247; Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285; Riley *v.* Taber, 9 Gray 372; Bates *v.* Kempton, 7 Gray 382; Rockwood *v.* Brown, 1 Gray 261; Dennis *v.* Twitchell, 10 Met. 180; Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319; Dyer *v.* Homer, 22 Pick. 253; Jones *v.* Witter, 13 Mass. 304. **Tex.** — McFadin *v.* MacGreal, 25 Tex. 73. But see Allen *v.* Pannell, 51 Tex. 165. **Va.** But see Moseley *v.* Boush, 4 Rand. 392 (right of assignee not unlimited). **Eng.** — Portarlington *v.* Graham, 5 Sim. 416, 58 Eng. Reprint 393. But see Chambers *v.* Donaldson, 9 East 471, 103 Eng. Reprint 653; Spicer *v.* Todd, 2 Tyrw. 172, 1 L. J. Exch. 59.

22. **Ill.** — Dazey *v.* Mills, 10 Ill. 67;

d. *When Assignor Dies.* — The death of the assignor does not destroy the assignee's rights. He may use the name of the assignor's personal representative,[23] irrespective of the latter's consent.[24]

e. *When Assignor Becomes Bankrupt.* — The right of the assignee to sue in the assignor's name is not affected by the latter's bankruptcy occurring after the assignment.[25]

3. Actions in Name of Assignee. — a. *The Rule.* — In the absence of statutory authority[26] an assignee of a non-assignable chose cannot sue thereon at law in his own name.[27]

Henderson *v.* Welch, 8 Ill. 340; Chapman *v.* Shattuck, 8 Ill. 49; Creighton *v.* Hyde Park, 6 Ill. App. 272. **Me.** — Laws, 1874, c. 235; Wood *v.* Decoster, 66 Me. 542. **Mass.** — Walker *v.* Brooks, 125 Mass. 247; Foss *v.* Lowell Five Cents Savings Bank, 11[illegible] Mass. 285; Bates *v.* Kempton, 7 Gray 382; Rockwood *v.* Brown, 1 Gray 261; Dennis *v.* Twitchell, 10 Met. 180. **Miss.** — Anderson *v.* Miller, 7 Smed. & M. 586. **N. H.** — Gordon *v.* Drury, 20 N. H. 353; Farnsworth *v.* Sweet, 5 N. H. 267. **Pa.** — See Canby *v.* Ridgway, 1 Binn. 496. **Tex.** — Allen *v.* Pannell, 51 Tex. 165. **Eng.** — Turquand *v.* Fearon, L. R. 4 Q. B. D. 280.

In Harriman *v.* Hill, 14 Me. 127, it is said that care will be taken that the assignor is not prejudiced by the use of his name.

Liability for Abuse of Process. — It was held in Brown *v.* Feeter, 7 Wend. (N. Y.) 301, that the assignor was liable for any abuse of process in an action in his name. But see, *contra*, Park *v.* Toledo, etc. R. Co., 41 Mich. 352, 1 N. W. 1032.

23. **U. S.** — Suydam *v.* Ewing, 2 Blatchf. 359, 23 Fed. Cas. No. 13,655. **Ill.** — Orr *v.* Thompson, 9 Ill. 451; Phillips *v.* Wilson, 25 Ill. App. 427. **Mass.** — Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285; Cutts *v.* Perkins, 12 Mass. 206; Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72. **Tenn.** Smiley *v.* Bell, Mart. & Y. 378, 17 Am. Dec. 813.

24. Legatee of debt may sue in name of executor of will, if the executor does not object. Grover *v.* Grover, 24 Pick. (Mass.) 261, 35 Am. Dec. 319; Hayes *v.* Hayes, 45 N. J. Eq. 461, 17 Atl. 634.

Though the statute authorizes the assignee to sue in his own name, still he may sue in name of the assignor's personal representative. Phillips *v.* Wilson, 25 Ill. App. 427.

Where the assignor dies before action is commenced in his name, a statute, providing that a suit brought by one person for his own use in the name of another shall not abate on the death of the nominal party, does not authorize an assignee to institute an action in the name of the deceased assignor. Jenks *v.* Edwards, 6 Ala. 143; Karrick *v.* Wetmore, 22 App. Cas. (D. C.) 487. But in Lewis *v.* Austin, 144 Mass. 383, 11 N. E. 538, and in Denton *v.* Stephens, 32 Miss. 194, the action was begun in the name of the deceased assignor and an amendment was permitted substituting the personal representative. *Compare* Humphreys *v.* Irvine, 6 Smed. & M. (Miss.) 205.

25. **Me.** — Sawtelle *v.* Rollins 23 Me. 196. **Mass.** — Reed *v.* Paul, 131 Mass. 129. **Miss.** — Defrance *v.* Davis, Walk. 69. **N. H.** — Hayes *v.* Pike, 17 N. H. 534.

See also Congress Constr. Co. *v.* Farson, 199 Ill. 398, 65 N. E. 357; Smalley *v.* Taylor, 33 Tex. 668. But see Benoist *v.* Darby, 12 Mo. 196.

26. See *infra*, I, C. As to choses assignable at law, see the title "**Bills and Notes.**"

27. **Ala.** — Bohanan *v.* Thomas, 159 Ala. 410, 49 So. 308; Brown *v.* Chambers, 12 Ala. 697; Bunnell *v.* Magee, 9 Ala. 433; Black *v.* Everett, 5 Stew. & P. 60. **Fla.** — Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526; Kendig *v.* Giles, 9 Fla. 278; Hooker *v.* Gallagher, 6 Fla. 351. **Ill.** — Merchants Ins. Co. *v.* Union Ins. Co., 162 Ill. 172, 44 N. E. 409; Hughes *v.* Trabern, 64 Ill. 48; Peoria Scrap Iron Co. *v.* Cohen, 113 Ill. App. 30. **Ind.** — Reid *v.* Ross, 15 Ind. 265; Moore *v.* Ireland, 1 Ind. 531; Richardville *v.* Cummins, 5 Blackf. 48. **Ky.** Elliott *v.* Waring, 5 T. B. Mon. 338,

b *Apparent Exception. — Promise by Debtor.* — If either before or after the assignment[28] the debtor assents thereto and promises[29] to pay the assignee, then the assignor may bring an action in his own name, apparently on the new promise,[30] although the cases do

17 Am. Dec. 69. **Me.** — Myers *v.* York, etc. R. Co., 43 Me. 232. **Mass.**—Baker *v.* Seavey, 162 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475; Bridgham *v.* Tileston, 5 Allen 371; Riley *v.* Taber, 9 Gray 372; Skinner *v.* Somes, 14 Mass. 107. **N. J.** — Richardson *v.* Beaumont, 20 N. J. L. 578; Sharp *v.* Moore, 3 N. J. L. 413; Mulford *v.* French, 3 N. J. L. 54; Smock *v.* Taylor, 1 N. J. L. 177. **S. C.** — Smith *v.* Cook, 2 McMull. 58. See Matheson *v.* Crain, 1 McCord 219. **Wis.** — Rockwell *v.* Daniels, 4 Wis. 432.

28. **U. S.** —Tiernan *v.* Jackson, 5 Pet. 580, 8 L. ed. 234. **Me.** — Lang *v.* Fiske, 11 Me. 385. **N. H.** — Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

29. **Debtor's Promise Essential.** — **U. S.** — Tiernan *v.* Jackson, 5 Pet. 580, 8 L. ed. 234. **Fla.** — Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526; Kendig *v.* Giles, 9 Fla. 278. **Ill.** — City of Carlyle *v.* Carlyle Water, etc. Co., 140 Ill. 445, 29 N. E. 556; Gray *v.* Bever, 122 Ill. App. 1. **Me.** — Vose *v.* Treat, 58 Me. 378; Page *v.* Danforth, 53 Me. 174; Farnum *v.* Virgin, 52 Me. 576; Myers *v.* York, etc. R. Co., 43 Me. 232; Ballard *v.* Greenbush, 24 Me. 336; Warren *v.* Wheeler, 21 Me. 484. **Md.** — Barger *v.* Collins, 7 Har. & J. 213; Allstan's Exr. *v.* Constee's Exr., 4 Har. & J. 351. **Mass.** — Leach *v.* Greene, 116 Mass. 534; Foss *v.* Lowell Five Cents Sav. Bank, 11 Mass. 285; Foss *v.* Nutting, 14 Gray 484; Hay *v.* Green, 12 Cush. 282; Derby *v.* Sanford, 9 Cush. 263; Parkhurst *v.* Dickerson, 21 Pick. 307; Andover, etc. Turnpike Corp. *v.* Gould, 6 Mass. 42, 4 Am. Dec. 80. **Minn.**—Dean *v.* St. Paul & D. R. Co., 53 Minn. 504, 55 N. W. 628. **Mo.** —Walker *v.* Mauro, 18 Mo. 564. **N. H.** — Boyd *v.* Webster, 58 N. H. 336; Pierce *v.* Nashua Fire Ins. Co., 50 N. H. 297, 9 Am. Rep. 235; Barnes *v.* Union Mut. Fire Ins. Co., 45 N. H. 21; Shepherd *v* Union Mut. Fire Ins. Co., 38 N. H. 232; Thompson *v.* Emery, 27 N. H. 269; Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307. **N. J.** — Flanagan *v.* Camden Mut. Ins. Co., 25 N. J. L. 506. **N. Y.** — Jessel *v.* Williamsburg Ins. Co., 3 Hill 88; Dubois *v.* Doubleday, 9 Wend. 317; Weston *v.* Barker, 12 Johns. 276, 7 Am. Dec. 319; Hudson *v.* Reeve, 1 Barb. 89. **Pa.** — De Barry *v.* Withers, 44 Pa. 356; Horbach *v.* Huey, 4 Watts 455, 39 Am. Dec. 99. **R. I.** — Clarke *v.* Thompson, 2 R. I. 146. **Tenn.** — Smith *v.* Cottrel, 8 Baxt. 62; Flickey *v.* Loney, 4 Baxt. 169; Mt. Olivet Cem. Co. *v.* Shubert, 2 Head 116. **Tex.** — Ross *v.* Smith, 19 Tex. 171, 70 Am. Dec. 327; Rollison *v.* Hope, 18 Tex. 446; Texas & Pac. R. Co. *v.* Wright, 2 Wills. Civ. Cas., § 339. **Vt.** — Simonds *v.* Pierce, 51 Vt. 467; Allis *v.* Jewell, 36 Vt. 547; Wood *v.* Rutland, etc. Mut. F. Ins. Co., 31 Vt. 552. **W. Va.** — Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584. **Eng.** —Innes *v.* Dunlop, 8 T. R. 595, 101 Eng. Reprint 1565; Fenner *v.* Meares, 2 W. Bl. 1269, 96 Eng. Reprint 746; Jones *v.* Farrell, 1 De G. & J. 208, 215, 44 Eng. Reprint 703; *Ex parte* South, 3 Swanst. 392, 36 Eng. Reprint 907; Israel *v.* Douglas, 1 H. Bl. 239; Fairlie *v.* Denton, 8 B. & C. 395, 15 E. C. L. 246; Wilson *v.* Coupland, 5 B. & Ald. 228, 7 E. C. L. 77.

30. **Recovery on Debtor's Promise.** **U. S.** — Tiernan *v.* Jackson, 5 Pet. 580, 8 L. ed. 234; Nederland L. Ins. Co. *v.* Hall, 84 Fed. 278, 55 U. S. App. 598, 27 C. C. A. 390; Burke's Case, 13 Ct. Cl. 231. **Ill.** — City of Carlyle *v.* Carlyle, etc. Water Co., 140 Ill. 445, 29 N. E. 556; Townsend *v.* Gregory, 132 Ill. App. 192; Gray *v.* Bever, 122 Ill. App. 1. **Me.** — Warren *v.* Wheeler, 21 Me. 484; Smith *v.* Berry, 18 Me. 122; Lang *v.* Fiske, 11 Me. 385. **Md.** — Gordon *v.* Downey, 1 Gill 41; Barger *v.* Collins, 7 Har. & J. 213; Allstan *v.* Contee, 4 Har. & J. 351. **Mass.** — Burrows *v.* Glover, 106 Mass. 324; Derby *v.* Sanford, 9 Cush. 263; Bourne *v.* Cabot, 3 Met. 305. See also Wilson *v.* Hill, 3 Met. 66; Coolidge *v.* Ruggles, 15 Mass. 387. **N. H.** — Morse *v.* Bellows, 7 N. H. 549, 20 Am. Dec. 372; Wiggin *v.* Damrell, 4 N. H. 69; Currier *v.* Hodgdon, 3 N. H. 82. See

not always discriminate as to the basis of the assignee's action.[31]

Sufficiency of Promise. — By some cases it is held that the promise must be express;[32] by others that it may be implied.[33]

Consideration. — By the weight of authority no new consideration is necessary to support the promise.[34]

also Thompson *v.* Emery, 27 N. H. 269. **N. J.** — Flanagan *v.* Camden Mut. Ins. Co., 25 N. J. L. 506. **N. Y.** — Compton *v.* Jones, 4 Cow. 13; Weston *v.* Barker, 12 Johns. 276, 7 Am. Dec. 319; Ford *v.* Adams, 2 Barb. 349. **Pa.** DeBarry *v.* Withers, 44 Pa. 356. **R. I.** Clarke *v.* Thompson, 2 R. I. 146. **Tenn.** Mt. Olivet Cem. Co. *v.* Shubert, 2 Head 116. **Vt.** — Allis *v.* Jewell, 36 Vt. 547; Wood *v.* Rutland Mut. F. Ins. Co., 31 Vt. 552; Hodges *v.* Eastman, 12 Vt. 358. **W. Va.** — Wilt *v.* Huffman, 46 W. Va. 473, 33 S. E. 279; Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584. **Eng.** — Innes *v.* Dunlop, 8 T. R. 595, 101 Eng. Reprint 1565; Clarke *v.* Adair, cited in Master *v.* Miller, 4 T. R. 320, 343, 100 Eng. Reprint 1042; Fenner *v.* Meares, 2 W. Bl. 1269, 96 Eng. Reprint 746; Surtees *v.* Hubbard, 4 Esp. 203; Israel *v.* Douglas, 1 H. Bl. 239; Crowfoot *v.* Gurney, 9 Bing. 372, 23 E. C. L. 309; Hodgson *v.* Anderson, 3 B. & C. 842, 10 E. C. L. 247.

Recognition and Sufficiency of Assent.—U. S. — Winchester *v.* Hackley, 2 Cranch 342, 2 L. ed. 299. **Mo.** — St. Louis *v.* Clemens, 42 Mo. 69. **W. Va.** — Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

See also: **Va.** — White *v.* Chicago & N. W. R. Co., 124 N. W. 309. **Mo.** — St. Louis *v.* Rudolph, 36 Mo. 465. **Eng.** Surtees *v.* Hubbard, 4 Esp. 203.

31. Assignee's Option. — Where the maker of a non-negotiable instrument has specially promised to pay the assignee, the latter can either sue in his own name on the special promise or in the name of the payee on the note, but cannot sue in his own name on the note. Hatch *v.* Spearin, 11 Me. 354. See also Weston *v.* Penniman, 1 Mason 306, 29 Fed. Cas. No. 17,455; Kingsley *v.* New England Mut. F. Ins. Co., 8 Cush. (Mass.) 393; Clark *v.* Parker, 4 Cush. (Mass.) 361.

32. Me. — Cole *v.* Bodfish, 17 Me. 310; Hatch *v.* Spearin, 11 Me. 354. **Mass.** — Parkhurst *v.* Dickerson, 21 Pick. 307. **N. Y.** — Jessel *v.* Williamsburgh Ins. Co., 3 Hill 88 (holding a mere consent to assignment not sufficient); McCoon *v.* Biggs, 2 Hill 121 (promise by one of joint makers); Dubois *v.* Doubleday, 9 Wend. 317. **Tenn.** — Mt. Olivet Cem. Co. *v.* Shubert, 2 Head 116, promise by agent.

33. Ill. — Carlyle *v.* Carlyle Water, etc. Co., 140 Ill. 445, 29 N. E. 556; Townsend *v.* Gregory, 132 Ill. App. 192. **Md.** — Stewart *v.* Rogers, 19 Md. 98; Barger *v.* Collins, 7 Har. & J. 213. **Mich.** — Robinson *v.* Watson, 101 Mich. 466, 59 N. W. 811. **N. Y.** — Sears *v.* Patrick, 23 Wend. 528. **N. C.** — Nimocks *v.* Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268.

Promise Need Not Be in Writing. — Rollison *v.* Hope, 18 Tex. 446; Wilt *v.* Huffman, 46 W. Va. 473, 33 S. E. 279.

34. Me. — Warren *v.* Wheeler, 21 Me. 484; Smith *v.* Berry, 18 Me. 122. **Mass.** Buttrick Lumb. Co. *v.* Collins, 202 Mass. 413, 89 N. E. 138; Derby *v.* Sanford, 9 Cush. 263; Crocker *v.* Whitney, 10 Mass. 319. See also Skinner *v.* Somes, 14 Mass. 107. **N. H.** — Pierce *v.* Nashua Fire Ins. Co., 50 N. H. 297, 9 Am. Rep. 235; Edson *v.* Fuller, 22 N. H. 183; Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372; Currier *v.* Hodgdon, 3 N. H. 82. **Pa.** — DeBarry *v.* Withers, 44 Pa. 356. **R. I.** — Clark *v.* Thompson, 2 R. I. 146. **Vt.** — Stiles *v.* Farrar, 18 Vt. 444; Bucklin *v.* Ward, 7 Vt. 195; Moar *v.* Wright, 1 Vt. 57. See also Phalan *v.* Stiles, 11 Vt. 82. **W. Va.** — Bentley *v.* Standard Fire Ins. Co., 40 W. Va. 729, 23 S. E. 584. **Eng.** Innes *v.* Dunlop, 8 T. R. 595, 101 Eng. Reprint 1565.

Contra, Kendrick *v.* Glover, Ga. Dec. (pt. 1) 63; McKinney *v.* Alvis, 14 Ill. 33. See also Wharton *v.* Walker, 4 B. & C. 163, 10 E. C. L. 302; 1 Chit. Pl. 18, 96 Eng Reprint 746; Oble *v.* Dittlesfield, 1 Vent. 153, 86 Eng. Reprint 105; Forth *v.* Stanton, 1 Saund. 210, 85 Eng. Reprint 217; Fenner *v.* Meares, 2 W. Bl. 1269.

B. In Equity. — 1. In General. — Since courts of law recognize the rights of an assignee by permitting him to sue in the name of the assignor on the assigned chose,[35] resort to equity can be had only where the assignor can show there is no remedy or an inadequate remedy at law; as, for example, where the assigned chose is equitable in its nature and cognizable only by a court of equity;[36] or where the remedy at law on a chose, legal in its nature, is inadequate.[37] It has been held, however, in some jurisdictions, that an assignee having an equitable title to a legal chose may enforce it in equity notwithstanding he has also a legal remedy in the name of his assignor.[38] But by the weight of authority he cannot, except as just noted, come into equity relying upon his equitable rights until he is unable to enforce at law the legal rights of his assignor.[39]

35. Steele *v.* Frierson, 85 Tenn. 430, 3 S. W. 649; Shenandoah Val. R. Co. *v.* Miller, 80 Va. 821, 833. See also *infra*, I, B, 2; *supra*, I, A, 2.

36. **Equitable Chose Enforceable in Assignee's Name. — U. S.** — Bradford *v.* Williams, 4 How. 576, 11 L. ed. 1109; Lenox *v.* Roberts, 2 Wheat. 373, 4 L. ed. 264; Riddle *v.* Mandeville, 5 Cranch 322, 3 L. ed. 114; O'Shaughnessy *v.* Humes, 129 Fed. 953. **Ala.** — Moorer *v.* Moorer, 87 Ala. 545, 6 So. 289; Plowman *v.* Riddle, 14 Ala. 169, 48 Am. Dec. 92; Powell *v.* Powell, 10 Ala. 900; Graham *v.* Abercrombie, 8 Ala. 552. **Ark.** — Caldwell *v.* Meshew, 44 Ark. 564. **D. C.** — Young *v.* Kelly, 3 App. Cas. 296. **Fla.** — Sammis *v.* Wightman, 3 Fla. 10, 12 So. 526. **Ill.** Gleason, etc. Mfg. Co. *v.* Hoffman, 168 Ill. 25, 48 N. E. 143; Smith *v.* Brittenham, 109 Ill. 540; Olds *v.* Cummings, 31 Ill. 188; Dixon *v.* Buell, 21 Ill. 203; Frye *v.* State Bank, 10 Ill. 332. **Ind.** — Slaughter *v.* Foust, 4 Blackf. 379. **Ky.** — Blackerby *v.* Holton, 5 Dana 522. **Me.** — Moor *v.* Veazie, 32 Me. 343, 52 Am. Dec. 655; Haskell *v.* Hilton, 30 Me. 419; Moore *v.* Griffin, 22 Me. 355. **Md.** — Coale *v.* Mildred's Admr., 3 Har. & J. 278. **Mass.** — Murphy *v.* Marland, 8 Cush. 575; Ensign *v.* Kellogg, 4 Pick. 1; Bigelow *v.* Willson, 1 Pick. 485. **Mo.** — Dobyns *v.* McGovern, 15 Mo. 662. **N. Y.** — Hooker *v.* Eagle Bank, 30 N. Y 83, 86 Am. Dec. 351; Sedgwick *v.* Cleveland, 7 Paige 287; Gleason *v.* Gage, 7 Paige 121; Rogers *v.* Traders' Ins. Co., 6 Paige 583; Field *v.* Maghee, 5 Paige 539. **Ohio.** — Townsend *v.* Carpenter, 11 Ohio 21. **Pa.** — Trexler *v.* Kuntz, 36 Pa. Super. 352. **S. C.** — Hopkins *v.* Hopkins, 4 Strobh. Eq. 207, 53 Am. Dec. 663. **Tenn.** — Kramer *v.* Wood, 52 S. W. 1113; Steele *v.* Frierson, 85 Tenn. 430, 3 S. W. 649. **Tex.** — Heard *v.* Lockett, 20 Tex. 162; Ross *v.* Smith, 19 Tex. 171, 70 Am. Dec. 327. **Vt.** — Hagar *v.* Buck, 44 Vt. 285, 8 Am. Rep. 368. **Va.** — Shenandoah Val. R. Co. *v.* Miller, 80 Va. 821, 833. **Wis.** — Varney *v.* Bartlett, 5 Wis. 276.

37. **U. S.** — Bradford *v.* Williams, 4 How. 576, 11 L. ed. 1109; Lenox *v.* Roberts, 2 Wheat. 373, 4 L. ed. 264; Riddle *v.* Mandeville, 5 Cranch 322, 3 L. ed. 114; Pendleton *v.* Wambersie, 4 Cranch 73, 2 L. ed. 554. **D. C.** — Glenn *v.* Sothoron, 4 App. Cas. 125. **Ky.** — Gatewood *v.* Lyle, 5 T. B. Mon. 6; Cobb *v.* Thompson, 1 A. K. Marsh. 507; Beauchamp *v.* Davis, 3 Bibb 111. **Mass.** — Hobart *v.* Andrews, 21 Pick. 526. **Miss.** — Pearson *v.* Barlow, 35 Miss. 174, 72 Am. Dec. 121. **Pa.** — Watson *v.* McManus, 224 Pa. 430, 73 Atl. 931. **Tex.** — Bullion *v.* Campbell, 27 Tex. 653.

38. **Miss.** — Taylor *v.* Reese, 44 Miss. 93. **Mo.** — Dobyns *v.* McGovern, 15 Mo. 662. **Ohio.** — Townsend *v.* Carpenter, 11 Ohio 21. **Va.** — Winn *v.* Bowles, 6 Munf. 23. **W. Va.** — Dudley *v.* Barrett, 66 W. Va. 363, 66 S. E. 507.

39. **U. S.** — Glenn *v.* Marbury, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. ed. 790; New York Guar. Co. *v.* Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. ed. 484; Hayward *v.* Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. ed. 271; Root *v.* Lake Shore, etc. R. Co., 105 U. S. 189, 26 L. ed. 975; Lenox *v.* Roberts, 2 Wheat. 373, 4 L. ed. 264; Riddle *v.* Mandeville, 5 Cranch 322, 3 L. ed. 114; Union Tr.

So long as his remedies at law are adequate, equity will not entertain his suit to enforce a legal right.[40]

2. Suit in Assignee's Name. — When the assigned chose is equitable in its nature and cognizable only in equity, the assignee should proceed in his own name,[41] and it is held by some courts that he should not sue in the name of the assignor.[42]

C. Statutory Modifications. — **1. In General.** — As a result of statutory changes[43] in many states the rights of assignees have been modified, and where these changes exist the assignee need no longer pursue his remedies in the name of the assignor.[44]

Co. *v.* Bulkeley, 150 Fed. 510, 80 C. C. A. 328; Eau Claire *v.* Payson, 107 Fed. 552, 46 C. C. A. 466. **Ala.** — McGehee *v.* Dougherty, 10 Ala. 863. **D. C.** — Glenn *v.* Sothoron, 4 App. Cas. 125. **Ill.** — Chicago & N. W. R. Co *v.* Nichols, 57 Ill. 464; Hillis *v.* Asay, 105 Ill. App. 667. **Md.** — Adair *v.* Winchester, 7 Gill & J. 114; Gover *v.* Christie, 2 Har. & J. 67. **Mass.** — Walker *v.* Brooks, 125 Mass. 241. **N. J.** — Hayes *v.* Hayes, 45 N. J. Eq. 461, 17 Atl. 634. **N. Y.** — Ontario Bank *v.* Mumford, 2 Barb. Ch. 596; Rogers *v.* Traders' Ins. Co., 6 Paige 583; Field *v.* Maghee, 5 Paige 539. **Tenn.** — Smiley *v.* Bell, Mart. & Y. 378, 17 Am. Dec. 813. **Vt.** — Hagar *v.* Buck, 44 Vt. 285, 8 Am. Rep. 368. **Va.** — Moseley *v.* Boush, 4 Rand. 392. **Eng.** — Rose *v.* Clarke, 1 Y. & C. Ch. 534, 62 Eng. Reprint 1005; Hammond *v.* Messenger, 9 Sim. 327, 7 L. J. Ch. 310, 2 Jur. 655, 59 Eng. Reprint 383; Cator *v.* Burke, 1 Bro. C. C. 434, 28 Eng. Reprint 1222; Motteux *v.* London Assur. Co., 1 Atk. 545, 26 Eng. Reprint 343; Dhegetoft *v.* London Assur. Co., Moseley 83, 25 Eng. Reprint 285; Rolt *v.* White, 9 Jur. N. S. 343, 7 L. T. N. S. 345. **Can.** — Ross *v.* Munro, 6 Grant Ch. 431.

40. **U. S.** — New York Guaranty Co. *v.* Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. ed. 484; Hayward *v.* Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. ed. 271; Root *v.* Lake Shore, etc. R. Co., 105 U. S. 189, 26 L. ed. 975; Eau Claire *v.* Payson, 107 Fed. 552, 46 C. C. A. 466; Burke's Case, 13 Ct. Cl. 231. **D. C.** — Glenn *v.* Sothoron, 4 App. Cas. 125. **Ind.** — Jones *v.* Burtch, 5 Blackf. 372. **Ky.** — *Contra*, Cobb *v.* Thompson, 1 A. K. Marsh. 507. **Md.** — Adair *v.* Winchester, 7 Gill & J. 114; Gover *v.* Christie, 2 Har. & J. 67. **Mass.** — Angell *v.* Stone, 110 Mass. 54. **N. Y.** — Ontario Bank *v.* Mumford, 2 Barb. Ch. 596; Carter *v.* United Ins. Co., 1 Johns. Ch. 463. **Ohio.** — New York, etc. Co. *v.* Herrmann, 27 Ohio C. C. 694. **Tenn.** — Smiley *v.* Bell, Mart. & Y. 378, 17 Am. Dec. 813. **Va.** — Moseley *v.* Boush, 4 Rand. 392; Taylor *v.* Ficklin, 5 Munf. 25. **Eng.** — Hammond *v.* Messenger, 9 Sim. 327, 59 Eng. Reprint 383; Rolt *v.* White, 31 Beav. 520, 54 Eng. Reprint 1240; Dhegetoft *v.* London Assur. Co., Moseley 83, 25 Eng. Reprint 285; Keys *v.* Williams, 3 Y. & C. Exch. 462, 3 Jur. 950; Hammond *v.* Wilkes, 2 Jur. 655. But see Jones *v.* Farrell, 1 De G. & J. 208, 44 Eng. Reprint 703.

41. See cases cited *supra*, I, B, 2.

42. **Ala.** — Plowman *v.* Riddle, 14 Ala. 169, 48 Am. Dec. 92. **Fla.** — Sammis *v.* Wightman, 31 Fla. 45, 12 So. 536. **Ill.** — Elder *v.* Jones, 85 Ill. 384; Frye *v.* State Bank, 10 Ill. 332. **Me.** — Haskell *v.* Hilton, 30 Me. 419. **N. Y.** — Gleason *v.* Gage, 7 Paige 121; Rogers *v.* Traders' Ins. Co., 6 Paige 583; Field *v.* Maghee, 5 Paige 539. **Wis.** — Varney *v.* Bartlett, 5 Wis. 276.

43. Baumert *v.* Daeschler, 120 N. Y. Supp. 957; Smith *v.* Cook, 2 McMull. (S. C.) 58.

44. **Action in Assignor's Name No Longer Necessary.** — **U. S.** — Delaware County *v.* Diebold Safe Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. ed. 674 (referring to statute in Indiana); Harper *v.* Butler, 2 Pet. 239, 7 L. ed. 410 (referring to statute in Mississippi); American Bond & T. Co. *v.* Baltimore, etc. R. Co., 124 Fed. 866, 60 C. C. A. 52; Cronin *v.* Patrick County, 89 Fed. 79; Morrison *v.* North America Transp., etc. Co., 85 Fed. 802; Edmunds *v.* Illinois Cent. R. Co., 80 Fed. 78; Glenn *v.* Scott, 26 Fed. 804. **Ark.** — Collier *v.* Trice, 79 Ark. 414, 96 S. W. 174; Lanigan *v.* North, 67

Ark. 62, 63 S. W. 62; Worthington *v.* Curd, 15 Ark. 491; Owen *v.* Lavine, 14 Ark. 389. **Cal.** — Heisen *v.* Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; Quan Wye *v.* Chin Lin Hee, 123 Cal. 185, 55 Pac. 783; Ingham *v.* Weed, 48 Pac. 318; Morl *v.* Massini, 32 Cal. 590; Lazard *v.* Wheeler, 22 Cal. 139; Gray *v.* Garrison, 9 Cal. 325; Ryan *v.* Maddux, 6 Cal. 247. **Colo.** — Rambo *v.* Armstrong, 45 Colo. 124, 100 Pac. 586; Good *v.* Lipp, 41 Colo. 209, 91 Pac. 1104; Doyle *v.* Nesting, 37 Colo. 522, 88 Pac. 862; Forsyth *v.* Ryan, 17 Colo. App. 511, 68 Pac. 1055. **Del.** — Herdman *v.* Morris, 2 Harr. 509. **D. C.** — Sincell *v.* Davis, 24 App. Cas. 218. **Fla.** Ritch *v.* Eichelberger, 13 Fla. 169. **Ill.** Congress Constr. Co. *v.* Farson & Libby Co., 199 Ill. 398, 65 N. E. 357, *affirming* 101 Ill. App. 279; Wabash, etc. R. Co. *v.* Octting, 147 Ill. App. 179. **Ind.** Strong *v.* Clem, 12 Ind. 37, 74 Am. Dec. 200; Hancock *v.* Ritchie, 11 Ind. 48. **Ia.** — Abell Note Brokerage & Bond Co. *v.* Hurd, 85 Iowa 559, 52 N. W. 488; Charles *v.* Haskins, 11 Iowa 329, 77 Am. Dec. 148; Merchants & Mechanics' Bank *v.* Hewitt, 3 Iowa 93, 66 Am. Dec. 49. **Kan.** — Stewart *v.* Price, 64 Kan. 191, 67 Pac. 553, 64 L. R. A. 581; Krapp *v.* Eldridge, 33 Kan. 106, 5 Pac. 372. **Ky.** — Murray *v.* Duffy, 23 Ky. L. Rep. 2194, 66 S. W. 1038. **Me.** — Coombs *v.* Harford, 99 Me. 426, 59 Atl. 529; National Exch. Bank *v.* McLoon, 73 Me. 498, 40 Am. Rep. 388. **Md.** — Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708. **Mass.** — Gilman *v.* American Producers C. Co., 180 Mass. 319, 62 N. E. 267; Wiley *v.* Connelly, 179 Mass. 360, 60 N. E. 784. **Mich.** — Midland County Sav. Bank *v.* Prouty Co., 158 Mich. 656, 123 N. W. 549, 133 Am. St. Rep. 401; Ebel *v.* Piehl, 134 Mich. 64, 95 N. W. 1004; Toledo, etc. R. Co. *v.* Johnson, 55 Mich. 456, 21 N. W. 888; Felt *v.* Reynolds Rotary Fruit Evap. Co., 52 Mich. 602, 18 N. W. 378; Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489. **Minn.** — Hurley *v.* Bendel, 67 Minn. 41, 69 N. W. 477; Tuttle *v.* Howe, 14 Minn. 145, 100 Am. Dec. 205. **Miss.** — Wright *v.* Hardy, 76 Miss. 524, 24 So. 697. **Mo.** — Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132; Snyder *v.* Wabash, etc. R. Co., 86 Mo. 623, 29 Am. & Eng. R. Cas. 237; Long *v.* Heinrich, 46 Mo. 603; Long *v.* Constant, 19 Mo. 320, 61 Am. Dec. 559; Williams *v.* Whitlock, 14 Mo. 552; Webb *v.* Morgan, 14 Mo. 428; Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 894. **Neb.** — Huddleson *v.* Polk, 70 Neb. 483, 97 N. W. 624; Crum *v.* Stanley, 55 Neb. 351, 75 N. W. 851; Mills *v.* Murry, 1 Neb. 327; Hixon Map Co. *v.* Nebraska Post Co., 5 Neb. (Unof.) 388, 98 N. W. 872. **Nev.** — Carpenter *v.* Johnson, 1 Nev. 331. **N. J.** — Sullivan *v.* Visconti, 68 N. J. L. 543, 53 Atl. 598 (wherein it is shown that the assignment passes the legal title under the statute now prevailing); Howe *v.* Smeeth Copper Co., 48 Atl. 24. **N. Y.** — Richtmeyer *v.* Remsen, 38 N. Y. 206; Allen *v.* Smith, 16 N. Y. 415; McKee *v.* Judd, 12 N. Y. 622, 64 Am. Dec. 515; Foster *v.* Central Nat. Bank, 106 App. Div. 616, 94 N. Y. Supp. 1146, *affirmed*, 183 N. Y. 379, 76 N. E. 338 (memo.); Baumert *v.* Daeschler, 65 Misc. 526, 120 N. Y. Supp. 957; Penhollow *v.* Lawyers' Title Ins. Co., 30 Misc. 778, 63 N. Y. Supp. 390; Haller *v.* Ingraham, 101 N. Y. Supp. 789; Johnston *v.* Bennett, 5 Abb. Pr. (N. S.) 331; Platt *v.* Stout, 14 Abb. Pr. 178; Allgoever *v.* Edmunds, 66 Barb. 579; Graves *v.* Spier, 58 Barb. 349; Van Rensselaer *v.* Owen, 48 Barb. 61, 33 How. Pr. 12. **N. C.** — Gill *v.* Dixon, 131 N. C. 87, 42 S. E. 538; Timberlake *v.* Powell, 99 N. C. 233, 5 S. E. 410; Moore *v.* Nowell, 94 N. C. 265. **Ohio.** — Allen *v.* Miller, 11 Ohio St. 374; Hall *v.* Cincinnati, etc. R. Co., 1 Disney 58. **Ore.** — Gregoire *v.* Rourke, 28 Ore. 275, 42 Pac. 996; Little *v.* Portland, 26 Ore. 235, 37 Pac. 911; Dawson *v.* Pogue, 18 Ore. 94, 22 Pac. 637, 6 L. R. A. 176. **Tenn.** — Spring City Bank *v.* Rhea County, 59 S. W. 442. **Tex.** — Winn *v.* Ft. Worth, etc. R. Co., 12 Tex. Civ. App. 198, 33 S. W. 593. **Utah.** — Lawler *v.* Jennings, 18 Utah 35, 55 Pac. 60. **Va.** — Aylett *v.* Walker, 92 Va. 540, 24 S. E. 226; Tyler *v.* Ricamore, 87 Va. 466, 12 S. E. 799; Norfolk, etc. R. Co. *v.* Read, 87 Va. 185, 12 S. E. 395; Stebbins *v.* Bruce, 80 Va. 389. **Wash.** Von Tobel *v.* Stetson Mill Co., 32 Wash. 683, 73 Pac. 788. **W. Va.** — Wallace *v.* Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777; St. Lawrence Boom Co. *v.* Price, 49 W. Va. 432, 38 S. E. 526; Cochrane *v.* Hyre, 49 W. Va. 315, 38 S. E. 554; Thomas *v.* Linn, 40 W. Va. 122, 20 S. E. 878.

The statutes effect a part or all of the following changes: The distinction between actions at law and suits in equity is abolished and a single civil action is provided which may or must be prosecuted in the name of the real party in interest;[45] assignees of choses in action are expressly authorized to sue in their own names;[46] all

Wis. — Chase *v.* Dodge, 111 Wis. 70, 86 N. W. 548; Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426; Tyson *v.* McGuineas, 25 Wis. 656; Smith *v.* Chicago & N. R. Co., 23 Wis. 267. Eng. — Fitzroy *v.* Cave (1905), 2 K. B. 364, 74 L. J. K. B. 829. Can. — Wallace *v.* Gilchrist, 24 U. C. C. P. 40; Hostrawser *v.* Robinson, 23 U. C. C. P. 350; Wellington *v.* Chard, 22 U. C. C. P. 518; Blair *v.* Ellis, 34 U. C. Q. B. 466; Blackley *v.* Dooley, 18 Ont. 381.

An action for money *had and received* will lie by the assignee of funds against one receiving such funds without right. Brooks *v.* Hinton State Bank, 26 Okla. 56, 110 Pac. 46.

45. Long *v.* Heinrich, 46 Mo. 603; Walker *v.* Mauro, 18 Mo. 564; East Tex. F. Ins. Co. *v.* Coffee, 61 Tex. 287; Galveston, etc. R. Co. *v.* Freeman, 57 Tex. 156; Mims *v.* Swartz, 37 Tex. 13; Bullion *v.* Campbell, 27 Tex. 653; Heard *v.* Lockett, 20 Tex. 162; Rollinson *v.* Hope, 18 Tex. 446; Guest *v.* Rhine, 16 Tex. 549; Devine *v.* Martin, 15 Tex. 25; Merlin *v.* Manning, 2 Tex. 351; Ogden *v.* Slade, 1 Tex. 13; Winn *v.* Fort Worth, etc. R. Co., 12 Tex. Civ. App. 198, 33 S. W. 593; Texas, etc. R. Co. *v.* Wright, 2 Wills. Civ. Cas., § 339.

See *infra*, I, C, 4.

46. U. S. — Salmon *v.* Rural Independent School Dist., 125 Fed. 235. Ark. — In certain cases. Block *v.* Walker, 2 Ark. 4 (assignee of a bond); Gamblin *v.* Walker, 1 Ark. 220. Conn. Rev. Stat. 1902, § 631 (*bona fide* assignee). See Uncas Paper Co. *v.* Corbin, 75 Conn. 675, 55 Atl. 165. Ind. — Horner's Ann. Stats. 1901, §§ 5501, 5502. Ia. — Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226; Ann. Code 1907, §§ 3044, 3047. Me. — Rev. St. 1903, § 146. Mass. — Rev. St. 1902, c. 173, § 4. Mich. — Cilley *v.* Van Patten, 58 Mich. 404, 25 N. W. 326; Watertown F. Ins. Co. *v.* Grovers & Bakers S. M. Co., 41 Mich. 131, 1 N. W. 961, 32 Am. Rep. 146; Blackwood *v.* Broom, 32 Mich. 104. Under How. Anno. St., § 7344, see Robinson *v.* Watson, 101 Mich. 466, 59 N. W. 811; Hyma *v.* Three Rivers Nat. Bank, 79 Mich. 167, 44 N. W. 427. Miss. — See Wright *v.* Hardy, 76 Miss. 524, 24 So. 697. Neb. Weir *v.* Anthony, 35 Neb. 396, 53 N. W. 206. N. J. — Vickers *v.* Electrozone, etc. Co., 66 N. J. L. 9, 48 Atl. 606; Howe *v.* Smeeth Copper, etc. Co., 48 Atl. 24; Allen *v.* Pancoast, 20 N. J. L. 68 (holding that an assignee of a bond may sue in his own name, although the bond was not payable to the assignee). N. Y. — Barker *v.* Clark, 12 Abb. Pr. (N. S.) 106; Armstrong *v.* Cushney, 43 Barb. 340; Monahan *v.* Story, 2 E. D. Smith 393; Cobb *v.* Howard, 10 N. Y. Leg. Obs. 353. Under N. Y. Act of 1853, see Van Derveer, *v.* Wright, 6 Barb. 547; Seeley *v.* Seeley, 2 Hill 496. Pa. — Elmer *v.* Hall, 148 Pa. 345, 23 Atl. 971. S. C. — Waring *v.* Cheeseborough, 4 Rich. 243 note; Farmer *v.* Baker, 3 Brev. 548 (decided under the S. C. Act of 1808). Tenn. — Marrigan *v.* Page, 4 Humph. 246, where the assignment is of a note or agreement for the payment of money or the delivery of specific articles or for the performance of any duty. Tex. — Knight *v.* Holloman, 6 Tex. 153 (assignees of non-negotiable instruments); Koeningheim *v.* Randolph, 1 White & Wills. § 764. Vt. — Chandler *v.* Warren, 30 Vt. 510. Wash. — Code of Proc., § 145; Graham *v.* McCoy, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235; Bellingham Bay Boom Co. *v.* Brisbois, 14 Wash. 173, 44 Pac. 153. W. Va. — W. Va. Code (1887), c. 99, § 14, authorizes the assignee of any bond, note, account or writing, not negotiable, to sue in his own name in any actions thereon that the assignor could enforce. Thomas *v.* Linn, 40 W. Va. 122, 20 S. E. 878. Eng. — Judicature Act of 1873 (36 & 37 Vict., c. 66, § 25 [6]) gives the assignee all the remedies the assignor had, where the assignment of a debt or other legal chose is absolute and in writing and notice thereof is given to the debtor.

choses, or certain designated choses, are made assignable.[47]

2. Choses in Action Ex Delicto. — Likewise, by virtue of the statutory changes,[48] an assignee of a right of action *ex delicto* that will

Virginia Code (1873), c. 141, § 17, authorizes the assignee of any bond, note or writing, not negotiable, to maintain any action, in his own name, which the original obligee or payee might have brought, but must allow set-offs against himself and those existing against the assignor at the time of notice to the debtor of the assignment. Glenn *v.* Scott, 28 Fed. 804. But the statute does not apply where an open account between two firms having common members was assigned. Aylett *v.* Walker, 92 Va. 540, 24 S. E. 226; Stebbins *v.* Bruce, 80 Va. 389; Gordon *v.* Rixey, 76 Va. 694; Feazle *v.* Dillard, 5 Leigh (Va.) 30.

Action in Assignee's Name Expressly Authorized by Statute. — Statute authorizes an assignee by indorsement of a contract for the performance of any act or duty to sue in his own name. Phillips *v.* Sellers, 42 Ala. 658; Henley *v.* Bush, 33 Ala. 636; Skinner *v.* Bedell's Admr., 32 Ala. 44. But a judgment is not a contract in writing for the payment of money or other thing, and the assignee thereof cannot, under the statute, sue in his own name. Lovins *v.* Humphries, 67 Ala. 437; Bunnell *v.* Magee, 9 Ala. 433.

Statute permits the assignee to sue in his own name where the assignor does *pendente lite*. Phillips *v.* Wilson, 25 Ill. App. 427. See Wetherbee *v.* Fitch, 117 Ill. 67, 7 N. E. 513; St. 1896, c. 3, § 5 (assignee of designated choses).

Statute authorizing the assignee of a bond or chose in action for the payment of money, or of a legacy. Outtoun *v.* Durlin, 72 Md. 536, 20 Atl. 134; Crisfield *v.* State, 55 Md. 192 (Maryland Act of 1829); Lucas *v.* Byrne, 35 Md. 485; Kent *v.* Somervell, 7 Gill & J. (Md.) 265. But see Goble *v.* Scarlett, 56 Md. 169.

Unless the assignment is in writing, the assignee cannot, under the statute, sue in his own name. **U. S.** — New York Mutual Life Ins. Co. *v.* Watson, 30 Fed. 653, construing a Georgia statute. **Ga.** — Kirkland *v.* Dryfus, 103 Ga. 127, 29 S. E. 612; Planter's Bank *v.* Prater, 64 Ga. 609; Turk *v.* Cook, 63 Ga. 681. **Ia.** — Williams *v.* Soutter, 7 Iowa 435; Andrews *v.* Brown, 1 Iowa 154. **Md.** — Chesley *v.* Taylor, 3 Gill 251. **Miss.** — Tully *v.* Herrin, 44 Miss. 626.

Where the statute authorizes the assignee to sue in his own name, the permission of the assignor is not necessary. Gilman *v.* American Producer's Controlling Co., 180 Mass. 319, 62 N. E. 267.

47. **Choses Assignable by Statute.** — **U. S.** — Morrison *v.* North American Transp., etc. Co., 85 Fed. 802 (construing Ohio statute); May *v.* Logan County, 30 Fed. 250 (construing a Rhode Island statute). **Ala.** — Code, 1896, § 876, contracts for payment of money are assignable. **Ark.** — Kirby's Digest, § 509. **Cal.** — St. 1850, p. 332. **Ga.** — Code, 1895, § 3077; Wilson *v.* Tolson, 79 Ga. 137, 3 S. E. 900. **Ill.** — St. 1896, c. 3, §§ 3, 4. **Ia.** — Ann. Code, 1907, §§ 3044, 3047. **Kan.** — Thornburgh *v.* Cole, 27 Kan. 490; Shively *v.* Beeson, 24 Kan. 352; Civ. Code, § 26 (every chose in action is assignable except a tort); M'Crum *v.* Corby, 11 Kan. 464. **Ky.** — Sanders *v.* Blain's Admr. 6 J. J. Marsh. 446, 22 Am. Dec. 86; Conn *v.* Jones, Hard. 8; St. 1909, § 474. **Miss.** — Code, 1906, § 718. **N. Y.** — Birdseye Gen. Laws (3d ed.), p. 154. **N. D.** — Rev. St. 1905, § 4903. **Pa.** — 1 Purden's Dig. (13th ed), p. 439. **Tenn.** — Bradley County *v.* Surgoine, 6 Baxt. 108, but assignee must have the legal title. **Wash.** — Neg. Inst. Law, § 49 (vests title in transferee without endorsement); Swenson *v.* Stoltz, 36 Wash. 318, 321, 78 Pac. 999.

The statute making bonds, bills and notes for payment of money assignable does not authorize an assignee of a bond with a collateral condition to sue in his own name. Henderson *v.* Hepburn, 2 Call (Va.) 232; Craig *v.* Craig, 1 Call (Va.) 483. See also Lewis *v.* Harwood, 6 Cranch (U. S.) 82, 3 L. ed. 160.

48. See notes 45-47, *supra*.

How. Mich. St., § 7344, authorizing an assignee of any note, bond or "other chose in action" to sue thereon, in his own name, comprehends an

survive to the personal representatives may sue therefor in his own name;[49] as where the tort is injury to one's estate,[50] or by taking and converting personal property,[51] in which latter case, however, a demand and refusal, subsequent to the assignment, is a prerequisite to the maintenance of the action in the assignee's own name.[52]

3. Effect of Statutes. — a. *As to Assignability.* — The statutes permitting or requiring the real party in interest to sue in his own name or expressly authorizing an assignee to do so do not enlarge the right of assignment nor authorize the assignment of choses not otherwise assignable.[53]

action of tort. Felt *v.* Reynolds Rotary Fruit Evap. Co., 52 Mich. 602, 18 N. W. 378; Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489; Finn *v.* Corbitt, 36 Mich. 318; Grant *v.* Smith, 26 Mich. 201; Brady *v.* Whitney, 24 Mich. 154; Cook *v.* Bell, 18 Mich. 387; Final *v.* Backus, 18 Mich. 218.

49. **Ia.** — Vi ont *v.* Chicago & N. W. R. Co., 64 Iowa 513, 17 N. W. 31, 21 N. W. 9, 19 Am. & Eng. R. Cas. 215. **Mich.** — Felt *v.* Reynolds Rotary Fruit Evap. Co., 52 Mich. 602, 18 N. W. 378; Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489; Finn *v.* Corbitt, 36 Mich. 318; Grant *v.* Smith, 26 Mich. 201; Brady *v.* Whitney, 24 Mich. 154; Cook *v.* Bell, 18 Mich. 387; Final *v.* Backus, 18 Mich. 218. **Mo.** — Snyder *v.* Wabash, etc. R. Co., 86 Mo. 623, *overruling* Wallen *v.* St. Louis, etc. R. Co. 74 Mo. 521; Doering *v.* Kenamore, 86 Mo. 588; Smith *v.* Kennett, 18 Mo. 154; Goodger *v.* Finn, 10 Mo. App. 226. **Neb.** — Kinsella *v.* Sharp, 47 Neb. 664, 66 N. W. 634, as to the right of a donee of property to maintain an action for its conversion. **N. Y.** — McKeage *v.* Hanover F. Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471; Waldron *v.* Willard, 17 N. Y. 466; McKee *v.* Judd, 12 N. Y. 622, 64 Am. Dec. 515; Wickham *v.* Roberts, 112 App. Div. 742, 98 N. Y. Supp. 1092; Alexander *v.* Gloversville, 110 App. Div. 791, 97 N. Y. Supp. 198; Butler *v.* New York, etc. R. Co., 22 Barb. 110; Drake *v.* Smith, 12 Hun 532; Purple *v.* Hudson River R. Co., 4 Duer 74; Monahan *v.* Story, 2 E. D. Smith 393. **N. C.** — Morgan *v.* Bradley, 10 N. C. 559; Robertson *v.* Stuart, 2 N. C. 159. **Okla.** — Kansas City Co. *v.* Shutt, 24 Okla. 96, 104 Pac.
51. **Wis.** — Arpin *v.* Burch, 68 Wis. 619, 32 N. W. 681.

50. **Injuries to Property.** — Snyder *v.* Wabash, etc. R. Co., 86 Mo. 623, (*overruling* Wallen *v.* St. Louis, etc. R. Co., 74 Mo. 521); Doering *v.* Kenamore, 86 Mo. 588; Morgan *v.* Bradley, 10 N. C. 559; Robertson *v.* Stuart, 2 N. C. 159.

51. **Mo.** — Smith *v.* Kennett, 18 Mo. 154; Goodger *v.* Finn, 10 Mo. App. 226. **Neb.** — Kinsella *v.* Sharp, 47 Neb. 664, 66 N. W. 634, construing Neb. Code Civ. Proc., § 29. **N. Y.** — Chase *v.* Chase, 1 Paige 198; Clowes *v.* Hawley, 12 Johns. 484. **Wis.** — Arpin *v.* Burch, 68 Wis. 619, 68 N. W. 681.

But an equitable assignee of a chattel mortgage cannot maintain an action in his own name, for the conversion of the mortgaged property. Baker *v.* Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475. See also Clapp *v.* Shepard, 2 Metc. (Mass.) 127.

52. Smith *v.* Kennett, 18 Mo. 154; Robinson *v.* Weeks, 6 How. Pr. (N. Y.) 161, *overruling* Gardner *v.* Adams, 12 Wend. (N. Y.) 297; Van Hassell *v.* Borden, 1 Hilt. (N. Y.) 128, *citing* Hall *v.* Robinson, 2 N. Y. 293; Cass *v.* New York, etc. R. Co., 1 E. D. Smith (N. Y.) 522.

53. **U. S.** — Joseph Dixon Crucible Co. *v.* Paul, 167 Fed. 784, 93 C. C. A. 204; Davis *v.* St. Louis, etc. R. Co., 25 Fed. 786. **Ia.** — Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132. **Mo.** — Snyder *v.* Wabash, etc. R. Co., 86 Mo. 623. **N. J.** — Lindsay *v.* McInerney, 62 N. J. L. 524, 41 Atl. 701. **N. Y.** — Butler *v.* New York, etc. R. Co., 22 Barb. 110; Thurman *v.* Wells, 18 Barb. 500; Purple *v.* Hudson River R. Co., 4 Duer 74; Hyslop *v.* Randall, 11 How. Pr. 97, 4 Duer 660; Hodgman *v.* Western R. Corp., 7 How. Pr. 492. **Ore.** — Hillman *v.* Shannahan, 4 Ore.

b. *As to Remedies.* — **(I.) Statutory Remedies Cumulative.** — Where the statutory provisions, authorizing an assignee to sue in his own name or providing that the real party in interest may sue, have been construed as permissive merely, the common law remedies of the assignee still exist, and he may enforce the chose in the name of the assignor.[54] Where the assignee may thus still pursue his remedies in the name of the assignor, it is held that he has control over the action, as at common law;[55] that the assignor can no longer enforce the action for himself;[56] and that the assignor must not interfere,[57] further than to secure indemnity for costs.[58]

(II.) Statutory Remedies Exclusive. — Where, however, such statutes are construed as mandatory, the common law remedies are superseded.[59] Also, where the statute makes choses in action assignable

163, 18 Am. Rep. 281. **S. C.** — Childs *v.* Alexander, 22 S. C. 169. **Va.** — Stebbins *v.* Bruce, 80 Va. 389; Gordon *v.* Rixey, 76 Va. 694; Feazle *v.* Dillard, 5 Leigh 30. **Wis.** — McArthur *v.* Green Bay, etc. Canal Co., 34 Wis. 139.

54. **Statutory Remedies Cumulative. Ark.** — Boqua *v.* Marshall, 88 Ark. 373, 114 S. W. 714; Lanigan *v.* North, 69 Ark. 62, 63 S. W. 62; St. Louis, I. M. & S. R. *v.* Camden Bank, 47 Ark. 541, 1 S. W. 704. **Fla.** — Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526. **Ill.** — Congress Const. Co. *v.* Farson & Libbey Co., 199 Ill. 398, 65 N. E. 357. **Me.** — Rogers *v.* Brown, 103 Me. 478, 70 Atl. 206; McDonald *v.* Laughlin, 74 Me. 480. **Md.** — Canfield *v.* McIlwaine, 32 Md. 94. **Mich.** — Park *v.* Toledo, etc. R. Co., 41 Mich. 352, 1 N. W. 1032; Sisson *v.* Cleveland, etc. R. Co., 14 Mich. 489, 90 Am. Dec. 252. **N. J.** Elsberg *v.* Honeck, 76 N. J. L. 181, 68 Atl. 1090; Sullivan *v.* Visconti, 68 N. J. L. 543, 53 Atl. 598. **S. C.** — Coachman *v.* Hunt, 2 Rich. L. 450 (under Act of 1798); Thorn *v.* Myers, 5 Strobh. 210. **Tenn.** Simpson *v.* Moulden, 3 Coldw. 429; Moore *v.* Weir, 3 Sneed 46. **Vt.** — Chase *v.* Plymouth, 20 Vt. 469, 50 Am. Dec. 52. **Va.** — Dunn *v.* Price, 11 Leigh 203; Garland *v.* Richeson, 4 Rand. 266. **W. Va.** — Bentley *v.* Standard Fire Ins. Co., 40 W. Va. 729, 22 S. E. 584; Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185; Clarke *v.* Hogeman, 13 W. Va. 718.

55. Boqua *v.* Marshall, 88 Ark. 373, 114 S. W. 714.

56. **Ky.** — Lytle *v.* Lytle, 2 Met. 127. **Me.** — Reed *v.* Nevins, 38 Me. 193. **Mass.** — Coulter *v.* Haynes, 146 Mass. 458, 16 N. E. 19; Moore *v.* Spiegel, 143 Mass. 413, 9 N. E. 827; Moore *v.* Coughlin, 4 Allen 335; Derby *v.* Sanford, 9 Cush. 263. **Minn.** — St. Anthony Mill Co. *v.* Vandall, 1 Minn. 246. **Tex.** — Allen *v.* Pannell, 51 Tex. 165; Winn *v.* Ft. Worth, etc. R. Co., 12 Tex. Civ. App. 198, 33 S. W. 593. **Eng.** Jones *v.* Ferrell, 1 De G. & J. 208, 44 Eng. Reprint 703.

57. **U. S.** — Mandeville *v.* Welch, 1 Wheat. 233, 4 L. ed. 79, 5 Wheat. 277, 5 L. ed. 87; McCullum *v.* Coxe, 1 Dall. 139, 1 L. ed. 72. **Ind.** — State *v.* Herod, 6 Blackf. 444. **Me.** — Southwick *v.* Hopkins, 47 Me. 362. **Miss.** — Anderson *v.* Miller, 7 Smed. & M. 586. **N. Y.** — Martin *v.* Hawks, 15 Johns. 405. **N. C.** — Deaver *v.* Elle, 42 N. C. 24; ——— *v.* Arrington, 2 N. C. 164.

58. Southwick *v.* Hopkins, 47 Me. 362.

59. **Ind.** — Sinker *v.* Floyd, 104 Ind. 291, 4 N. E. 10; Bartholomew County *v.* Jameson, 86 Ind. 154; Mountjoy *v.* Adair, 1 Ind. 254. **Ia.** — Allen *v.* Newberry, 8 Iowa 65. **Kan.** — Reynolds *v.* Quaely, 18 Kan. 361. **Ky.** — Lytle *v.* Lytle, 2 Met. 127. **Minn.** — St. Anthony Mill Co. *v.* Vandall, 1 Minn. 246; Russell *v.* Minnesota Cutfit, 1 Minn. 162. **Mo.** — Long *v.* Heinrich, 46 Mo. 603; Weise *v.* Gerner, 42 Mo. 527; Hutchings *v.* Weems, 35 Mo. 285; Brady *v.* Chandler, 31 Mo. 28; Van Doren *v.* Relfe, 20 Mo. 455; Conn *v.* Long-Bell Lumb. Co., 66 Mo. App. 483; Buffington *v.* South Missouri Land Co., 25 Mo. App. 492. **Neb.** — Crum *v.* Stanley, 55 Neb. 351, 75 N. W. 851; Hoagland *v.* Van Etten, 22 Neb. 681, 35 N. W. 869, 23 Neb. 462, 36 N. W. 755; Hicklin *v.* Nebraska City Nat. Bank, 8 Neb. 463; Seymour *v.* Street,

so that the legal title vests in the assignee, he must pursue his remedies in his own name.[60] And the same is true if the chose, apart from statute, is assignable.[61]

5 Neb. 85; Mills *v.* Murry, 1 Neb. 327. **Nev.** — Peck *v.* Doods, 10 Nev. 204. **N. Y.** — Sheridan *v.* New York, 68 N. Y. 30; Greene *v.* Niagara F. Ins. Co., 6 Hun 128, 51 How. Pr. 73. **N. C.** — State *v.* Rousseau, 94 N. C. 355. **Wis.** Stuckey *v.* Fritsche, 77 Wis. 329, 46 N. W. 59; Webber *v.* Quaw, 46 Wis. 118, 49 N. W. 830.

60. **Ind.** — Mountjoy *v.* Adair, Smith 96. **Ky.** — Neyfong *v.* Wells, Hard. 561. **Miss.** — Beck *v.* Rosser, 68 Miss. 72, 8 So. 259; Lake *v.* Hastings, 24 Miss. 490. **Mo.** — Jeffers *v.* Oliver, 5 Mo. 433. **N. J.** — Carhart *v.* Miller, 5 N. J. L. 675; Reed *v.* Bainbridge, 4 N. J. L. 400. **N. Y.** — Cummings *v.* Morris, 25 N. Y. 625. **Pa.** — Philadelphia *v.* Lockhardt, 73 Pa. 211. **R. I.** — Herscovitz *v.* Guertin, 22 R. I. 594, 48 Atl. 934. **Tex.** — East Texas F. Ins. Co. *v.* Coffee, 61 Tex. 287; Winn *v.* Ft. Worth, etc. R. Co., 12 Tex. Civ. App. 198, 33 S. W. 593.

61. **Choses Assignable by Statute or Common Law. — U. S.** — Withers *v.* Greene, 9 How. 213, 13 L. ed. 109; Scott *v.* Lunt's Admr., 7 Pet. 596, 8 L. ed. 797; Reed *v.* Ingraham, 3 Dall. 505, 1 L. ed. 697, 4 Dall. 169, 1 L. ed. 786; Waters *v.* Millar, 1 Dall. 369, 1 L. ed. 180; Kemmil *v.* Wilson, 4 Wash. 308, 14 Fed. Cas. No. 7,685. **Ark.** — Boque *v.* Marshall, 88 Ark. 373, 114 S. W. 714; Buckner *v.* Greenwood, 6 Ark. 200; Roane *v.* Lafferty, 5 Ark. 465; Gamblin *v.* Walker, 1 Ark. 220. **Cal.** — Lazard *v.* Wheeler, 22 Cal. 139. **Ill.** — Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586; Ransom *v.* Jones, 2 Ill. 291; Wineman *v.* Hughson, 44 Ill. App. 22. **Ind.** — Mountjoy *v.* Adair, 1 Ind. 254. **Ia.** — Williams *v.* Soutter, 7 Iowa 435. **Ky.** — Hicks *v.* Doty, 4 Bush 420; Yantes *v.* Smith, 12 B. Mon. 395; Russell *v.* Petree, 10 B. Mon. 184; Marcum *v.* Hereford, 8 Dana 1; Neyfong *v.* Wells, Hard. 561; Conn *v.* Jones, Hard. 8; Pigman *v.* Ward, Sneed 305. **Mass.** Kendall *v.* Carland, 5 Cush. 74; Clark *v.* Swift, 3 Met. 390; Coolidge *v.* Ruggles, 15 Mass. 387. **Mich.** — Cook *v.* Bell, 18 Mich. 387; Final *v.* Backus, 18 Mich. 218. **Minn.** — Spencer *v.* Woodbury, 1 Minn. 105. **Miss.** — Montgomery *v.* Handy, 63 Miss. 43; Chicago, etc. R. Co. *v.* Packwood, 59 Miss. 280; Lowenburg *v.* Jones, 56 Miss. 688, 31 Am. Rep. 379; Kirkland *v.* Lowe, 33 Miss. 423, 60 Am. Dec. 355. **Mo.** — St. Louis *v.* Clemens, 42 Mo. 69; Smith *v.* Kennett, 18 Mo. 154; Draher *v.* Schreiber, 15 Mo. 602; Hill *v.* McPherson, 15 Mo. 204, 55 Am. Dec. 142; McCarty *v.* Hall, 13 Mo. 480; Davis *v.* Christy, 8 Mo. 569; Jeffers *v.* Oliver, 5 Mo. 433; Thomas *v.* Wash, 1 Mo. 665; Chauvin *v.* Labarge, 1 Mo. 557. **Neb.** — Weir *v.* Anthony, 35 Neb. 396, 53 N. W. 206. **N. H.** — Folsom *v.* Belknap County Mut. F. Ins. Co., 30 N. H. 231. See Jordan *v.* Gillen, 44 N. H. 424. **N. J.** — Howe *v.* Smeeth Copper Co., 48 Atl. 24; Norris *v.* Douglass, 5 N. J. L. 942; Lacey *v.* Collins, 5 N. J. L. 563. **N. Y.** — Merrill *v.* Grinnell, 30 N. Y. 594; Van Rensselaer *v.* Read, 26 N. Y. 558; McKee *v.* Judd, 12 N. Y. 622, 64 Am. Dec. 515; Willard *v.* Tillman, 2 Hill 274; Gardner *v.* Adams, 12 Wend. 297; Demarest *v.* Willard, 8 Cow. 206; Grocers' Nat. Bank *v.* Clark, 48 Barb. 26; Smith *v.* New York, etc. R. Co., 28 Barb. 605; King *v.* Kirby, 28 Barb. 49; Butler *v.* New York, etc. R. Co., 22 Barb. 110; Hodgman *v.* Western R. Corp., 7 How. Pr. 492; Robinson *v.* Weeks, 6 How. Pr. 161; Johnston *v.* Bennett, 5 Abb. Pr. (N. S.) 331; Drake *v.* Smith, 12 Hun 532; Purple *v.* Hudson River R. Co., 4 Duer 74; Monahan *v.* Story, 2 E. D. Smith 393.. **Ohio.** — Hall *v.* Cincinnati, etc. R. Co., 1 Disney 58. **Pa.** Fahnestock *v.* Schoyer, 9 Watts 102; Aldricks *v.* Higgins, 16 Serg. & R. 212. **S. C.** — Folk *v.* Cruikshanks, 4 Rich. L. 243; Waring *v.* Cheeseborough, 4 Rich. L. 243 note; Sims *v.* Radcliffe, 3 Rich. L. 287; Smith *v.* Cook, 2 McMull. L. 58. **Tenn.** — East Tennessee R. Co. *v.* Henderson, 1 Lea 1; Mutual Protection Ins. Co. *v.* Hamilton, 5 Sneed 269; Moore *v.* Weir, 3 Sneed 46. **Tex.** — Devine *v.* Martin, 15 Tex. 25; Koeningheim *v.* Randolph, 1 White & Wills., § 764. **Va.** — Feazle *v.* Dillard, 5 Leigh 30; Craig *v.* Craig, 1 Call 483; Norton *v.* Rose, 2 Wash. 233. **Wis.** — Murray *v.* Buell, 76 Wis. 657, 45 N.

c. *Choses Non-Assignable Under Statute.* — Where the statutes relating to assignability are confined to specified kinds of choses, as contracts in writing for the payment of money, the remedies at common law continue in force, as to other choses,[62] unless in a jurisdiction where the real party in interest resides, the statute has been construed as requiring the person having the beneficial interest to sue regardless of the legal title.[63]

d. *Assignments Not Conforming to Statute.* — Likewise, some statutes prescribe certain conditions of assignability, as that the assignment shall be in writing indorsed on the chose,[64] or that the assignment or a copy thereof shall be filed with the writ.[65] Non-compliance with these requirements may deprive the assignee of the statutory remedies, and leave available only the common law remedies.[66]

4. Real Party in Interest. — The decisions are conflicting as to who is the real party in interest. On the one hand it is held that if the assignment does not pass the legal title, the suit may still be brought in the name of the assignor.[67] On the other hand, if the assignment confers the entire beneficial interest upon the assignee, he is the

W. 667, 20 Am. St. Rep. 92; Tyson *v.* McGuineas, 25 Wis. 656; Kimball *v.* Spicer, 12 Wis. 668; Minert *v.* Emerick, 6 Wis. 355; Pillsbury *v.* Mitchell, 5 Wis. 17. **Eng.** — Allen *v.* Bryan, 5 B. & C. 512, 11 E. C. L. 292.

62. Thus in Boqua *v.* Marshall, 88 Ark. 373, 114 S. W. 714, it was held that a statute which made certain specified choses in action assignable, and required that all actions must be prosecuted in the name of the real party in interest, did not abrogate the common law rule as to choses not assignable under the statute. The assignee must enforce his rights in the name of the assignor. Moore *v.* Heany, 34 App. Cas. (D. C.) 31, assignee of patent rights.

63. See *infra*, I, C, 4.

64. Thus, where an assignment of written chose was ineffective because it was not endorsed on the document as required by the statute, the assignor was held to be the proper party plaintiff to bring the action for the benefit of his assignee. **U. S.** — Dexter *v.* Sayward, 51 Fed. 729. **Ala.** — Bohanan *v.* Thomas, 159 Ala. 410, 49 So. 308. **Ga.** — Kirkland *v.* Dryfus, 103 Ga. 127, 29 S. E. 612. **Me.** — Ware *v.* Bucksport, etc. R. Co., 69 Me. 97. **Can.** — Wallace *v.* Gilchrist, 24 U. C. C. P. 40; Hostrawser *v.* Robinson, 23 U. C. C. P. 350; Wellington *v.* Chard, 22 U. C. C. P. 518.

Where the statute requires the assignment to be in writing, the assignee under an oral assignment gets only an equitable interest and must sue in the name of his assignor. **Ia.** — Williams *v.* Soutter, 1 Iowa 435; Andrews *v.* Brown, 1 Iowa 154. **Mass.** — Rogers *v.* Abbot, 206 Mass. 270, 92 N. E. 472, if objection is made. **Miss.** — Lowenburg *v.* Jones, 56 Miss. 688, 31 Am. Rep. 379; Tully *v.* Herrin, 44 Miss. 626.

65. Liberty *v.* Haines, 101 Me. 402, 64 Atl. 665; National Shoe & Leather Bank *v.* Gooding, 87 Me. 337, 32 Atl. 967; Littlefield *v.* Pinkham, 72 Me. 369.

In Sleeper *v.* Gagne, 99 Me. 306, 59 Atl. 472, it was held to be sufficient filing if the assignment was on the back of the assignee's account filed with the declaration.

66. Rogers *v.* Abbot, 206 Mass. 270, 92 N. E. 472; Bowen *v.* New York Cent. R. Co., 202 Mass. 263, 88 N. E. 781.

Likewise assignments prior to statutory modifications are to be enforced as at common law. Thomson *v.* Caverly, 148 Ill. App. 295.

67. Allison *v.* Phoenix Ins. Co., 87 Tex. 593, 30 S. W. 547; Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 8 S. W. 98; Stewart *v.* State, 42 Tex. 242; Winn *v.* Ft. Worth, etc. R. Co., 12 Tex. Civ. App. 198, 33 S. W. 593; Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

real party in interest and may sue as such in his own name,[68] although he does not have the legal title.[69]

5. What Law Governs. — The law of the jurisdiction where the remedy is sought (lex fori) governs the remedies of parties to

68. **Beneficial Owner as Real Party in Interest.** — **U. S.** — Davis *v.* Bilsland, 18 Wall. 659, 21 L. ed. 969; Edmunds *v.* Illinois Cent. R. Co., 80 Fed. 78; Robinson *v.* Memphis R. Co., 16 Fed. 57. **Ark.** — Love *v.* Cahn, 93 Ark. 215, 124 S. W. 259; Caldwell *v.* Meshew, 44 Ark. 564; Heartman *v.* Franks, 36 Ark. 501. **Cal.** — Quan Wye *v.* Chin Lin Hee, 123 Cal. 185, 55 Pac. 783; Wing Ho *v.* Baldwin, 70 Cal. 194, 11 Pac. 565; Cheney *v.* Newberry, 67 Cal. 126, 7 Pac. 445; McLaren *v.* Hutchinson, 22 Cal. 187, 83 Am. Dec. 59. **Colo.** — Perkins v. Peterson, 2 Colo. App. 242, 29 Pac. 1135. **Fla.** — Robinson *v.* Nix, 22 Fla. 321. **Ind.** — Sinker *v.* Kidder, 123 Ind. 528, 24 N. E. 341; Bartholomew County *v.* Jameson, 36 Ind. 154; Swails *v.* Coverdill, 17 Ind. 337; Patterson *v.* Crawford, 12 Ind. 241; Mewherter *v.* Price, 11 Ind. 199. **Ia.** — Younker *v.* Martin, 18 Iowa 143; Shepard *v.* Ford, 10 Iowa 502; State *v.* Putterworth, 2 Iowa 158. **Kan.** — Rullman *v.* Rullman, 81 Kan. 521, 106 Pac. 52. **Ky.** — Hicks *v.* Doty, 4 Bush 426. **Minn.** — Russell *v.* Minnesota Outfit, 1 Minn. 162. **Mo.** — Turner *v.* Hayden, 33 Mo. App. 15. **Neb.** — Weir *v.* Anthony, 35 Neb. 396, 53 N. W. 206. **N. Y.** — Oneida Bank *v.* Ontario Bank, 21 N. Y. 490; Van Vechten *v.* Graves, 4 Johns. 403; Small *v.* Sloan, 1 Bosw. 352; Hastings *v.* McKinley, 1 E. D. Smith 273. **N. C.** — Thompson *v.* Osborne, 152 N. C. 408, 67 S. E. 1029. **Ohio.** — Hall *v.* Cincinnati, etc. R. Co., 1 Disn. 58. **Ore.** — State Ins. Co. *v.* Oregon R. Co., 20 Ore. 563, 26 Pac. 838, where partial assignment, assignee cannot sue alone. **S. C.** Childs *v.* Alexander, 22 S. C. 169. **Tex.** — East Texas F. Ins. Co. *v.* Coffee, 61 Tex. 287; Galveston, etc. R. Co. *v.* Freeman, 57 Tex. 156; Bullion *v.* Campbell, 27 Tex. 653; Hopkins *v.* Upshur, 20 Tex. 89, 70 Am. Dec. 375; Devine *v.* Martin, 15 Tex. 25; Ogden *v.* Slade, 1 Tex. 13. **Wis.** — Chase *v.* Dodge, 111 Wis. 70, 86 N. W. 548.

69. **Real Party in Interest Without Legal Title.** — **U. S.** — Marvin *v.* Ellis, 9 Fed. 367. **Ariz.** — Sroufe *v.* Soto, 5 Ariz. 10, 43 Pac. 221. **Cal.** — Tuller *v.* Arnold, 98 Cal. 522, 33 Pac. 445; O'Connor *v.* Irvine, 74 Cal. 435, 16 Pac. 236; Gradwohl *v.* Harris, 29 Cal. 150; Wheatley *v.* Strobe, 12 Cal. 92, 73 Am. Dec. 522. **Colo.** — Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383. **Ia.** — Green *v.* Marble, 37 Iowa 95; Pearson *v.* Cummings, 28 Iowa 344; Cottle *v.* Cole, 20 Iowa 481; Conyngham *v.* Smith, 16 Iowa 471. **Mich.** — Showen *v.* Owens Co., 158 Mich. 321, 122 N. W. 640, 133 Am. St. Rep. 376; Henderson *v.* Detroit, etc. R. Co., 131 Mich. 438, 91 N. W. 630. **Minn.** — Struckmeyer *v.* Lamb, 64 Minn. 57, 65 N. W. 930; Anderson *v.* Reardon, 46 Minn. 185, 48 N. W. 777. **Mo.** — Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132; Gardner *v.* Armstrong, 31 Mo. 535; Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594. **Nev.** — Carpenter *v.* Johnson, 1 Nev. 331. **N. Y.** — Foster *v.* Cent. Nat. Bk, 183 N. Y. 379, 76 N. E. 338, 106 App. Div. 616, memo., 94 N. Y. Supp. 1146; Sheridan *v.* New York, 68 N. Y. 30; Eaton *v.* Alger, 47 N. Y. 345; Meeker *v.* Claghorn, 44 N. Y. 349; Allen *v.* Brown, 44 N. Y. 228; Cummings *v.* Morris, 25 N. Y. 625; Cronk *v.* Crandall, 137 App. Div. 440, 121 N. Y. Supp. 805; Cunningham *v.* Cohn, 14 Misc. 12, 35 N. Y. Supp. 125; Bedford *v.* Sherman, 68 Hun 317, 22 N. Y. Supp. 892; Burtnett *v.* Gwynne, 2 Abb. Pr. 79; Richardson *v.* Mead, 27 Barb. 178; Arthur *v.* Brooks, 14 Barb. 533; Freeman *v.* Falconer, 44 N. Y. Super. 132; Hastings *v.* McKinley, 1 E. D. Smith 273. **Ohio.** — Lee *v.* Fraternal Mut. Ins. Co., 1 Handy 217. **Ore.** — King *v.* Miller, 53 Ore. 53, 97 Pac. 542; Gregoire *v.* Rourke, 28 Ore. 275, 42 Pac. 996; Dawson *v.* Pogue, 18 Ore. 94, 22 Pac. 637, 6 L. R. A. 176. **Tex.** — Hopkins *v.* Upshur, 20 Tex. 89, 70 Am. Dec. 375; Devine *v.* Martin, 15 Tex. 25. **Va.** — Dunn *v.* Price, 11 Leigh 203; Garland *v.* Richeson, 4 Rand. 266. **Wash.** — Von Tobel *v.* Stetson Mill Co., 32 Wash. 683, 73 Pac. 788. **Wis.** — Robbins *v.* Deverill, 20 Wis. 142, as to waiver of objection that assignee has no beneficial interest.

See *infra*, II, A, 2; II, A, 4.

assignments.[70] The federal courts will follow the local law.[71]

D. Partial Assignments. — 1. At Law.[72] — No action at law

70. **U. S.** — Glenn *v.* Marbury, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. ed. 790; Pritchard *v.* Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. ed. 104; Martin *v.* Ihmsen, 21 How. 394, 16 L. ed. 134; Joseph Dixon Crucible Co. *v.* Paul, 167 Fed. 784, 93 C. C. A. 204. **Mass.** — Mayhew *v.* Pentecost, 129 Mass. 332; Foss *v.* Nutting, 14 Gray 484. **Miss.** — Tully *v.* Herrin, 44 Miss. 626. **Eng.** — Wolff *v.* Osholm, 6 Maule & Selw. 92, 105 Eng. Reprint 1177.

In Glenn *v.* Marbury, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. ed. 790, the court quoted approvingly from "Pritchard *v.* Norton, 106 U. S. 124, 130 (27 L. ed. 104, 106), where Mr. Justice Matthews, delivering judgment, said: 'Whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and determinable by the law of the forum; but whether the foreign assignment, on which the plaintiff claims, is valid at all or whether it is valid against the defendant, goes to the merits and must be decided by the law in which the case has its legal seat. Wharton, Conflict of Laws, §§ 735, 736.'"

71. Delaware County *v.* Diebold Safe & L. Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. ed. 674; Arkansas Val. Smelt. Co. *v.* Belden Min. Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. ed. 246; Thompson *v.* Central Ohio R. Co., 6 Wall. 134, 18 L. ed. 765; Joseph Dixon Crucible Co. *v.* Paul, 167 Fed. 784, 93 C. C. A. 204; Paige *v.* Rochester, 137 Fed. 663; Nederland L. Ins. Co. *v.* Hall, 84 Fed. 278, 55 U. S. App. 598, 27 C. C. A. 390; Edmunds *v.* Illinois Cent. R. Co., 80 Fed. 78; Dexter *v.* Sayward, 51 Fed. 729; Marine Ins. Co. *v.* St. Louis, etc. R. Co., 41 Fed. 643; May *v.* Logan County, 30 Fed. 250; Weed Sew. Mach. Co. *v.* Wicks, 3 Dill. 261, 29 Fed. Cas. No. 17,348; Spratley *v.* Hartford Ins. Co., 1 Dill. 392, 22 Fed. Cas. No. 13,256. But see Suydam *v.* Ewing, 2 Blatchf. 359, 23 Fed. Cas. No. 13,655, as to practice in federal courts prior to U. S. Rev. St. 914.

72. Except by statute the law does not recognize the assignment of a part of a chose in action. **U. S.** — Mandeville *v.* Welch, 5 Wheat, 277, 5 L. ed. 87; The Elmbank, 72 Fed. 610. **Cal.** — Thomas *v.* Rock Island, G. & S. Min. Co., 54 Cal. 578; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423. **Colo.** — City of Pueblo *v.* Dye, 44 Colo. 35, 96 Pac. 969; McMurray *v.* Marsh, 12 Colo. App. 95, 54 Pac. 852; Snedden *v.* Harmes, 5 Colo. App. 477, 39 Pac. 68. **D. C.** — Sincell *v.* Davis, 24 App. Cas. 218. **Ga.** — Reviere *v.* Chambliss, 120 Ga. 714, 48 S. E. 122; Rivers *v.* Wright, 117 Ga. 81, 43 S. E. 499; Central of Georgia R. Co. *v.* Dover, 1 Ga. App. 240, 57 S. E. 1002. **Ill.** — Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586. **Me.** — Whitcomb *v.* Waterville, 99 Me. 75, 58 Atl. 68; Getchell *v.* Maney, 69 Me. 442. **Mass.** — James *v.* Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692; Warren *v.* Comings, 6 Cush. 103; Gibson *v.* Cooke, 20 Pick. 15, 32 Am. Dec. 194. **Mich.** — Milroy *v.* Spurr, etc. Co., 43 Mich. 231, 5 N. W. 287. **Minn.** — Dean *v.* St. Paul & D. R. Co., 53 Minn. 504, 55 N. W. 628. **Mo.** — Loomis *v.* Robinson, 76 Mo. 488; Burnett *v.* Crandall, 63 Mo. 410; McPike *v.* McPherson, 41 Mo. 521; Love *v.* Fairfield, 13 Mo. 300, 53 Am. Dec. 148. **N. J.** — Sternberg & Co. *v.* Lehigh Val. R. Co., 78 N. J. L. 277, 73 Atl. 39; Van Schoick *v.* Van Schoick, 76 N. J. L. 242, 69 Atl. 1080; Otis *v.* Adams, 56 N. J. L. 38, 27 Atl. 1092. **N. Y.** — Dickinson *v.* Tysen, 125 App. Div. 735, 110 N. Y. Supp. 269. **N. C.** — Boyle *v.* Robbins, 71 N. C. 130. **Ohio.** — Pennsylvania Co. *v.* Thatcher, 78 Ohio St. 175, 85 N. E. 55; Pittsburg, etc. R. Co. *v.* Volkert, 58 Ohio St. 362, 50 N. E. 924; Cincinnati, etc. R. Co. *v.* Lima R. Supply Co., 27 Ohio C. C. 807. **Ore.** — State Ins. Co. *v.* Oregon R. Co., 20 Ore. 563, 26 Pac. 838. **Pa.** — Hopkins *v.* Stockdale, 117 Pa. 365, 11 Atl. 368; Trexler *v.* Kuntz, 36 Pa. Super. 352; Fullmer & Co. *v.* Pine Twp., 17 Pa. Co. Ct. 482; Fairgrieves *v.* Lehigh Nav. Co., 2 Phila. 182, 13 Leg. Int. 356. **Tenn.** — Allison *v.* Pearce, 59 S. W. 192. **Tex.** — Galveston, H. S. R. Co. *v.* Ginther, 96 Tex. 295, 72 S. W. 166; Lindsay *v.* Price, 33 Tex. 280. **Vt.** — Burditt *v.* Porter, 63 Vt. 296, 21 Atl. 955, 25 Am. St.

can be brought, in the absence of assent, by the debtor to a partial assignment,[73] and the assignee can sue at law neither in his own name[74] nor in the name of the assignor.[75]

Rep. 763; Carter *v.* Nichols, 58 Vt. 553, 5 Atl. 197. **Wash.** — Lewis *v.* Third St., etc. R. Co., 26 Wash. 28, 66 Pac. 150. **W. Va.** — Dudley *v.* Barrett, 66 W. Va. 363, 66 S. E. 507; St. Lawrence Boom Co. *v.* Price, 49 W. Va. 432, 38 S. E. 526. **Wis.** — Thiel *v.* John Week Lumb. Co., 137 Wis. 272, 118 N. W. 802, 129 Am. St. Rep. 1064; Dugan *v.* Knapp, 105 Wis. 320, 81 N. W. 412; Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426.

Between Assignor and Debtor. — In the absence of statute a court of law will not even recognize a partial assignment as a defense to an action by the assignor against the debtor. City of Pueblo *v.* Dye, 44 Colo. 35, 96 Pac. 969; Thiel *v.* John Week Lumb. Co., 137 Wis. 272, 118 N. W. 802, 129 Am. St. Rep. 1064.

Severable Demand.—A severable part of a claim is assignable. Adler *v.* Kansas City, etc. R. Co. 92 Mo. 242, 4 S. W. 917.

73. **U. S.** — Shankland *v.* Mayor of Washington, 5 Pet. 390, 8 L. ed. 166; Mandeville *v.* Welch, 5 Wheat. 277, 5 L. ed. 87. **Ala.** — Kansas City R. Co. *v.* Robertsor, 109 Ala. 296, 19 So. 432. **Ark.** — Hanks *v.* Harris, 29 Ark. 323. **Cal.** — Thomas *v.* Rock Isl. G. & S. Min. Co., 54 Cal. 578. **Colo.** — Chicago, B. & Q. R. Co. *v.* Provolt, 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587; Barnum *v.* Green, 13 Colo. App. 254, 57 Pac. 757; McMurray *v.* Marsh, 12 Colo. App. 95, 54 Pac. 852; Snedder *v.* Harmes, 5 Colo. App. 477, 39 Pac. 68. **D. C.** — Sincell *v.* Davis, 24 App. Cas. 218. **Ga.** — Central of Georgia R. Co. *v.* Dover, 1 Ga. App. 240, 57 S. E. 1002. **Ill.** — Crosby *v.* Loop, 13 Ill. 625, 14 Ill. 330. **Kan.** — Insurance Co. *v.* Bullene, 51 Kan. 764, 33 Pac. 467. **Ky.** — Weinstock *v.* Bellwood, 12 Bush 139. **La.** — Russell *v.* Ferguson, 9 Mart. (N. S.) 647. **Me.** Whitcomb *v.* Waterville, 99 Me. 75, 58 Atl. 68; Getchell *v.* Maney, 69 Me. 442. **Mich.** — Milroy *v.* Spurr, etc. Co., 43 Mich. 231, 5 N. W. 287. **Minn.** — Dean *v.* St. Paul & D. R. Co., 53 Minn. 504, 55 N. W. 658. **Mo.** — Loomis *v.* Robinson, 76 Mo. 488; Love *v.* Fairfield, 13 Mo. 300, 53 Am. Dec. 148. **N. J.** — Otis *v.* Adams, 56 N. J. L. 38, 27 Atl. 1092. **N. C.** — Boyle *v.* Robbins, 71 N. C. 130. **Ohio.** — Pittsburg, etc. R. Co. *v.* Volkert, 58 Ohio St. 362, 50 N. E. 924; Cincinnati etc. R. Co. *v.* Lima R. Supply Co., 27 Ohio C. C. 807. **Pa.** — Hopkins *v.* Stockdale, 117 Pa. 365, 11 Atl. 368; Fullmer & Co. *v.* Pine Twp., 17 Pa. Co. Ct. 482; Fairgrieves *v.* Lehigh Nav. Co., 2 Phila. 182, 13 Leg. Int. 356. **Vt.** — Burditt *v.* Porter, 63 Vt. 296, 21 Atl. 955, 25 Am. St. Rep. 763; Carter *v.* Nichols, 58 Vt. 553, 5 Atl. 197. **Wash.** — Lewis *v.* Third St., etc. R. Co., 26 Wash. 28, 66 Pac. 150.

74. **U. S.** — Mandeville *v.* Welch, 5 Wheat. 277, 5 L. ed. 87; Tyler *v.* Tuel, 6 Cranch 324, 3 L. ed. 237; Aetna Ins. Co. *v.* Hannibal R. Co., 3 Dill. 1, 1 Fed. Cas. No. 96. **Ill.** — Chicago, etc. R. Co. *v.* Nichols, 57 Ill. 464; Crosby *v.* Loop, 13 Ill. 625, 14 Ill. 330; Miller *v.* Bledsoe, 2 Ill. 530, 32 Am. Dec. 37. **Mass.** — James *v.* Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692. **N. J.** — Sloan *v.* Sommers, 14 N. J. L. 509. **Ohio.** — Stanberry *v.* Smythe, 13 Ohio St. 495. **Ore.** — State Ins. Co. *v.* Oregon R. Co., 20 Ore. 563, 26 Pac. 838. **Pa.** — Jermyn *v.* Moffitt, 75 Pa. 399; Fairgrieves *v.* Lehigh Nav. Co., 2 Phila. 182, 13 Leg. Int. 356. *Compare* Caldwell *v.* Hartupee, 70 Pa. 74; Budd *v.* Himmelberger, 4 Pa. Dist. 545.

75. Thiel *v.* John Week Lumb. Co., 137 Wis. 272, 118 N. W. 802, 129 Am. St. Rep. 1064; Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426.

A party entitled to share in the proceeds of a note in the hands of a trustee or depository is entitled to maintain a suit at law in the name of the trustee. Penobscot R. Co. *v.* Mayo, 60 Me. 306; Caldwell *v.* Hartupee, 70 Pa. 74. See also Brown *v.* Dunn, 50 N. J. L. 111, 11 Atl. 149, where a part owner of rights under an execution levy compelled the sheriff to pay the fund into court.

Assent By Debtor. — If, however, the debtor assents to the partial assignment, the assignee is generally allowed to sue in his own name for the portion assigned, without joining the assignor. Whether the action is on the original contract or is a new promise implied from the assent is not clear.[76]

2. In Equity. — Because of the ability to bring all parties interested before the court, equity has generally recognized partial assignments, and allows recovery by the partial assignee where the assignor is made a party to the action.[77] The presence of the as-

76. **U. S.** — Rogers *v.* Penobscot Min. Co., 83 C. C. A. 380, 154 Fed. 606. **Cal.** — Thomas *v.* Rock Island Min. Co., 54 Cal. 578. **Colo.** — Chicago, B. & Q. R. Co. *v.* Provolt, 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587; French *v.* Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; Home Ins. Co. *v.* Atchison, T. & S. F. R. Co., 19 Colo. 46, 34 Pac. 281; Smith *v.* Atkinson, 18 Colo. 255, 32 Pac. 425; Snedden *v.* Harnes, 5 Colo. App. 477, 39 Pac. 68. **D. C.** — Westham Granite Co. *v.* Chandler, 4 Mackey 32. **Ill.** — Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586; Miller *v.* Bledsoe, 2 Ill. 530, 32 Am. Dec. 37. **Kan.** — German Fire Ins. Co. *v.* Bullene, 51 Kan. 764, 33 Pac. 467. **Ky.** — Weinstock *v.* Bellwood, 12 Bush 139. **La.** — Le Blanc *v.* East Baton Rouge, 10 Rob. 25. **Mass.** — Palmer *v.* Merrill, 6 Cush. 282, 52 Am. Dec. 782. **Mich.** — Milroy *v.* Spurr Mt. Min. Co., 43 Mich. 231, 5 N. W. 287. **Mo.** — Fourth Nat. Bank *v.* Noonan, 88 Mo. 372; Leonard *v.* Missouri, K. & T. R. Co., 68 Mo. App. 48. **Ohio.** — Stanberry *v.* Smythe, 13 Ohio St. 495. **Ore.** — McDaniel *v.* Maxwell, 21 Ore. 202, 27 Pac. 952, 28 Am. St. Rep. 740. **Pa.** — Ingraham *v.* Hall, 11 Serg. & R. 78; Smith *v.* Stockdale, 3 Pa. Co. Ct. 113; McCaffery *v.* Cassidy, 3 Phila. 210. **S. C.** — Hughes *v.* Kiddell, 2 Bay 324. **Vt.** — Angus *v.* Robinson, 59 Vt. 585, 8 Atl. 497, 5 Am. Rep. 758. **Wis.** — Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426.

Contra, Insurance Co. of North America *v.* Martin, 139 Ind. 317, 37 N. E. 394; Cochran v. Glover, Morris (Iowa) 151.

Recovery After Debtor's Assent. — When the debtor has consented to the partial assignment the assignee may sue at law without joining either the assignor or other partial assignee. **U. S.** — Delaware County *v.* Diebold Safe Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. ed. 674. **Cal.** — Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423. **Hawaii.** Horner *v.* Spreckels, 5 Hawaii 430. **Md.** — Harris *v.* City of Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 25 Am. St. Rep. 565, 8 L. R. A. 677. **Mass.** Richmond *v.* Parker, 12 Met. 48. **Mo.** Fourth Nat. Bank *v.* Noonan, 88 Mo. 372; Johnson County *v.* Bryson, 27 Mo. App. 341. **Ohio.** — Cincinnati, etc. R. Co. *v.* Lima R. Supply Co., 27 Ohio C. C. 807. **Ore.** — Little *v.* Portland, 26 Ore. 235, 37 Pac. 911; McDaniel *v.* Maxwell, 21 Ore. 202, 27 Pac. 952, 28 Am. St. Rep. 740. **Pa.** — Miller *v.* Insurance Co., 5 Phila. 12. **Vt.** — Burditt *v.* Porter, 63 Vt. 296, 21 Atl. 955, 25 Am. Rep. 763.

In New Jersey it is held that the debtor's assent is not necessary in an equitable action, and that such assent need only be shown in an action at law where it creates a novation. Lanigan *v.* Bradley & C. Co., 50 N. J. Eq. 201, 24 Atl. 505.

A holder of a partial interest may assign it. King *v.* King, 59 App. Div. 128, 68 N. Y. Supp. 1089.

77. **U. S.** — Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. ed. 855; Peugh *v.* Porter, 112 U. S. 737, 5 Sup. Ct. 361, 28 L. ed. 859; Burke *v.* Child, 21 Wall. 441, 22 L. ed. 623; *In re* MacCauley, 158 Fed. 322; Dulles *v.* Crippen Mfg. Co., 156 Fed. 706; The Elmbank, 72 Fed. 610; Dowell *v.* Cardwell, 4 Sawy. 217, 7 Fed. Cas. No. 4,039. **Ark.** — Moore *v.* Robinson, 35 Ark. 293. **Cal.** — Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423. **Ga.** — Western Union Tel. Co. *v.* Ryan, 126 Ga. 191, 55 S. E. 21; Rivers *v.* Wright, 117 Ga. 81, 43 S. E. 499; Central of Georgia R. Co. *v.* Dover, 1 Ga. App. 240, 57 S. E. 1002. **Ill.** — Warren *v.* First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; Phil-

signor in court may be secured either by a joinder of parties or a bill of interpleader.[78]

lips *v.* Edsall, 127 Ill. 535, 20 N. E. 801; North Chicago St. R. Co. *v.* Ackley, 58 Ill. App. 572. **Ind.** — Wood *v.* Wallace, 24 Ind. 226. **Ky.** — Columbia Finance & T. Co. *v.* First Nat. Bank, 116 Ky. 364, 76 S. W. 156. **Me.** — Horne *v.* Stevens, 79 Me. 262, 9 Atl. 616; National Exch. Bank *v.* McLoon, 73 Me. 498, 40 Am. Rep. 388; Buck *v.* Swazey, 35 Me. 41, 56 Am. Dec. 681. **Mass.** — Staples *v.* Somerville, 176 Mass. 237, 57 N. E. 380; Richardson *v.* White, 167 Mass. 58, 44 N. E. 1072; James *v.* Newton, 142 Miss. 366, 8 N. E. 122, 56 Am. Rep. 692. **Miss.** — Hutchinson *v.* Simon, 57 Miss. 628; Moody *v.* Kyle, 34 Miss. 506. **N. J.** — Terney *v.* Wilson, 45 N. J. L. 282; Todd v. Meding, 56 N. J. Eq. 83, 38 Atl. 349; Lanigan *v.* Bradley & C. Co., 50 N. J. Eq. 201, 24 Atl. 505; Trenton Public Schools *v.* Heath, 15 N. J. Eq. 22. **N. Y.** — Chambers *v.* Lancaster, 160 N. Y. 342, 54 N. E. 707; Whittemore *v.* Judd L. & S. O. Co., 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708; Field *v.* New York, 6 N. Y. 179, 57 Am. Dec. 435; Chase *v.* Deering, 104 App. Div. 192, 93 N. Y. Supp. 434. **N. C.** Etheridge *v.* Vernoy, 74 N. C. 800. **Ohio.** — Pittsburg, etc. R. Co. *v.* Volkert, 58 Ohio St. 362, 50 N. E. 924; Taneyhill *v.* Burlington & O. R. Co., 7 Ohio N. P. (N. S.) 487. **Ore.** — Commercial Nat. Bank *v.* Portland, 37 Ore. 33, 54 Pac. 814, 60 Pac. 563. **Pa.** — Budd *v.* Himmelberger, 4 Pa. Dist. 545. **Tenn.** — Spring City Bank *v.* Rhea County, 59 S. W. 442; Allison *v.* Pearce, 59 S. W. 192. **Tex.** — Clark *v.* Gillespie, 70 Tex. 513, 8 S. W. 121; Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 8 S. W. 98; Harris County *v.* Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Campbell *v.* Grant Co., 36 Tex. Civ. App. 641, 82 S. W. 794; Harris County *v.* Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791. **Va.** Brooks *v.* Hatch, 6 Leigh 534. **W. Va.** Wamsley *v.* Ward, 61 W. Va. 65, 55 S. E. 998. See also McConaughey *v.* Bennett, 50 W. Va. 172, 40 S. E. 540; St. Lawrence Boom Co. *v.* Price, 49 W. Va. 432, 38 S. E. 526. **Wis.** — Baillie *v.* Stephenson, 95 Wis. 500, 70 N. W. 660.

Equitable Interests. — A *cestui que trust* of real or personal property may convey a part interest therein without consent of the trustee, and the assignee may maintain a suit in equity to enforce the execution of the trust. **U. S.** Rogers *v.* Penobscot Min. Co., 154 Fed. 606, 83 C. C. A. 380. **Ark.** — Honnett *v.* Williams, 66 Ark. 148, 49 S. W. 495. **Me** — Buck *v.* Swazey, 35 Me. 41, 56 Am. Dec. 681. **Mass.** — Whipple *v.* Fairchild, 139 Mass. 262, 30 N. E. 89; Putnam *v.* Story, 132 Mass. 205; Palmer *v.* Stevens, 15 Gray 343. **N. Y.** — Clark *v.* Crego, 47 Barb. 599.

78. **Interpleader.** — The rights of the assignee may be enforced under a bill of interpleader. Lanigan *v.* Bradley & C. Co., 50 N. J. Eq. 201, 24 Atl. 505.

Where all part owners have joined, the fact of assignment of a part is no defense. Whittemore *v.* Judd L. & S. O. Co., 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708.

Joinder of Parties. — The assignee may join the assignor either as co-plaintiff or, if the assignor refuses, as a co-defendant. Schilling *v.* Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475. And where the fund has been brought into court, the court will on the debtor's petition adjust all claims and divide the fund. James *v.* Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692.

Failure To Join Assignor. — The failure to make other part owners of the chose in action parties to the suit is a curable defect, and will not sustain a judgment of dismissal of the bill on its merits. The bill will be retained until the complainant has had a reasonable opportunity to amend and bring in the other parties, or to explain and excuse their absence under the practice of equity in the federal courts. Rogers *v.* Penobscot Min. Co., 154 Fed. 606, 83 C. C. A. 380.

The only remedy left open to the debtor where separate actions are brought and later joined is an adjustment of the costs prior to the consolidation. Avery *v.* Popper, 92 Tex. 337, 50 S. W. 122, 49 S. W. 219, 71 Am. St. Rep. 849.

3. Statutory Modifications. — The distinction between non-recovery by the partial assignee at law and his recovery in equity is generally lost sight of under the codes,[79] and the action is frequently viewed as an action at law.[80] It is necessary, however, to make the assignor and other partial assignees parties to the proceedings,[81]

79. **U. S.** — Delaware County *v.* Diebold Safe & L. Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. ed. 674 (referring to Indiana); Evans *v.* Durango Land & C. Co., 80 Fed. 433, 25 C. C. A. 531, 49 U. S. App. 320 (referring to Colorado). **Cal.** — Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423. **Ga.** — Western & A. R. Co. *v.* Union Inv. Co., 128 Ga. 74, 57 S. E. 100. **Ind.** — Earnest *v.* Barrett, 6 Ind. App. 371, 33 N. E. 635. **Minn.** — Schilling *v.* Mullen, 55 Minn. 122, 46 N. W. 586, 43 Am. St. Rep. 475. **Tex.** — Goldman *v.* Blum, 58 Tex. 630; Lanes *v.* Squyres, 45 Tex. 383; Stachely *v.* Peirce, 28 Tex. 328; Faulk *v.* Faulk, 23 Tex. 653; Moore *v.* Minerva, 17 Tex. 20.

As to New York, see Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Chase *v.* Deering, 104 App. Div. 192, 93 N. Y. Supp. 434; Chambers *v.* Lancaster, 3 App. Div. 215, 38 N. Y. Supp. 253, *affirmed*, 160 N. Y. 342, 54 N. E. 707; Lauer *v.* Dunn, 52 Hun 191, 5 N. Y. Supp. 161, *affirmed*, 115 N. Y. 405, 22 N. E. 270. See also Dickinson *v.* Tysen, 125 App. Div. 735, 110 N. Y. Supp. 269, to the effect that the original relief was never in law but in equity, but allowing the court in a code action to summon all parties to appear if such is deemed essential under N. Y. Code Civ. Proc., § 452.

In Chase *v.* Deering, *supra*, the New York court refuses to allow the assignee to join the assignor for the sole purpose of avoiding a jury trial. (See adverse criticism in Dickinson *v.* Tysen, *supra*.) Nor can the assignor deprive the debtor of a jury trial by joining assignees so as to give the action an equitable character. Butterly *v.* Deering, 102 App. Div. 395, 92 N. Y. Supp. 675. See also Crouch *v.* Muller, 141 N. Y. 495, 36 N. E. 394; Lauer *v.* Dunn, 115 N. Y. 405, 22 N. E. 270; Danvers *v.* Lugar, 30 Misc. 18, 61 N. Y. Supp. 778, assuming that originally the action by a partial assignee could be brought at law. Criticised in Dickinson *v.* Tysen, and Chambers *v.* Lancaster, *supra, following* Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Cook *v.* Genesee Mut. Ins. Co., 8 How. Pr. (N. Y.) 514; McLean *v.* Fidelity, etc. Co., 56 Misc. 623, 107 N. Y. Supp. 907.

In England a partial assignment does not appear to have been included in § 25, sub-div. 6 of the Judicature Act, 1873, but the assignee is still reduced to an action in equity with the assignor also brought before the court. Durham *v.* Robertson (1898), 1 Q. B. Div. 765; Nelson *v.* Nelson Line, Ltd. (1906), 2 K. B. 217.

80. Delaware County *v.* Diebold Safe & L. Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. ed. 674 (holding the joinder of the assignor not always necessary under the practice in Washington and Indiana); Dickerson *v.* Spokane, 26 Wash. 292, 66 Pac. 381.

Joinder of Assignor. — On analogy to the New York and Wisconsin practice, it was held in Oregon that under the statute providing that the real party in interest may sue an insurance company with which wheat has been insured for a part of its value, upon paying the insurance and becoming subrogated to that extent, may sue at law for the negligent destruction by fire by joining the assignor. Firemen's Ins. Co. *v.* Oregon R. Co., 45 Ore. 53, 76 Pac. 1075, 67 L. R. A. 161. In New Jersey under a similar statute an opposite result was reached and recovery at law was refused. Otis *v.* Adams, 56 N. J. L. 38, 27 Atl. 1092.

81. **N. Y.** — Dickinson *v.* Tysen, 125 App. Div. 735, 110 N. Y. Supp. 269. **Ore.** Firemen's Ins. Co. *v.* Oregon R. Co., 45 Ore. 53, 76 Pac. 1075, 67 L. R. A. 161. **Wis.** — Thiel *v.* John Week Lumb. Co., 137 Wis. 272, 118 N. W. 802, 129 Am. St. Rep. 1064; Raesser *v.* National Exch. Bank, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979, 56 L. R. A. 174; Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426.

Contra. — But in the absence of counterclaims, or where the other claimants have been paid, or in the absence of desire of the debtor, the assignee

though, with the exception of a few jurisdictions, the debtor's assent to the assignment is not essential.[82]

II. PARTIES. — A. At Law. — **1. Action By Assignor. — Joinder of Assignee.** — Where an assignment does not transfer the legal title it is usually held that the assignee need not be made a party in an action by the assignor.[83] In suits in equity and actions under the modern codes, however, the assignee may be a party where his presence is essential to a proper disposition of the controversy.[84]

2. Action By Assignee. — Joinder of Assignor. — Where the assignment, either under the common law or by statutory provision, vests the legal title and the entire beneficial interest in the assignee, he may sue in his own name without joining the assignor.[85]

may sue alone. **Ind.** — Insurance Co. of North America *v.* Martin, 139 Ind. 317, 37 N. E. 394. **N. Y.** — Cook *v.* Genesee Mut. Ins. Co., 8 How. Pr. 514. **Wash.** — Dickerson *v.* Spokane, 26 Wash. 292, 66 Pac. 381.

See Southwestern T. Co. *v.* Tucker (Tex. Civ. App.), 98 S. W. 909, where the assignor is allowed to recover the portion unassigned without joining the partial assignee.

82. Where such assent was originally immaterial in an equity action, it remains so under the code. Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

But in Wisconsin it is held that in the absence of such assent the debtor may pay his claim *in solido* to the original creditor without incurring any liability towards partial assignees. Thiel *v.* John Week Lumb. Co., 137 Wis. 272, 118 N. W. 802. See also Raesser *v.* Nat. Exch. Bank, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979, 56 L. R. A 174; Dugan *v.* Knapp, 105 Wis. 320, 81 N. W. 412; Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426. But see Baillie *v.* Stephenson, 95 Wis. 500, 70 N. W. 660, favoring an equitable assignment of a part of a debt regardless of the debtor's assent, and relieving it of garnishment.

83. See *supra*, I, A, 3.

84. **Conn.** — Colburn *v.* Rossiter, 2 Conn. 503. **Ill.** — Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801. **Me.** — Brown *v.* Johnson, 53 Me. 246. **Md.** — Coale *v.* Mildred's Admr., 3 Har. & J. 278. **Minn.** — Herrick *v.* Minneapolis & St. L. R. Co., 32 Minn. 435, 21 N. W. 471. **N. Y.** — Wilcox *v.* Pratt, 125 N. Y. 688, 25 N. E. 1091; Mumford *v.* Sprague, 11 Paige 438. **N. C.** — Boyle *v.* Robbins, 71 N. C. 130. **Tex.** — Galveston, etc. R. Co. *v.* Mathes (Tex. Civ. App.), 73 S. W. 411.

Where the debtor has some defense good only against the assignee, the equitable owner, the assignee may be brought in as a party. Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 8 S. W. 98. See *infra*, I, B, 1.

85. **Ark.** — Collier *v.* Trice, 79 Ark. 414, 96 S. W. 174; St. Louis, etc. R. Co. *v.* Camden Bank, 47 Ark. 541, 1 S. W. 704. **D. C.** — Young *v.* Kelley, 3 App. Cas. 297. **Ind.** — Colerick *v.* Hooper, 3 Ind. 316, 56 Am. Dec. 505. **Ia.** — Shambaugh *v.* Current, 111 Iowa 121, 82 N. W. 497; Vimont *v.* Chicago & N. W. R. Co., 64 Iowa 513, 17 N. W. 31, 21 N. W. 9, 69 Iowa 296, 22 N. W. 906, 28 N. W. 612, 19 Am. & Eng. R. Cas. 215. **Ky.** — Kennedy *v.* Davis, 7 T. B. Mon. 372; Clark *v.* Smith, 7 B. Mon. 273; Snelling *v.* Boyd, 5 T. B. Mon. 172; Cobb *v.* Thompson, 1 A. K. Marsh. 508; Oldham *v.* Rowan, 3 Bibb 534. **Minn.** — Davis *v.* Sutton, 23 Minn. 307. **Neb.** — Huddleson *v.* Polk, 70 Neb. 483, 97 N. W. 624; Wood *v.* Carter, 67 Neb. 133, 93 N. W. 158. **Nev.** — Carpenter *v.* Johnson, 1 Nev. 331. **N. Y.** — Allen *v.* Smith, 16 N. Y. 415. **Ohio.** — Allen *v.* Miller, 11 Ohio St. 374. **Ore.** — Levins *v.* Stark, 110 Pac. 980. **Wash.** — VanHorne *v.* Watrous, 10 Wash. 525, 39 Pac. 136. **Wis.** Gunderson *v.* Thomas, 87 Wis. 406, 58 N. W. 750. **Eng.** — Tolhurst *v.* Associated Portland Cement Mfrs. (1903), App. Cas. 414, 72 L. J. K. B. 834. **Can.** Blackley *v.* Dooley, 18 Ont. 381.

Assignor need not be made a party for the purpose of accounting. Alex-

3. Beneficial Interest in Assignor or Another. — But even though the assignee has not the beneficial interest,[86] he may by virtue of his legal title sue in his own name, as, for example, an assignee for collection merely;[87] or where the chose has been assigned as collateral security;[88] or upon some collateral agree-

ander *v.* Gloversville, 110 App. Div. 791, 97 N. Y. Supp. 198.

A surety on an attachment bond, having been obliged to pay it, took an assignment thereof, and, in a suit to subject the proceeds derived from the sale of the attached property, joined the assignor. There was no misjoinder of plaintiffs. Hunneman *v.* Lowell Inst. for Savings, 205 Mass. 441, 91 N. E. 526.

86. Rullman *v.* Rullman, 81 Kan. 521, 106 Pac. 52; Continental Oil, etc. Co. *v.* Van Winkle, etc. Works (Tex. Civ. App.), 131 S. W. 415.

87. **Ariz.** — Stroufe *v.* Soto Bros. & Co., 5 Ariz. 10, 43 Pac. 221. **Cal.** — Ingham *v.* Weed, 48 Pac. 318; Tuller *v.* Arnold, 98 Cal. 522, 33 Pac. 445; Gradwohl *v.* Harris, 29 Cal. 150. **Colo.** Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383; Forsythe *v.* Ryan, 17 Colo. App. 511, 68 Pac. 1055; Gomer *v.* Stockdale, 5 Colo. App. 489, 39 Pac. 355. **Ind.** Butler *v.* Sturges, 6 Blackf. 186. **Ia.** — Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226; Knadler *v.* Sharp, 36 Iowa 232; Cottle *v.* Cole, 20 Iowa 481. **Kan.** — Walburn *v.* Chenault, 43 Kan. 352, 23 Pac. 657. But see Stewart *v.* Price, 64 Kan. 191, 67 Pac. 553, 64 L. R. A. 581. **Minn.** — Struckmeyer *v.* Lamb, 64 Minn. 57, 65 N. W. 930; Anderson *v.* Reardon, 46 Minn. 185, 48 N. W. 777; Castner *v.* Austin, 2 Minn. 44. **Mo.** — Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132; Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632; Simmons *v.* Belt, 35 Mo. 461; Beattie *v.* Lett, 28 Mo. 596; Peters *v.* St. Louis, etc. R. Co., 24 Mo. 586; Webb *v.* Morgan, 14 Mo. 428; Dean *v.* Chandler, 44 Mo. App. 338; Haysler *v.* Dawson, 28 Mo. App. 531. **N. Y.** — Mecker *v.* Claghorn, 44 N. Y. 349; Curran *v.* Weiss, 6 Misc. 138, 26 N. Y. Supp. 8, 56 N. Y. St. 284; Moore *v.* Robertson, 25 Abb. N. C. 173, 11 N. Y. Supp. 798; 17 N. Y. Supp. 554, 43 N. Y. St. 245. **Wis.** — Hankwitz *v.* Barrett, 143 Wis. 639, 128 N. W. 430.

The assignment being absolute, the assignee is as to the debtor the real party in interest, though the assignor is to receive the proceeds. Sheridan *v.* New York, 68 N. Y. 30; Walcott *v.* Hilman, 23 Misc. 459, 51 N. Y. Supp. 358; Cunningham *v.* Cohen, 14 Misc. 12, 35 N. Y. Supp. 125, 69 N. Y. St. 498; Allen *v.* Brown, 51 Barb. 86, 44 N. Y. 228.

An assignee who is a mere attorney to collect and apply the proceeds to paying off debts of the assignor in the attorney's hands for collection is the real party in interest, and may sue alone. Wynne *v.* Heck, 92 N. C. 414.

Contra.—Where assignee, although he has the legal title, is to account for the proceeds, he is not the real party in interest and cannot sue in his own name. **Ala.** — Pleasants *v.* Erskine, 82 Ala. 386, 2 So. 122. **Conn.** — Gaffney *v.* Tammany, 72 Conn. 701, 46 Atl. 156; Metropolitan Life Ins. Co. *v.* Fuller, 61 Conn. 252, 23 Atl. 193, 29 Am. St. Rep. 196. **Neb.** — Hoagland *v.* Van Etten, 22 Neb. 681, 35 N. W. 869, 23 Neb. 462, 36 N. W. 755. **N. C.** — Abrams *v.* Cureton, 74 N. C. 523.

88. **Cal.** — Wetmore *v.* San Francisco, 44 Cal. 294; Warner *v.* Wilson, 4 Cal. 310. **Colo.** — Butler *v.* Rockwell, 14 Colo. 125, 23 Pac. 462. **D. C.** — McCormick *v.* District of Columbia, 7 Mackey 534. **Minn.** — Castner *v.* Austin, 2 Minn. 32. **N. H.** — Barnes *v.* Union Mut. F. Ins. Co., 45 N. H. 21. **N. Y.** — Lawler *v.* Nat. Life Association, 83 Hun 393, 31 N. Y. Supp. 875, 64 N. Y. St. 785; Carnes *v.* Platt, 6 Robt. 270. **Tex.** — East Texas F. Ins. Co. *v.* Coffee, 61 Tex. 287; Riggins *v.* Sass (Tex. Civ. App.), 127 S. W. 1064. **W. Va.** — Bentley *v.* Standard Fire Ins. Co., 40 W. Va. 729, 23 S. E. 584. **Wis.** — Plant's Mfg. Co. *v.* Falvey, 20 Wis. 200.

Where the assignee can sue in his own name only when he has the entire beneficial interest, he cannot sue on an account assigned as collateral security unless a sum remains due

ment,[89] even though the plaintiff paid nothing by way of consideration.

4. Assignee As Real Party in Interest. — Where the assignment does not pass the legal title to the chose, but only the beneficial interest, it is held, in most states, that the equitable assignee may, under the statutes, sue in his own name as the real party in interest, without joining the assignor;[90] in other states, that the assignor must be a party to the action, as the legal title did not pass by the

greater than the amount assigned. New Haven City Bank *v.* Thorp, 78 Conn. 211, 61 Atl. 428.

Contra.—The assignor must be joined with the assignee, as he is a party in interest. **Cal.** — Cerf *v.* Ashley, 68 Cal. 419, 9 Pac. 658, holding that assignor may join with assignee. **N. J.** — Chew *v.* Brumagim, 21 N. J. Eq. 520. **N. Y.** Western Bank *v.* Sherwood, 29 Barb. 383; Boynton *v.* Clinton & E. Mut. Ins. Co., 16 Barb. 254.

Under the Judicature Act of 1873, the assignment must be absolute to entitle the assignee to sue in his own name, and so an assignment by way of security is insufficient. Durham *v.* Robertson (1898), 1 Q. B. Div. 765, 67 L. J. Q. B. 484; Hostrawser *v.* Robinson, 23 U. C. C. P. 350.

89. **Idaho.** — Brumback *v.* Oldham, 1 Idaho 709. **Ind.** — Pugh *v.* Miller, 126 Ind. 189, 25 N. E. 1040. **Ia.**—Wardner *v.* Jack, 82 Iowa 435, 48 N. W. 729; Whittaker *v.* Johnson County, 10 Iowa 161. **Me.** — Norris *v.* Hall, 18 Me. 332. **Mo.** — Wolff *v.* Matthews, 39 Mo. App. 376. **N. Y.** — Stone *v.* Frost, 61 N. Y. 614; Richardson *v.* Mead, 27 Barb. 178; Arthur *v.* Brooks, 14 Barb. 533. **Ore.** — Gregoire *v.* Rourke, 28 Ore. 275, 42 Pac. 996; Dawson *v.* Pogue, 18 Ore. 94, 22 Pac. 637, 6 L. R. A. 176.

If one partner has assigned his interest to his co-partner, though for a nominal consideration, the action cannot be brought in the name of both partners. Clark *v.* Downing, 1 E. D. Smith (N. Y.) 406.

Agreement Not Amounting to Assignment. — Where an agreement is made with a creditor to whom an account is assigned that if he collect it he may apply a portion of it to the indebtedness and return the remainder to the assignor, but if nothing is collected no credit is to be given, the assignee cannot sue in his own name, because there is no assignment, or partial assignment, but merely an agreement to pay the debt out of a particular judgment, provided the plaintiff's name is used and a recovery had. Ritter *v.* Stevenson, 7 Cal. 388.

See also as to agreement with attorney to deduct his fee from amount collected. **Ill.** — Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801. **Minn.** — Herrick *v.* Minneapolis & St. L. R. Co., 32 Minn. 435, 21 N. W. 471. **Tex.** — Galveston, etc. R. Co. *v.* Mathes (Tex. Civ. App.), 73 S. W. 411.

90. **U. S.** — Davis *v.* Bilsland, 18 Wall. 659, 21 L. ed. 969 (as to assignee of a mechanic's lien); Edmunds *v.* Illinois Cent. R. Co., 80 Fed. 78; Robinson *v.* Memphis R. Co., 16 Fed. 57. **Ark.** — Heartman *v.* Franks, 36 Ark. 501. **Cal.** — Quan Wye *v.* Chin Lin Hee, 123 Cal. 185, 55 Pac. 783; Wing Ho *v.* Baldwin, 70 Cal. 194, 11 Pac. 565; Cheney *v.* Newberry, 67 Cal. 126, 7 Pac. 445; McLaren *v.* Hutchinson, 22 Cal. 187, 83 Am. Dec. 59; Boyce *v.* Gordon, 11 Cal. App. 771, 106 Pac. 264. **Colo.** — Perkins *v.* Peterson, 2 Colo. App. 242, 29 Pac. 1135. **Fla.** — Robinson *v.* Nix, 22 Fla. 321. **Ind.** — Sinker *v.* Kidder, 123 Ind. 528, 24 N. E. 341; Patterson *v.* Crawford, 12 Ind. 241. **Ia.** Barthol *v.* Blakin, 34 Iowa 452; Younker *v.* Martin, 18 Iowa 143 (*dictum*); Conynham *v.* Smith, 16 Iowa 471; Shepard *v.* Ford, 10 Iowa 502; State *v.* Butterworth, 2 Iowa 158. **Minn.** — Russell *v.* Minnesota Outfit, 1 Minn. 162. **Mo.** — Turner *v.* Hayden, 33 Mo. App. 15, suit must be brought in name of real party in interest. **Neb.** — Weir *v.* Anthony, 35 Neb. 396, 53 N. W. 206. **N. Y.** — Oneida Bank *v.* Ontario Bank, 21 N. Y. 490; Hastings *v.* McKinley, 1 E. D. Smith 273. See Van Vechten *v.* Graves, 4 Johns. 403. **N. C.** — Thompson *v.* Osborne, 152 N. C. 408, 67 S. E. 1029. **Ohio.** — Hall *v.* Cincinnati R. Co., 1 Disn. 58. **S. C.** — Childs *v.* Alexander, 22 S. C. 169. **Tex.** — East Texas Fire Ins. Co. *v.* Coffee, 61 Tex. 287; Galveston, etc. R. Co. *v.* Freeman, 57 Tex. 156; **Bullion**

assignment.[91] The statutes of some of these states expressly or impliedly, require that the assignor be made a party.[92]

v. Campbell, 27 Tex. 653; Hopkins *v.* Upshur, 20 Tex. 89, 70 Am. Dec. 375; Devine *v.* Martin, 15 Tex. 26; Ogden *v.* Slade, 1 Tex. 13. **Wis.** — Chase *v.* Dodge, 111 Wis. 70, 86 N. W. 548.

The real owner of a promissory note may sue thereon in his own name without joining the payee, though he holds only by delivery and not by written assignment. Love *v.* Cahn, 93 Ark. 215, 124 S. W. 259.

But where there is only a partial assignment the assignee cannot sue alone; the owners of the entire interest must sue. State Ins. Co. *v.* Oregon R. Co., 20 Ore. 563, 26 Pac. 838.

91. **Assignor Necessary Party.** — **Ark.** — Boqua *v.* Marshall, 88 Ark. 373, 114 S. W. 714; St. Louis, etc. R. Co. *v.* Camden Bank, 47 Ark. 541, 1 S. W. 704. **Ky.** — Hayes Creek Coal Co. *v.* Eagle Coal Co., 32 Ky. L. Rep. 888, 107 S. W. 297; Hicks *v.* Doty, 4 Bush 420; Lytle *v.* Lytle, 2 Met. 127; Gill *v.* Johnson, 1 Met. 649; Craig *v.* Johnson, 3 J. J. Marsh. 573; Young *v.* Rodes, 5 T. B. Mon. 498; Pemberton *v.* Riddle, 5 T. B. Mon. 401; Jarman *v.* Howard, 3 A. K. Marsh. 383; Lemmon *v.* Brown, 4 Bibb 308; Allen *v.* Crockett, 4 Bibb 240; Neyfong *v.* Wells, Hard. 561; Colvin *v.* Newell, 8 Ky. L. Rep. 959; Maynard *v.* Cassady, 4 Ky. L. Rep. 836. See Freebach *v.* Brunker, 5 Ky. L. Rep. 314. **Ohio.** — Stevens *v.* Swallow, 2 Ohio Dec. (Reprint) 305.

Assignor must be made a party defendant where assignment is not by indorsement. Keller *v.* Williams, 49 Ind. 504; Swails *v.* Coverdill, 17 Ind. 337; St. John *v.* Hardwick, 11 Ind. 251 (holding that where assignor is dead, personal representative must be made a party); Stewart *v.* Fralich, 14 Ind. App. 260, 42 N. E. 951; Watson *v.* Conwell, 3 Ind. App. 518, 30 N. E. 5.

A surviving partner who assigns a partnership claim is a necessary party in an action by the assignee, but the representatives of the deceased partners are not necessary parties. Willson *v.* Nicholson, 61 Ind. 241.

If assignor is omitted, demurrer for defect of parties will be sustained. Gordon *v.* Carter, 79 Ind. 386; Hubbell *v.* Skiles, 16 Ind. 138.

Manner of assignment, whether legal or equitable, goes not to the cause of action, but to the question whether or not the assignor should be joined. Singleton *v.* O'Blenis, 125 Ind. 151, 25 N. E. 154; Treadway *v.* Cobb, 18 Ind. 36; Earnest *v.* Barrett, 6 Ind. App. 371, 33 N. E. 635.

Where one who has assigned his interest is before the court urging the assignment, both assignor and assignee should be made parties plaintiff. Swift *v.* Ellsworth, 10 Ind. 205, 71 Am. Dec. 316.

In an action by the assignee of a promissory note against the maker it was held proper to join the payee as defendant. Mewherter *v.* Price, 11 Ind. 199.

Where one of two persons having a cause of action assigned his interest to the other, who sued without joining the assignor, the nonjoinder was waived, under the code, by failure to raise the objection. Abbe *v.* Clark, 31 Barb. (N. Y.) 238.

92. **Ark.** — "Where the assignment of a thing in action is not authorized by statute, the assignor must be a party, as plaintiff or defendant." Kirby's Dig., § 600; Boqua *v.* Marshall, 88 Ark. 373, 114 S. W. 714; St. Louis, etc. R. Co. *v.* Camden Bank, 47 Ark. 541, 1 S. W. 704. **Ind.** — Rev. Stat., 1894, § 277 (where the assignment of a contract is otherwise than by indorsement the assignor is a necessary party); Singleton *v.* O'Blenis, 125 Ind. 151, 25 N. E. 154; Gordon *v.* Carter, 79 Ind. 386 (complaint demurrable for nonjoinder of assignor); Swails *v.* Coverdill, 17 Ind. 337; Hubbell *v.* Skiles, 16 Ind. 138; St. John *v.* Hardwick, 11 Ind. 251; Stewart *v.* Fralich, 14 Ind. App. 260, 42 N. E. 951; Earnest *v.* Barrett, 6 Ind. App. 371, 33 N. E. 635; Watson *v.* Conwell, 3 Ind. App. 518, 30 N. E. 5. **Ky.** — Hayes Creek Coal Co. *v.* Eagle Coal Co., 32 Ky. L. Rep. 888, 107 S. W. 297; Craig *v.* Johnson, 3 J. J. Marsh. 573; Pemberton *v.* Riddle, 5 T. B. Mon. 401; Jarman *v.* Howard, 3 A. K. Marsh. 383; Lemmon *v.* Brown, 4 Bibb 308; Allen *v.* Crockett, 4 Bibb

5. Trustee of Express Trust. — Where the code requires the real party in interest to sue in his own name, trustees of an express trust are usually excepted from the provision, and may sue in their own name without joining the beneficiary.[93]

6. In Partial Assignment. — As already pointed out, an assignee under a partial assignment has not, apart from statute, any remedies at law.[94] Where by statute the real party in interest may sue in his own name, an assignee under a partial assignment may make the assignor a party plaintiff with himself in an action to enforce the assigned chose.[95] But if the debtor has consented to the partial assignment the assignee may sue him for such part without making the assignor a party to the action.[96]

240. **Va.** — Baily's Exr. *v.* Warren, 80 Va. 512.

See *supra,* I, C, 4.

93. **Ia.** — Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226. **Kan.** — Walburn *v.* Chenault, 43 Kan. 352, 23 Pac. 657. **Minn.** — Murphin *v.* Scovell, 44 Minn. 530, 47 N. W. 256; Cremer *v.* Wimmer, 40 Minn. 511, 42 N. W. 467; Laké *v.* Albert, 37 Minn. 453, 3 N. W. 177; St. Anthony Mill Co. *v.* Vandall, 1 Minn. 246. **Mo.** — Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132; Dean *v.* Chandler, 44 Mo. App. 338; Haysler *v.* Dawson, 28 Mo. App. 531. **Nev.** — Carpenter *v.* Johnson, 1 Nev. 331. **N. Y.** — Cummins *v.* Barkalow, 1 Abb. Dec. 479; Allen *v.* Brown, 51 Barb. 86, 44 N. Y. 228; Lewis *v.* Graham, 4 Abb. Pr. 106. **Wis.** — Robbins *v.* Deverill. 20 Wis. 142; Kimball *v.* Spicer, 12 Wis. 668.

Trustee cannot release the right or discontinue the action. *Ex parte* Randall, 149 Ala. 640, 42 So. 840; Foster *v.* Central Nat. Bank, 183 N. Y. 379, 76 N. E. 338.

94. See cases cited under I, D, *supra.*

95. **U. S.** — Evans *v.* Durango Land & C. Co., 80 Fed. 433, 49 U. S. App. 320, 25 C. C. A. 531, the assignee of part of a debt may, in conjunction with his assignor, recover the entire debt. **Cal.** — Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423. **Conn.** — Hamilton *v.* Lamphear, 54 Conn. 237, 7 Atl. 19. **Ind.** — Singleton *v.* O'Blenis, 125 Ind. 151, 25 N. E. 154; Earnest *v.* Barrett, 6 Ind. App. 371, 33 N. E. 635. **Mich.** Wood *v.* Metropolitan I. Ins. Co., 96 Mich. 437, 56 N. W. 8, the assignee of part of a policy of insurance must be joined in an action thereon. **N. Y.** *Compare* Chambers *v.* Lancaster, 160 N. Y. 342, 54 N. E. 707, *affirming* 3 App. Div. 215, 38 N. Y. Supp. 253.

"There can be but one action upon a single demand. The parties interested must join as plaintiffs, or those not joined must be made defendants, in the action, so that the whole controversy may be determined in one suit, unless the creditor agrees to a severance, as by the acceptance of an order, or otherwise. The assignee of a part interest cannot be permitted to carve out of the entire demand the amount of his claim, leaving other parties to bring separate actions for their several interests. See Field *v.* Mayor, 6 N. Y. 188, and Bank *v.* McLoon, 73 Me. 510, where the questions involved herein are fully discussed. The case of bank checks is distinguishable, for manifest reasons." Dean *v.* St. Paul & D. R. Co., 53 Minn. 504, 55 N. W. 628.

In New York an assignee of part of a chose in action may sue thereon in his own name. Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Cushman *v.* Family Fund Soc., 13 N. Y. Supp. 428, 36 N. Y. St. 856. See also Danvers *v.* Lugar, 30 Misc. 98, 61 N. Y. Supp. 778; Penhollow *v.* Lawyers Title Ins. Co., 63 N. Y. Supp. 390. See further, I, D, *supra.*

96. **U. S.** — Delaware County *v.* Diebold Safe & L. Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. ed. 674. **Cal.** — Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423. **Mass.**—Richmond *v.* Parker, 12 Met. 48. **Ore.** — Little *v.* Portland, 26 Ore. 235, 37 Pac. 911.

7. Misjoinder of Assignor. — Where the assignor has parted with all interest both legal and equitable, he cannot be joined with the assignee, and a demurrer for his misjoinder will be sustained.[97]

Joint Assignees. — In an action to enforce a debt assigned jointly to several, all should join.[98]

B. In Equity. — **1. In General.** — In suits in equity, whether by the assignor or by the assignee, all persons whose interests will be affected by the decree should be made parties, and a court may under the general rules of equity practice order the necessary parties to be brought in. Thus, if there remains in the assignor any interest, right or liability whatever he is a proper and usually a necessary party.[99] It

97. In an action by the assignee against the debtor who refuses payment on the ground that he has paid the assignor, the assignee cannot join the debtor and assignor to seek an accounting to ascertain the rights and liabilities of the parties and get judgment against the one who is liable, because his remedy is either on the assigned claim against the debtor or against the assignor for a breach of warranty. Allen *v.* Smith, 16 N. Y. 415; Alexander *v.* Gloversville, 110 App. Div. 791, 97 N. Y. Supp. 198, (demurrer for misjoinder); Camblos *v.* Butterfield, 15 Abb. Pr. N. S. (N. Y.) 197.

98. Allard *v.* Orleans Nav. Co., 14 La. 27; Abbe *v.* Clark, 31 Barb. (N. Y.) 238 (nonjoinder must be taken advantage of by pleading or notice); Atwood *v.* Norton, 27 Barb. (N. Y.) 638.

99. **U. S.** — Hubbard *v.* Manhattan Trust Co., 87 Fed. 51, 57 U. S. App. 730, 30 C. C. A. 520 (holding also that the assignor may be made a party by amendment); Cooke *v.* Bidwell, 8 Fed. 452. **Ind.** — Insurance Co. of North America *v.* Martin, 139 Ind. 317, 37 N. E. 394 (where the part of the claim retained by the assignor has been paid, the assignor is not a necessary party); Earnest *v.* Barrett, 6 Ind. App. 371, 33 N. E. 635. **Mass.** — Hunneman *v.* Lowell Inst. for Sav., 205 Mass. 441, 91 N. E. 526; Montague *v.* Lobdell, 11 Cush. 111; Hobart *v.* Andrews, 21 Pick. 526. **Minn.** — Schilling *v.* Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475 (holding that the assignor who refuses to join as plaintiff should be made a defendant); Dean *v.* St. Paul & D. R. Co., 53 Minn. 504, 55 N. W. 628. **N. J.** — Miller *v.* Henderson, 10 N. J. Eq. 320. **N. Y.** — Miller *v.* Bear, 3 Paige 466; Cook *v.* Genesee Mut. Ins. Co., 8 How. Pr. 514; Corning *v.* Roosevelt, 25 Abb. N. C. 220, 18 Civ. Proc. 399, 11 N. Y. Supp. 758. **N. C.** — Thompson *v.* McDonald, 22 N. C. 477; Smith *v.* Garey, 22 N. C. 42. **Tenn.** — Wilson *v.* Davidson County, 3 Tenn. Ch. 536. **Tex.** — East Texas F. Ins. Co. *v.* Coffee, 61 Tex. 287.

The vendors of land must be made parties to a suit against the vendee to enforce the lien of the purchase money on the land, and so where bonds or notes given for the price of the land have been assigned and there remains a right or liability in the assignor which may be affected by the decree. Plowman *v.* Riddle, 14 Ala. 169, 48 Am. Dec. 92; Betton *v.* Williams, 4 Fla. 11.

A trustee holding for the separate use of a married woman, and for certain contingent trusts, is a necessary party in a bill by the married woman, although he has executed a deed purporting to assign his whole interest to her. Thompson *v.* McDonald, 22 N. C. 477.

The insolvency of the assignor does not excuse the failure to make him a party. Betton *v.* Williams, 4 Fla. 11.

In an action by the equitable assignee, the assignor must be made a party to the suit because he has the legal title. Craig *v.* Johnson, 3 J. J. Marsh. (Ky.) 573; Neyfong *v.* Wells, Hard. (Ky.) 561. But in New Mexico Land Co. *v.* Elkins, 20 Fed. 545, the assignor did not have to be joined though he retained the legal title.

is held in some states that an assignor, retaining the legal title to the chose assigned, must be made a party either as plaintiff or defendant, notwithstanding he has no beneficial interest.[1] Some cases have held that because convenience is promoted or additional protection is afforded the defendant, the joinder of assignee and assignor is not objectionable.[2] And some courts hold that an assignor is a proper party in any case where a bill is filed by an assignee.[3]

2. Suit By Assignor. — Joinder of Assignee. — If the rights of the assignee will be affected by the suit in equity brought by the as-

1. **Ala.** — Broughton *v.* Mitchell, 64 Ala. 210. **Ark.** — Boles *v.* Jessup, 57 Ark. 469, 21 S. W. 880, assignor may be made a party after the action is brought. **Ind.** — Elderkin *v.* Shultz, 2 Blackf. 345. But see Blair *v.* Shelby County Agr., etc. Assn, 28 Ind. 175. **Ky.** — Craig *v.* Johnson, 3 J. J. Marsh. 573; Young *v.* Rodes, 5 T. B. Mon. 498; Gatewood *v.* Rucker, 1 T. B. Mon. 21; Bradley *v.* Morgan, 2 A. K. Marsh. 369; Allen *v.* Crockett, 4 Bibb 240. **N. C.** — Jones *v.* Carter, 73 N. C. 148; MacKinnie *v.* Rutherford, 21 N. C. 14. **Va.** Corbin *v.* Emmerson, 10 Leigh 663, holding that in every case of a bill in equity filed by an assignee the assignor is a proper and necessary party. But see James River, etc. Co. *v.* Littlejohn, 18 Gratt. 53. **Eng.** — Cathcart *v.* Lewis, 3 Bros. Ch. 516, 29 Eng. Reprint 676; 1 Ves. Jr. 463, 30 Eng. Reprint 439; Kay *v.* Fenwick, 3 Bros. Ch. 25, 29 Eng. Reprint 387.

A title bond for land being assigned by the obligee to another who assigned it to a third party, both the intermediate assignee and obligor are necessary parties in a suit thereon for specific performance. Hancock *v.* Beckham, 5 Litt. (Ky.) 135. See also Madeiras *v.* Catlett, 7 T. B. Mon. (Ky.) 475. Where a vendor sues a remote assignee to enforce a vendor's lien on land successively assigned, the original vendee is a necessary party and the intermediate assignees proper parties. Wickliffe *v.* Clay, 1 Dana (Ky.) 585.

Where an assignee of an insurance policy, after loss, seeks to have the policy reformed so as to conform to the intention of the parties, the assignor is a necessary party. Sykora *v.* Forest City Mut. Ins. Co., 7 Ohio Dec. (Reprint) 372, 2 Cinc. Law Bul. 223.

2. Gunter *v.* Williams, 40 Ala. 561; Blevins *v.* Buck, 26 Ala. 292; Plowman *v.* Riddle, 14 Ala. 169, 48 Am. Dec. 92; Wilson *v.* Davidson County, 3 Tenn. Ch. 536.

Where one who has assigned his interest in a claim is before the court urging the assignment, both the assignor and assignee should be made parties plaintiff to fully protect the obligor, as intended by Rev. St., 1881, § 276. Singleton *v.* O'Blenis, 125 Ind. 151, 25 N. E. 154.

Joinder of assignee and assignor is proper where the suit is on a claim as to which there has been, at least, even if it does not continue, a privity between each of them and the defendant. Thompson *v.* McDonald, 22 N. C. 477.

A bill filed in the names of both assignor and assignee, in a suit to enforce a chose, is a demand between them of the rights of the assignee. Ryan *v.* Anderson, 3 Madd. 174, 56 Eng. Reprint 474, *quoted* in McLane *v.* Riddle, 19 Ala. 180. *Contra*, Fulham *v.* McCarthy, 1 H. L. Cas. 703, 9 Eng. Reprint 937, holding under the Chancery rule forbidding the joining, as plaintiffs, parties whose interests are opposed; that the joining of the assignor and assignee of an equitable interest is improper, and that the validity of the assignment cannot be put in issue.

3. **Ala.** — Broughton *v.* Mitchell, 64 Ala. 210; Blevins *v.* Buck, 26 Ala. 292. **N. Y.** — Congregation Shomri Laboker Anshe Sakoler *v.* Sindrack, 15 App. Div. 82, 44 N. Y. Supp. 295. **N. C.** — Thompson *v.* McDonald, 22 N. C. 477. **Tenn.** — Wilson *v.* Davidson County, 3 Tenn. Ch. 536. **Va.** — Corbin *v.* Emmerson, 10 Leigh 663.

signor, the assignee is a proper and, sometimes, a necessary party plaintiff.[4]

3. Suit Against Assignor. — In any suit brought against the assignor for the purpose of interfering with the enforcement of the rights represented by the chose assigned, the assignee is a necessary party.[5]

4. Suit By Assignee. — Joinder of Assignor. — a. *Absolute Assignment.* — By the weight of authority, where an assignment is absolute and unconditional, transferring the entire equitable interest, and the extent and validity of the assignment are not questioned, and no liability remains in the assignor to be affected by the decree, the assignor need not be made a party to a bill filed by the assignee.[6]

4. **Proper Party.** — Showell *v.* Winkup, 60 L. T. N. S. (Eng.) 389.

Where one of the parties to a joint enterprise transfers an interest in it to another, his right to proceed in equity to enforce his rights will not be affected thereby, and the assignee is a proper, if not a necessary, party to such action when the situation is complicated and an adjustment of the rights of all the parties is necessary. Wilcox *v.* Pratt, 125 N. Y. 688, 25 N. E. 1091.

Necessary Party.—Coale *v.* Mildred's Admr., 3 Har. & J. (Md.) 278; Ridgway *v.* Bacon, 72 Hun 211, 25 N. Y. Supp. 651, 55 N. Y. St. 345 (where the claim has been assigned as collateral security).

Where an obligor, as security for a debt, assigns a note with a mortgage to secure the same, the assignee is a necessary party to a bill to redeem, though he afterwards makes an absolute assignment of the mortgage to another party. Hopkins *v.* Roseclare Lead Co., 72 Ill. 373; Brown *v.* Johnson, 53 Me. 246; Hood *v.* Hood, 85 N. Y. 561.

5. **Cal.** — Johnson *v.* Kirby, 65 Cal. 482, 4 Pac. 458. **Ky.** — Triplett *v.* Cox, 7 T. B. Mon. 190 (bill for set-off); McCormick *v.* McCormick, 9 Ky. L. Rep. 519, 5 S. W. 573. **N. Y.** — Mahr *v.* Norwich Union F. Ins. Co., 127 N. Y. 452, 28 N. E. 391, 40 N. Y. St. 218; Mumford *v.* Sprague, 11 Paige 438 (suit to stay proceedings on judgment); Brockway *v.* Copp, 3 Paige 539; Chase *v.* Chase, 1 Paige 197 (bill to stay the suit).

6. **U. S.** — Boon's Heirs *v.* Chiles, 8 Pet. 532, 8 L. ed. 1034; Fidelity, etc. Co. *v.* Fidelity Trust Co., 143 Fed. 152; O'Shaugnessy *v.* Humes, 129 Fed. 953; New Mexico Land Co. *v.* Elkins, 20 Fed. 545; Trecothick *v.* Austin, 4 Mason 16, 24 Fed. Cas. No. 14,164; Henry *v.* Francestown Soapstone Stove Co., 2 B. & A. Pat. Cas. 221, 11 Fed. Cas. No. 6,382. **Ala.** — Walker *v.* Mobile Bank, 6 Ala. 452. But see Broughton *v.* Mitchell, 64 Ala. 210. **D. C.** — Young *v.* Kelly, 3 App. Cas. 296. **Fla.** Sammis *v.* Wightman, 31 Fla. 45, 12 So. 536; Robinson *v.* Springfield Co., 21 Fla. 203; Betton *v.* Williams, 4 Fla. 11. **Ill.** — Gleason Mfg. Co. *v.* Hoffman, 168 Ill. 25, 48 N. E. 143; Dixon *v.* Buell, 21 Ill. 203. **Ind.** — Garrett *v.* Puckett, 15 Ind. 485; Colerick *v.* Hooper, 3 Ind. 316, 56 Am. Dec. 505, where the assignee with the legal title sued for specific performance. **Ky.** — Anderson's Admr. *v.* Wells, 6 B. Mon. 540; Kennedy *v.* Davis, 7 T. B. Mon. 372; Cobb *v.* Thompson, 1 A. K. Marsh. 507; Lemmon *v.* Brown, 4 Bibb 308. **Me.** — Moor *v.* Veazie, 32 Me. 343, 52 Am. Dec. 655; Miller *v.* Whittier, 32 Me. 203; Haskell *v.* Hilton, 30 Me. 419. **Md.** — Grand United Order *v.* Merklin, 65 Md. 583, 5 Atl. 544; Coale *v.* Mildred's Admr., 3 Har. & J. 278. **Mass.** — Allyn *v.* Allyn, 154 Mass. 570, 28 N. E. 779; Currier *v.* Howard, 14 Gray 511; Montague *v.* Lobdell, 11 Cush. 111; Haskell *v.* Codman, 8 Met. 536; Hodges *v.* Saunders, 17 Pick. 470; Ensign *v.* Kellogg, 4 Pick. 1. **Mich.** — Beach *v.* White, Walk. 495; Morey *v.* Forsyth, Walk. 465. **Miss.** — Everett *v.* Winn, Smed. & M. Ch. 67. **N. J.** — King *v.* Berry, 3 N. J. Eq. 44; Chester *v.* King, 2 N. J. Eq. 405; Bruen *v.* Crane, 2 N. J. Eq. 347; Vrelland *v.* Loubat, 2 N. J. Eq. 104. **N. Y.** — Allen *v.* Smith, 16 N. Y. 415; Connecticut

b. *Assignment Not Absolute.* — Where the assignment, however, is not absolute,[7] or where there is a controversy between the assignor and assignee touching the assignment,[8] the assignor should be made a party for the protection of all.

C. Amendments as to Parties. — Generally, amendments will be allowed to bring before the court all persons having an interest in the subject-matter of the litigation and whose presence is necessary for a complete and final determination of the controversy, or striking out disinterested parties.[9] Thus, an amendment has been allowed substituting the holder of the legal title as plaintiff for the use of the beneficiary;[10] striking out the assignor where the assignee has the legal title or is entitled to sue in his own

Mut. L. Ins. Co. *v.* Cornwell, 72 Hun 199, 25 N. Y. Supp. 348, 55 N. Y. St. 480; Sedgwick *v.* Cleveland, 7 Paige 287; Rogers *v.* Traders' Ins. Co., 6 Paige 583; Field *v.* Maghee, 5 Paige 539; Miller *v.* Bear, 3 Paige 466; Ward *v.* Van Bokkelen, 2 Paige 289 (as to development of doctrine); Whitney *v.* McKinney, 7 Johns. Ch. 144; Brashear *v.* Van Cortlandt, 2 Johns. Ch. 247. But see Congregation Shomri Laboker Anshe Sakoler *v.* Sindrack, 15 App. Div. 82, 44 N. Y. Supp. 295. **N. C.** — Polk *v.* Gallant, 22 N. C. 395, 34 Am. Dec. 410. But see Thompson *v.* McDonald, 22 N. C. 463. **Ohio.** — Grant *v.* Ludlow, 8 Ohio St. 1; McGuffey *v.* Finley, 20 Ohio 474. **R. I.** — Sayles *v.* Tibbitts, 5 R. I. 79. **Tenn.** — Wilson *v.* Davidson County, 3 Tenn. Ch. 536. **Vt.** Day *v.* Cummings, 19 Vt. 496. **Va.** — Tatum *v.* Ballard, 94 Va. 370, 26 S. E. 1871; Lynchburg Iron Co. *v.* Tayloe, 79 Va. 671; Omohundro *v.* Henson, 26 Gratt. 511; James River, etc. Co. *v.* Littlejohn, 18 Gratt. 53; Newman *v.* Chapman, 2 Rand. 93, 14 Am. Dec. 766 (holding that the assignor is not a necessary party where the assignee, who has the legal title, seeks to foreclose the mortgage). **W. Va.** — Chapman *v.* Pittsburgh & S. R. Co., 18 W. Va. 184; Scott *v.* Ludington, 14 W. Va. 387; Vance *v.* Evans, 11 W. Va. 342. **Eng.** — Whitworth *v.* Davis, 1 Ves. & B. 545, 35 Eng. Reprint 212; Chambers *v.* Goldwin, 9 Ves. Jr. 254, 269, 32 Eng. Reprint 600; Bromley *v.* Holland, 7 Ves. Jr. 14, 32 Eng. Reprint 2; Brace *v.* Harrington, 2 Atk. 235, 26 Eng. Reprint 545; Hill *v.* Adams, 2 Atk. 39, 26 Eng. Reprint 426; Blake *v.* Jones, 3 Anstr. 651; Kirk *v.* Clark, Prec. Ch. 276.

Costs for Misjoinder. — Where the assignor and assignee are improperly joined and objection is taken, costs will be given. Padwick *v.* Platt, 11 Beav. 503, 50 Eng. Reprint 912. See also cases cited, *supra*, I, B, 1.

7. **U. S.** — New Mexico Land Co. *v.* Elkins, 20 Fed. 545, where the agreement between assignor and assignee was executory. **Fla.** — Robinson *v.* Springfield Co., 21 Fla. 203. **Mass.** — Hobart *v.* Andrews, 21 Pick. 526. **N. J.** — Miller *v.* Henderson, 10 N. J. Eq. 320. **N. Y.** — Kittle *v.* Van Dyck, 1 Sandf. Ch. 76; Whitney *v.* McKinney, 7 Johns. Ch. 144; Topping *v.* Van Pelt, Hoffm. 545. **N. C.** — Thompson *v.* McDonald, 22 N. C. 463.

See also cases cited, *supra*, I, B, 1.

8. Beach *v.* White, Walk. (Mich.) 495; Morey *v.* Forsyth, Walk. (Mich.) 465; Miller *v.* Bear, 3 Paige (N. Y.) 466; Ward *v.* VanBokkelen, 2 Paige (N. Y.) 289.

9. **U. S.** — Hubbard *v.* Manhattan Tr. Co., 87 Fed. 51, 30 C. C. A. 520, 57 U. S. App. 730. **Miss.** — Lee *v.* Gardiner, 26 Miss. 521, allowing the name of the deceased used to be stricken out. **N. Y.** — Cook *v.* Genesee Mut. Ins. Co., 8 How. Pr. 514. **Eng.** Showell *v.* Winkup, 60 L. T. N. S. 389. "To use of" was held mere surplusage which may be stricken out. Beattie *v.* Lett, 28 Mo. 596.

Where the payee of a note brought an action in debt for the use of the assignee of the note, he was not allowed to strike out the indorsement for the purpose of showing that he was the legal owner, since by his form of action he had declared that he was not. Langham *v.* Lebarge, 6 Mo. 355.

10. Trader's Ins. Co. *v.* Mann, 118 Ga. 381, 45 S. E. 426.

name;[11] also substituting one nominal plaintiff for another, as, where the assignor dies, his executor or administrator may be brought in.[12]

D. Assignments Pendente Lite. — **1. At Law.** — Unaffected by statutes, an assignment, pending an action at law, of a non-negotiable chose did not affect the legal title, and therefore the assignee need not be brought in as a party.[13] Either by statute, however,[14]

Consent of Assignor To Be a Party. Under the Practice Act in England, where the equitable assignee seeks to make the assignor a party plaintiff, the application will only be granted when proof is offered of his consent, or of a communication with him, and that all terms necessary for his protection have been made. Turquand *v.* Fearon, L. R. 4 Q. B. D. 280.

11. Frank *v.* Kaigler, 36 Tex. 305; Barnett *v.* Logue's Admr., 29 Tex. 282; Heard *v.* Lockett, 20 Tex. 162.

An amendment showing that the legal title is not in the nominal plaintiffs, but in the person for whose use the action is brought, will not be allowed without a further amendment to strike out the names of the nominal plaintiffs. Richmond, etc. R. Co. *v.* Bedell, 88 Ga. 591, 15 S. E. 676.

12. Lewis *v.* Austin, 144 Mass. 383, 11 N. E. 538; Denton *v.* Stephens, 32 Miss. 194. See *supra*, I, A, 2, d. *Contra*, Karrick *v.* Wetmore, 22 App. Cas. (D. C.) 487.

Bringing in the assignee where plaintiff has made an absolute assignment, but reserved some beneficial interest. Hood *v.* Hood, 85 N. Y. 561, holding that since the assignees were necessary parties they should be brought in, but a mere direction that they should be brought in immediately does not have the effect of making them parties.

Bringing in the assignor as the real party in interest. Platner *v.* Ryan, 76 N. J. L. 239, 69 Atl. 1007 (where the court stayed proceedings until the declaration was amended so as to show that the suit was brought by the assignee for the use and benefit of the assignor). Mills *v.* Small, 14 Ont. L. Rep. 105.

Introducing New Parties. — Where, under a statute, amendments in form or substance in furtherance of justice were authorized, it was held that in an action at law new parties cannot be brought in. Wood *v.* Metropolitan Life Ins. Co., 96 Mich. 437, 56 N. W. 8, where the action was by the beneficiary in an insurance policy and an assignee of part of the chose was not allowed to be brought in.

Where an action was brought in the name of an equitable owner, an amendment on trial to insert the holder of the legal title was not allowed. Nelson *v.* Marly, 2 Yerg. (Tenn.) 576.

Where plaintiff sued an assignee of one Alexander the court refused to allow an amendment striking out the name of the assignee and thus leaving Alexander as the plaintiff. Johnson *v.* Mayrant, 1 McCord L. (S. C.) 484.

13. Gulf, etc. R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829. See *supra*, I, A, 2; also the title "**Bills and Notes**," as to effect on parties of assignments *pendente lite*.

14. **Continuance of Suit in Name of Assignor.** — **Cal.** — Barstow *v.* Newman, 34 Cal. 90; Moss *v.* Shear, 30 Cal. 468. **Ind.** — Brown *v.* Cody, 115 Ind. 484, 18 N. E. 9. **Ia.** — Krenger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059; Jordan *v.* Ping, 32 Iowa 64. **Kan.** — Werner *v.* Hatton, 54 Kan. 250, 38 Pac. 279. **Minn.** — Nichols *v.* Chicago, etc. R. Co., 36 Minn. 452, 32 N. W. 176; Whiteacre *v.* Culver, 9 Minn. 295. **Miss.** — Montgomery *v.* Handy, 63 Miss. 43. **Mo.** Smith *v.* Phelps, 74 Mo. 598; Werner *v.* Finley (Mo. App.), 129 S. W. 73; Green's Bank *v.* Wickham, 23 Mo. App. 663. **N. Y.** — Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997; Hegewisch *v.* Silver, 140 N. Y. 414, 35 N. E. 658; Getty *v.* Spaulding, 58 N. Y. 636; Senft *v.* Manhattan R. Co., 57 N. Y. Super. 417, 24 Abb. N. C. 64; Cuff *v.* Dorland, 7 Abb. N. C. 194. **Tex.** Mathews *v.* Boydstun (Tex. Civ. App.), 31 S. W. 814. **Utah.** — National Bank *v.* Hapgood, 9 Utah 85, 33 Pac. 241. **Wis.** — Belden *v.* Hurlbut, 94 Wis. 562, 69 N. W. 537; Johnston *v.* King, 88 Wis. 211, 58 N. W. 1105.

In Missouri statute provides that the assignor may require the assignee to give him a bond indemnifying him

or by judicial decision,[15] in most states, an assignee under an assignment *pendente lite* may continue the action in the name of the assignor,[16] or substitute his own name as plaintiff, at his option,[17]

against costs or procure his substitution as party in the action, and in default of either the suit shall be dismissed. Cutter *v.* Waddingham, 33 Mo. 269.

If assignor suffers the assignee to proceed in his name, the defendant cannot complain. Asher *v.* St. Louis, etc. R. Co., 89 Mo. 116, 1 S. W. 123.

In Oregon, under the statute, actions must be prosecuted in the name of the real party in interest, except in cases where, *pendente lite*, he transfers his interest to another. In such a case the transfer does not operate to abate the action, and no order of substitution of parties is required. Dundee Mortg., etc. Co. *v.* Hughes, 89 Fed. 182.

In South Carolina Code Civ. Proc., § 142, provides for the continuance of an action in the name of the original plaintiff even after a transfer of the cause of action pending suit, but this applies only where the transferee claims under the original plaintiff; in all other cases the transferee should be substituted as party plaintiff in accordance with section 132 of the code, which provides that every action shall be prosecuted in the name of the real party in interest. Matthews *v.* Cantey, 48 S. C. 588, 26 S. E. 894.

Where no substitution is asked for, the action will continue in the name of the assignor as if no transfer had been made, and no application to or action by the court is necessary. **Cal.** Malone *v.* Big Flat Gravel Min. Co., 93 Cal. 384, 28 Pac. 1063; Camarillo *v.* Fenlon, 49 Cal. 202. **Ind.** — Harvey *v.* Myer, 9 Ind. 391. **N. Y.** — Platt *v.* McMurray, 63 How. Pr. 149. **Utah.** — Hanks *v.* Matthews, 16 Utah 325, 52 Pac. 7.

Consolidation of Corporations. — Statutes authorizing a continuance of the action in the name of the original plaintiff do not apply where the plaintiff has ceased to exist, as where a corporation suing as plaintiff is *pendente lite* consolidated with other corporations under a new name. Kansas, etc. R. Co. *v* Smith, 40 Kan. 192, 19 Pac. 636; La Pointe *v.* O'Malley, 47 Wis. 332, 2 N. W. 632.

15. **U. S.** — Thompson *v.* Maxwell, 95 U. S. 391, 24 L. ed. 481 (holding that a bill of review will not lie for assignees). *Ex parte* South Alabama R. Co., 95 U. S. 221, 24 L. ed. 355. **Ala.** — Foster *v.* Goodwin, 82 Ala. 384, 2 So. 895. **Conn.** — Pond *v.* Clark, 24 Conn. 370. **Mich.** — Rajnowski *v.* Detroit, etc. R. Co., 74 Mich. 20, 20 N. W. 847; Moon *v.* Harder, 38 Mich. 566. **Minn.** — St. Anthony Mill Co. *v.* Vandall, 1 Minn. 246. **Miss.**—Montgomery *v.* Handy, 63 Miss. 43. **N. Y.** — Sedgwick *v.* Cleveland, 7 Paige 287; Gale *v.* Vernon, 1 Sandf. 679. **Tenn.** — Paul *v.* Williams, 12 Lea 215. **Tex.** — Clarke *v.* Koehler, 32 Tex. 679 (holding that the original plaintiffs to an action cannot sell out their interest *pendente lite* and make new parties to the suit); Dowell *v.* Mills, 32 Tex. 440; Evans Co. *v.* Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219 (where *pendente lite* one partner sells his interest in the firm property to the other partner a change of parties is unnecessary). **Wash.** — Hood *v.* California Wine Company, 4 Wash. 88, 29 Pac. 768. **W. Va.** — List *v.* Pumphrey, 3 W. Va. 672.

16. See cases in two preceding notes.

17. **U. S.** — *Ex parte* South Alabama R. Co., 95 U. S. 221, 24 L. ed. 355. **Cal.** — Hestres *v.* Brennan, 37 Cal. 385. **Ky.** — Cantrell *v.* Hewlett, 2 Bush 311. **Mich.** — Moon *v.* Harder, 38 Mich. 566; Peters *v.* Gallagher, 37 Mich. 407; Newberry *v.* Trowbridge, 13 Mich. 263. **Mo.** Renfro *v.* Prior, 25 Mo. App. 402. **N. Y.** — Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997; Platte *v.* McMurray, 63 How. Pr. 149; Emmet *v.* Bowers, 23 How. Pr. 300; Packard *v.* Wood, 17 Abb. Pr. 318; Arnold *v.* Keyes, 5 Jones & S. 135; Merchants' Exch. Nat. Bank *v.* Waitzfelder, 14 Hun 47 (where the assignee, by motion, might have been brought in as plaintiff). **Ore.** — King *v.* Miller, 53 Ore. 53, 97 Pac. 542, assignee may continue action in name of assignor or in his own name at his option, without filing supplemental bill. **Utah.** — Hanks *v.* Matthews, 16 Utah 325, 52 Pac. 7; Lowell *v.* Parkinson, 4 Utah 64, 6 Pac. 58. **Wyo.** — Smith *v.* Harrington, 3 Wyo. 503, 27 Pac. 803.

though this is sometimes subject to the discretion of the court.[18]

2. In Equity. — An assignment pending a suit in equity does not cause the action to abate, but the defendant may refuse to proceed until a supplemental bill is filed making the assignee a party plaintiff.[19]

III. PLEADINGS. — A. In General. — In actions on assigned choses the usual rules of pleading should be observed.[20] All the facts upon which the right of recovery or defense depends should be set out.[21]

Action may be prosecuted in name of either assignor or assignee, but until notice of the transfer is given to the court the parties to the record are *prima facie* the parties before it. Chisholm *v.* Clitherall, 12 Minn. 375.

The assignee might come in as plaintiff by an original bill in the nature of a supplementary bill and conduct the litigation in his own name. Trabue *v.* Bankhead, 2 Tenn. Ch. 412; Paul *v.* Williams, 12 Lea (Tenn.) 215; Wills *v.* Whitmore, 9 Baxt. (Tenn.) 198.

18. **Ark.** — Ivey *v.* Drake, 36 Ark. 228. **Cal.** — Emerson *v.* McWhirter, 128 Cal. 268, 60 Pac. 774. **Ind.** — Jones *v.* Julian, 12 Ind. 274; Dearmond *v.* Dearmond, 10 Ind. 191; Harvey *v.* Myer, 9 Ind. 391; Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620. **Ia.** — Snyder *v.* Phillips, 66 Iowa 481, 484, 24 N. W. 6, 7; Chickasaw County *v.* Pitcher, 36 Iowa 593. **Ky.** — Dougherty *v.* Smith, 4 Metc. 279. **Minn.** — Brown *v.* Kohout, 61 Minn. 113, 63 N. W. 248. **N. Y.** — Getty *v.* Spaulding, 58 N. Y. 636; McNamara *v.* Harris, 4 Civ. Proc. 76; Howard *v.* Taylor, 5 Duer 604; Murray *v.* General Mut. Ins. Co., 2 Duer 607; Sheldon *v.* Havens, 7 How. Pr. 268; Harris *v.* Bennett, 6 How. Pr. 220; Ford *v.* David, 1 Bosw. 569; O'Dougherty *v.* Remington Paper Co., 1 N. Y. St. 523; Riverside Bank *v.* Totten, 16 N. Y. Supp. 348. **Ohio.** — Sifford *v.* Beaty, 12 Ohio St. 189. **Wyo.** Smith *v.* Harrington, 3 Wyo. 503, 27 Pac. 803.

The statute requiring that indemnity be given or that the transferee be substituted, takes away the discretion of the court to deny an application for this purpose. Childs *v.* Thompson, 81 Mo. 337, *citing* Smith *v.* Phelps, 74 Mo. 598; Cutter *v.* Waddingham, 33 Mo. 269.

19. **Ia.** — Wright *v.* Meek, 3 Greene 472. **Mo.** — Gamble *v.* Johnson, 9 Mo. 265. **N. Y.** — Sedgwick *v.* Cleveland, 7 Paige 287; Garr *v.* Gomez, 9 Wend. 649. **W. Va.** — List *v.* Pumphrey, 3 W. Va. 672. **Eng.** — Williams *v.* Kinder, 4 Ves. Jr. 387, 31 Eng. Reprint 197.

But where the cause proceeded without objection until after report by the referee, the court refused to dismiss the bill. Pond *v.* Clark, 24 Conn. 370.

Where Part Interest Is Assigned, Assignee Not a Necessary Party. — Galveston, etc. R. Co. *v.* Mathes (Tex. Civ. App.), 73 S. W. 411, where plaintiff assigned to his attorney an interest in the cause of action.

20. **Kan.** — Polster *v.* Rucker, 16 Kan. 115, defective pleading may be cured by verdict. **Ohio.** — Hall *v.* Cincinnati R. Co., 1 Disney 58, the causes of action should be stated and numbered separately. **Tex.** — McNeill *v.* Masterson, 79 Tex. 670, 15 S. W. 673, indefiniteness in the pleadings should be taken advantage of by special demurrer.

21. **Ky.** — Conn *v.* Jones, Hard. 8. **N. H.** — Whittier *v.* Whittier, 31 N. H. 452. **N. Y.** — Seeley *v.* Seeley, 2 Hill 496; Janes *v.* Saunders, 19 App. Div. 538, 46 N. Y. Supp. 574. **Pa.** — Heckscher *v.* American Tube, etc. Co., 137 Pa. 421, 20 Atl. 804. **Tex.** — Gooch *v.* Parker, 16 Tex. Civ. App. 256, 41 S. W. 662. **Vt.** — Goss *v.* Barker, 22 Vt. 520. **Wis.** — Webber *v.* Roddis, 22 Wis. 61.

Alleging Fund to Which Assignment Relates. — Where the defense relies upon an assignment in the form of an order addressed to the obligor directing him to pay the assignee a certain sum "out of funds" in the obligor's hands, or to come to his hands, the affidavit should allege the

B. Of Plaintiff. — **1. In General.** — The plaintiff should allege sufficient facts to show his right to maintain the action,[22] as, for example, his possession of the legal title, if his right depends upon that.[23] An assignee need not, however, in his pleading, set out the statute which enables him to sue in his own name;[24] but he should

existence of a fund applicable to the payment of the order. Heckscher *v.* American Tube, etc. Co., 137 Pa. 421, 20 Atl. 801.

Allegation of Demand on Debtor. — Where the allegation that the covenant sued on was presented to defendant and that he refused to pay according to its true meaning and effect, it was held insufficient because it did not allege when or by whom the covenant was presented for payment. Sabin *v.* Hamilton, 2 Ark. 485.

Performance by Assignor.—In an action on an assignment of part of an indebtedness which arose out of a contract between defendant and plaintiff's assignor the plaintiff need not allege performance of the contract by the assignor, for the order on, and acceptance by, the defendant is the foundation of the suit, and not the original contract. Welch *v.* Mayer, 4 Colo. App. 440, 36 Pac. 613.

Alleging Corporate Existence of Assignor.—For failure to do this the complaint was held bad on demurrer in Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135. But in Strong *v.* Moore, 75 Kan. 437, 89 Pac. 895, it was held that the corporate entity of the assignor need not be alleged. See also Crinnian *v.* Knauth, 29 Misc. 523, 61 N. Y. Supp. 976, where the complaint showed an assignment by a certain firm, it was held unnecessary to allege the existence of the partnership or to specify persons competent to contract.

In an action on an assigned contract for work and labor, the declaration should state the performance of the labor by the assignor. Nagelbaugh *v.* Harder, etc. Min. Co., 21 Ind. App. 551, 51 N. E. 427.

22. **Cal.** — Moore *v.* Waddle, 34 Cal. 145. **Fla.** — Jordan *v.* John Ryan Co., 35 Fla. 259, 17 So. 73. **Kan.** — Polster *v.* Rucker, 16 Kan. 115. **Ky.** — Maynard *v.* Cassady, 4 Ky. L. Rep. 836, it should be alleged by whom chose was assigned. **Mich.** — Morrill *v.* Bissell, 99 Mich. 409, 58 N. W. 324. **Minn.** St. Anthony Mill Co. *v.* Vandall, 1 Minn. 246. **Mo.** — Boger *v.* Hamilton, 21 Mo. App. 520. **Neb.** — Yeisler *v.* Jetter, 86 Neb. 352, 125 N. W. 632. **N. J.** — Stevens *v.* Bowers, 16 N. J. L. 16, where it was held sufficient to allege the fact of change of interest without stating all the facts making the change effectual. **N. Y.** — Cox *v.* Stillman, 59 Misc. 248, 112 N. Y. Supp. 328; Crinnian *v.* Knauth, 29 Misc. 523, 61 N. Y. Supp. 976; H. C. Miner Lithographing Co. *v.* Canary, 20 Misc. 664, 46 N. Y. Supp. 256; Hoshkowitz *v.* Sargoy, 125 N. Y. Supp. 913; King *v.* King, 68 N. Y. Supp. 1089; Horner *v.* Wood, 15 Barb. 371. **Tex.** — Thomas *v.* Chapman, 62 Tex. 193, allegations of ownership are sufficient to let in proof of the assignment. **Wash.** — Latimer *v.* Baker, 25 Wash. 192, 64 Pac. 899. *Compare* with Seattle National Bank *v.* School Dist. No. 40, 20 Wash. 368, 55 Pac. 317. **Wis.**—River Falls Bank *v.* German Am. Ins. Co, 72 Wis. 535, 40 N. W. 506; Burnham *v.* Milwaukee, 69 Wis. 379, 34 N. W. 389. **Can.** — Cousins *v.* Bullen, 6 Ont. Pr. 71.

That plaintiff sues "as assignee" need not be alleged. Brooks *v.* Whiting, 5 Ark. 18. The word "assignee" is merely *descriptio personae.* Bloom *v.* Sexton, 33 Mich. 181.

The assignee's incapacity to sue is waived unless objected to. Rogers *v.* Abbot, 206 Mass. 270, 92 N. E. 472.

"The rule seems to be that, where the original owner might have sued in the federal courts if the chose in action had not been assigned, an assignee thereof is not deprived of his right to sue in said courts upon assignment of the chose in action to him, although his immediate assignor could not enforce the remedy in the courts of the United States." Moore Bros. Glass Co. *v.* Drevet Mfg. Co., 154 Fed. 737.

23. Carpenter *v.* Talbot, 33 Fed. 537; Guest *v.* Rhine, 16 Tex. 549; Anderson *v.* Shaw, 2 Posey Unrep. Cas. (Tex.) 285.

24. Gano *v.* Slaughter, Hard. (Ky.) 76.

allege compliance with the statutory conditions under which the suit is permitted.[25] If the action is based on the assigned chose, the declaration must state facts sufficient to show a cause of action in the assignor, had there been no assignment.[26] Performance of all conditions precedent must be alleged.[27]

Where the distinction between the forms in equity and at law has been abolished, and the assignment is one not recognized at law, the complaint should contain averments substantially like those formerly required in a bill in equity, or such averments as are made necessary by statute.[28]

2. Particular Averments. — a. *Alleging Beneficial Interest.* — In an action by the assignor it is usual and proper,[29] but not necessary, for the plaintiff to indicate for whose benefit the action is brought.[30]

25. **Compliance With Statutory Conditions.** — Bush *v.* Prescott, etc. R. Co., 76 Ark. 497, 89 S. W. 86; Kansas City, etc. R. Co. *v.* Joslin, 74 Ark. 551, 86 S. W. 435; Seeley *v.* Seeley, 2 Hill (N. Y.) 496.

In Maine, an assignee cannot sue in his own name unless he has filed, with the writ, a copy of the assignment. Sleeper *v.* Gagne, 99 Me. 306, 59 Atl. 472, where it was held sufficient to make the assignment on the bill of items annexed to the writ.

Statutory Provisions as to Process in Actions on Assignments Must Be Complied With.—Liberty *v.* Haines, 101 Me. 402, 64 Atl. 665, where the Rev. St. c. 84, § 144, was held mandatory in requiring the indorsement of the name and residence of the assignee on writ or process at any time during the pendency of an action, if defendant requested it.

26. **Non-Payment to Assignor.**— Keeton *v.* Scantland, Hard. (Ky.) 149; Lynch *v.* Barr, Sneed (Ky.) 170.

Non-Payment to Assignee. — Cal. Preston *v.* Central California Water Co., 11 Cal. App. 190, 104 Pac. 462. **N. J.** Van Schoick *v.* Van Schoick, 76 N. J. L. 242, 69 Atl. 1080; Gregory *v.* Freeman, 22 N. J. L. 405; Goldengay *v.* Smith, 62 N. J. Eq. 354, 50 Atl. 456. **N. Y.** Miner Lithographing Co. *v.* Canary, 20 Misc. 664, 46 N. Y. Supp. 256; Palmer *v.* Smedley, 28 Barb. 468.

Consideration, Breach and Damages Must Be Alleged. — Roberts *v.* Smith, 58 Vt. 492, 4 Atl. 709, 56 Am. Rep. 567.

27. **Performance of Conditions Precedent.** — Where the assignee of a building contract was to pay the assignor on receiving payment from the owner, the assignor should allege such receipt of payment by the assignee. Schilling Co. *v.* Robert H. Reid & Co., 87 N. Y. Supp. 1115.

Performance of Contract. — Goldengay *v.* Smith, 62 N. J. Eq. 354, 50 Atl. 456; Burnham *v.* Milwaukee, 69 Wis. 379, 34 N. W. 389.

Conditional Liability.— The existence of the necessary conditions must be alleged, as the use of due diligence where the right of recovery depends upon it (Leas *v.* White, 15 Iowa 187); or nonmarriage, in an action to recover payments under a separation contract. Spence *v.* Woods, 134 App. Div. 182, 118 N. Y. Supp. 807.

Where the assignor sues for his share of the assigned claim he should allege that the claim has been collected by the assignee. Cox *v.* Stillman, 59 Misc. 248, 112 N. Y. Supp. 328.

28. Home Ins. Co. *v.* Atchison, etc. R. Co., 19 Colo. 46, 34 Pac. 281; Exchange Bank *v.* Ford, 7 Colo. 314, 3 Pac. 449; Weaver *v.* Beard, 21 Mo. 155.

29. **Pa.** — Armstrong *v.* Lancaster, 5 Watts 68, 30 Am. Dec. 293. **Tenn.** — Trezevant *v.* McNeal, 2 Humph. 352. **Vt.** — Stiles *v.* Farrar, 18 Vt. 444.

30. **Ill.**—Union Nat. Bank *v.* Barth, 179 Ill. 83, 53 N. E. 615; Wey *v.* Dooley, 134 Ill. App. 244; Meyer *v.* Ross, 119 Ill. App. 485; Chamberlain *v.* Fernbach, 118 Ill. App. 145; Tarrant *v.* Burch, 102 Ill. App. 393. **Mich.** — Peters *v.* Gallagher, 37 Mich. 407. **N. J.** Elsberg *v.* Honeck, 76 N. J. L. 181, 68 Atl. 1090. **W. Va.** — Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

"To the Use of" Surplusage.—Beattie *v.* Lett, 28 Mo. 596.

But if in such an action a defense is pleaded against the assignor personally, the replication should set out the fact of the assignment and the beneficial interest of the assignee.[31] Where the assignee sues in his own name as holder of the legal title, he need not allege in his declaration that others have the beneficial interest, if such be the fact.[32]

b. *Fact of Assignment.* — Where the assignor sues in his own name, as holder of the legal title, for the use of the assignee, the assignment need not be pleaded.[33] In an action by the assignee, where his right to sue depends on the assignment, the declaration must allege not only facts sufficient to show a cause of action on the chose assigned,[34] but also the fact of assignment to the plaintiff.[35]

In Clay F. &. M. Ins. Co. *v.* Huron Salt & Lumb. Mfg. Co., 31 Mich. 346, it was held that the use of the phrase "for the use and benefit of" some person other than the plaintiff was not necessary, although the complaint set forth no assignment, nor the fact that another had the beneficial interest.

Sufficiency of Showing of Beneficial Interest.—Where it is necessary that the interest of the party for whose benefit the action is brought should appear, it is sufficient if it appear in any part of the pleadings. Armstrong *v.* Lancaster, 5 Watts (Pa.) 68, 30 Am. Dec. 293; Canby *v.* Ridgway, 1 Binn. (Pa.) 496.

Where an assignor sues on the assigned chose and recovers judgment after he has parted with all beneficial interest, he may be compelled to mark the judgment for the use of the assignee. Watson *v.* McManus, 224 Pa. 430, 73 Atl. 931.

31. Parsons *v.* Woodward, 22 N. J. L. 196 (insolvency); Raymond *v.* Squire, 11 Johns. (N. Y.) 47 (release).

Where to a plea of payment to plaintiff the replication should set up the assignment and the fact that the suit was brought for the use of the assignee. Chestnut Hill Reservoir Co. *v.* Chase, 14 Conn. 123.

32. Zimmerman *v.* Wead, 18 Ill. 305; King *v.* Miller, 53 Ore. 53, 97 Pac. 542.

But in Uncas Paper Co. *v.* Corbin, 75 Conn. 675, 55 Atl. 165, it was held that an assignee suing in his own name must show, as a condition precedent to exercising that right, that he is the owner in his own right, for his own benefit, without accountability.

33. Boqua *v.* Marshall, 88 Ark. 373, 114 S. W. 714.

34. Palmer *v.* Smedley, 28 Barb. (N. Y.) 468.

35. **U. S.** — Earhart *v.* Campbell, Hempst. 48, 8 Fed. Cas. No. 4,241*a*. **Cal.** — Stearns *v.* Martin, 4 Cal. 227. **Colo.** — Gallup *v.* Lichter, 4 Colo. App. 296, 35 Pac. 985. **Fla.** — Jordan *v.* John Ryan Co., 35 Fla. 259, 17 So. 73. **Ind.** Treadway *v.* Cobb, 18 Ind. 36 (which being an action by an assignee against the maker of a promissory note, the assignment did not have to be set out, it being no part of the cause of action); Nagelbaugh *v.* Harder, etc. Min. Co., 21 Ind. App. 551, 51 N. E. 427. **Ia.** — Hoppes *v.* Des Moines City R. Co., 126 N. W. 783; McAleer *v.* McNamara, 140 Iowa 112, 117 N. W. 1122; Montague *v.* Reineger, 11 Iowa 503; McCarn *v.* Rivers, 7 Iowa 404; Mainer *v.* Reynolds, 4 Greene 187. **Ky.** — Miller *v.* Rice, 1 Bush 70, 92 Am. Dec. 475. **Me.** — Wood *v.* Decoster, 66 Me. 542, in which case a demurrer was held to admit the assignment, and a presumption followed that the assignment was valid. **Md.** — Gable *v.* Scarlett, 56 Md. 169. **Mich.** — Pierce *v.* Closterhouse, 96 Mich. 124, 55 N. W. 663; Altman *v.* Fowler, 70 Mich. 57, 37 N. W. 708; Webster *v.* Williams, 69 Mich. 135, 37 N. W. 62 (holding a judgment valid although proof of the assignment was admitted over defendant's objection, on the score that no assignment was averred); Cilley *v.* VanPatten, 58 Mich. 404, 25 N. W. 326; Rose *v.* Jackson, 40 Mich. 29; Blackwood *v.* Brown, 32 Mich. 104; Draper *v.* Fletcher, 26 Mich. 154. **Mo.** — *Compare* Lamar Water, etc. Co. *v.* Lamar, 140 Mo. 145, 39 S. W. 768. **N. H.** — Tibbetts *v.* Gerrish, 25 N.

A failure to allege the assignment may be cured by amendment not amounting to a new cause of action,[36] or by verdict, where no objection is raised as to the pleadings and there is evidence of assignment.[37] Where, however, the right to maintain the action does not depend on the assignment it need not be alleged.[38]

In certain forms of action, as trover and replevin, it has been held unnecessary to set out the nature of plaintiff's title, or to allege the assignment, these being matters in evidence merely.[39] If the plaintiff is a remote assignee it has been held that he should allege the facts of his derivative title through the intermediate assignees.[40]

Sufficiency of Allegation of Assignment. — The sufficiency of the allegation of assignment will depend largely on the subject-matter assigned and its negotiability.[41] A mere recital that plaintiff sues as

H. 41, 57 Am. Dec. 307, to the point that it is not necessary to allege mesne assignments unless the names of the intermediate parties appeared upon the instrument sued as the indorsers or assignors. **N. J.**—Sullivan *v.* Visconti, 6[illegible] N. J. L. 543, 53 Atl. 598; Cullen *v.* Woolverton, 63 N. J. L. 664, 44 Atl. 646; Gaskill *v.* Barbour, 62 N. J. L. 530, 41 Atl. 700; Lindsay *v.* McInerney, 62 N. J. L. 524, 41 Atl. 701. **N. Y.**—Brower *v.* Crimmins, 67 Misc. 68, 121 N. Y. Supp. 648; Buffalo Ice Co. *v.* Cook, 9 Misc. 434, 29 N. Y. Supp. 1057, 61 N. Y. St. 731; Billings *v.* Jane, 11 Barb. 620 (holding that under Code Proc., § 111, requiring the real party in interest to sue an assignee of a note payable to order need not allege the indorsement to him). **Ohio.**—Lowther *v.* Lawrence, Wright 180. **Pa.**—Fett's Estate, 39 Pa. Super, 246, sufficiency of evidence of assignment. **Tenn.**—Smith *v.* Cottrel, 8 Baxt. 62; Bradley Co. *v.* Surgoine, 6 Baxt. 108; Stovall *v.* Bowers, 10 Humph. 560. **Tex.**—Riggins *v.* Sass (Tex. Civ. App.), 127 S. W. 1064. **Va.**—Lynchburg Iron Co. *v.* Tayloe, 79 Va. 671; Marietta Bank *v.* Pindall, 2 Rand. 465; Gordon *v.* Brown's Exr. 3 Hen. & M. 219. **Wis.** Johnson *v.* Vickers, 139 Wis. 145, 120 N. W. 837, 131 Am. St. Rep. 1046; River Falls Bank *v.* German Am. Ins. Co., 72 Wis. 535, 40 N. W. 506.

An averment that the original contractor with a city, with the consent of his sureties and the board of public works, assigned the contract to plaintiff, together with all his claims for money earned and to be earned under it, and for and on account of said extra work and materials, that accordingly, in the completion of the sewer under the contract, plaintiff assumed in every respect the position and situation of such contractor, naming him, was held a sufficient averment of the substitution and assignment. Burnham *v.* Milwaukee, 69 Wis. 379, 34 N. W. 389.

An allegation of an assignment by a company is not supported by proof of an assignment executed by an individual. Kibler *v.* Brown, 114 Fed. 1014; Saffier *v.* Haft, 86 App. Div. 284, 13 Ann. Cas. 318, 83 N. Y. Supp. 763.

36. Farnam *v.* Doyle, 128 Mich. 69[illegible], 87 N. W. 1026; Dawson *v.* Peterson, 110 Mich. 431, 68 N. W. 246.

Where there was no assignment when plaintiff's action was begun, he cannot by amendment, set up an assignment written over a signature, after action begun, for the purpose of enabling him to maintain his action. Weinwick *v.* Bender, 33 Mo. 80.

37. Lassiter *v.* Jackman, 88 Ind. 118.

38. **Allegation of Assignment Unnecessary.**—Where the assignor, who was the original contracting party named in the ordinance, assigned his right under the ordinance and his assignee then made the contract with the city, it was not necessary to allege the assignment. Lamar Water, etc. Co. *v.* Lamar, 140 Mo. 145, 39 S. W. 768.

39. Warren *v.* Dwyer, 91 Mich. 414, 51 N. W. 1062 (trover); Myres *v.* Yapel 60 Mich. 339, 27 N. W. 536, (replevin).

40. Williams *v.* Wetherbee, 1 Aik. (Vt.) 233. But see Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307, where a second assignee of a note did not have to aver a first assignment which was in blank.

41. An allegation that a note was

assignee is insufficient,[42] but a general allegation of an assignment to the plaintiff has been held sufficient to imply a valid assignment.[43]

assigned, instead of the allegation that the debt which it represented was assigned, is sufficient. Chestnut Hill Reservoir Co. *v.* Chase, 14 Conn. 123.

Where in an action to foreclose a mortgage an averment that the mortgage notes were indorsed to the plaintiff, and payment thereof ordered to be made to him, was held sufficient. Slaughter *v.* Foust, 4 Blackf. (Ind.) 379.

An averment of the assignment of a note by the payee by indorsement thereon, together with the indorsed note appended to the complaint, is a sufficient allegation of the assignment. Treadway *v.* Cobb, 18 Ind. 36.

Under How. St. Mich., § 344, the attachment of the assignment to the assigned account was held a sufficient averment. Morrill *v.* Bissell, 99 Mich. 409, 58 N. W. 324 (annotated case—reviewing prior authorities).

An averment (before a justice) that a claim for services was assigned to plaintiff was sufficient averment that the assignment was of an antecedent debt. Farnam *v.* Doyle, 128 Mich. 696, 87 N. W. 1026.

A bill of particulars attached to a declaration on the common counts, and showing the assignment to the plaintiff, rendered unnecessary any further averment of the assignment. Snell *v.* Gregory, 37 Mich. 500; Kelly *v.* Waters, 31 Mich. 404.

An allegation of the assignment of a debt and reference to an order drawn on defendant as evidence of it was held sufficient to show an equitable assignment. Walker *v.* Mauro, 18 Mo. 564.

An averment that certain covenants had been assigned and that an agreement had been made whereby the assignee was to have the benefit of them, and that for this purpose a power of attorney had been given to him, was held sufficient. Raymond *v.* Squire, 11 Johns. (N. Y.) 47. It is sufficient to allege that the contract was "duly" assigned. Buffalo Tin Can Co. *v.* E. W. Bliss Co., 118 Fed. 106. Further on sufficiency of allegation of assignment, see U. S. — Carpenter *v.* Talbot, 33 Fed. 537. Wash. — Rice *v.* Yakima, etc. R. Co., 4 Wash. 724, 31 Pac. 23. Wis. — Racine County Bank *v.* Ayres, 12 Wis. 512.

Clerical Errors Will Be Overlooked.— Where plaintiff in tracing his title to a trade secret stated that the assignment to him was in April, 1898, and the date of the assignment to his assignor was stated to be February, 1899, the discrepancy was regarded as a clerical error. Vulcan Detinning Co. *v.* American Can Co., 67 N. J. Eq. 243, 58 Atl. 290.

42. **Ark.**—Brooks *v.* Whiting, 5 Ark. 18. **Ia.**—McAleer *v.* McNamara, 140 Iowa 112, 117 N. W. 1122. **Mich.**—Bloom *v.* Sexton, 33 Mich. 181. **N. J.**—Lindsay *v.* McInerney, 62 N. J. L. 524, 41 Atl. 701.

43. **U. S.**—Buffalo Tin Can Co. *v.* E. W. Bliss Co., 118 Fed. 106. **S. C.**—Haile *v.* Richardson, 2 Strobh. L. 114 **Wis.**—River Falls Bank *v.* German Am. Ins. Co., 72 Wis. 535, 40 N. W. 506.

Authority of assignor to assign need not be specially alleged. Keen *v.* Brooks, 19 Colo. App. 165, 73 Pac. 1092, where the allegation was that the executor of a payee assigned notes, without alleging his authority from the probate court, the presumption is that a valid assignment is alleged. Crinian *v.* Knauth, 29 Misc. 523, 61 N. Y. Supp. 976, affirmed, 48 App. Div. 633, 63 N. Y. Supp. 1106. But see Brower *v.* Crimmins, 67 Misc. 68, 121 N. Y. Supp. 648 (where authority of president of an incorporated labor union to assign had to be shown).

Where a chose was assigned by a corporation it was held in S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135, that the legal existence of the corporation and its nature should be alleged. But see Strong *v.* Moore, 75 Kan. 437, 89 Pac. 895, where an allegation of the corporate entity of assignor was unnecessary.

In Darlington Miller Lumb. Co. *v.* Nat. Surety Co., 35 Tex. Civ. App. 346, 80 S. W. 238, it was held that one claiming an assignment through an attorney in fact must show that the latter had authority.

Setting Out of Assignment or Copy. — When plaintiff's action is based on the original cause assigned, and not on the assignment, the latter need not be set out,[44] nor a copy thereof attached to the pleading, except where the statute requires it.[45]

c. *Manner and Form of Assignment.* — Where the right of an assignee to maintain the action in his own name depends on the manner or form of assignment, these should be set out in the declaration.[46] When a written assignment is necessary to vest the legal title in the plaintiff, such an assignment should be alleged.[47] If the assignment is conditional, the condition should be set out.[48] Though

44. Stanford *v.* The Broadway Sav. & Loan Assn., 122 Ind. 422, 24 N. E. 154; Thayer *v.* Pressey, 175 Mass. 225, 56 N. E. 5; Keith *v.* Champer, 69 Ind. 477.

In an action on a note by the assignee against the maker it is not necessary to make the assignment of the note a part of the complaint, because the assignment constitutes no part of the cause of action, but in an action by an indorsee against an indorser the indorsement constitutes the contract sued on and should be set out by original or copy. Treadway *v.* Cobb, 18 Ind. 36. *Contra,* Gregory *v.* Freeman, 22 N. J. L. 405.

45. Under Gen. St., p. 2572, plaintiff must furnish the defendant with a copy of the assignment, if defendant makes a written demand for same. Cullen *v.* Woolverton, 63 N. J. L. 644, 44 Atl. 646.

Filing With Writ.—Where the assignment is pleaded, a failure to file it with the writ as required is matter in abatement only. Littlefield *v.* Pinkham, 72 Me. 369.

An assignment on the back of an assigned note filed with the declaration was held sufficient filing. Sleeper *v.* Gagne, 99 Me. 306, 59 Atl. 472.

46. **Ala.**—Phillips *v.* Sellers, 42 Ala. 658; Skinner *v.* Bedell, 32 Ala. 44 (indorsement of assignment should be alleged). **Ind.**—Gordon *v.* Carter, 79 Ind. 386; Stowe *v.* Weir, 15 Ind. 341; Barcus *v.* Evans, 14 Ind. 381; Garrison *v.* Clark, 11 Ind. 369. **N. J.**—Allen *v.* Pancoast, 20 N. J. L. 68; Stroud *v.* Howell, 3 N. J. L. 649.

Where under the statute the assignee sues in his own name, without making the assignor a party, he must allege the manner of the assignment. Treadway *v.* Cobb, 18 Ind. 36.

The insufficiency of allegation of the manner of assignment should be raised by demurrer. Phillips *v.* Sellers, 42 Ala. 653; Phipps *v.* Bacon, 183 Mass. 5, 66 N. E. 414.

47. **Ala.**—Ragland *v* Wood, 71 Ala. 134, 46 Am. Rep. 305 (holding that words "duly transferred" do not import a writing, but words "duly assigned" do, the word assignment importing a writing); Phillips *v.* Sellers, 42 Ala. 658. **Ga.**—Foster *v.* Sutlive, 110 Ga. 297, 34 S. E. 1037; Hartford F. Ins. Co. *v.* Amos, 98 Ga. 533, 25 S. E. 575. **Ind.**—Watson *v.* Conwell, 3 Ind. App. 518, 30 N. E. 5. **Ia.**—Williams *v.* Sautter, 7 Iowa 434 (where under the statute a written transfer was necessary to enable the assignee to sue in his own name); Andrews *v.* Brown, 1 Iowa *154 (Cole's ed.). **Miss.** Lowenburg *v.* Jones, 56 Miss. 688 (where an equitable owner of a chose who had no written assignment was permitted to sue in his own name, though the code of 1892, § 660, provided that an assignee may sue in his own name if the assignment be in writing); Tully *v.* Herrin, 44 Miss. 626 (where debt had to be assigned in writing). **Can.**—Lynch *v.* William Richards Co., 37 N. Bruns. 549.

Contra, Rice *v.* Yakima, etc. R. Co., 4 Wash. 724, 31 Pac. 23 (where it was held unnecessary to allege the assignment to be in writing although it might be necessary to prove a written assignment on the trial); Gunderson *v.* Thomas, 87 Wis. 406, 58 N. W. 750; River Falls Bank *v.* German Am. Ins. Co., 72 Wis. 535, 40 N. W. 506.

48. Hobart *v.* Andrews, 21 Pick. (Mass.) 526; Walburn *v.* Ingilby Coop. t. Br. 270, 47 Eng. Reprint 96, 3 L. J. Ch. 21, 1 Myl. & K. 61, 7 Eng. Ch. 61, 39 Eng. Reprint 604.

the statute requires the assignment to have been *bona fide*, plaintiff need not aver that it was *bona fide*.[49]

Time, Place and Delivery of Assignment. — When the time and place of the making of the assignment or of the delivery are material facts, these should be stated.[50]

d. *Consideration.* — Generally, in an action by an assignee against the debtor, the consideration for the assignment need not be averred;[51] but it has been held that where the assignee has a mere equitable right, as when the thing assigned possesses no negotiable qualities, a consideration for the transfer must be alleged.[52] Where the assignee sues the assignor, the consideration for the assignment must be alleged.[53]

e. *Demand and Notice.* — **(I.) In Actions Against Debtor.** — Where the right of action is conditional upon demand upon or notice to the debtor, or where by the terms of the chose assigned such notice or demand are conditions precedent to liability, plaintiff should allege

49. Crawford *v.* Brooke, 4 Gill (Md.) 213.

50. **Time of assignment** is not a necessary allegation. **U. S.**—Buffalo Tin Can Co. *v.* E. W. Bliss Co., 118 Fed. 106. **Cal.** — Union Collection Co. *v.* National Fertilizer Co., 2 Cal. App. xiii, 82 Pac. 1129. **S. C.** — Haile *v.* Richardson, 2 Strobh. L. 114.

But see Hoppes *v.* Des Moines City R. Co. (Iowa), 126 N. W. 783 (proof of delivery); Murphy *v.* Cochran, 1 Hill (N. Y.) 339 (where in *scire facias*, on a judgment sued out by an assignee, particularity as to time and place of assignment was required).

51. **Ark.** — Alston *v.* Whiting, 6 Ark. 402, also made unnecessary by statute. See Kirby's Digest 1904, § 518. **Colo.** Welch *v.* Mayer, 4 Colo. App. 440, 36 Pac. 613. **Fla.**—Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526, a voluntary assignee can sue in the name of his assignor, notwithstanding statute permitting the real party in interest to sue in his own name. **Ky.**—Holt *v.* Thompson, 1 Duv. 301. But see Malone *v.* Adairville Bank, 6 Ky. L. Rep. 440, where it was held that if the consideration for the assignment is set out, it must be proved and be sufficient. **Minn.** — Russell *v.* Minnesota Outfit, 1 Minn. 136, where it is estimated that an allegation of a valuable consideration might be required to be more specific; also where plaintiff alleges a valuable consideration he must prove it. **N. J.**—Gregory *v.* Freeman, 22 N. J. L. 405, where it was held not necessary that the assignment of a bond, under seal, should show any consideration. **N. Y.**—Rosenthal *v.* Rudnick, 65 App. Div. 519, 72 N. Y. Supp. 804; Murphy *v.* Cochran, 1 Hill 339 (where the assignment was under seal); Vogel *v.* Badcock, 1 Abb. Pr. 176. But see De Forest *v.* Frary, 6 Cow. 151, where the chose assigned was non-negotiable an allegation of consideration was necessary. **Tex.**—Knight *v.* Halloman, 6 Tex. 153, in an action on a promissory note the assignee need not aver the consideration for the assignment, although the note contained no words of negotiability. **Vt.**—Smilie *v.* Stevens, 41 Vt. 321, where the action was on the promise of defendant. See Roberts *v.* Smith, 58 Vt. 492, 4 Atl. 709, 56 Am. Rep. 567, where it as held that the consideration for the original chose must be alleged.

52. "For value received" insufficient. Perkins *v.* Parker, 1 Mass. 117. See also Quigley *v.* Mexico Southern Bank, 80 Mo. 289, 50 Am. Rep. 503, *dictum*.

Consideration May Be Alleged Generally.—Where a written assignment stated that it was for a valuable consideration, defendant cannot in an exception of no cause of action set up that the actual consideration was not specifically set forth. Viguerie *v.* Hall, 107 La. 767, 31 So. 1019.

53. Humphrey *v.* Hughes, 79 Ky.

the same.[54] As, for instance, where an equitable assignee claims priority over a later assignment, an allegation of notice to the debtor prior to the latter assignment is necessary.[55] And where the action is brought in the name of the assignor and the defendant pleads payment to the nominal plaintiff, the plaintiff must allege in his replication the fact of notice to the debtor before such payment.[56]

(II.) In Actions Against Assignor.— Where the assignee of an obligation is given a right of action against his assignor for breach of warranty of collectibility, the declaration for such a breach should allege demand upon the obligor and due diligence by the assignee in attempting to collect the obligation.[57]

f. *Assent or Promise of Debtor.* — Where the common law rule prevails, an equitable assignee suing in his own name must allege a promise by the debtor to pay him directly;[58] but where under the statute the assignee may sue in his own name, such promise need not be alleged.[59] Also, where a partial assignee is permitted to sue

487, 3 Ky. L. Rep. 273; Hall *v.* Smith, 3 Munf. (Va.) 550.

Where the assignment was for tobacco sold, but the declaration stated that it was for value received, it was held that the consideration was stated sufficiently. Barksdale *v.* Fenwick, 4 Call (Va.) 492. See further *infra*, III, B, 2, d.

54. Stanton *v.* Ohio Oil Co. 41 Ind. App. 96, 83 N. E. 521.

Where the debtor's liability under assignment is uncertain, demand is a condition precedent to the maintenance of the action, and must be alleged in the complaint. **U. S.**—Burck *v.* Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578, where an allegation of filing and recording and notice thereof, was construed to be not a charge of actual notice. **Ark.**—Busch *v.* Prescott, etc. R. Co., 76 Ark. 497, 89 S. W. 86; Kansas City, etc. R. Co. *v.* Joslin, 74 Ark. 551, 86 S. W. 435; White *v.* Cannada, 25 Ark. 41; Anderson *v.* Yell, 14 Ark. 9, 58 Am. Dec. 363. **N. Y.**—Packard *v.* Long Island R. Co., 59 Misc. 98, 101 N. Y. Supp. 660 (as where an assignment was given as security, notice thereof to the debtor merely created a contingent liability and demand was a condition precedent to the maintenance of the action); Murphy *v.* Cochran, 1 Hill 33[illegible] (notice need not be alleged in first instance, but it is appropriate in reply to a defense, or may be shown under the general issue). **Wis.**—Webber *v.* Roddis, 22 Wis. 61.

55. Enochs-Havis Lumber Co. *v.* Newcomb, 79 Miss. 462, 30 So. 608.

56. Shriner *v.* Lamborn, 12 Md. 170.

57. **Ark.**—White *v.* Cannada, 25 Ark. 41. **Del.** — Bennett *v.* Moore, 5 Harr. 350. **Ind.** — James *v.* Nicholson, 6 Blackf. 288. **Ky.** — Maze *v.* Owingsville Bkg. Co., 23 Ky. L. Rep. 574, 63 S. W. 428; Chambers *v.* Keene, 1 Met. 289; Morrison *v.* Glass, 5 B. Mon. 240; Berry *v.* Kenney, 5 B. Mon. 120; Passmore *v.* Prather, 9 Dana 57; McMurray *v.* Wood, 9 Dana 45; Sebree *v.* Harper, 4 Dana 64; Campbell *v.* Hopson, 1 A. K. Marsh. 228; Thompson *v.* Caldwell, 2 Bibb 290; Spratt *v.* McKinney, 1 Bibb 595; Smallwood *v.* Woods, 1 Bibb 542. **Md.** — Boyer *v.* Turner's Admr., 3 Har. & J. 285; Parrott *v.* Gibson, 1 Har. & J. 398. **Mo.** — Collins *v.* Warburton, 3 Mo. 202. **S. C.** — Drayton *v.* Thompson, 1 Bay 263. **Tex.** — National Oil Co. *v.* Teel, 95 Tex. 586, 68 S. W. 979; Gooch *v.* Parker, 16 Tex. Civ. App. 256, 41 S. W. 662. **Va.** — Wood's Admr. *v.* Duval, 9 Leigh 6; Smith *v.* Triplett, 4 Leigh 590; Johnston *v.* Hackley, 6 Munf. 448; McClung *v.* Arbuckle, 6 Munf. 315; Goodall *v.* Stuart, 2 Hen. & M. 105; Barksdale *v.* Fenwick, 4 Call 492. **Eng.** — Williams *v.* Price, 1 Sim. & S. 581, 2 L. J. Ch. 105.

As to demand and notice in actions against indorsers of negotiable paper, see the title "Bills and Notes."

58. Page *v.* Danforth, 53 Me. 174 (where the omission of the allegation was amendable); Smith *v.* Cottrel, 8 Baxt. (Tenn.) 62.

59. Crawford *v.* Brooke, 4 Gill (Md.) 213; Robinson *v.* Watson, 101 Mich. 466, 59 N. W. 811.

in his own name without joining the assignor, the assent of the debtor must be alleged.[60]

g. *Non-Payment or Non-Performance.* — In an action by the assignee, non-payment or non-performance to the assignor before the assignment, or to the assignee since the assignment, should be alleged.[61] Likewise, in an action against an assignee, non-payment or non-performance before and after the assignment must be alleged.[62]

3. **Amendments.** — Amendments which do not change the cause of action and are not prejudicial to the defendant will be allowed.[63]

C. Of Defendant. — 1. **In General.** — In accordance with the general rules of pleading, the defendant may demur, or by plea or answer set up any matter tending to invalidate plaintiff's right to maintain the action.[64]

60. Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

Presumed Consent of Debtor.—Where there has been a partial assignment, it will be presumed, on appeal, in the absence of anything to the contrary in the record, that the debtor consented. Sincell *v.* Davis, 24 App. Cas. (D. C.) 218. See further, *supra*, I, D.

61. **Ky.** — Keeton *v.* Scantland, Hard. 149 (assignee must allege nonpayment of the debt to the assignor). **N. H.** — Whittier *v.* Whittier, 31 N. H. 452. **N. J.** — Gregory *v.* Freeman, 22 N. J. L. 405. **N. Y.** — Miner Lithographing Co. *v.* Canary, 20 Misc. 664, 46 N. Y. Supp. 256. **Wis.** — Webber *v.* Roddis, 22 Wis. 61.

An allegation that the assignment was made before the defendant had complied with his covenant was held to be tantamount to an averment that the covenant had not been performed with the assignor, in Conn *v.* Jones, Hard. (Ky.) 8.

62. Gerzebek *v.* Lord, 33 N. J. L. 240.

63. A plaintiff suing as assignee will not be allowed to amend his complaint so as to declare upon an account stated immediately between the parties without reference to the assignor. Ivy Coal & Coke Co. *v.* Long, 139 Ala. 535, 36 So. 722.

In a suit by a widow upon an insurance policy issued in her favor upon the life of her husband, the complaint cannot be amended on trial by joining as co-plaintiff his daughter, to whom an interest in the policy had been assigned prior to her father's death. Wood *v.* Metropolitan Life Ins. Co., 96 Mich. 437, 56 N. W. 8.

Where defendant pleaded that plaintiff was not the real party in interest and had assigned his claim, the plaintiff was not allowed to amend his complaint by alleging a reassignment after the action was brought. Staunton *v.* Swann, 10 N. Y. Civ. Proc. 12.

A complaint alleging that the demand assigned was originally the demand of the assignor alone may be amended to show that the demand belonged to the assignor and plaintiff jointly. Read *v.* Jaudon, 35 How. Pr. (N. Y.) 303.

Where the action was improperly brought in the name of the assignee instead of assignor, the defect was cured by amendment. Robertson *v.* Reed, 47 Pa. 115. But *contra*, Johnson *v.* Mayrant, 1 McCord (S. C.) 484.

Where the action was brought in the name of the assignor for use of assignee, an amendment making the assignee the plaintiff was allowed. Heard *v.* Lockett, 20 Tex. 162.

A judge should not exercise his discretion in joining a person as co-plaintiff without his consent or a hearing. Turquand *v.* Fearon, L. R. 4 Q. B. D. 280, 48 L. J. Q. B. 341, 40 L. T. N. S. 191, 27 Wkly. Rep. 396.

See, generally, the titles "**Amendments and Jeofails**"; "**Complaint, Petition and Declaration.**"

64. In an action of debt on an assigned bond, a demurrer was held necessary to raise the objection of failure to make profert. Shields *v.* Barden, 6 Ark. 459.

2. Defenses Against Assignor. — In an action by an assignee a debtor may plead any defense which he might have pleaded against the assignor, before notice of the assignment, unless, in some way, he has precluded himself from that right.[65]

3. Denying Plaintiff's Interest or Right To Sue. — Unless changed by statute, where the action is brought in the name of the holder of the legal title to the chose, as by the assignor for the benefit of the assignee, it is no defense that the plaintiff is a nominal party having no real interest and that the beneficial interest is in others.[66] Thus, in such a situation an answer denying plaintiff's beneficial interest only is of no avail.[67] Where, however, by statute, the real party in interest must sue, the defendant can plead that the plaintiff is not such a party,[68] but he must set out all the facts on which he bases his defense.[69] He can also specifically deny the authority of the holder

The objection that assignor was not made a party to the action should be raised by demurrer, or motion to bring him in. Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

A failure of the complaint to refer to a copy of an account and its assignment should be raised by demurrer. Lassiter *v.* Jackman, 88 Ind. 118. It cannot be shown that an assignment is colorable unless such fact is pleaded. Lesh *v.* Meyer, 63 Kan. 524, 66 Pac. 245, where the execution of the assignment was admitted.

65. **U. S.** — Sullivan *v.* Ayer, 174 Fed. 199. **Mich.** — Spinning *v.* Sullivan, 48 Mich. 5, 11 N. W. 758. **Mo.** — Ewing *v.* Miller, 1 Mo. 234. **N. H.** — Thompson *v.* Emery, 27 N. H. 269. **N. C.** — McKinnie *v.* Rutherford, 21 N. C. 14.

Between the original parties the defense of illegality in the original contract was held good, notwithstanding an assignment to a third person. Fales *v.* Mayberry, 2 Gall. 560, 8 Fed. Cas. No. 4,622; Western Union Tel. Co. *v.* Ryan, 126 Ga. 191, 55 S. E. 21 (assignment given as security for a usurious loan).

66. Labaume *v.* Sweeney, 17 Mo. 153; Carr *v.* Gomez, 9 Wend. (N. Y.) 653. And see Chambers *v.* Webster, 69 App. Div. 546, 75 N. Y. Supp. 31, where it was held proper to inquire whether the assignor held the chose in trust for someone else, as bearing on the validity of the assignment.

Where suit is brought in the name of the legal plaintiff for the use of the assignee and defendant does not deny that the whole demand is due and unpaid, it is no concern of defendant whether the assignor or assignee receives the proceeds of the judgment when recovered, as he is protected from further suit. Kamber *v.* Becker, 27 Pa. Super. 266. See also Continental, etc. Co. *v.* Van Winkle, etc. Wks. (Tex. Civ. App.), 131 S. W. 415.

67. **Ill.** — Chadsey *v.* Lewis, 6 Ill. 153; McHenry *v.* Ridgely, 3 Ill. 309, 35 Am. Dec. 110. **Mo.** — Boyer *v.* Hamilton, 21 Mo. App. 520, where it was no defense that others claimed the fund. **Tex.** — Knight *v.* Holloman, 6 Tex. 153.

See also *supra*, I, A, 2, a; I, C, 4; II, A, 4.

68. **Plaintiff Not Real Party in Interest.** — Lawrence *v.* Long, 18 Ind. 301; Crum *v.* Stanley, 55 Neb. 351, 75 N. W. 851; Henley *v.* Evans, 54 Neb. 187, 74 N. W. 578; Hoagland *v.* Van-Etten, 22 Neb. 681, 35 N. W. 869.

If a debtor in an action by the assignor wishes to set up the assignment as a defense, he must allege that the plaintiff is not the real party in interest and has not title to the claim. Selleck *v.* Manhattan Fire Alarm Co., 117 N. Y. Supp. 964.

A court of law will not recognize a partial assignment as a defense to an action by the assignor against the debtor. City of Pueblo *v.* Dye, 44 Colo. 35, 96 Pac. 969; Thiel *v.* John Week Lumb. Co., 137 Wis. 272, 118 N. W. 802. See also *supra*, I, C, 4; II, A, 4.

69. **Ind.** — Treadway *v.* Cobb, 18 Ind. 36 (where sufficient facts showing

of the legal title to sue on his own account, after he has assigned all beneficial interest.[70] He can also put in issue the authority of a beneficiary to sue in the name of the holder of the legal title.[71] Where an action is brought by one who had parted with his interest at the time the action was commenced, it has been held that a supplemental complaint will be permitted to be filed on reassignment to plaintiff.[72]

4. Fact of the Assignment. — As the plaintiff's right of action will usually depend upon the fact of assignment, which he must allege and prove, it is held by some cases that the defendant may by general denial put such fact in issue;[73] by other cases it is held that the assignment should be specially denied.[74] In some jurisdictions

a want of interest in plaintiff were required); Swift *v.* Ellsworth, 10 Ind. 205, 71 Am. Dec. 316 (want of beneficial interest in the plaintiff should be pleaded). **Ia.** — Cottle *v.* Cole, 20 Iowa 481. **Kan.** — Lesh *v.* Meyer, 63 Kan. 524, 66 Pac. 245, the fact that the assignment is colorable and transferred no real interest to plaintiff should be specially pleaded. **Mass.** — Rogers *v.* Abbot, 206 Mass. 270, 92 N. E. 472, waiver by not objecting. **N. Y.** Selleck *v.* Manhattan Fire Alarm Co., 117 N. Y. Supp. 964 (where plaintiff was not the real party in interest because he had assigned his interest in the claim, this fact had to be pleaded); Smith *v.* New York Cooperage Co., 35 Misc. 203, 71 N. Y. Supp. 479 (where the fact of assignment and that the plaintiff was the real party in interest were denied separately, the second defense was held bad because it was already involved in the first); Russell *v.* Clapp, 4 How. Pr. 347.

70. Moore *v.* Spiegel, 143 Mass. 413, 9 N. E. 827; Trezevant *v.* McNeal, 2 Humph. (Tenn.) 352 (assignor was allowed to reply that the suit was for the benefit of the assignee).

Where in an action by an assignee the defendant pleaded a former recovery by the assignor, it was held that the defendant, having had notice of the assignment, should have pleaded in the former suit the fact of assignment and that the assignor had parted with all beneficial interest. Dawson *v.* Coles, 16 Johns. (N. Y.) 51.

71. Field *v.* Weir, 28 Miss. 56; Thompson *v.* Cartwright, 1 Tex. 87, 46 Am. Dec. 95. See also *supra*, I, A, 2, a.

72. Walsh *v.* Woarms, 109 App. Div. 166, 95 N. Y. Supp. 824; Staunton *v.* Swann, 10 N. Y. Civ. Proc. 12.

73. **Ky.** — Kincaid *v.* Higgins, 1 Bibb 396. **N. Y.** — Torrey *v.* Standish, 61 Hun 623, 16 N. Y. Supp. 5, where the admission of the indebtedness precluded the defendant from denying the assignment. **Ohio.**—McMurty *v.* Campbell, 1 Ohio 262. **Va.** — Lynchburg Iron Co. *v.* Tayloe, 79 Va. 671 (holding that, in equity, an assignee should show and prove the assignment, though it is not denied nor proof of it called for); Corbin *v.* Emmerson, 10 Leigh 663. **Wis.** — Johnson *v.* Vickers, 139 Wis. 145, 120 N. W. 837, 21 L. R. A. (N. S.) 359; Hilliard *v.* Wisconsin Life Ins. Co., 137 Wis. 208, 117 N. W. 999.

In an action of assumpsit by the assignee against the assignor of a promissory note, a special plea denying the assignment was held bad, because it amounted to the general issue. Scribner *v.* Bullitt, 1 Blackf. (Ind.) 112.

74. **Ark.** — Jordan *v.* Newborn, 8 Ark. 502. **Ind.** — Morrison *v.* Ross, 113 Ind. 186, 14 N. E. 479; Utter *v.* Vance, 7 Blackf. 514 (the plea of *non est factum* puts nothing in issue but the execution of the instrument); Gully *v.* Reny, 1 Blackf. 69. **Ky.** — McConnell *v.* Morrison, 1 Litt. 206, Smith *v.* Shields, 2 Bibb 328. **Mo.** — Ragland *v.* Ragland, 5 Mo. 54, the pleas of *non est factum*, payment and set-off did not put the assignment in issue. **Eng.** — Smithey *v.* Edmondson, 3 East 22, 102 Eng. Reprint 504; Smith *v.* Broomhead, 7 T. R. 300, 101 Eng. Reprint 986.

If defendant pleads the general issue it is held that he merely denies the assignee's right to sue, and not his

the verification of defendant's plea by an oath is essential.[75]

5. Validity of Assignment. — Where the plaintiff's right to sue depends upon a valid assignment he must allege it, and consequently it has been held that a general denial is sufficient to put such allegation in issue.[76]

6. Consideration. — Where an allegation of consideration for the assignment or for the chose itself is essential, the defendant may by demurrer raise the sufficiency of the complaint in this respect,[77]

capacity. Brown *v.* Curtis, 128 Cal. 193, 60 Pac. 773.

Denial of assignment on information and belief was held in Read *v.* Buffum, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131, to be sufficient.

75. **Ala.** — Bancroft *v.* Paine, 15 Ala. 834; Tarver *v.* Nance, 5 Ala. 712. **Ark.** — Winer *v.* Bank of Blytheville, 89 Ark. 435, 117 S. W. 232; School Dist. *v.* Reeve, 56 Ark. 68, 19 S. W. 106 (but the statute covers only assignments in writing); Jordan *v.* Newborn, 8 Ark. 502 (where it was held that the execution of an assignment cannot be denied except by a plea verified by an oath); Alston *v.* Whiting, 6 Ark. 402. **Ind.** — Lassiter *v.* Jackman, 88 Ind. 118 (where a copy of the account and the assignment thereof followed the complaint in the record, but was not referred to or identified therein, it was held that an objection to the complaint on that ground was waived by defendant's failure to demur thereto); Beagles *v.* Sefton, 7 Ind. 496 (assignment of note or judgment should be denied under oath); Hooker *v.* State, 7 Blackf. 272. **Ia.** — Edmonds *v.* Montgomery, 1 Iowa 143. **Kan.** — Lesh *v.* Meyer, 63 Kan. 524, 66 Pac. 245; School Dist. *v.* Carter, 11 Kan. 445 (covers only written assignments). **Ky.** — Burks *v.* Howard, 2 B. Mon. 66, which relates to assignments of bonds. **Tex.** — Park *v.* Glover, 23 Tex. 469; Carpenter *v.* Historical Pub. Co. (Tex. Civ. App.), 24 S. W. 685 (statute relates only to assignments and indorsements of written instruments, and does not apply where the action is not brought on the instrument and where the latter is used only as title in an action of trespass).

76. Wood *v.* Decoster, 66 Me. 542, *citing* Lawrence *v.* Chase, 54 Me. 196 (where it was held that the validity of the assignment should be put in issue by plea or by a brief statement); Johnson *v.* Vickers, 139 Wis. 145, 120 N. W. 837, 131 Am. St. Rep. 1046, 21 L. R. A. (N. S.) 359.

Where the assignor and equitable assignee are made plaintiffs, the defendant cannot question the validity of the assignment, that issue being confined to the co-plaintiffs. Fulham *v.* McCarthy, 1 H. L. Cas. 703, 39 Eng. Reprint 937.

Where in an action by an assignee against a bank, the latter, being a stranger to the assignment, cannot plead that it was voluntary and therefore invalid in equity. Walker *v.* Bradford Old Bank, L. R. 12 Q. B. Div. 511.

Where a suit is in the name of the legal plaintiff to the use of the assignee and defendant does not deny that the whole demand is due and unpaid, it is no concern of defendant whether the assignment was *bona fide* or not. Kamber *v.* Becker, 27 Pa. Super. 266.

Want of consideration is no defense to an action by the assignee on the assigned chose (Levins *v.* Stark [Ore.], 110 Pac. 980), or that the consideration for the assignment was a usurious loan (Western Union Tel. Co. *v.* Ryan, 126 Ga. 191, 55 S. E. 21).

Fraud in the Assignment. — Where fraud in the assignment is relied on, all the elements thereof must be alleged, as in Cox *v.* Stillman, 59 Misc. 248, 112 N. Y. Supp. 328, where it was held that the fact of intention to defraud should be alleged. Pearce *v.* Wallis, Landes & Co. (Tex. Civ. App.), 124 S. W. 496.

An allegation of *colorable assignment* for the purpose of conferring jurisdiction on the court states no defense on the merits. Pearce *v.* Wallis, Landes & Co. (Tex. Civ. App.), 124 S. W. 496.

77. Driscoll *v.* Driscoll, 143 Cal. 528, 77 Pac. 471; Colorado Fuel & Iron Co. *v.* Kidwell, 20 Colo. App. 8, 76 Pac.

or may by general denial put in issue an alleged consideration.[78] But usually want of consideration for the assignment is no defense.[79]

7. Payment. — The defendant may plead payment, but must allege to whom it was made.[80]

8. Want of Notice. — Where the defendant pleads want of notice, he must allege some consequential injury.[81]

IV. ISSUES AND PROOF. — A. In General. — In accordance with the usual rules of practice, an assignee must prove his cause of action.[82] Necessary averments should be supported by adequate proof,[83] and sometimes, although they are not denied in the an-

922; Levins *v.* Stark (Ore.), 110 Pac. 980.

A creditor's bill alleging the consideration for the assignment is not demurrable on the ground that the consideration as alleged is inadequate. Jahn *v.* Champagne Lumb. Co., 147 Fed. 631.

78. See *supra*, III, C, 4; III, C, 5; III, C, 6.

79. Cal. — Moore *v.* Waddle, 34 Cal. 145; Caulfield *v.* Sanders, 17 Cal. 569. Colo. — Forsyth *v.* Ryan, 17 Colo. App. 511, 68 Pac. 1055; Robinson Reduction Co. *v.* Johnson, 10 Colo. App. 135, 50 Pac. 215; Welch *v.* Mayer, 4 Colo. App. 440, 36 Pac. 613. Fla. — Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526. Ga. Western Union Tel. Co. *v.* Ryan, 126 Ga. 191, 55 S. E. 21. Ind. — Pugh *v.* Miller, 126 Ind. 189, 25 N. E. 1040; Morrison *v.* Ross, 113 Ind. 186, 14 N. E. 479. Ia. — Wardner, etc. Co. *v.* Jack, 82 Iowa 435, 48 N. W. 729; Gere *v.* Council Bluffs Ins. Co., 67 Iowa 272, 23 N. W. 137, 25 N. W. 159; Whittaker *v.* Johnson County, 10 Iowa 161. Me. — Norris *v.* Hall, 18 Me. 332. Mass. — Phipps *v.* Bacon, 183 Mass. 5, 66 N. E. 414. Mich. — Hicks *v.* Steel, 126 Mich. 408, 85 N. W. 1121; Coe *v.* Hinkley, 109 Mich. 608, 67 N. W. 915. Mo. — Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632; Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594. N. Y. — Rosenthal *v.* Rudnick, 65 App. Div. 519, 72 N. Y. Supp. 804; Guy *v.* Craighead, 6 App. Div. 463, 39 N. Y. Supp. 688; Walcott *v.* Hilman, 23 Misc. 459, 51 N. Y. Supp. 358; VanDyke *v.* Gardner, 22 Misc. 113, 49 N. Y. Supp. 328; Toplitz *v.* King Bridge Co., 20 Misc. 576, 46 N. Y. Supp. 418; Deach *v.* Perry, 53 Hun 638 (memo.), 6 N. Y. Supp. 940; Moore *v.* Robertson, 25 Abb. N. C. 173; Burtnett *v.* Gwynne, 2 Abb. Pr. 79; Allen *v.* Brown, 51 Barb. 86, *affirmed*, 44 N. Y. 228; Richardson *v.* Mead, 27 Barb. 178; Beach *v.* Raymond, 2 E. D. Smith 496. Ore. — Levins *v.* Stark, 110 Pac. 980; King *v.* Miller, 53 Ore. 53, 97 Pac. 542; Gregoire *v.* Rourke, 28 Ore. 275, 42 Pac. 996. S. D. — Dewey *v.* Komar, 21 S. D. 117, 110 N. W. 90. Tex. — Doty *v.* Moore (Tex. Civ. App.), 113 S. W. 955; St. Louis S. W. R. Co. *v.* Jenkins (Tex. Civ. App.), 89 S W. 1106. Utah. — Rutan *v.* Huck, 30 Utah 217, 83 Pac. 833. W. Va. — Wallace *v.* Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777. Wis. — Chase *v.* Dodge, 111 Wis. 70, 86 N. W. 548. Eng. — Wiesener *v.* Rackow, 76 L. T. N. S. 448; Walker *v.* Bradford Old Bank, L. R. 12 Q. B. D. 511.

80. Willard *v.* Tillman, 19 Wend. (N. Y.) 358.

81. Kinckerbocker Trust Co. *v.* Coyle, 139 Fed. 792; Walker *v.* Sargeant, 14 Vt. 247 (where the failure to give notice to the defendant did not cause any injury, it was held that a plea alleging no notice raised no material issue).

82. Colo. — Chicago, etc. R. Co. *v.* Provolt, 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587, assignee was required to prove the amount due him. Ia. — Doty *v.* Braska, 126 N. W. 1108; Hoppes *v.* Des Moines City R. Co., 126 N. W. 783. La. — Yerger *v.* Murdock, 52 So. 1028. N. J. — New Jersey Produce Co. *v.* Gluck (N. J. L.), 74 Atl. 443. N. Y. — Marandino *v.* Brown & Co., 120 N. Y. Supp. 744.

83. U. S. — Conant *v.* Wills, 1 McLean 427, 6 Fed. Cas. No. 3,087. Ark. Shields *v.* Barden, 6 Ark. 459; Alston *v.* Whiting, 6 Ark. 402; Beebe *v.* Real Estate Bank, 4 Ark. 124; McLain *v.* Onstott, 3 Ark. 478; Kirby's Dig.,

swer.[84] But generally only the points put in issue need be proved.[85]

B. General Issue. — Evidence as to the fact of assignment and its validity is admissible under the general issue.[86] Lack of consideration for the assignment cannot be shown under the general issue, except in cases where consideration is an essential allegation in the declaration.[87] Likewise, the issue of fraud is usually not involved under a general denial.[88]

C. Variance. — Material variance between the allegations of assignment and the proof offered is fatal to the action.[89] But imma-

1904, § 517 (the assignment need not be proved unless denied under oath). **Ia.** — Doty *v.* Braska, 126 N. W. 1108, genuineness of assignor's signature. **Mass.** — Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285. **Mich.** — Seeley *v.* Albrecht, 41 Mich. 525, 2 N. W. 667, where the proof did not support the allegation of assignment by joint owners. **Mo** — Quigley *v.* Mexico Southern Bank, 80 Mo. 289; Kuhn *v.* Schwartz, 33 Mo. App. 610 (holding parol proof of written assignments inadequate). **N. H.** — Pierce *v.* Nashua F. Ins. Co., 50 N. H. 297, 7 Am. Rep. 235; Barnes *v.* Union Mut. F. Ins. Co., 45 N. H. 21; Shepherd *v.* Union Mut. F. Ins. Co., 38 N. H. 232. **N. Y.** — Burke *v.* New York, 7 App. Div. 128, 40 N. Y. Supp. 81, where an assignment was denied admission on trial that it was executed meets the denial in the answer). **Va.** — Anderson *v.* DeSoer, 6 Gratt. 363 (holding that where no objection is made the presumption is that the date of the assignment is correct); Tennent's Heirs *v.* Pattons, 6 Leigh 196; Cunningham *v.* Herndon, 2 Call 530.

84. Lynchburg Iron Co. *v.* Tayloe, 79 Va. 671; Corbin *v.* Emmerson, 10 Leigh (Va.) 663.

Admission in pleading of adverse party dispenses with proof. Chickering *v.* Fullerton, 90 Ill. 520. See also Coffin *v.* Smith (S. D.), 128 N. W. 805.

Admission on trial dispenses with proof. Burke *v.* New York, 7 App. Div. 128, 40 N. Y. Supp. 81.

85. **Ala.** — Wood *v.* Brewer, 66 Ala. 570, holding that where the plea does not deny the assignment, evidence thereof is inadmissible. **Ill.** — Barstow *v.* McLachlan, 99 Ill. 641. **Ky.** — Crawford *v.* Duncan, 6 Ky. L. Rep. 734. **Mont.** — General Elec. Co. *v.* Black, 19 Mont. 110, 47 Pac. 639. **N. Y.** — Burke *v.* New York, 7 App. Div. 128, 40 N. Y. Supp. 81. **Tex.** — Gulf, etc. R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829, holding that where the ownership of the chose is put in issue, proof of the assignment of the cause of action is inadmissible.

Under a mere denial proof of invalidity is inadmissible. Clark *v.* Geery, 8 Jones & S. (N. Y.) 227.

On denying the allegation of assignment, defendant may disprove plaintiff's title by showing a previous assignment. Donai *v.* Metropolitan El. R. Co., 14 N. Y. St. 264.

86. See *supra*, III, B, 2, b; III, C, 5.

Where the statute required an assignment to be made *bona fide*, the defendant may under the general issue show that it was not so made. Crawford *v.* Brooke, 4 Gill (Md.) 213.

87. In an action by an assignee of certain claims, evidence under the general issue to prove that a third person and not the plaintiff furnished the consideration was excluded as not within the issues. Jacobs *v.* Mitchell, 2 Colo. App. 456, 31 Pac. 235. To the same effect, Wolff *v.* Mathews, 39 Mo. App. 376. See also *supra*, III, B, 2, d.

88. In an action by an assignee of an account due a corporation, assigned by the superintendent in payment of a debt of the corporation, in which the answer was a general denial, the court found that the assignment constituted a fraudulent preference. It was held that such finding was outside the issues, as the general denial put in issue only the fact of the indebtedness and the assignment to plaintiff. McKiernan *v.* Lenzen, 56 Cal. 61. See also Adam *v.* Hogden, 1 T. B. Mon. (Ky.) 87; McSmithee's Admr. *v.* Feamster, 4 W. Va. 673.

89. **U. S.** — Horne *v.* Hoyle, 28 Fed. 743. **Conn.** — Clark *v.* Mix, 15 Conn.

terial variance between pleading and proof which does not prejudice the defendant may be cured by amendment.[90] When put in issue, the assignment, as alleged, must be proved.[91]

D. Burden of Proof. — The general rules as to burden of proof apply. A party alleging an assignment which is put in issue must prove it.[92] But the party relying upon the incompetency of the as-

151. **Mass.** — Hobart *v.* Andrews, 21 Pick. 526, where an absolute assignment is alleged and a conditional one proved, the variance is fatal. **Mich.** — Seeley *v.* Albrecht, 41 Mich. 525, 2 N. W. 667.

The date of an assignment need not be proved as alleged, it being sufficient to show an assignment before the commencement of the action. Canfield *v.* McIlwaine, 32 Md. 94; Haile *v.* Richardson, 2 Strobh. (S. C.) 114.

It is no variance where the declaration does not allege mesne assignments but the proof shows that the instrument assigned in blank passed through the hands of several. Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307.

90. Read *v.* Jaudon, 35 How. Pr. (N. Y.) 303, (where the assignment of a joint claim was alleged and the assignment of a separate and sole claim proved); Toplitz *v.* King Bridge Co., 20 Misc. 576, 46 N. Y. Supp. 418, where plaintiff sued as the assignee of a corporation and the evidence showed an assignment not from the corporation but from its receivers. But in Kibler *v.* Brown, 114 Fed. 1014, an allegation of assignment from E. G. Church & Co. was not supported by proof that the assignment was from E. G. Church.

91. **Ill.** — Hall *v.* Freeman, 59 Ill. 55. **Ind.** — Lassiter *v.* Jackman, 88 Ind. 118, but the plea putting the assignment in issue must be under oath. But see Arnold *v.* Sturges, 5 Blackf. 256. To the same effect Kirby's Digest, Ark. St., 1904, § 517. **Ky.** — Walter *v.* Clark, 6 J. J. Marsh. 629. **La.** — Wadsworth *v.* New Orleans, 46 La. Ann. 545, 15 So. 202; Terry *v.* Hennen, 4 La. Ann. 458. **Md.** — Lamar *v.* Mauro, 10 Gill & J. 50, need not prove formal assignment where debtor recognized the assignee's ownership by making part payment. **Mo.** — Turner *v.* Hayden, 33 Mo. App. 15. **N. J.** — Nixon *v.* Dickey, 3 N. J. L. 252. **N. Y.** — Vestner *v.* Findlay, 10 Misc. 410, 31 N. Y. Supp. 138, 63 N. Y. St. 519; Buffalo Ice Co *v.* Cook, 9 Misc. 434, 29 N. Y. Supp. 1057, 61 N. Y. St. 731; Torrey *v.* Standish, 16 N. Y. Supp. 5, 40 N. Y. St. 713. **Ohio.** — Baltimore, etc. R. Co. *v.* Gibson, 41 Ohio St. 145. **Tex.** — Childress *v.* Smith, 90 Tex. 610, 40 S. W. 389, 39 S. W. 518.

A written assignment, though necessary, need not be proved where opposite party alleges a transfer of a mortgage. **Ga.** — Burgwyn Bros. Tobacco Co. *v.* Bentley, 90 Ga. 508, 16 S. E. 216. **Md.** — Harris *v.* Jaffray, 3 Har. & J. 543. **S. C.** — Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538. **Va.** Tennent's Heirs *v.* Pattons, 6 Leigh 196.

But where an assignment is unnecessarily in writing, oral evidence of the same is admissible. New Jersey Produce Co. *v.* Gluck (N. J. L.), 74 Atl. 443.

92. **U. S.** — See Tebbetts *v.* United States, 5 Ct. Cl. 607. **Ala.** — Jarrell *v.* Lillie, 40 Ala. 271. **Cal.** — Calloway *v.* Oro Min. Co., 5 Cal. App. 191, 89 Pac. 1070. **Ill.** — Wyman *v.* Snyder, 112 Ill. 99, 1 N. E. 469, where an actual assignment, as distinguished from a mere promise to pay, had to be proved. **Ind.** — Stair *v.* Richardson, 108 Ind. 429, 9 N. E. 300. **Ia.** — Hoppes *v.* Des Moines City R. Co., 126 N. W. 783; Seymour *v.* Aultman, 109 Iowa 297, 80 N. W. 401; Hay *v.* Frazier, 49 Iowa 454. **Ky.** — Domestic Sewing Machine Co. *v.* Murphy, 15 Ky. L. Rep. 815. **Me.** — National Shoe, etc. Bank *v.* Gooling, 87 Me. 337, 32 Atl. 967. **Mich.** — Powell *v.* Williams, 99 Mich. 30, 57 N. W. 1041; Blackwood *v.* Brown, 32 Mich. 104. **Mo.** — Quigley *v.* Mexico Southern Bank, 80 Mo. 289 (as to negotiable note); Turner *v.* Hayden, 33 Mo. App. 15. **N. J.** — Allen *v.* Pancoast, 20 N. J. L. 68; Nixon *v.* Dickey, 3 N. J. L. 252. **N. Y.** — Belden *v.* Belden, 139 App. Div. 437, 124 N. Y. Supp. 225; St. John

signor,[93] or fraud in a previous assignment,[94] or a prior assignment of the chose,[95] has the burden of proving the same.

Notice to Debtor. — Where defendant pleads and proves payment to the assignor, the plaintiff has the burden of proving notice of the assignment to the debtor prior to such payment.[96]

Promise of Debtor. — An assignee relying on a promise of the debtor to pay him has the burden of proving it.[97]

E. QUESTIONS FOR JURY. — Several questions peculiar to assignments may be for the jury's determination,[98] as, for example, the issue of fact as to the assignment;[99] whether there has been an abandonment of the assignment;[1] whether the assignment was intended to be absolute or conditional;[2] whether the transaction was intended as an equitable assignment;[3] whether an equitable assignment was in good faith.[4] Where there is only parol evidence of the

v. Coates, 63 Hun 460, 18 N. Y. Supp. 419, 45 N. Y. St. 431, 140 N. Y. 634, 35 N. E. 891. **Ohio.** — Baltimore, etc. R. Co. *v.* Gibson, 41 Ohio St. 145; Piatt *v.* St. Clair's Heirs, Wright 526 (holding that a debtor pleading payment of a judgment to an assignee has the burden of proving the assignment to the person paid). **Va.** — Lynchburg Iron Co. *v.* Tayloe, 79 Va. 671; Corbin *v.* Emmerson 10 Leigh 663. **Wis.** — Johnson *v.* Vickers, 139 Wis. 145, 120 N. W. 837, 131 Am. St. Rep. 1046, 21 L. R. A. (N. S.) 359.

Genuineness of Assignor's Signature. The burden of proving the same is on the assignee when the answer puts it in issue. Doty *v.* Braska (Iowa), 126 N. W. 1108.

93. Wood *v.* Neeley, 7 Baxt. (Tenn.) 586.

94. Daily's Exr. *v.* Warren, 80 Va. 512. See Belden *v.* Belden, 139 App. Div. 437, 124 N. Y. Supp. 225, where the assignee had the burden of proving good faith.

95. Conant *v.* Wills, 1 McLean 427, 6 Fed. Cas. No. 3,087.

96. **Ill.** — Burritt *v.* Tidmarsh, 1 Ill. App. 571. **N. Y.** — Heermans *v.* Ellsworth, 64 N. Y. 159. **S. C.** — Jervey *v.* Stauss, 11 Rich. 376, where a set-off against assignor was pleaded.

97. Auerbach *v.* Pritchett, 58 Ala. 451; Shepherd *v.* Union Mut. F. Ins. Co., 38 N. H. 232.

98. **Ia.** — Gary *v.* Northwestern Mut. Aid Association, 87 Iowa 25, 53 N. W. 1086. **Mont.** — General Electric Co. *v.* Black, 19 Mont. 110, 47 Pac. 639, where answer merely denies the assignment, tha[t] issue alone goes to the jury. **N. C.** — Thompson *v.* Osborne, 152 N. C. 408, 67 S. E. 1029.

99. **Ga.** — Haas *v.* Old Nat. Bank, 91 Ga. 307, 18 S. E. 188. **Ia.** — Hoppes *v.* Des Moines City R. Co., 126 N. W. 783. **Mass.** — Barry *v.* Curley, 202 Mass. 42, 88 N. E. 437. **Mo.** — Horner *v.* Missouri Pacific R. Co., 70 Mo. App. 285. **N. Y.** — Liberty Wall Paper Co. *v.* Stone Wall Paper Mfg. Co., 59 App. Div. 353, 69 N. Y. Supp. 355.

Fact of notice of assignment is a question for the jury. Jordan *v.* Gillen, 44 N. H. 424.

Refusal to instruct as to effect of transfer is not erroneous. Saltmarsh *v.* Bower, 22 Ala. 221.

1. Wilson *v.* Pearson, 20 Ill. 81.

Whether the obligor waived the right to personal performance by the assignor is for the jury. Pulaski Stove Co. *v.* Miller's Creek Lumb. Co., 138 Ky. 372, 128 S. W. 96. Likewise, whether the non-assignability of a contract has been waived. Pulaski Stove Co. *v.* Miller's Creek Lumb. Co., *supra.*

2. **Mo.** — Horner *v.* Missouri Pac. R. Co., 70 Mo. App. 285, where issue was submitted to the jury, although the evidence was all on one side. **Pa.** Schwartz *v.* Hersker, 140 Pa. 550, 21 Atl. 401. **W. Va.** — Protzman's Exr. *v.* Joseph, 65 W. Va. 788, 65 S. E. 461.

3. Haas *v.* Old Nat. Bank, 91 Ga. 307, 18 S. E. 188; Collins, etc. Co. *v.* United States Ins. Co., 7 Tex. Civ. App. 579, 27 S. W. 147.

4. Gumbert *v.* Logan, 13 Pa. Super. 622; Pearce *v.* Wallis, Landes & Co. (Tex. Civ. App.), 124 S. W. 496.

questions in issue, they are determined by the jury.[5]

F. Questions for Court. — Whether the assignment is valid is a question for the court;[6] and where all the evidence is written and uncontradicted, the fact as well as the validity of the assignment is to be determined by the court.[7]

5. **Ga.** — Haas *v.* Old Nat. Bank, 91 Ga. 307, 18 S. E. 188. **Ia.** — Gary *v.* Northwestern Mut. Aid Assn., 87 Iowa 25, 53 N. W. 1086, as to consideration. **N. H.** — Jordan *v.* Gillen, 44 N. H. 424. **N. Y.** — Liberty Wall Paper Co. *v.* Stoner Wall Paper Mfg. Co., 59 App. Div. 353, 69 N. Y. Supp. 355. **Pa.** — Schwartz *v.* Hersker, 140 Pa. 550, 21 Atl. 461. **Wis.** — Blackman *v.* Dunkirk, 19 Wis. 183.

6. **Md.** — Myers *v.* King, 42 Md. 65. **Neb.** — Maul *v.* Drexel, 55 Neb. 446, 76 N. W. 163. **Tex.** — Wood *v.* Gulf, etc. R. Co., 15 Tex. Civ. App. 322, 40 S. W. 24.

The scope of the assignment may be a question for the court. Rogers *v.* Abbot, 206 Mass. 270, 92 N. E. 472.

7. **Ia.** — Snyder *v.* Kurtz, 61 Iowa 593, 16 N. W. 722. **N. C.** — Clark *v.* Edney, 28 N. C. 50. **Tex.** — Wood *v.* Gulf, etc. R. Co., 15 Tex. Civ. App. 322, 40 S. W. 24.

ASSIGNMENTS OF ERROR.—See **Error, Assignments of.**

ASSISTANCE, WRITS OF

CROSS-REFERENCE:
Ejectment

I. ORIGIN AND DEFINITION.—Writs of assistance are of ancient English origin and were usually classed under three heads:[1] (1.) Writs which were issued out of the court of chancery, usually termed "writs of aid," addressed to the sheriff, commanding him to be in aid (*"quod fit in auxilium"*) of the King's tenants by knight service, or the King's collectors, debtors or accountants, to enforce payment of their own dues, in order to enable them to pay their dues to the King.[2] (2.) A writ issuing from the equity side of the Court of Exchequer or any court of chancery to the sheriff, to assist a receiver, sequestrator or other party to an action in equity, to get possession under a decree of court of lands withheld from him by another party to the suit.[3] (3.) A writ to seize uncustomed goods.[4]

II. NATURE OF WRIT AND WHEN ISSUED.—A. SUMMARY PROCESS.—The writ of assistance is summary in its character,[5] and will issue as part of the process in enforcing a judgment[6] to put a party in possession in a particular case in which the question of title to the specific piece of real property is involved,[7] or in which the judg-

1. **New Writ Substituted.**—In England under Rules of Court, Order XLVIII, the writ of possession was substituted. Hall *v.* Hall, 47 L. J. Ch. 680.

2. Quincy (Mass.), App. 1, 395.

In Aid of Attachment.—It was not permissible to issue this writ to the sheriff in aid of an attachment, as it would be ordering him to assist himself in executing the process. Meagher *v.* Meagher, 1 Jones & L. (Ir.) 31; Mahoney *v.* Aylward, 1 Hogan (Ir.) 474. It could be issued, however, to the pursuivant. Mahoney *v.* Aylward, *supra.*

3. Sills *v.* Goodyear, 88 Mo. App. 316. See also Adamson *v.* Adamson, 12 Ont. Pr. 21.

In Ireland this form of writ did not issue to sequestrators. Brown *v.* Cuffe, 1 Hogan 145.

Origin of Writ.—This form of writ is said to have had its origin at least as far back as James I (2 Bouv. L. Dict. 1248). Lord Hardwicke is quoted in Jones on Mortgages (2d ed.) §1663 to the same effect; but in Voigtlander *v.* Brotze, 59 Tex. 286, quoting from Jones on Mortgages, it is said it originated as early as the reign of Queen Elizabeth and is also found in a book of orders in the time of Henry VIII, Edward VI and Mary. See also Montgomery *v.* Tutt, 21 Cal. 190.

Modern Authority—The right to issue this writ has been exercised by courts of chancery in the United States. 2 Daniell Ch. Pr. (6th ed.) 1062, note 3; Murray *v.* De Rottenham, 6 Johns. Ch. (N. Y.) 52; Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609; Voigtlander *v.* Brotze, 59 Tex. 286.

So far as appears there is no known instance of an issuance of this form of writ in Massachusetts. Quincy (Mass.), App. I, 396.

4. Quincy (Mass.), App. I, 395.

This writ was first introduced by 13 and 14 Car. 2, c. 11.

5. **Ala.**—*Ex parte* Forman, 130 Ala. 278, 30 So. 480; Hooper *v.* Yonge, 69 Ala. 484. **Cal.**—City of San Jose *v.* Fulton, 45 Cal. 316; Fox *v.* Stubenrauch, 2 Cal. App. 88, 83 Pac. 82. **Ind.**—Emerick *v.* Miller (Ind. App.), 62 N. E. 284.

6. City of San Jose *v.* Fulton, 45 Cal. 316; Fox *v.* Stubenrauch, 2 Cal. App. 88, 83 Pac. 82; Griswold *v.* Simmons, 50 Miss. 123.

7. **Cal.**—People *v.* Doe, 31 Cal. 220. **Md.**—Garretson *v.* Cole, 1 Har. & J. 370. **N. J.**—Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493. **N. Y.**—Matter of New York Central & H. R. R. Co., 60 N. Y. 116. **Pa.**—Com. *v.* Dieffenbach, 3 Grant 368, *citing* Kelsey *v.* Church, C. Pl. Rep. 105. **Tenn.**—Irvine's Heirs *v.* McRee, 5 Humph. 554, 42 Am. Dec. 468.

See also Adamson *v.* Adamson, 12 Ont. Pr. 21.

In a suit to remove a cloud on the title, no writ of assistance can be granted since the title is not adjudicated and no conveyance by the defendant ordered. Clay *v.* Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146.

ment or decree directs the sale of the defendant's interest in real property.[8]

The purpose of the writ is to give effect to the rights awarded by the decree of a court of equity,[9] and it is issued on the principle that the court will carry its decrees into effect, when it can justly do so, without the co-operation of any other tribunal.[10]

B. Issuance Rests in Discretion.—The issuance of this writ rests

8. **Cal.**—People *v.* Doe, 31 Cal. 220. **Fla.**—Keil *v.* West. 21 Fla. 508. **Miss.** Jones *v.* Hooper, 50 Miss. 510. **N. Y.** Matter of New York Cent. & H. R. R. Co., 60 N. Y. 116. **N. C.**—Knight *v.* Houghtalling, 94 N. C. 408.

The Michigan statute Act No. 229, Pub. Act 1897, does not prevent the issuance of a writ of assistance where the tax sale at which the property was bid in was held before the act took effect, though the conveyance by the auditor general was made after the taking effect of the act. Pierpont *v.* Osmun, 118 Mich. 472, 76 N. W. 1044.

9. **U. S.**—Gormley *v.* Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909; Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How 421, 15 L. ed. 435. **Cal.**—Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164; Fox *v.* Stubenrauch, 2 Cal. App. 88, 83 Pac. 82. **Ill.**—Clay *v.* Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146. **Ind.**—Emerick *v.* Miller (Ind. App.), 62 N. E. 284, the object being to put in possession of the premises the purchaser at a judicial sale. **Mo.**—Sills *v.* Goodyear, 88 Mo. App. 316, its use in Missouri is almost unknown. **Wis.**—Diggle *v.* Boulden, 48 Wis. 477, 4 N. W. 678, the power to allow a writ of assistance is inherent in courts of chancery.

10. **U. S.**—Root *v.* Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. ed. 1123. **Fla.**—McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823. **Miss.**—Griswold *v.* Simmons, 50 Miss. 123. **N. J.**—Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493; Beatty *v.* De Forest, 27 N. J. Eq. 482, *affirming* 25 N. J. Eq. 343. **N. Y.** Kershaw *v.* Thompson, 4 Johns. Ch. 609. **Va.**—Newman *v.* Chapman, 2 Rand. 93, 14 Am. Dec. 766; Com. *v.* Ragsdale, 2 Hen. & M. 8. **W. Va.**—Trimble *v.* Patton, 5 W. Va. 432.

A decree in equity requiring a defendant to execute a conveyance of land will be enforced by writ of assistance. Buffum's Case, 13 N. H. 14.

Basis of Power To Issue.—"This writ is a process issued from a court of equity to enforce its decree, and its power to issue the writ results from the principle that jurisdiction to enforce a decree is coextensive with jurisdiction to hear and determine the rights of the parties—that the court may do complete justice by declaring the right and enforcing a remedy for its enjoyment." Fox *v.* Stubenrauch, 2 Cal. App. 88, 83 Pac. 82. "It is a rule of that court to do complete justice when that is practicable, not merely by declaring the right, but by affording a remedy for its enjoyment. It does not turn the party to another forum to enforce a right which it has itself established." Terrell *v.* Allison, 21 Wall. (U. S.) 289, 22 L. ed. 634, *per* Mr. Justice Field.

In Texas, the district court in all cases within the scope of its jurisdiction has common law authority both in law and equity, and can, after a sale under a decree in a foreclosure suit, issue a writ of assistance. Voigtlander *v.* Brotze, 59 Tex. 286.

Where there is no express statutory authority for the issuance of the writ, it might be issued under the general statutory grant of authority to issue writs. Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287.

Does Not Violate Right of Trial by Jury.—The issuance of the writ of assistance is said to be the means provided to enable the court to carry its decree into execution, and it would be but an idle ceremony to call a jury to determine the questions arising under the application. The failure to so require is not a violation of the constitutional right of trial by jury on the ground of depriving the owner of the right to try his title to his land before a jury. Ball *v.* Ridge Copper Co., 118 Mich. 7, 76 N. W. 130.

in the discretion of the court,[11] which is never exercised in a doubtful case.[12]

Laches. — Whether the writ should be refused by reason of laches is a matter resting in the discretion of the court,[13] and mere delay in applying therefor is not necessarily sufficient to defeat the application.[14]

C. Cannot Be Used To Try Title.—The court will not, under color of its exercise, try or decide a question of title, either legal or equitable.[15]

11. **Ind.**—Roach *v.* Clark, 150 Ind. 93, 48 N. E. 796, 65 Am. St. Rep. 353; Emerick *v.* Miller (Ind. App.), 62 N. E. 284. **Mich.**—Baker *v.* Pierson, 5 Mich. 456. **N. J.**—Board of Home Missions *v.* Davis, 70 N. J. Eq. 577, 62 Atl. 447, *affirmed*, 71 N. J. Eq. 788, 65 Atl. 1117; Barton *v.* Beatty, 28 N. J. Eq. 412; Vanmeter *v.* Borden, 25 N. J. Eq 414; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95. **Wash.**—Hagerman *v.* Heltzel, 21 Wash. 444, 58 Pac. 580.

12. **Ala.**—Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288. **Ind.**—Roach *v.* Clark, 150 Ind. 93, 48 N. E. 796, 65 Am. St. Rep. 353; Gilliland *v.* Milligan, 144 Ind. 154, 42 N. E. 1010; Emerick *v.* Miller (Ind. App.), 62 N. E. 284. **N. J.**—Board of Home Missions *v.* Davis, 70 N. J. Eq. 577, 62 Atl. 447, *affirmed*, 71 N. J. Eq. 788, 65 Atl. 1117; Barton *v.* Beatty, 28 N. J. Eq. 412; Vanmeter *v.* Borden, 25 N. J. Eq. 414; Blauvelt *v.* Smith, 22 N. J. Eq. 31 (the remedy being summary it will only be allowed in a clear case); Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95. **N. C.**—Knight *v.* Houghtalling, 94 N. C. 408. **Wash.**—Hagerman *v.* Heltzel, 21 Wash. 444, 58 Pac. 580. **Can.**—Wooden *v.* Bushen, 1 Nova Scotia 429.

13. Clark & Leonard Inv. Co. *v.* Lindgren, 76 Neb. 59, 107 N. W. 116.

When Applicant Guilty of Laches. When three years have elapsed since the final disposition of a cause without an application having been made for the writ, a party will be remitted to his remedy at law. The Planters' Bank *v.* Fowlkes, 4 Sneed (Tenn.) 461. See also **Ala.**—Hooper *v.* Yonge, 69 Ala. 484. **Cal.**—Langley *v.* Voll, 54 Cal. 435. **N. J.**—New Jersey Bldg. L. & I. Co. *v.* Schatzkin, 72 N. J. Eq. 175, 64 Atl. 1086.

14. Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287.

"The court is clothed with pretty broad discretionary power in respect thereto, but . . . one holding a sheriff's deed issued on a foreclosure sale, duly confirmed, is *prima facie* entitled to his writ to be put in possession of the subject of the purchase. It cannot be withheld without some reasonable cause, mere delay not being sufficient." Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287.

15. **Ariz.**—Godchaux *v.* Demarbaix, 11 Ariz. 221, 11 Pac. 45; Asher *v.* Cox, 2 Ariz. 71, 11 Pac. 44. **Cal.**—Hibernia Sav., etc., Soc. *v.* Robinson, 150 Cal. 140, 88 Pac. 720; Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164; Landregan *v.* Peppin, 94 Cal. 465, 29 Pac. 771 (holding that the purchase by defendant of an outstanding title is no defense to an application for the writ); Henderson *v.* McTucker, 45 Cal. 647. **Ind.**—Roach *v.* Clark, 150 Ind. 93, 48 N. E. 796, 65 Am. St. Rep. 353; Gilliland *v.* Milligan, 144 Ind. 154, 42 N. E. 1010; Emerick *v.* Miller (Ind. App.), 62 N. E. 284. **Ky.**—Kercheval *v.* Ambler, 4 Dana 166. **Mich.**—Flint Land Co. *v.* Grand Rapids Terminal R. Co., 147 Mich. 627, 111 N. W. 192, 101 Am. St. Rep. 645. **Neb.**—Merrill *v.* Wright, 65 Neb. 794, 91 N. W. 697, 101 Am. St. Rep. 645. **N. J.**—Board of Home Missions *v.* Davis, 70 N. J. Eq. 577, 62 Atl. 447, *affirmed*, 71 N. J. Eq. 788, 65 Atl. 1117; Barton *v.* Beatty, 28 N. J. Eq. 412; Vanmeter *v.* Borden, 25 N. J. Eq. 414; Thomas *v.* DeBaum, 14 N. J. Eq. 37. **N. Y.**—Stillwell *v.* Hart, 40 App. Div. 112, 57 N. Y. Supp. 639; Frelinghuysen *v.* Colden, 4 Paige 204. **N. C.**—Exum *v.* Baker, 115 N. C. 242, 20 S. E. 448, 44 Am. St. Rep. 449. **S. C.**—*Ex parte* Jenkins, 48 S. C. 325, 26

III. WHO MAY HAVE WRIT — A. PURCHASERS THOUGH NOT PARTIES. — The writ will issue to a purchaser under a decree of sale, though he is not a party to the action, or does not appear in the record,[16] and to his assignee or grantee,[17] except in a case where injustice

S. E. 686. **Wis.**—Stanley *v.* Sullivan, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245; Gelpeke *v.* Milwaukee & H. R. Co., 11 Wis. 454. **Can.**—Wooden *v.* Bushen, 1 Nova Scotia 429.

And see Ricketts *v.* Chicago Permanent B. & L. Assn., 67 Ill. App. 71.

16. **U. S.**—Terrell *v.* Allison, 21 Wall. 289, 22 L. ed. 634. **Ala.**—Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Johnston *v.* Smith's Admr., 70 Ala. 108; Chapman *v.* Gibbs, 51 Ala. 502; Trammel *v.* Simmons, 8 Ala. 271; Creighton v. Paine, 2 Ala. 158. **Cal.**—Hibernia Sav. & Loan Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146; Montgomery *v.* Tutt, 11 Cal. 190. **Fla.**—McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823. **Ill.**—Lambert *v.* Livingston, 131 Ill. 161, 23 N. E. 352; Jackson *v.* Warren, 32 Ill. 331. **Kan.**—Watkins *v.* Jerman, 36 Kan. 464, 13 Pac. 798. **Miss.**—Gibson *v.* Marshall, 64 Miss. 72, 8 So. 205. **Neb.**—Clark & Leonard Inv. Co. *v.* Lindgren, 76 Neb. 59, 107 N. W. 116. **N. J.**—Beatty *v.* DeForest, 27 N. J. Eq. 482; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95. **N. Y.**—Bell *v.* Birdsall, 19 How. Pr. 491; Kershaw *v.* Thompson, 4 Johns. Ch. 609; Frelinghuysen *v.* Colden, 4 Paige 204; Lynde *v.* O'Donnell, 12 Abb. Pr. 286. **N. C.**—Knight *v.* Houghtalling, 94 N. C. 408. **Wis.**—Diggle *v.* Boulden, 48 Wis. 477, 4 N. W. 678. And see Gelpeke *v.* Milwaukee & H. R. Co., 11 Wis. 454, as to who will be heard in opposition to the application, and whether it will be issued against one not a party to the action.

In Gibson *v.* Marshall, 64 Miss. 72, 8 So. 205, sustaining the text, the court cites Redus *v.* Hayden, 43 Miss, 614, and Jones *v.* Hooper, 50 Miss. 510, as supporting its view, and calls attention to Wilson *v.* Polk, 13 Smed. & M. (Miss.) 131, 51 Am. Dec. 151, which holds that the writ will not issue to a purchaser as he was not a party to the record, as having been at one time the rule, and also to 2 Smith's Ch. Pr. 214, that such was also the English practice.

In a note to Wilson *v.* Polk (13 Smed. & M. 131), 51 Am. Dec. 151, 153, Wilson *v.* Angus and Toynbee *v.* Ducknell, both cited in Seton's Decrees, Judgments, and Orders, 1563, are referred to as sustaining the right of a purchaser to the writ.

Contra.—In Stephenson *v.* Giltenau, 5 Ohio (N. P.) 419, 8 Ohio Dec. 513, it is held that the writ will not issue to one not a party to the cause.

17. **U. S.**—Farmers' Loan & Tr. Co. *v.* Chicago & A. R. Co., 44 Fed. 653. **Fla.**—McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823; Keil *v.* West, 21 Fla. 508. **Kan.**—Motz *v.* Henry, 8 Kan. App. 416, 54 Pac. 796. **Mich.**—Ketchum *v.* Robinson, 48 Mich. 618 ,12 N. W. 877. **N. J.** Elkings v. Murray, 29 N. J. Eq. 388. **N. Y.**—New York Life Ins. & T. Co *v.* Rand, 8 How. Pr. 352, *affirming* 8 How. Pr. 35.

See also Root *v.* Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. ed. 1123.

Application by Purchaser's Grantee. "The grantee of a purchaser at a judicial sale is not necessarily incompetent to prosecute an application for a writ of assistance to put him into possession, and whether he shall be permitted so to do or not is a matter dependent upon circumstances and resting largely in the discretion of the court." Clark & Leonard Inv. Co. *v.* Lindgren, 76 Neb. 59, 107 N. W. 116.

Compare, however, Langley *v.* Voll, 54 Cal. 435 (in which the court leaves the question open for further consideration), and Gibson *v.* Marshall, 64 Miss. 72, 8 So. 205 (in which it is said that the question is "not free from difficulty," and that, so far as the court is advised, "the question has never been passed on by any court of last resort in America").

The cases of City of San Jose *v.* Fulton, 45 Cal. 316; People *v.* Grant, 45 Cal. 97, and Stanley *v.* Sullivan, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245, which appear to hold a contrary view, are not of general application, but are

might be done thereby to the person in possession of the premises.[18]

B. Purchasers at Foreclosure Sales.—This writ is most frequently resorted to, and is an appropriate remedy, to place in possession the purchaser at a foreclosure sale.[19]

C. Successful Party in Divorce Proceedings.—The writ may issue to place a party in possession of land under the provisions of a decree in a divorce proceeding vesting in such party the title to the property.[20]

dependent on a construction of local statutes.

Petitioner's title to land cannot be litigated on an application for a writ of assistance. White *v.* White, 130 Cal. 597, 62 Pac. 1062, 80 Am. St. Rep. 150, reversed on other grounds, 62 Pac. 34.

18. Clark & Leonard Inv. Co. *v.* Lingren, 76 Neb. 59, 107 N. W. 116; New York Life Ins. & T. Co. *v.* Rand, 8 How. Pr. (N. Y.) 25, *affirmed*, 8 How. Pr. 352; Van Hook *v.* Throckmorton, 8 Paige (N. Y.) 33.

19. **U. S.**—Terrell *v.* Allison, 21 Wall. 289, 22 L. ed. 634; Farmers' Loan & Tr. Co. *v.* Chicago & A. R. Co., 44 Fed. 653. **Ark.**—Bright *v.* Pennywit, 21 Ark. 130. **Cal.**—Hibernia Sav. & Loan Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146; Montgomery *v.* Tutt, 11 Cal. 190; Fox *v.* Stubenrauch, 2 Cal. App. 88, 83 Pac. 82. **Idaho.**—Harding *v.* Harker, 17 Idaho 341, 105 Pac. 788, 134 Am. St. Rep. 259. **Ill.**—Clay *v.* Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146; Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Jackson *v.* Warren, 32 Ill. 331. **Kan.**—Watkins *v.* Jerman, 36 Kan. 464, 13 Pac. 798. **Mich.**—Ketchum *v.* Robinson, 48 Mich. 618, 12 N. W. 877; Ramsdell *v.* Maxwell, 32 Mich. 285. **Miss.**—Jones *v.* Hooper, 50 Miss. 510. **Neb.**—Clark & Leonard Inv. Co. *v.* Lingren, 76 Neb. 59, 107 N. W. 116. **N. J.**—Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493; Beatty *v.* DeForest, 27 N. J. Eq. 482; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95. **N. Y.**—Bell *v.* Birdsall, 19 How. Pr. 491; New York Life Ins. & Tr. Co. *v.* Rand, 8 How. Pr. 35, *affirmed*, 8 How. Pr. 352; Frelinghuysen *v.* Colden, 4 Paige 204; Kershaw *v.* Thompson, 4 Johns. Ch. 609. **N. C.**—Knight *v.* Houghtalling, 94 N. C. 408. **Tex.**—Voigtlander *v.* Brotze, 59 Tex. 286. **Wash.**—London Debenture Corp. *v.* Warren, 9 Wash. 312, 37 Pac. 451. **Wis.**—Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287; Diggle *v.* Boulden, 48 Wis. 477, 4 N. W. 678; Loomis *v.* Wheeler, 18 Wis. 524.

See also Herr *v.* Sullivan, 26 Colo. 133, 56 Pac. 175.

Contra.—In Armstrong *v.* Humphreys, 5 S. C. 128, it is held, however, that this writ is not the proper remedy, but that an order of ouster should be obtained.

In Indiana writs of assistance cannot be had in foreclosure suits. Emerick *v.* Miller (Ind. App.), 62 N. E. 284.

Foreclosure of Mechanic's Lien.—The writ has been issued to put in possession a purchaser at foreclosure of a mechanic's lien. O'Connor v. Schaeffel, 19 N. Y. Civ. Proc. 378, 25 Abb. N. C. 344, 11 N. Y. Supp. 737, 33 N. Y. St. 142.

Independent Proceeding.—The writ may be granted in an independent proceeding brought by the purchaser. Baker *v.* Pierson, 5 Mich. 456.

When a decree of sale fails to order the surrender of possession and the person in possession refuses to give it up, the court will, on proper notice, make such order, and upon like service of a copy and demand of possession will on motion without notice order the delivery of possession; then on affidavit of service of the order and a refusal to obey it a writ of assistance will issue without notice directing the sheriff to put the purchaser in possession. Oglesby *v.* Pierce, 68 Ill. 220.

20. Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164, the statute permitting the disposition of community property in a divorce proceeding. See also White *v.* White, 130 Cal. 597, 62 Pac. 1062, 80 Am. St. Rep. 150, reversed on other

D. Petitioner Under Burnt Records Acts. — As a result of the destruction of public records, and as emergency measures, there have been enacted what are termed "Burnt Records Acts."[21] And when under such act a petitioner's title is established and decreed, the court has ample power under its own decree to issue a writ of assistance to put him in possession.[22]

IV. AGAINST WHOM ISSUED.—The writ is issued and effective only as to persons against whom the decree is operative, and who are bound thereby.[23] One who goes into possession under a defendant is subject to dispossession by means of the writ,[24] even though he also

grounds, 62 Pac. 34; Schultz *v.* Schultz, 133 Wis. 125, 113 N. W. 445, 126 Am. St. Rep. 934.

21. Rev. St., Illinois, Laws 1871-2, p. 652, c. 116; Act 1048, title 153, Gen. Laws Cal.

Burnt Records Act confers upon courts of equity an enlarged jurisdiction in the matter of establishing titles. Clay *v.* Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146; Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Gage *v.* DuPuy, 127 Ill. 216, 19 N. E. 878.

22. Gormley *v.* Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909; Clay *v.* Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146; Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053.

23. **U. S.**—Howard *v.* Railway Co., 101 U. S. 837, 25 L. ed. 1081; Terrell *v.* Allison, 21 Wall. 289, 22 L. ed. 634. **Ariz.**—Godchaux *v.* Demarbaix, 11 Ariz. 221, 11 Pac. 45; Asher *v.* Cox, 2 Ariz. 71, 11 Pac. 44. **Cal.**—Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164; Frisbie *v.* Fogarty, 34 Cal. 11 (whether named in the decree or not); Burton *v.* Lies, 21 Cal. 87; Fox *v.* Stubenrauch, 2 Cal. App. 88, 83 Pac. 82 (containing valuable discussion by Chipman, P. J.). **Idaho.**—Harding *v.* Harker, 17 Idaho 341, 105 Pac. 788, 134 Am. St. Rep. 259. **Mich.** Howard *v.* Bond, 42 Mich. 131, 3 N. W. 289. **Neb.**—Merrill *v.* Wright, 65 Neb. 794, 91 N. W. 697, 101 Am. St. Rep. 645. **Wis.**—Gelpcke *v.* Milwaukee & H. R. Co., 11 Wis. 454. See also State *v.* Giles, 10 Wis. 101.

It issues merely "to give effect to rights awarded by the judgment. It should not and cannot operate to establish in the one party, or to destroy in the other, any rights to the property independent of those determined by the judgment." Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164.

It will not be operative and will not issue against one who was not a party to the suit or one who is privy to such a party. Miller *v.* Bate, 56 Cal. 135.

One holding by paramount and independent title is not subject to the writ. Ritchie *v.* Johnson, 50 Ark. 551, 8 S. W. 942, 7 Am. St. Rep. 118.

Unrecorded Conveyance.—Under a statute which provides that those only need be made defendants whose conveyances or liens appear on the record, and that the judgment rendered and proceedings in the action are conclusive against a party holding an unrecorded conveyance, a writ of assistance may be executed against one holding under an unrecorded conveyance from one who was a party defendant, though he went into possession prior to the commencement of the foreclosure proceedings. Harding *v.* Harker, 17 Idaho 341, 105 Pac. 788, 134 Am. St. Rep. 259. See also Hibernia Sav. & L. Soc. *v.* Cochran, 141 Cal. 653, 75 Pac. 315.

Former Owner of Fee Cannot Object. A former owner of the fee whose rights are concluded by the decree of foreclosure, cannot complain of the issuance of the writ to oust the tenant, the tenant himself making no complaint. McCagg *v.* Touhy, 150 Ill. App. 15.

24. Ritchie *v.* Johnson, 50 Ark. 551, 8 S. W. 942, 7 Am. St. Rep. 118; Strong v. Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493.

It is presumed that one who goes into possession pending the suit does so under the defendant. Ritchie *v.* Johnson, 50 Ark. 551, 8 S. W. 942, 7 Am. St. Rep. 118.

A purchaser from a party to the suit with knowledge of its pendency is bound by the decree and subject to the

sets up a claim under an independent title.[25] Thus it will issue against a party to the action or against his representative,[26] over whom the court has obtained jurisdiction,[27] or against one entering into possession under a party to the action after suit commenced,[28] or after sale of the premises.[29] It will also issue against one holding possession as a trespasser or a mere intruder,[30] or against the privies to the original

writ. Baker *v.* Pierson, 5 Mich. 456. This is not so, however, if such purchaser is without either actual or constructive notice. Harlan *v.* Rackerby, 24 Cal. 561.

Only against defendants and parties holding under them who are bound by the decree. Burton *v.* Lies, 21 Cal. 87.

25. Ritchie *v.* Johnson, 50 Ark. 551, 8 S. W. 942, 7 Am. St. Rep. 118.

26. **U. S.**—Terrell *v.* Allison, 21 Wall. 289, 22 L. ed. 634; Comer *v.* Felton, 61 Fed. 731, 22 U. S. App. 313, 10 C. C. A. 28. **Ala.**—Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Johnston *v.* Smith's Admr., 70 Ala. 108; Hooper *v.* Yonge, 69 Ala. 484; Thompson *v.* Campbell, 57 Ala. 183. **Cal.**—Hibernia Sav. & Loan Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Frisbie *v.* Fogarty, 34 Cal. 11 (though not mentioned in the decree or the sheriff's deed); Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146; Montgomery *v.* Tutt, 11 Cal. 190. **Ill.**—Brush *v.* Fowler, 36 Ill. 53, 85 Am. Dec. 382; Heffron *v.* Gage, 44 Ill. App. 147. **Kan.**—Watkins *v.* Jerman, 36 Kan. 464, 13 Pac. 798. **Miss.**—Jones *v.* Hooper, 50 Miss. 510. **N. J.**—Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493; Beatty *v.* DeForest, 27 N. J. Eq. 482; Blauvelt *v.* Smith, 22 N. J. Eq. 31; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95. **N. Y.**—Bell *v.* Birdsall, 19 How. Pr. 491; New York Life Ins. & Tr. Co. *v.* Rand, 8 How. Pr. 35, *affirmed*, 8 How. Pr. 352; Boynton *v.* Jackson, 10 Paige 307; Frelinghuysen *v.* Colden, 4 Paige 204; Kershaw *v.* Thompson, 4 Johns. Ch. 609; Meiggs *v.* Willis, 8 N. Y. Civ. Proc. 125. **N. C.**—Knight *v.* Houghtalling, 94 N. C. 408. **Wis.**—Diggle *v.* Boulden, 48 Wis. 477, 4 N. W. 678.

The writ will issue after a sale in foreclosure against a tenant in possession who was a party defendant in the action, notwithstanding he claims under an unexpired lease of several years, executed by the mortgagors previous to the date of the mortgage foreclosure. Lovett *v.* German Reformed Church, 9 How. Pr. (N. Y.) 220.

27. Steinbach *v.* Leese, 27 Cal. 295.

28. **U. S.**—Terrell *v.* Allison, 21 Wall. 289, 22 L. ed. 634; Comer *v.* Felton, 61 Fed. 731, 22 U. S. App. 313, 10 C. C. A. 28. **Ala.**—Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Johnston *v.* Smith's Admr., 70 Ala. 108; Hooper *v.* Yonge, 69 Ala. 484; Thompson *v.* Campbell, 57 Ala. 183; Chapman *v.* Gibbs, 51 Ala. 502. **Fla.**—Brown *v.* Marzyck, 19 Fla. 840, where a party claimed under a tax title and it appeared that the claim was not in good faith. **Ill.**—Kessinger *v.* Whittaker, 82 Ill. 22; Brush *v.* Fowler, 36 Ill. 53, 85 Am. Dec. 382; Jackson *v.* Warren, 32 Ill. 331; Heffron *v.* Gage, 44 Ill. App. 147. **Kan.**—Watkins *v.* Jerman, 36 Kan. 464, 13 Pac. 798. **Miss.**—Jones *v.* Hooper, 50 Miss. 510. **N. J.**—Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493; Beatty *v.* DeForest, 27 N. J. Eq. 482; Blauvelt *v.* Smith, 22 N. J. Eq. 31; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95. **N. Y.**—Bell *v.* Birdsall, 19 How. Pr. 491; New York Life Ins. & Tr. Co. *v.* Rand, 8 How. Pr. 35, *affirmed*, 8 How. Pr. 352; Boynton *v.* Jackway, 10 Paige 307; Frelinghuysen *v.* Colden, 4 Paige 204; Kershaw *v.* Thompson, 4 Johns. Ch. 609; Meiggs *v.* Willis, 8 Civ. Proc. 125. **N. C.**—Knight *v.* Houghtalling, 94 N. C. 408. **S. C.**—*Ex parte* Jenkins, 48 S. C. 325, 26 S. E. 686. **Wis.**—Diggle *v.* Boulden, 48 Wis. 477, 4 N. W. 678. **Eng.**—Bird *v.* Littletales, 3 Swanst. 311, 36 Eng. Reprint 871.

The text is sustained in Montgomery *v.* Tutt, 11 Cal. 190, but in later cases (Hibernia Sav. & Loan Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Montgomery *v.* Byers, 21 Cal. 107; Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146), it is stated that the writ will issue provided such party had notice.

29. Jackson *v.* Warren, 32 Ill. 331.

30. Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Johnston *v.* Smith's Admr., 70 Ala. 108; Hooper *v.* Yonge, 69 Ala.

parties to the suit, though such privies may not have been named as parties therein.[31]

When Ineffective. — The writ will not issue for the purpose of establishing or destroying any right in the property, other than as determined by the judgment.[32] It will not issue against one in possession at the time of the commencement of the action, who was not made a party,[33] or even against a party thereto where a new and independent right has been acquired, or where a *prima facie* showing of the acquirement of such a right is made.[34] Nor will it be awarded against one who has entered upon land *pendente lite,* claiming an independent title, not derived from or in succession to any of the parties to the suit or their privies.[35]

484; Thompson *v.* Campbell, 57 Ala. 183; Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl 493.

31. Hagerman *v.* Heltzel, 21 Wash. 444, 58 Pac. 580.

32. **Cal.**—Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164. **N. J.**—Chadwick *v.* Island Beach Co., 42 N. J. Eq. 602. **Wis.**—Stanley *v.* Sullivan, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245.

The writ will not be awarded in an action where the party in possession claims to hold under a paramount title, and the question of the title could not be litigated in the pending action. Hayward *v.* Kinney, 84 Mich. 591, 48 N. W. 170.

33. **U. S.**—Terrell *v.* Allison, 21 Wall. 289, 22 L. ed. 634; Thompson *v.* Smith, 1 Dill. 458, 23 Fed. Cas. No. 13,977. **Ala.**—Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288, where there was also claim of paramount title. **Cal.**—Burton *v.* Lies, 21 Cal. 87, will not issue against a widow not a party, though the executors were parties. **Ill.**—Gilcreest *v.* Magill, 37 Ill. 300; Root *v.* Paine, 22 Ill. App. 349, *affirmed,* 121 Ill. 77, 13 N. E. 541. **Ky.**—McChord *v.* McClintock, 5 Litt. 304. **N. Y.**—Boynton *v.* Jackway, 10 Paige Ch. 307. **S. C.**—*Ex parte* Jenkins, 48 S. C. 325, 26 S. E. 686.

But see Schultz *v.* Schultz, 133 Wis. 125, 113 N. W. 445, 126 Am. St. Rep. 934.

Partnership Property.—When a mortgage given by one partner on partnership property is foreclosed and a sheriff's deed to an undivided interest in the partnership property is given, the other partner not being made a party to the action, a writ of assistance will not be issued as against a receiver appointed by the court at the instance of the partner who was not made a party, in an action instituted by him to dissolve the partnership and for sale of the partnership property to pay debts. Autenreith *v.* Hessenauer, 43 Cal. 356.

34. **Cal.**—Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164; Langley *v.* Voll, 54 Cal. 435; City of San Jose *v.* Fulton, 45 Cal. 316. **Mich.**—Ramsdell *v.* Maxwell, 32 Mich. 285. **N. Y.**—Toll *v.* Hiller, 11 Paige Ch. 228.

Where defendant in a foreclosure suit after the entry of the decree purchases an outstanding title confessedly superior to and independent of that of the purchaser at the foreclosure sale, the writ will not issue against him. Board of Home Missions *v.* Davis, 70 N. J. Eq. 577, 62 Atl. 447, *distinguishing* Chadwick *v.* Island Beach Co., 43 N. J. Eq. 616, 12 Atl. 380 (holding that where defendant purchased and relied upon an outstanding title, the foreclosure proceeding impliedly adjudicates such claim and the writ will issue).

Adverse Possession Subsequent to Deed.—"The court gives possession to the purchaser, as against all persons who are parties to the suit, or who came into possession under either of them while the suit is pending. It does not undertake to remove persons who go into possession after the purchaser has received his deed and conveyed the premises to another." Bell *v.* Birdsall, 19 How. Pr. (N. Y.) 491.

35. **Ill.**—Ricketts *v.* Chicago Permanent Bldg. & L. Assn., 67 Ill. App. 71. **Neb.**—Merrill v. Wright, 65 Neb. 794, 91 N. W. 697, 101 Am. St. Rep. 645. **N.**

V. PROCEEDINGS TO OBTAIN.—A. Facts Necessary To Secure Writ.—When the writ is applied for it should be made to appear at least that the decree was served and that possession was demanded and refused.[36] And while it may be customary, and the better practice, first to issue an order requiring the surrender of possession, when it

Y.—Toll *v.* Hiller, 11 Paige 228; Van Hook *v.* Throckmorton, 8 Paige 33. N. C.—Exum *v.* Baker, 115 N. C. 242, 20 S. E. 448, 44 Am. St. Rep. 449. Wash.—Hagerman *v.* Heltzel, 21 Wash. 444, 58 Pac. 580.

When Possession Adverse.—Where a party comes into possession of the property *pendente lite*, not under a party thereto, but under one who was neither a party or privy, but claiming an independent title to the premises involved, the writ will not issue. Ill.—Ricketts *v.* Chicago Permanent Bldg. & L. Assn., 67 Ill. App. 71. Neb.—Merrill *v.* Wright, 65 Neb. 794, 91 N. W. 697, 101 Am. St. Rep. 645. N. Y.—Van Hook *v.* Throckmorton, 8 Paige Ch. 33.

36. Ala.—Hooper *v.* Yonge, 69 Ala. 484. Cal.—Montgomery *v.* Middlemiss, 21 Cal. 103. Ill.—O'Brian *v.* Fry, 82 Ill. 87. Mich.—Tucker *v.* Stone, 99 Mich. 419, 58 N. W. 319; Howard *v.* Bond, 42 Mich. 131, 3 N. W. 289. Miss. Jones *v.* Hooper, 50 Miss. 510. N. J.—Board of Home Missions *v.* Davis, 70 N. J. Eq. 577, 62 Atl. 447; Strong *v.* Smith, 68 N. J. Eq. 686, 60 Atl. 66, 63 Atl. 493. N. Y.—New York Life Ins. & T. Co. *v.* Cutler, 9 How. Pr. 407; New York Life Ins. & T. Co. *v.* Rand, 8 How. Pr. 35, *affirmed*, 8 How. Pr. 352. Wis.—Landon *v.* Burke, 36 Wis. 378, holding that the application, where the proceeding is in strict foreclosure, should show that the amount adjudged was demanded and refused. Eng.—Stribley *v.* Hawkie, 3 Atk. 275, 26 Eng. Reprint 961(there must be an injunction to defendant to deliver possession, the decree being for possession and then a writ of assistance), *citing* Pen *v.* Lord Baltimore, 1 Ves. Sr. 444, 454, 27 Eng. Reprint 1132, 1139; Roberdean *v.* Rous, 1 Atk. 543, 26 Eng. Reprint 342.

Necessity of Showing Valid Judgment.—To entitle a party to a writ of assistance, he should show a valid judgment. Vermont L. & T. Co. *v.* McGregor, 5 Idaho 510, 51 Pac. 104.

Forms of Petition.—The petition should set forth the making and entry of decree of sale, the sale of the premises, the execution of the deed by the commissioner, and its record; also, that the defendants were in possession. The petition in this case recited:

"That on the 14th day of June, 1893, your petitioner peaceably applied to the said defendants, and in a friendly manner presented and exhibited to them the said deed of the said circuit court commissioner, made to your petitioner as aforesaid, of the said land, and also a copy of the order confirming such sale, duly certified by the register of this court, and requested and demanded of the said defendants, Chester A. Stone and Harriet Stone, that they should forthwith surrender and deliver up possession thereof to your petitioner, as in and by said decree provided, and as in equity they ought to have done; but so to do the said defendants absolutely refused, and still do refuse, and retain possession of said last-mentioned land, against the rights of your petitioner." Tucker *v.* Stone, 99 Mich. 419, 422, 58 N. W. 319.

In Ferguson *v.* Blakeney, 6 Ark. 296, the court after questioning whether this should be an *ex parte* proceeding, says: "We think that the correct practice, in such cases, is to require the purchaser to state in his petition, that it is either the defendant or his lessee, who is in possession, and also to set forth such facts as are sufficient in law to divest either, as the case may be, of whatever right, title and interest he may have had in the premises and to vest the same in himself, and then to conclude with a prayer for a rule upon the party in possession to appear at a time and place therein designated to show cause, if any he can, why the order should not be made against him."

In Illinois the practice, "conforming to the general chancery practice, is, where the decree orders the defendant, on the execution of the deed by the master in chancery, to surrender the possession to the purchaser, to serve a copy of the decree on the defendant in

is made to appear that the making of such preliminary order would be unavailing, the writ may issue in the first instance.[37]

B. Necessity for Notice. — In some jurisdictions the writ is issued as part of the process of the court upon an *ex parte* application without notice, upon proof of facts showing the necessity therefor,[38] but

possession, or, if others are in under him as purchasers, tenants, or otherwise, then upon them, and on possession being refused, the court will, on filing an affidavit of the facts, award a writ of possession. But where the original decree ordering the sale fails to order possession to be thus surrendered, and the person in possession refuses to surrender it, the court will, on proper notice and motion, make such an order, and upon like service of a copy, and demand of possession, will, on motion, and without notice, order an injunction against the party to deliver possession, and then, on affidavit of the service of the injunction, and a refusal to deliver possession, a writ of assistance directed to the sheriff to put the purchaser into possession issues, of course, on motion and without notice." Oglesby *v.* Pearce, 68 Ill. 220, *citing* Holt *v.* Rees, 46 Ill. 181; Lloyd *v.* Karnes, 45 Ill. 62; Bennett *v.* Matson, 41 Ill. 332; Jackson *v.* Warren, 32 Ill. 331; Bruce *v.* Roney, 18 Ill. 67; Aldrich *v.* Sharp, 4 Ill. 261; Hill's Ch. Pr. 509.

Failure to allege that the person against whom the proceeding is brought is in possession of the land is a fatal defect. Oglesby *v.* Pearce, 68 Ill. 220.

"The petition is in the usual form, setting forth the issuing of the execution; a description of the lands, the possession of the defendant, who was a party to the foreclosure proceedings; the exhibition of the sheriff's deed to her, with a demand for possession, and her refusal." Board of Home Missions *v.* Davis, 70 N. J. Eq. 577, 62 Atl. 447.

Regarding the form of petition, it is said in Jones *v.* Hooper, 50 Miss. 510: "It seems to be enough to file a petition setting forth the sale under the decree, the purchase, and the deed by the commissioner, confirmation of sale, payment of the money if made for cash, that the deed was exhibited to the defendant and possession demanded and praying that the writ may issue."

In Devaucene *v.* Devaucene, 1 Edw. Ch. (N. Y.) 272, under a decree for reconveyance of certain real estate the writ was issued upon the following: "Notice of the motion and affidavit of personal service of a copy of the same and of the other papers; a certified copy of the decree; certificate of the enrolment of the decree; deed of reconveyance, approved by a master; affidavit showing a demand of possession and execution of the deed of reconveyance and refusal to do either."

37. Kemp *v.* Lyon, 76 Ala. 212.

38. **Ala.**—Hooper *v.* Yonge, 69 Ala. 484 (service of the decree and refusal to obey); Creighton *v.* Paine, 2 Ala. 158. And see Trammel *v.* Simmons, 8 Ala. 271. **Cal.**—Sickler *v.* Look, 93 Cal. 600, 29 Pac. 220 (but it is expedient to include provision therefor in the decree); Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146 (upon showing that the deed was presented, and possession was demanded and refused); Montgomery *v.* Tutt, 11 Cal. 190. But see Miller *v.* Bate, 56 Cal. 135, that on an *ex parte* application against a defendant the order is inoperative against any other person. **Fla.**—McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823. **Ill.**—O'Brian *v.* Fry, 82 Ill. 87 (when an order for possession is contained in the original decree); Oglesby *v.* Pearce, 68 Ill. 220; Bruce *v.* Roney, 18 Ill. 67; Smith *v.* Brittenham, 3 Ill. App. 62. **Mich.**—Tucker *v.* Stone, 99 Mich. 419, 58 N. W. 319 (the writ will be granted on proof of service of the order of confirmation. And see form following); Benhard *v.* Darrow, Walk. 519 (when party in possession was a party to the action). **Miss.**—Harney *v.* Morton, 39 Miss. 508, as between the parties and those claiming under them. See, however, Jones *v.* Hooper, 50 Miss. 510, that notice of application should be given. **N. Y.**—New York Life Ins. & T. Co. *v.* Cutler, 9 How. Pr. 407; New York Life Ins. & T. Co. *v.* Rand, 8 How. Pr. 35, *affirmed*, 8 How. Pr. 352; Kershaw *v.* Thompson,

the better practice would seem to be to make the application on notice.[39]

4 Johns. Ch. 609; Valentine *v.* Teller, 1 Hopkins Ch. 422.

Necessity for Notice.—The writ is issued sometimes upon notice and sometimes without notice. Emerick *v.* Miller (Ind. App.), 62 N. E. 284. And see the following cases: Bruce *v.* Roney, 18 Ill. 67; Cook *v.* Moulton, 66 Ill. App. 480; Smith *v.* Brittenham, 3 Ill. App. 62 (holding that application be made to the court presenting the facts so that the court may judge of the propriety of awarding the writ); Landon *v.* Burke, 36 Wis. 378 (that "an application should be made to the court—founded on proof of a demand and refusal on the part of the defendants to pay the amount adjudged to be paid,—for the issuing of a process or execution in the nature of a writ of assistance, to place plaintiff in possession of the premises;" there being no statement as to whether or not this application is required to be on notice).

In the case of Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287, the court says: "The manner of obtaining the writ, it will be seen, is left entirely to the wisdom of the court, in the absence of any rule on the subject prescribed by this court, and there is none. The trial court may require notice to the occupant of the property of the application for the writ or not as in his judgment may seem best in the particular case. What would be proper and reasonably necessary in one case might not be in another."

In McLane *v.* Piaggio, 24 Fla. 71, 99, 3 So. 823, the court says: "The direction in the decree of foreclosure, that the master put the purchaser in possession, we regard as tantamount to the usual provision that the purchaser be let into possession, and this provision is held to render any further order for the writ unnecessary." *Citing* **Cal.**—Montgomery *v.* Middlemiss, 21 Cal. 103. **Ill.**—Kessinger *v.* Whittaker, 82 Ill. 22; Aldrich *v.* Sharp, 4 Ill. 261. **N. Y.**—Kershaw *v.* Thompson, 4 Johns. Ch. 609.

In Alabama if the Chancellor, on examination, "is satisfied that the possession is withheld by some one who is concluded by the decree, that is, by the defendant himself, or some one who has come in under him *pendente lite*, he will make a decretal order, that the possession be delivered to the purchaser, unless the master had been previously, directed by the decree of foreclosure, to put the purchaser into possession. If this order be not complied with, on application, an injunction will issue commanding those in possession forthwith to deliver it up; and on affidavit of service of the injunction, and refusal, a writ of assistance to the Sheriff to put the party in possession, issues of course, on motion, without notice." Creighton *v.* Paine, 2 Ala. 158.

The course of procedure according to the English practice was laid down in Dove *v.* Dove, 1 Bro. Ch. 375, 28 Eng. Reprint 1187, 1 Dick. 617, 21 Eng. Reprint 411, as follows: "A writ of assistance must be applied for, because the Court is to be satisfied that the steps requisite to be pursued have been followed: they are these, first, the service of a writ of execution, of an order to deliver a demand, and the issuing an attachment for disobeying it. The next is an injunction to enjoin the defendant to deliver possession, (which affects the tenant, and which the order for the defendant to deliver possession, doth not, as is said in Venables *v.* Foyles, 12 Car. 2, Lib. fol. 260.) The order for the injunction is of course, upon affidavit of service of a writ of execution of the order for the defendant to deliver possession, demanding possession, refusal, and the issuing the attachment. Upon proof of service of the injunction, and its not having been complied with, upon motion without notice, and reading an affidavit of the facts, a writ of assistance will be ordered."

39. **Ala.**—Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Creighton *v.* Paine, 2 Ala. 158. **Ark.**—Ferguson *v.* Blakeney, 6 Ark. 296, the right to notice is waived by appearance and disclaimer. **Cal.**—Hibernia Sav. & L. Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Miller *v.* Bate, 56 Cal. 135; Newmark *v.* Chapman, 53 Cal. 557. **Fla.**—McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823; Keil *v.* West, 21 Fla. 508. **Ill.**—O'Brian *v.*

C. Hearing of Application. — **1. What Considered.** — While on the hearing of the application for a writ of assistance there can be no retrial on the merits,[40] it is competent for a defendant to try the question whether the court granting the decree was without jurisdiction.[41]

2. Standing of Third Parties. — One who is a stranger to the rec-

Fry, 82 Ill. 87 (when the original decree contains no order for possession, application should be on notice); McCagg *v.* Touhy, 150 Ill. App. 15. **Md.**—Waters *v.* Duvall, 6 Gill & J. 76. **Mich.** Benhard *v.* Darrow, Walk. 519, when party in possession was not a party to the action. **Miss.**—Jones *v.* Hooper, 50 Miss. 510. But see Harney v. Morton, 39 Miss. 508, holding that as between the parties and those claiming under them notice is unnecessary. **N. Y.**—Devaucene *v.* Devaucene, 1 Edw. Ch. 272. **N. C.**—Coor *v.* Smith, 107 N. C. 430, 11 S. E. 1089 (but while the action is pending no actual notice is required, all parties being presumed to have notice of all motions, orders and decrees made in the cause); Knight *v.* Houghtalling, 94 N. C. 408. **Wis.**—Schultz *v.* Schultz, 133 Wis. 125, 113 N. W. 445, 126 Am. St. Rep. 934.

When Petition Unnecessary on Application.—When a party "had notice from the beginning as to what was sought and was fully as informed of the claim of right made against her, as she possibly could have been by a petition," and had the opportunity and did contest the issuing of various orders, as if a petition had been filed, the writ is not improperly issued because of failure to file a petition therefor. Dorr *v.* Root, 104 Ill. App. 417.

While the court in Schenck *v.* Conover, 13 N. J. Eq. 220, 226, says: "The proper mode of proceeding where the delivery of possession is not included in the decree, as settled in Kershaw *v.* Thompson, (4 Johns. Ch. [N. Y.] 609), and as hitherto adopted in this court, is a demand of possession by the purchaser of the tenant in possession, accompanied by an exhibit of the deed from the sheriff or master, order to deliver possession, injunction, and writ of assistance. The preliminary orders are made upon notice and affidavits; the last writ issues of course and without notice." In a note to that case it appears that "in a more recent case it has been held that the injunction should be dispensed with, and that the writ of assistance should issue in the first instance, upon proof of the service of the order to deliver possession, of demand of possession, and refusal to comply therewith. Notice of the application is necessary."

Notice to the occupant of the land may or may not be required by the court preliminary to the issuance of a writ of assistance in aid of a purchaser at foreclosure sale. Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287.

40. **Fla.**—Keil *v.* West, 21 Fla. 508. **Mich.**—Peters *v.* Youngs, 122 Mich. 484, 81 N. W. 263; Ball *v.* Ridge Copper Co., 118 Mich. 7, 76 N. W. 130. **Pa.**—Pittsburg, J. E. & E. R. Co. *v.* Altoona & B. C. R. Co., 203 Pa. 108, 52 Atl. 13, declaring that the only question on the hearing for the writ is whether the decree had been complied with.

41. White v. White, 130 Cal. 597, 62 Pac. 1062, 80 Am. St. Rep. 150, *reversing* 62 Pac. 34; Peters *v.* Youngs, 122 Mich. 484, 81 N. W. 263; Ball *v.* Ridge Copper Co., 118 Mich. 7, 76 N. W. 130.

In Michigan under §72 of the State Tax Law provision is made for writ of assistance to put in possession a purchaser of tax title. Upon the filing of the petition the inquiries are "(1) whether the court had jurisdiction to render the decree; (2) whether all the steps required by the statute have been taken in making the sale, filing the report of sale, etc.; (3) whether the time for redemption has expired." Ball *v.* Ridge Copper Co., 118 Mich. 7, 76 N. W. 130.

Cannot Attack Judgment on the Hearing.—Upon proceedings to procure the writ the person in possession cannot collaterally attack the judgment. Hibernia Sav. & Loan Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Newark *v.* Chapman, 53 Cal. 557.

An objection that the papers were improperly entitled will not be considered, it being too technical. Howe *v.* Lemon, 47 Mich. 544, 11 N. W. 379.

ord, and who is neither in possession nor entitled to possession, will not be heard on the application.[42]

3. **Form of Objections.**—When the application is on notice, objections to its issuance must be more than mere verbal objections or argument opposing the enforcement of the decree.[43] Objections on the part of one without right which would postpone the issuance of the writ will not be entertained.[44]

4. **Pendency of Another Proceeding.**—That there is also pending another proceeding to obtain possession begun by the applicant, is no reason for refusing the writ.[45]

VI. HOW ISSUED. — A. In General. — As a rule the writ is issued by the court,[46] but there is authority for its issuance by a judge,[47] or

42. Gibson *v.* Marshall, 64 Miss. 72, 8 So. 205, where a counter petition was dismissed, it being filed by one having a debt against K and who had sued on it and garnished against the defendant who was indebted to K, although he had given a mortgage to secure K.

43. Aldrich *v.* Wayne Circuit Judge, 111 Mich. 525, 69 N. W. 1108.

A mere technical objection will not be entertained. Howe *v.* Lemon, 47 Mich. 544, 11 N. W. 379.

The filing of an answer on the application for the writ is a waiver of any informality in the proceedings to obtain it. Keil *v.* West, 21 Fla. 508.

44. White *v.* White, 130 Cal. 59, 62 Pac. 1062, 80 Am. St. Rep. 150, reversed on other grounds, 62 Pac. 34.

45. Keil *v.* West, 21 Fla. 508 (an action in ejectment where no election of remedies was requested); Kessinger *v.* Whittaker, 82 Ill. 22 (action for forcible entry and detainer).

46. **U. S.**—Gormley *v.* Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909. **Ala.**—Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Johnston *v.* Smith's Admr., 70 Ala. 108; Hooper *v.* Yonge, 69 Ala. 484; Trammel *v.* Simmons, 8 Ala. 271; Creighton *v.* Paine, 2 Ala. 158. **Ark.**—Jeffers *v.* Davis, 85 Ark. 242, 107 S. W. 1175. **Cal.**—Montgomery *v.* Tutt, 11 Cal. 190. **Fla.**—Gorton *v.* Paine, 18 Fla. 117. **Ill.**—Bruce *v.* Roney, 18 Ill. 67; Smith *v.* Brittenham, 3 Ill. App. 62. **N. Y.**—Kershaw *v.* Thompson, 4 Johns. Ch. 609; Valentine *v.* Teller, 1 Hopk. Ch. 422; Ludlow *v.* Lansing, 1 Hopk. Ch. 231. **N. C.**—Knight *v.* Houghtalling, 94 N. C. 408. **Va.**—Newman *v.* Chapman, 2 Rand. 93, 14 Am. Dec. 766. **Wis.**—Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287.

The city court of New York, though not a court of equity, had under the statute jurisdiction over foreclosures of mechanics' liens, and under a statute which provided that the manner and form of conducting a mechanic's lien proceeding should be the same as the foreclosure of a mortgage, it was held that with the jurisdiction given to foreclose went everything necessary to a complete execution of the jurisdiction, and that the court in such a proceeding had authority to issue a writ of assistance. O'Connor *v.* Schaeffel, 19 Civ. Proc. 378, 25 Abb. N. C. 344, 11 N. Y. Supp. 737, 33 N. Y. St. 143. And see Marcus *v.* Aufses, 94 N. Y. Supp. 397.

47. Chapman *v.* Thornburg, 23 Cal. 48, since the passage of c. 512, Laws of 1861. See also Kessinger *v.* Whittaker, 82 Ill. 22; Murchison *v.* Miller, 64 S. C. 425, 42 S. E. 177, either in open court or at chambers. See, however, Hartsuff v. Huss, 2 Neb. (Unof.) 145, 95 N. W. 1070, that a judge at chambers has no authority to issue the writ.

In McLane *v.* Piaggio, 24 Fla. 71, 92, 3 So. 823, "a writ of assistance directed to the Sheriff of Washington County, was issued in this cause by the Judge of the Second Circuit, sitting for Leon county. This writ recites the fact of the rendition of the decree of foreclosure and that a sale was made to Piaggio, trustee, and the order of confirmation, and that 'it now appears that the defendants refuse to surrender possession of the mortgaged property to George W. Wright, to whom said

other court official, as, for instance, the prothonotary or clerk.[48]

Only the court whose mandate is to be enforced can issue the writ.[49]

Piaggio has sold the same, and to whom he is desirous that the same shall be surrendered,' and commands the Sheriff to remove defendants from possession and put Wright in possession of all said mortgaged property, to wit: a certain parcel of land in Washington county, known as the McLane mill tract, consisting of ten acres of land, more or less, together with all of the buildings, improvements, structures of every kind, saw mill boilers, machinery, fixtures, tools and implements on said premises.'' The writ was sustained both as to form and description of property.

48. **Miss.**—Griswold *v.* Simmons, 50 Miss. 123. **Pa.**—Com. *v.* Dieffenbach, 3 Grant's Cas. 368, holding that the writ may be issued by the prothonotary, and citing Rule 9 of the equity practice of the United States courts, providing that the writ of assistance shall be issued by the clerk of the court. **Wis.**—Loomis *v.* Wheeler, 21 Wis. 271; Attorney-General *v.* Lum, 2 Wis. 507 (holding that the writ is to be issued by the clerk). See, however, Goit *v.* Dickerman, 20 Wis. 630, in which the court says: ''*As against parties to the suit*, it may well be the duty of the clerk to issue the writ of assistance, when the requisite affidavit is made, without a special order of the court. But surely the rule does not authorize the clerk to issue the writ, without such an order, against one not a party to the suit nor bound by the judgment.''

The use of the rule under which these decisions were made has, however, been discontinued, and Loomis *v.* Wheeler, *supra*, should be entirely disregarded, Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287.

Issuance by clerk not without an order of court. Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287.

49. People *v.* Doe, 31 Cal. 220; Harney *v.* Morton, 39 Miss. 508.

When a decree involving the title to real estate is reversed on appeal, all supplementary matters are to be carried out by the trial court and a writ of assistance should be applied for there, and not in the appellate court. Foster *v.* Beidler, 81 Ark. 274, 98 S. W. 968.

After Decree in Appellate Court.—When a decree requiring the delivery of possession of certain property is made in the supreme court, and the cause is remitted to the court below for the purpose of an accounting, the application for the writ of assistance must be made in the court below. Ryerson *v.* Eldred, 18 Mich. 195.

Form of Order for Writ.—In McCagg v. Touhy, 150 Ill. App. 15, the order ''after reciting a petition of Jane Creigh Wells for a writ of assistance in the cause, and that notice had been given to Catherin C. Touhy, S. Rogers Touhy, and all parties in interest, found from 'affidavits, evidence and admissions in open court, that Jane Creigh Wells became a *bona fide* purchaser of block two in Rogers Park (the premises involved in this suit), and that her title was derived under the decree of foreclosure of March 18, 1902, and the master's deed pursuant thereto; that at the time she became such *bona fide* purchaser for value no appeal or writ of error had been prosecuted or was pending from said decree, and that by an order of the court entered July 18, 1905, she had been put into possession of all of block 2 except a piece twenty-two by thirty-one feet on the northwest corner of Clark street and Touhy avenue; that she was not in possession of this piece because the right of possession thereof was claimed by one S. Rogers Touhy under a lease from the defendant, Catherine C. Touhy, which expired September 10, 1905; that Jane Creigh Wells had, after proper service of the decree and the master's deed on Catherine C. Touhy, made demand since September 10, 1905, on S. Rogers Touhy for the possession of this excepted piece of block 2, and S. Rogers Touhy had refused to give up such possession.' It then ordered that a writ of assistance as prayed for in said petition against said Catherine C. Touhy, S. Rogers Touhy, and all persons claiming by, through or under them, or either of them, issue forthwith, to eject and move them from this excepted portion of block 2 and put Jane Creigh Wells into possession thereof.''

B. Irregularity in Form of.—Amendable irregularities in the writ are waived by appearance and motion to set it aside on the merits.[50]

C. Issuance of Alias Writ.—When the record fails to disclose facts from which it can be determined whether or not the writ has been fully executed, and it appears to the court by affidavit, not contradictory to the return but explanatory thereof, that the writ has not been fully executed, the court will on application of the party for whose benefit the original writ was issued, direct the issuance of an *alias* writ.[51]

VII. HOW EXECUTED.—It is the duty of the officer executing the writ to place the party in whose favor the same is issued in possession of every part of the property described therein, and to eject therefrom all persons whom he finds in possession or occupancy of the premises, whether named in the writ or not, who claim under or through the person against whom the writ is directed.[52] If he refuses

In Tevis *v.* Hicks, 38 Cal. 234, the writ was issued by the Sixth District Court, directed to the sheriff of Sacramento county, commanding him to "'go to and enter upon the said tract of land hereinafter described, and that you eject and remove therefrom the said William Hicks, and that you place the said John F. McCauley or his assigns, without delay, in the full, peaceable and quiet possession of the following described property and premises, that is to say: All the right, title and interest, and possession and claim of possession, that William Hicks had on the 30th day of November, 1861, the 29th day of November, 1862, and on the 19th day of November, 1864, or has since acquired, or now has in and to that certain tract of land situated partly in the County of San Joaquin, of the State of California, and known as the Rancho San Jose de los Moquelumnes, containing eight square leagues of land, and which is accurately described in the patent dated the 30th day of May, 1865, from the United States to Angel Maria Chabolla and others, the heirs of Anastasio Chabolla, which patent, with the map accompanying the same, fixes and determines the boundaries of said rancho, and which was, on the 11th day of October, 1865, recorded in the office of the County Clerk and ex officio County Recorder of Sacramento County, in Book No. 1 of Patents, on pages 129 to 147 thereof, which record of said patent, for the purposes of description, is hereby made part of this order, and him, the said John F. McCauley, in such possession thereof from time to time maintain, keep and defend, or cause to be kept, maintained and defended, according to the tenor and true intent of said decree and order of said Court.'"

50. Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287, omission of seal.

51. Jeffers *v.* Davis, 85 Ark. 242, 107 S. W. 1175; Tevis *v.* Hicks, 38 Cal. 234. And see Reeves *v.* State, 145 Ala. 510, 41 So. 927.

When Alias Will Not Issue.—When several years had elapsed after the purchase of the property and after the original writ was returned executed, and neither the petition for the writ nor the proof thereunder negatives the presumption arising from the delay that the party in possession holds as tenant of the purchaser or under some other like claim of right, an alias writ will not issue. *Ex parte* Forman, 130 Ala. 278, 30 So. 480.

52. Tevis *v.* Hicks, 38 Cal. 234, pointing out that a tenant in common has a right to the possession and occupancy of the whole of the premises jointly with his co-tenant.

In a petition applying for a writ of mandamus directing the issue of a second writ of assistance, it being alleged that the petitioner had applied for and obtained a writ of assistance which was executed "by posting notice in two public places upon said land, the

to fully execute the writ, or if he makes a false return thereunder, he is liable to the party aggrieved as for neglect of duty or false return.[53]

VIII. RELIEF AGAINST WRIT.—A. By Appeal.—The right of appeal from an order either granting or refusing a writ of assistance

said Thomas R. McCartney not being found by the sheriff,'' the court said: ''The defendant could not, on the facts presented, be held guilty of a contempt for a disobedience of the orders of the court. It is not shown that he knew, or ever heard of the issuance of the writ of assistance in the case referred to.'' *Ex parte* Forman, 130 Ala. 278, 30 So. 480.

Form of Return.—A return as follows: '' 'I hereby certify and return, that I did, on the 11th day of May, 1868, serve the annexed writ, by placing John F. McCauley in the quiet and peaceable possession of all the interest and possession that William Hicks (defendant) had on the 30th day of November, 1861, 29th day of November, 1862, and the 10th day of November, 1864, or has since acquired or had, in and to the land mentioned and referred to in said writ, so far as the same could be ascertained by me, and that I did notify each and every person occupying the said land of the possession of the said John F. McCauley, and the said John F. McCauley declared himself satisfied with the service made above,' '' does not sufficiently show a compliance with the writ. Tevis *v.* Hicks, 38 Cal. 234, 237.

53. Tevis *v.* Hicks, 38 Cal. 234.

In Ontario the provisions of Rev. St. O., c. 40, §86, apply to writs of assistance, it being a writ of execution within the meaning of §11 of that Act, and is not in force after one year from the teste, if unexecuted, unless renewed. Adamson *v.* Adamson, 12 Ont. Pr. 21. See also Reeves *v.* State, 145 Ala. 510, 41 So. 927.

Form of Writ.—*Habere facias possessionem* is in the nature of a writ of assistance of which the following is a form: '' 'Maryland, *sc.* The State of Maryland, to the sheriff of Baltimore County, Greeting. Whereas by the original decree, passed in the Court of Chancery on, etc., in a cause wherein R. C. is complainant, and J. G. is defendant, it was decreed, etc. And whereas by a subsequent decree or order, made and passed in the said cause on the, etc., it was adjudged, etc. And whereas according to the decrees aforesaid, and in conformity therewith, on the, etc., an injunction did issue directed to the said J. G. his servants, slaves, agents, and all persons assisting him, and every and all other person and persons in possession of the said land, commanding that he the said J. G. and all and every person or persons aforesaid, should deliver the possession of the said land and premises, and every part and parcel thereof, to the complainant R. C. and that he the said J. G. should cease from any further molestation of the said R. C. in the quiet possession of the said land: And whereas it hath been represented to the said Court of Chancery, that on the 4th of March instant, at the county aforesaid, a true copy of the injunction so as aforesaid issued was served on and delivered, in the presence of the said complainant, to the said J. G. and at the same time the original injunction, with the great seal appendant thereto, was shewn to the said J. G. and that the said complainant R. C. did then and there request and demand of the said J. G. that he would deliver the possession of the land in the said writ mentioned, according to the directions of the said writ, which he the said J. G. absolutely refused to do; and that on the same day, and in manner aforesaid, a true copy of the said writ of injunction was also shewn and delivered to T. S. a tenant of the said J. G. and the original writ, with the great seal as aforesaid, was also shewn to the said T. S. and that the complainant R. C. then and there made the same request and demand of the said T. S. which he then and there absolutely refused to comply with; and the said R. C. having applied to the said Court of Chancery for additional process to enforce the said decrees. Know ye therefore, that to complete and carry into full effect the decrees

is generally conceded,[54] and in at least one jurisdiction has been expressly sustained,[55] though in another a contrary view has been adopted.[56]

One not a party to the record cannot take an appeal from the order granting it.[57]

B. By Order Setting Aside. — **1. General Rule.** — The remedy where the writ was improperly issued or executed is by motion to va-

of the said Court of Chancery, made and passed in manner aforesaid, the said Court of Chancery hath given, and from this time doth give to you, full power and authority to the land and premises aforesaid, situate in Baltimore County aforesaid, and in the decrees and injunction aforesaid mentioned and expressed, you approach and enter, and from thence the said J. G. and the said T. S. as well as all and every other person or persons in possession of the premises being, against the form and effect of the decrees and injunction aforesaid, you remove, and the said R. C. in full, quiet, and peaceable possession of all and singular the premises aforesaid, immediately, and from time to time, as often as necessary, you put and place; and that the said R. C. so being put and placed in possession, you protect and keep quiet; and therefore you are hereby commanded, that immediately after the receipt of this writ, to the land and premises aforesaid you approach and enter, and the said J. G. and the said T. S. as well as all and every other person and persons in possession of the said land and premises being, against the form and effect of the decrees and injunction aforesaid, from the possession thereof you remove, and to the said R. C. the full, peaceable, and quiet possession of all and singular the premises, you deliver, put and place, and so from time to time as often as necessary; and the said R. C. so being put in possession, you preserve, keep and continue, and cause to be preserved, kept and continued, according to the true intent of the decrees and writ of injunction aforesaid, and of this writ. Witness,' etc.'' Garretson *v.* Cole, 1 H. & J. (Md.) 370, 389.

54. **Cal.**—Hibernia Sav. & L. Soc. *v.* Robinson, 150 Cal. 140, 88 Pac. 720; Horn *v.* Volcano Water Co., 18 Cal. 141. **Idaho.**—Harding *v.* Harker, 17 Idaho 341, 105 Pac. 788, 134 Am. St. Rep. 259. **Ill.**—McCagg *v.* Touhy, 150 Ill. App. 15. **Ind.**—Emerick *v.* Miller (Ind. App.), 62 N. E. 284. **Mich.**—Flint Land Co. *v.* Grand Rapids Terminal R. Co., 147 Mich. 627, 111 N. W. 192, 101 Am. St. Rep. 645; Tucker *v.* Stone, 99 Mich. 419, 58 N. W. 318. **Neb.**—Clark & Leonard Inv. Co. *v.* Lingren, 76 Neb. 59, 107 N. W. 116; Merrill *v.* Wright, 65 Neb. 794, 91 N. W. 697, 101 Am. St. Rep. 645. **Pa.**—Pittsburg, J. E. & E. R. Co. *v.* Altoona & B. C. R. Co., 203 Pa. 108, 52 Atl. 13. **Wis.**—Schultz *v.* Schultz, 133 Wis. 125, 113 N. W. 445, 126 Am. St. Rep. 934.

Recital in Order Appealed From.— When upon a hearing for a writ of assistance reference is made to records, files and proceedings in the original action and the proceedings for leave to enforce the judgment, they should be recited in the order allowing the writ of assistance and on appeal should be transmitted to the appellate court. Schultz *v.* Schultz, 133 Wis. 125, 113 N. W. 445, 126 Am. St. Rep. 934.

55. Baker *v.* Pierson, 5 Mich. 456, holding that such an order, though discretionary in the same sense as an order granting or refusing an injunction, is a final order determinative of a party's right in the case.

When a defendant appeals from the order granting the writ, but omits to appeal from a further order refusing to vacate the writ, the appeal will be dismissed as it would be of no service to reverse the first order and leave the latter order affirming it in force. Horn *v.* Volcano Water Co., 18 Cal. 141.

56. Bryan *v.* Sanderson, 3 MacArthur (D. C.) 402.

57. People *v.* Grant, 45 Cal. 97, his remedy being by motion to set aside the writ, or, after eviction, by motion to be restored to possession.

cate,[58] and the court granting it may on summary motion set aside the writ or the service,[59] and restore the party dispossessed to possession.[60]

2. Who May Make Motion.—This motion may be made by one not a party to the record.[61]

3. Ruling on Application Appealable.—An order refusing to vacate the order granting a writ of assistance is appealable,[62] as is also the refusal of the application to restore a party to possession on vacating the order.[63]

C. By Restraining Execution of Writ. — **1. The Rule.** — One in possession under claim of title may also protect his possession by a motion to restrain the execution of the writ.[64]

2. Appeal From Order.—An appeal will lie from an order refusing to restrain the execution thereof.[65]

58. **Ala.**—Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288. **Cal.**—Skinner *v.* Beatty, 16 Cal. 157. **Colo.**—Herr *v.* Sullivan, 26 Colo. 133, 56 Pac. 175. **Md.**—Waters *v* Duvall, 6 Gill & J. 76. **N. Y.**—Meiggs *v.* Willis, 8 N. Y. Civ. Proc. 125. **Wis.**—Prahl *v.* Rogers, 127 Wis. 353, 106 N. W. 287.

But the question whether the writ was properly granted cannot be reviewed collaterally in another court. Rawiszer *v.* Hamilton, 51 How. Pr. (N. Y.) 297.

59. Skinner *v.* Beatty, 16 Cal. 157.

60. Skinner *v.* Beatty, *supra;* Meiggs *v.* Willis, 8 N. Y. Civ. Proc. 125.

Where the tenant was ousted the landlord may make motion. McChord *v.* McClintock, 5 Litt. (Ky.) 305.

If the order granting the writ is set aside, the court should in the same order also restore to possession the party dispossessed. Chamberlain *v.* Choles, 35 N. Y. 477, 3 Abb. Pr. (N. S.) 477. See also People *v.* Johnson, 38 N. Y. 63. But see Lombar *v.* Atwater, 46 Iowa 501, holding it not to be matter of course, but that question of right of possession should first be determined.

61. People *v.* Grant, 45 Cal. 97; Mills *v.* Smiley, 9 Idaho 317, 76 Pac. 783. And see McChord *v.* McClintock, 5 Litt. (Ky.) 304.

62. **Cal.**—City of San Jose *v.* Fulton, 45 Cal. 316. **Fla.**—Ray *v.* Trice, 48 Fla. 297, 37 So. 582. **Idaho.**—Mills *v.* Smiley, 9 Idaho 317, 76 Pac. 783. **Mich.**—See Tucker *v.* Stone, 99 Mich. 419, 58 N. W. 318.

63. Chamberlain *v.* Choles, 35 N. Y. 477, 3 Abb. Pr. (N. S.) 118.

64. Hibernia Sav. & L. Soc. *v.* Robinson, 150 Cal. 140, 88 Pac. 720; Pignaz *v.* Burnett, 119 Cal. 157, 51 Pac. 48.

65. Hibernia Sav. & L. Soc. *v.* Robinson, 150 Cal. 140, 88 Pac. 720.

ASSOCIATIONS

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CROSS-REFERENCE:
Beneficial Associations.

I. DEFINITION.—An association is an organization of persons without a charter, for business, humanity, charity, culture, or other purposes; any unincorporated society or body;[1] and is to be distin-

1. Anderson's Law Dict., title "Associations." **Cal.**—Gorman *v.* Russell, 14 Cal. 531; Bullard *v.* Kinney, 10 Cal. 60. **Ind.**—Laycock *v.* State, 136 Ind. 217, 36 N. E. 137. **Me.**—Smith *v.* Virgin, 33 Me. 148. **Mass.**—Tyrrell *v.* Washburn, 6 Allen 466. **Mich.**—U. S. Heater Co. *v.* Iron Molders' Union, 129 Mich. 354, 88 N. W. 889; Butterfield *v.* Beardsley, 28 Mich. 412. **N. Y.**—Ebbinghousen *v.* Worth Clube, 4 Abb. N. C. 300. **Pa.**—Leech *v.* Harris, 2 Brewst. 571.

"The legal status of unincorporated societies and voluntary associations has not been very satisfactorily determined on many points. While the courts will generally treat the members as ordinary partners and the associations as partnerships, they will, as far as possible, give effect to the articles of association or agreement among the members themselves, when they themselves are the only ones interested. If such an association be organized for pecuniary profit, so far as the rights of third persons and liabilities of the members to strangers are concerned, such association is usually considered as a partnership. Robbins *v.* Butler, 24 Ill. 387; Hodgson *v.* Baldwin, 65 Ill. 532; Wadsworth *v.* Duncan, 164 Ill. 360, 45 N. E. 132; People *v.* Rose, 219 Ill. 46, 76 N. E. 42; Ashley *v.* Dowling, (Mass.) 89 N. E. 434, 25 Am. & Eng. Ency. of Law (2d ed.) pp. 1130-1136; 1 Bacon on Benefit Societies and Life Insurance (3d ed.) c. 2; Donald *v.* Guy (D. C.) 127 Fed. 228; Baltimore Trust & Guaranty Co. *v.* Hambleton, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216, and note." Hossack *v.* Ottawa Development Assn., 244 Ill. 274, 91 N. E. 439, 445.

The Term Association.—"There was nothing incompatible with this view in the constant previous use of the word *association.* This is said to signify '*Confederacy,* or *union* for particlar purposes, good or ill.' Johns. Dict. 4to. Association, 2. In that sense it is a generic term, and may indifferently comprehend a voluntary confederacy, which is a partnership dissoluble by the persons who formed it, or a corporate confederacy, deriving its existence from a statute, and dissoluble only by the law." Thomas *v.* Dakin, 22 Wend. (N. Y.) 1, 104.

guished from a partnership,[2] or a public or private corporation.[3]

2. **Ala.**—Burke *v.* Roper, 79 Ala. 138. **Mich.**—Burt *v.* Lathrop, 52 Mich. 106, 17 N. W. 716. **N. Y.**—Lumbard *v.* Grant, 62 App. Div. 617, 71 N. Y. Supp. 1141; Boston Baseball Assn. *v.* Brooklyn Baseball Club, 37 Misc. 521, 75 N. Y. Supp. 1076; Niagara County *v.* People, 7 Hill 504; White *v.* Brownell, 3 Abb. Pr. (N. S.) 318. **Ohio.**—Webster *v.* Taplin, 29 Ohio C. C. 543. **Pa.**—Ash *v.* Guie, 97 Pa. 493, 39 Am. Rep. 818; Leech *v.* Harris, 2 Brewst. 571; Thomas *v.* Ellmaker, 1 Pars. Eq. Cas. 98, 107. **Vt.**—Tenny *v.* Protection Union, 37 Vt. 64.

"Such an association is not a partnership, and to render a member liable as a principal on contracts made by the persons or committees who manage and assume to act for the association, it must be shown that they are expressly or impliedly authorized to represent and bind him." Brower *v.* Crimmins, 67 Misc. 68, 121 N. Y. Supp. 648.

Assumpsit Will Lie by Association Against Former Member.—"This is assumpsit for money had and received. The plaintiff is a beneficial association, unincorporated. The agreed statement of facts shows that while a member of the association the defendant received of the funds belonging to it $13.86, which he still retains, though he had ceased to be a member of the association before the bringing of the suit. The court below held that the action could not be maintained because the association, not being incorporated, must be regarded as a partnership. We think this was error. The essential element of a partnership, as between its members, is the agreement to share profits and losses. This element is wanting in voluntary associations, such as the plaintiff, formed for social or charitable purposes and the like, and not for the purpose of trade or profit, and hence they do not stand on the footing of a partnership. * * * The property of such an association is a mere incident to the purpose of the organization, and a member has no proprietary interest in it nor right to any proportional part of it, either during his continuance in the partnership or upon his withdrawal. He has merely the use and enjoyment of it while a member, the property belonging to and remaining with the society." Textile Workers Union *v.* Barrett, 19 R. I. 663, 36 Atl. 5.

Treated as Partnerships.—"All companies, societies, or partnerships, whatever might be the number of their members or partners, and of whatever nature or extent the object undertaken, which were not confirmed by public authority, that is, incorporated by act of Parliament, or charter, or privileged by letters patent, were in law nothing more than ordinary partnerships, consisting of two or three partners, and undertaken for private purposes. Collyer on Part. Sec. 1078. The same doctrine is recognized in the case of Babb v. Read, 5 Rawle 158, where the members of a society of Odd Fellows were treated as partners; and also in all that class of cases not within those properly denominated charities, in Thomas *v.* Ellmaker, 1 Parson's Select Eq. Cas. 98. A somewhat different rule, so far as the liability of the members of an unincorporated company of a public character, was adopted by Chancellor Kent, in Livingston, Executor of Fulton *v.* Lynch, 4 Johns. Ch. 573, which was a company for the purpose of navigating the Hudson by steam; the chancellor there holding, that the members held as tenants in common, and not as partners. But says the chancellor, in speaking of the articles, that they were binding upon all the members when adopted by all, as a solemn private contract." Pipe *v.* Bateman, 1 Iowa 369, 372.

3. **U. S.**—United States *v.* Trinidad Coal, etc. Co., 137 U. S. 161, 11 Sup. Ct. 57, 34 L. ed. 640. **Conn.**—Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40. **Ia.**—Nightingale *v.* Barney, 4 Greene 106. **Minn.**—State *v.* Steele, 37 Minn. 428, 34 N. W. 903. **N. Y.**—Niagara County *v.* People, 7 Hill 504.

None But a "Person" Can Be Party to a Suit.—"None but a natural or artificial person can become a party to a suit. An unincorporated association, such as a Masonic lodge cannot be recognized as a person or party at law,

II. ACTIONS BY OR AGAINST ASSOCIATIONS.—A. CAPACITY.—At common law an association could not sue in its own name,[4] but only in the names of the individual members.[5] In equity, however, the harshness of this rule has long been modified.[6] And by statute in some states an association is made competent to sue in its own

and hence cannot sue or be sued.'' Nightingale *v.* Barney, 4 Greene (Iowa) 106.

Distinguished From Corporations.—''It is not so with these associations. They have some privileges and attributes conferred upon them by the general act to authorize the business of banking, resembling those usually exercised by corporations; but they are such as are held in common with partnership associations, and may be exercised and conferred without creating a 'body corporate and politic.' These institutions differ from corporations in this respect, that the individuals composing the association act by an agency authorized and sanctioned by the law. A 'corporation or body politic' acts in its own person.'' Supervisors of Niagara *v.* People, 7 Hill (N. Y.) 504, 507.

4. **U. S.**—American Steel, etc., Co. *v.* Wire Drawers' & D. M. Union, 90 Fed. 598. **Ala.**—*Ex parte* Hill, 51 So. 786. **Conn.**—Huth *v.* Humboldt Stamm, 61 Conn. 227, 23 Atl. 1084. **Ind.**—Pollock *v.* Dunning, 54 Ind. 115; Farmers' Mutual *v.* Reser, 43 Ind. App. 634, 88 N. E. 349. **Ia.**—Westbrook *v.* Griffin, 132 Iowa 185, 109 N. W. 608; Pipe *v.* Bateman, 1 Iowa 369; Nightingale *v.* Barney, 4 Greene 106. **Ky.**—Nichols *v.* Bardwill Lodge, 105 Ky. 168, 48 S. W. 426; Soper *v.* Clay L. Co., 21 Ky. L. Rep. 933, 53 S. W. 267. **Mich.**—Schuetzen Bund *v.* Agitations Verein, 44 Mich. 313, 6 N. W. 675, 38 Am. Rep. 270. **Minn.**—St. Paul Typothetae *v.* St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725. **Mo.**—State *ex rel.* Attorney General *v.* Stock Exchange, 211 Mo. 181, 109 S. W. 675, 124 Am. St. Rep. 776; Hijek *v.* Benevolent Soc., 66 Mo. App. 568. **Mont.**—Vance *v.* McGinley, 39 Mont. 46, 101 Pac. 247. **R. I.**—Guild *v.* Allen, 28 R. I. 430, 67 Atl. 855.

Objection Must Be Made in Time.—''The objection to the name of the respondents comes too late. They waived process, appeared by the name in which they were sued, and have answered without taking the exception.'' Deems *v.* The Albany & Canal Line, 14 Blatch. C. C. 474, 7 Fed. Cas. No. 3,736.

5. **Fla.**—Richardson *v.* Smith & Co., 21 Fla. 336. **Ill.**—Merchants Underwriters *v.* Parkhurst—D. Merc. Co., 131 Ill. App. 617. **Ind.**—Mackenzie *v.* School Trustees, 72 Ind. 189. **Ia.**—Westbrook *v.* Griffin, 132 Iowa 185, 109 N. W. 608. **La.**—Soller *v.* Mouton, 3 La. Ann. 541. **Me.**—McGreary *v.* Chandler, 58 Me. 537. **Md.**—Mears *v.* Moulton, 30 Md. 142. **Minn.**—St. Paul Typothetae *v.* St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725. **Neb.**—Cleland *v.* Anderson, 66 Neb. 252, 92 N. W. 306, 5 L. R. A. (N. S.) 136. **R. I.**—Guild *v.* Allen, 28 R. I. 430, 67 Atl. 855.

Association May Sue for Libel.—''They being then members of an unincorporated association might have brought suit for the libel, if such it were, as individuals having a common interest in the business alleged to have been injuriously affected by the issue of the circular letter complained of.'' National Shutter Bar Co. *v.* Zimmerman & Co., 110 Md. 313, 73 Atl. 19.

6. Lloyd *v.* Loaring, 6 Ves. Jr. 773, 31 Eng. Reprint 1302. See: **U. S.**—Beatty *v.* Kurtz, 2 Pet. 566, 7 L. ed. 521. **Ill.**—Guilfoil *v.* Arthur, 158 Ill. 600, 41 N. E. 1009; Chicago Typ. Union *v.* Barnes & Co., 134 Ill. App. 11. **Mass.**—Birmingham *v.* Gallagher, 112 Mass. 190. **Neb.**—Branson *v.* Industrial Workers, 30 Nev. 270, 95 Pac. 354. **Ore.**—Liggett *v.* Ladd, 17 Ore. 89, 21 Pac. 133. **Pa.**—Klein *v.* Rand, 35 Pa. Super. 263.

But in such case suit can be maintained only by showing that all parties have a common interest and the interest must appear ''to be such as would entitle them, were they all before the court, to maintain the action in their own right, or in their own name..'' Habicht *v.* Pemberton, 4 Sandf. (N. Y.) 657.

A Plain Remedy.—The case of

name,[7] or in the names of members or officers for the use of the association.[8]

By the statutes of one state it is provided that an action or special proceeding may be maintained by or against certain named officers of an unincorporated association consisting of at least seven persons, upon any cause of action for or upon which all the associates may sue or be sued.[9] It has also been held that the remedy provided by

Maisch *v.* Order of Americus, 223 Pa. 199, 72 Atl. 528, was an action in assumpsit on an obligation of the organization, and the court held that the order was not a legal entity and, therefore, could not be a party defendant, but said: "A plain remedy remains, however, in the courts of equity, in which suit may be brought against some of the members of an unincorporated association, as representing themselves, and all others having the same interest. In this way, as pointed out in Fletcher *v.* Gawanese Tribe, 9 Pa. Super. Ct. 393, 'though the treasury alone shall respond for a debt found to be due, those in control of the treasury may be compelled to see that the treasury meets its liabilities by payment.'"

7. **Cal.**—Davidson *v.* Knox, 67 Cal. 143, 7 Pac. 413. **Conn.**—Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40. **Md.**—Littleton *v.* Wells, 98 Md. 453, 56 Atl. 798; Powhatan S. S. Co. *v.* Potomac S. S. Co., 36 Md. 238. **Mich.**—Detroit Light Guard Band *v.* First Mich. Independent Infantry, 134 Mich. 598, 96 N. W. 934; United States Heater Co. *v.* Iron Molders' Union, 129 Mich. 354, 88 N. W. 889. **Minn.**—Gale *v.* Townsend, 45 Minn. 357, 47 N. W. 1064. **Mont.**—Vance *v.* McGinley, 39 Mont. 46, 101 Pac. 247. **Ohio.**—Jackson *v.* Akron Brick Assn., 53 Ohio St. 303, 41 N. E. 257, 53 Am. St. Rep. 637, 35 L. R. A. 287, holding that an association formed for an illegal purpose or one contrary to public policy, as for example, controlling the price of brick, cannot sue in its associate name.

"It is very true that at common law such unincorporated associations were not suable in their associated names, and that suit had to be brought against the members of such associations or organizations. The evident purpose of this statute was to change this rule, so as to make them suable in the courts of this state in their associated or club names, and to provide that service might be effected upon them by serving the process upon their officers. It therefore follows that the court erred." *Ex parte* Hill (Ala.), 51 So. 786.

8. Payne *v.* McClure Lodge (Ky.) 115 S. W. 764; Vance *v.* McGinley, 39 Mont. 46, 101 Pac. 247.

"This practice finds ample support in section 25, Civ. Code Prac., providing that: 'If the questions involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all.' As the relief sought against appellant was for the use and benefit of the lodge, and the judgment directed that he make a deed to it, we are unable to perceive in what particular appellant's rights were affected by the failure of the members in whose names the suit was brought to produce evidence of their authority." Payne *v.* McClure Lodge No. 539 (Ky.), 115 S. W. 764.

9. N. Y. Civ. Proc. §1919. See Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. Rep. 496, 37 L. R. A. 802; Schwarcz *v.* International Ladies' G. W. Union, 68 Misc. 528, 124 N. Y. Supp. 968; Weidenfeld *v.* Keppler, 84 App. Div. 235, 82 N. Y. Supp. 634; McCabe *v.* Goodfellow, 15 N. Y. Supp. 377, 39 N. Y. St. 941.

In Barzilay *v.* Loewenthal, 134 App. Div. 502, 119 N. Y. Supp. 612, which was an action by certain members on an agreement under seal between two unincorporated associations, the court held that they could not maintain the action, they not being named in the agreement.

such statutes is not exclusive and that suit may be brought according to the rules at common law, notwithstanding their provisions.[10]

In the absence of an enabling statute suit must be brought against the individual members of the association rather than against the association, as in the case of partnerships.[11] The rule forbidding suits by such association equally forbids suits by a member against the association.[12] Such a suit, however, is allowable under some of the statutes above referred to.[13]

B. Who Should Be Made Parties.—**1. Members.**—In the absence of legislation otherwise an action at law by a voluntary association must be brought in the names of its members, and not in the name of the company,[14] or it may be brought in the name of one or

10. **Conn.**—Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40. **Mich.**—Detroit Light Guard Band *v.* First Mich. Independent Infantry, 134 Mich. 598, 96 N. W. 934. **N. Y.**—Peckham *v.* Wentworth, 116 N. Y. Supp. 781. **Tex.**—Rhodes *v.* Maret, 45 Tex. Civ. App. 593, 101 S. W. 278.

11. **Conn.**—Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40. **Ind.**—Karges Furn. Co. *v.* Amalgamated Woodworkers' Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788; Farmers' Mutual *v.* Reser, 43 Ind. App. 634, 88 N. E. 349. **Minn.**—St. Paul Typothetae *v.* St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725, holding that the statute authorized suit against such association but not by it. **R. I.**—Guild *v.* Allen, 28 R. I. 430, 67 Atl. 855.

12. **Cal.**—Bullard v. Kinney, 10 Cal. 60. **Conn.**—Huth *v.* Humboldt, 61 Conn. 227, 23 Atl. 1084. **N. Y.**—McMahon *v.* Rauhr, 47 N. Y. 67. **Vt.**—Cheeny *v.* Clark, 3 Vt. 431, 23 Am. Dec. 219.

Member Cannot Sue Association.—"If without that statute a member of a voluntary association could not institute and maintain an action at law against the association, he cannot maintain one by reason of that statute. That the statute confers any right on a member, or imposes any liability on the association, such as can arise only out of the law of corporations, would seem to be excluded by its language. It speaks of an association 'not having corporate powers.' Apart from this statute the law is clear that a member of an unincorporated association cannot maintain an action at law against the association, nor can the association maintain such an action against one of its members." Huth *v.* Humboldt Stamm, 61 Conn. 227, 23 Atl. 1084.

13. Westcott *v.* Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Boston Baseball Assn. *v.* Brooklyn Baseball Club, 37 Misc. 521, 75 N. Y. Supp. 1076.

14. **U. S.**—Metal Stamping Co. *v.* Crandall, 17 Fed. Cas. No. 9,493c. **Fla.** Richardson *v.* Smith & Co., 21 Fla. 336. **Ill.**—O'Connell *v.* Lamb, 63 Ill. App. 652. **Ind.**—Mackenzie *v.* School Trustees, 72 Ind. 189. **Ia.**—Pipe *v.* Bateman, 1 Iowa 369. **Md.**—Mears *v.* Moulton, 30 Md. 142. **Minn.**—St. Paul Typothetae *v.* St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725. **N. Y.**—Habicht *v.* Pemberton, 4 Sandf. 657. **Ohio.**—Higdon *v.* Gardner, 2 Ohio C. C. 340. **Tex.**—Ackerman *v.* Schuetzen Verein (Tex. Civ. App.), 60 S. W. 366. **Utah.**—Pearson *v.* Anderburg, 28 Utah 495, 80 Pac. 307.

Use Name To Distinguish.—"In support of the demurrer in behalf of the Traders' Live Stock Exchange, the point is made that it is a mere voluntary association and therefore it has no legal entity, it can neither sue nor be sued. The association as such has no legal entity and therefore can neither sue nor be sued, but in the case at bar the defendants are the individuals and corporations that compose the Exchange and the name 'Traders' Live Stock Exchange' merely serves to distinguish those defendants in their associated capacity." State *ex rel.* Attorney General *v.* Stock Exchange, 211 Mo. 181, 190, 109 S. W. 675, 124 Am. St. Rep. 776.

more members for the use of all of the members of the association."[15]

2. **Officers.**—In the absence of statutory authorization a suit cannot be brought by or against an officer of a voluntary association in his official capacity.[16] And when it is allowable to sue officers as representing the association, it is necessary to show a joint liability.[17]

Bill Signed by Members.—"At the foot of the bill following the verification appears the following: 'We the undersigned, members of complainant association, hereto affix our seals and consent and request that action be brought in court by the filing of the foregoing bill of complaint.' This is signed by the members of the Chicago Typothetae, for whom and in whose right the bill was filed and the relief prayed. * * * We think, however, that the firms and corporations who signed the bill in the manner above indicated were parties to the bill and were bound and would be bound by the proceedings as effectually as if they signed the bill in the ordinary and more formal way. The bill was filed and the relief was asked for in their behalf, and it was based on their right. Although the form and manner of their signatures to the bill is unusual, it is in essence and substance their bill signed by them." Franklin Union No. 4 *v.* People, 121 Ill. App. 647, 653.

15. **Cal.**—Florence *v.* Helms, 136 Cal. 613, 69 Pac. 429. **Ia.**—Pipe *v.* Bateman, 1 Iowa 369. **Mass.**—Snow *v.* Wheeler, 113 Mass. 179; Birmingham *v.* Gallagher, 112 Mass. 190. **N. J.**—Van Houten *v.* Pine, 36 N. J. Eq. 133. **N. C.**—Marshall *v.* Lovelass, 1 N. C. 325. **Ore.**—Liggett *v.* Ladd, 17 Ore. 89, 21 Pac. 133. **Utah.**—Pearson *v.* Arderburg, 28 Utah 495, 80 Pac. 307.

Injunction Will Lie Against an Unincorporated Labor Union by Name.—"In view of these authorities, supplementing the rulings of our Supreme Court, I entertain no doubt that the injunction will lie against an unincorporated labor union by the name (which is but the 'collective name of all its members') when sued together with one or more of its members individually upon whom service may be had in their representative capacity, and that such injunction will be binding upon the body as an entity and against all its members, whether or not they be directly represented." Hillenbrand *v.* Trades Council, 14 Ohio N. P. Dec. 628, 651.

16. **Ala.**—Ewing *v.* Medlock, 5 Port. 82. **Cal.**—Gieske *v.* Anderson, 77 Cal. 247, 19 Pac. 421. **La.**—Soller *v.* Mouton, 3 La. Ann. 541. **Me.**—McGreary *v.* Chandler, 58 Me. 537. **Mo.** Miller Lumb. Co. *v.* Oliver, 65 Mo. App. 435.

Contra.—In McDonald *v.* Laughlin, 74 Me. 480, the court held that a note, the property of the society, made payable to "the order of the treasurer of the India Street Universalist Society," but not naming him, was suable in the name of the person who was treasurer at the date of the writ.

Trustees May Sue.—The trustees of a voluntary association may maintain an action in its behalf. Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159. So if a note is payable to the trustees, action can be brought in their names, and if their term has expired then their successors may maintain an action in the name of the original trustees at the request of the association, notwithstanding that the original trustees have given a release. Pierce *v.* Robie, 39 Me. 205, 63 Am. Dec. 614. See also Marsh *v.* Astoria Lodge, 27 Ill. 420.

17. Powell Co. *v.* Finn, 198 Ill. 567, 64 N. E. 1036.

"This action is controlled by the rule in McCabe *v.* Goodfellow, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204; that in order to succeed the plaintiff must show that all the members of the association are liable either jointly or severally to pay the debt, and that the individual liability for debts contracted by officers or committees depends upon the application of the principal of the law of agency; that authority to create such liability will not be presumed or implied from the existence of a general power to attend to or transact business or promote the objects for which the association is

C. PLEADING.—**1. Petition.**—The petition should set out clearly and certainly the character in which plaintiff sues, showing its capacity to bring the action, and the nature of its claim.[18]

2. Pleas.—Objections to petition for want of capacity to sue or non-joinder of parties must be made in the suit, and if not so made will be considered waived.[19]

formed, except when the debt contracted is necessary for its preservation.'' Siff *v.* Forbes, 135 App. Div. 39, 119 N. Y. Supp. 773.

Davis *v.* Young, 123 N. Y. Supp. 363, was an action upon certificates of indebtedness for strike benefits. The court said: ''To sustain his cause of action the plaintiff must show that the officers who made this contract were authorized to pledge the personal credit of its members for the payment of these certificates. The plaintiff must show the agency, for none is implied by the mere fact of the association. 'In this respect there is a plain distinction between associations formed for the purpose of pecuniary profit and those formed for other objects.' McCabe *v.* Goodfellow, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204.''

Must Show Authorization.—''He depended upon the individual representations of an officer of the association as to what was the purpose of the vacant lots when the land was plotted and delineated upon a plan. It does not appear that these representations were authorized by the association, and so were ineffectual.'' Brown *v.* Dickey, 106 Me. 97, 75 Atl. 382.

18. **Cal.**—Welsh *v.* Kirkpatrick, 30 Cal. 202, 89 Am. Dec. 85. **Ind.**—Pollock *v.* Dunning, 54 Ind. 115. **Kan.**—McLaughlin *v.* Wall, 81 Kan. 206, 105 Pac. 33. **Mass.**—Wilkinson *v.* Stitt, 175 Mass. 581, 56 N. E. 830. **Ohio.**—Higdon *v.* Gardner, 2 Ohio C. C. 340. **Tex.**—Ackerman *v.* Schuetzen Verein (Tex. Civ. App.), 60 S. W. 366. **Wis.** Chickering Lodge *v.* McDonald, 16 Wis. 112.

Complaint Sufficient.—''The title and body of the petition show that the action is brought by an association of individuals as an entity, the character of which is fully described, but in their own names, so that capacity to sue appears. The petition does not disclose a joint ownership or tenancy in common of the property with the defendants. It shows ownership by the association, of which the defendants are no longer members. The allegations respecting ownership by the associated plaintiffs are plain enough. Since the facts are stated it is not necessary to name the kind of ownership by calling it either general or special. If the so-called disjunctive allegation confused the matter, then the amendment ought to have been allowed. The petition shows that the defendants withdrew from the association but wrongfully keep its property, hence a formal allegation of demand is not essential. The allegations of value in the petition control in this proceeding. If, as the petition alleges, the defendants are not members of the order they have no standing to invoke its laws, but if they have there is nothing in the laws pleaded to prevent the civil courts from settling the title to this property.'' McLaughlin *v.* Wall, 81 Kan. 206, 105 Pac. 33.

Necessary Allegations.—''Such a suit is considered as being brought by all the members of the plaintiff class against all the members of the defendant class, each class being represented by the particular members named in the bill, as parties plaintiff and defendant; it is not a suit which must be brought by an officer or under authority given so to do. In such a suit, the proper allegations as to why all the members of each class are not joined must be made in the bill, and the court must be satisfied at the hearing that those bringing the suit in behalf of all the plaintiffs and those against whom the suit is brought, as representing all the defendants, fairly represent the members of the class in question.'' Wilkinson *v.* Stitt, 175 Mass. 581, 584, 56 N. E. 830.

19. **U. S.**—Deems *v.* Albany & Canal Line, 14 Blatchf. C. C. 474, 7 Fed Cas. No. 3,736. **Ill.**—Barnes & Co. *v.* Chicago Union, 232 Ill. 402, 83 N. E. 932, 122 Am. St. Rep. 128. **N. Y.**—Peck-

ham *v.* Wentworth, 116 N. Y. Supp. 781. **Ohio.**—Webster *v.* Taplin, 29 Ohio C. C. 543.

Not Raised by General Denial.—"The defendants simply interposed a general denial. I believe that the non-joinder of the parties defendant was not sufficiently raised by the plea interposed. Had it been properly raised, there would be no question that the defect would be a bar to this action. . . . Where there is a defect of parties, plaintiff or defendant, and the defendant does not demur or answer on this ground, he cannot for the first time raise the question on the trial; and not taking it as provided in the code, it is deemed waived." Peckham *v.* Wentworth, 116 N. Y. Supp. 781.

Objection Should Be Raised by Answer.—The suggestion that the remedies within the organization for the collection of these payments have not yet been exhausted, and that an action cannot be maintained until they have been, we think should be made by answer, and it is not necessarily raised by demurrer. The demurrer should have been overruled, and for error in sustaining it the judgment is reversed. Webster *v.* Taplin, 29 Ohio C. C. 543.

ASSUMPSIT

By HUGH E. WILLIS,
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I. UNDER COMMON LAW PROCEDURE. — A. DEFINITION. — Assumpsit is a common law action of contract for the recovery of damages for the breach of any legal obligations, except such as are under seal or of record, whether created by agreement or by pure implication of law.[1]

B. HISTORY AND SCOPE. — Assumpsit is the most modern of all of the contract actions and has practically supplanted all the others.[2]

1. Bouv. Law Dict. 184; 1 Chit. Pl. (16th Am. ed.), 111; 1 Words & Phrases 587-588; Willis Contracts, 3-5.

The action is founded upon contract, either express or implied. Boylan *v.* Hot Springs R. Co., 132 U. S. 146, 10 Sup. Ct. 50, 33 L. ed. 290; Lloyd *v.* Hough, 1 How. (U. S.) 153, 11 L. ed. 83; Wicks *v.* Wheeler, 139 Ill. App. 412.

Not on Record.—Assumpsit will not lie on an obligation of a higher nature than simple contract, e. g., a covenant or judgment, but will lie upon a new contract with a new consideration to satisfy an obligation evidenced by a muniment of a higher nature than mere simple contract. Miller *v.* Watson, 7 Cow. (N. Y.) 39. And see Hilton *v.* Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95; Tayloe *v.* Sandiford, 7 Wheat. (U. S.) 13, 5 L. ed. 384.

In Dunn *v.* Auburn Electric Motor Co., 92 Me. 165, 42 Atl. 389, in the language of the court, "the plaintiff declared in assumpsit, alleging that the defendant agreed to manufacture and deliver to the plaintiff at his brickyard in Auburn, properly set up and connected and in running order, one ten horse-electric motor, which motor the defendant warranted should be all right and satisfactory to the plaintiff; and also alleging a breach of this agreement. In support of this declaration, the plaintiff, against the objection of the defendant, was permitted to introduce in evidence the contract of the defendant in writing and under its seal, by which the defendant covenanted to do the things which are set forth in the declaration. We think the admission of this document was erroneous. It has been decided many times that when one covenants or agrees under seal with another to pay a sum or to do an act, the other cannot maintain assumpsit upon the agreement. The action must be debt or covenant broken. But when there is in the sealed instrument no covenant or agreement to pay or perform to the obligee, or to some other person for his use, the instrument may be used as evidence in an action of assumpsit. Varney *v.* Bradford, 86 Maine, 510; Baldwin *v.* Emery, 89 Maine, 496, and cases cited. See also Carrier *v.* Dilworth, 59 Pa. St. 406, cited by plaintiff. In the instrument in question, the defendant agreeed under seal to do a certain act, namely to manufacture and deliver to the plaintiff an electric motor, properly set up and connected and in running order, and which it was warranted should be 'all right,' and it is for a breach of this agreement that the plaintiff seeks to recover here. Clearly it falls within the rule of covenants to do or perform acts. Assumpsit will not lie upon such a sealed instrument, nor can it be used as evidence to support an action of assumpsit."

In Pennsylvania, however, this remedy "is employed not only in cases where, at the common law, it would have been appropriate, but also in cases in which the action would formerly have been in debt or covenant." Stewart *v.* Barnes, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. ed. 781.

In Virginia it has superseded covenant (Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4); and in Maine it may be maintained on a sealed lease (Rumford Falls Boom Co. *v.* Rumford Falls Paper Co., 96 Me. 96, 51 Atl. 810).

2. For the origin and nature of the action of assumpsit, see *infra*, "Special Assumpsit" and "General Assumpsit," as each of these actions has had separate history.

The remedy has always existed in Virginia. Lloyd v. Hough, 1 How. (U. S.) 153, 11 L. ed. 83.

Like all the contract actions it is a form of action for the redress of the violations of those acquired legal rights which exist because of special relations into which parties have entered.[3] It will not afford redress for the violations of those legal rights which every person possesses because he is a member of civilized society, and which are called natural legal rights.[4]

To understand completely the nature and precise scope of the action of assumpsit, as distinguished from other similar actions, and when it is allowable or desirable from among several remedies to choose the action of assumpsit, requires a knowledge and appreciation of the elemental ideas and distinguishing features of the various causes of action and the peculiarities or characteristic features of the action of assumpsit. The practical operation of the practitioner at this point is the selection, or election, of a remedy.[5]

In order to grasp the rationale of these various actions and their application, not only to situations clearly *ex delicto* and clearly *ex contractu*, but where the facts seem to mingle in such a way as to permit a theory of tort and a theory of contract, it is absolutely essential to grasp the elemental features which warrant or compel the classification which has been given by the courts to the *causes of action*. The practical lawyer does not need to be reminded that these *causes of action* are not changed or affected by legislative reforms.[6]

The crude category of remedies devised in the comparatively barbarous periods of English law afforded no remedy for, or recognition of, a case, where, although no wrongful *act* is done, there exists what is now regarded as a culpable injurious omission. Nor did they recognize as injurious in the cognizance of the law (*i. e.*, actionable), *consequential* harm or damage resulting collaterally where the element of direct force (trespass) was not present; or where the idea of force was inapplicable because the subject-matter was not corporeal, even though the act was followed by immediate but consequential harm. As civilization progressed society began to recognize the reality of consequential injury from affirmative acts and the reality of a direct injury from negligent action or non-action, and the necessity of some remedy for such wrongs. The judges, however, had no power to extend their jurisdiction beyond what they considered the legiti-

This action is more accurately named trespass on the case upon promises. Carrol *v.* Green, 92 U. S. 509, 23 L. ed. 738.

Lord Coke's account as given in Slade's Case, 10 Co. Rep. 130, is said by Lord Loughborough to be incorrect. Rudder *v.* Price, 1 H. Bl. (Eng.) 550.

3. Besides assumpsit the other common law actions of contract are debt, detinue and covenant. See those articles.

4. The proper actions for the redress of violations of natural rights,—such as life, liberty, reputation, family and property,—are the tort actions of trespass, trover, replevin, case and ejectment.

5. See the title "**Choice and Election of Remedies.**"

6. See Byxbie *v.* Wood, 24 N. Y. 607.

mate scope of the original writs framed to meet the cases in which the law afforded remedies.

Among the old actions upon contract were the actions of *covenant* upon what were, of course, always express contracts under seal, and the action of debt, which was in the old time, with detinue, the only remedy on executory contracts not under seal. These were wholly inapplicable to a vast number of cases of actual contracts and to transactions where clearly the parties meant to have their acts followed by payment or restoration. Moreover, these actions were clogged by the defect that under the old system the defendant by waging his law practically defeated the application of a truly judicial remedy.

It was under these circumstances that the celebrated statute, 13 Edw. I, c. 24, commonly known as the Statute of Westminster the second, was passed, under which, by the combined action and "consent of men learned in the law," the clerks of chancery and the courts, the elastic and beneficent action on the case and the modern offshoot of the same, namely, the action of assumpsit, were invented.[7]

As to the action of trespass on the case, only a word is here permissible, that is, only sufficient to distinguish it in its present aspect, or in the features in which it impinges upon the law of contract, through the medium of actions involving contracts but sounding in tort, from the action of assumpsit (*ex contractu*).

In cases of simple contract, where the defendant had undertaken to do something for the plaintiff and by some wrongful affirmative act, *i. e.*, malfeasance, had failed or defeated the purpose of the contract (as for example, where the defendant had undertaken to carry the plaintiff's horse across the river but had overloaded his boat with other horses, causing the plaintiff's horse to perish), an action was allowed on the theory of tort.[8]

7. 1 Spence, 240.

8. Spence's Eq. Jur. 241. Thus, as Mr. Reeves observes, the notion of a trespass or malfeasance was the principle upon which the application of this new remedy was explained and justified even in this instance, which seems to approach nearer to the nature of a contract.

It was a principle of the Roman law that by natural law no one ought to enrich himself to the damage or from the property of another. Lindley's Thibaut, pp. 8, 23. See Byxbie *v.* Wood, 24 N. Y. 607.

Where an action was provided for by express law, it was called *actio directa;* where it was allowed by the courts from the justice of the case, it was called *action utilis;* but neither extended beyong cases where the agency of injury or the object damaged was corporeal. In time, therefore, as society became more refined, out of the justice of the case there grew up an action to remedy other wrongs, called *action in factum,* so named because the formula (i. e., the form of action) alleged all the facts. Poste's Gaius, p. 472; Lindley's Thibaut, 66, 67.

This is precisely the reason for naming the remedy action on the case Cooley's Bl. (4th ed.) 122; Slade's Case, 4 Co. 92b, 76 Eng. Reprint 1074. And see the title "Case."

The analogy between this latter action and the action on the case is too obvious to admit of doubt as to its appreciation by the English legislators, judges and lawyers. No pure fiction

Another form of injury under circumstances of contract was *misfeasance, i. e.*, doing improperly what one was bound to do. In this manner the action of trespass on the case in form *ex delicto* was extended into the domain of simple executory contracts, and in this aspect it extends only to contracts which in some part must be express.[9]

Assumpsit Proper—The extension of the remedy so as to allow an action for the mere non-performance of promises was not so easily worked out in theory and naturally lagged in point of time. The first case of this kind is in 2 Henry IV. It was an action against a carpenter, who was alleged to have agreed (*quare cum.*, etc., *assumpsisset, etc.*) to build a house within a given time, *which he had not done* (mere failure to act). This and several like cases subsequently brought were dismissed on the ground that such an action was not sustainable, thus leaving without remedy simple contracts not under seal. Afterwards, in the reign of Henry VII., it was held that an action on the case would lie as well for *nonfeasance* as for *malfeasance*, and this, as Spence says, is the origin of the modern action of assumpsit.[10] For some time the formula of statement retained the tort feature, but ultimately this was dropped and the action took on the form of mere contract and is now classed as an *ex contractu* action.[11]

Express Contract, Implied Contract, Quasi-Contract.—Nothing need be said as to express contracts, but the distinction between actions on implied contracts, properly so-called, and actions *quasi ex contractu* is not without practical value. There are many acts and transactions between men where the natural, *i. e.*, logical inference from the *acts* of the parties is that one party intends to compensate the other, although no agreement to that effect is made;[12] also many cases of voluntary enrichment of one at the expense of another under circumstances clearly implying, by the logical process of reasoning, the intention to compensate. There are also many other situations where the parties receiving, although shown by the most clear and uncontrovertible evidence not to intend to make payment, are held in the law obliged to pay.[13] Thus, Spence says, "This action (as-

is resorted to in *implied* contracts proper. The resort to fiction in *quasi* contracts is in perfect imitation of the practice of the Roman jurists, is within the scope of the Statute of Westminster (See 1 Spence Eq. Jur. 240, et seq.), and is followed to this day. See Byxbie *v.* Wood, 24 N. Y. 607.

9. See the titles "**Choice and Election of Remedies;**" "**Case.**"

10. 1 Spence's Eq. Jur. 242, 243. See Slade's Case, 4 Co. 92b, 76 Eng. Reprint 1074; Rudder *v.* Price, 1 H. Bl. (Eng.) 550.

11. See Miller *v.* Ambrose 35 App. Cas. (D. C.) 75.

12. Where beneficial service is performed.

13. The case of Byxbie *v.* Wood, 24 N. Y. 607, illustrates many phases of this salutary resort to fiction. In substance it is this: Wood, in the sale of a vessel to Marvin, by fraud and false statements obtained a largely excessive price, and in the same transaction otherwise defrauded him out of large sums of money. Byxbie, as assignee, sued Wood. The complaint alleged that Wood made false and

sumpsit) has been extended, conscience encroaching on the common law in almost every case where an obligation arises from natural reasoning and the just construction of law, *i. e., quasi ex contractu.*"[14] This action comprehends besides express contracts all implied and all presumptive undertakings, or assumpsits, which, though never perhaps actually made, yet constantly arise from this general intendment of courts of judicature, that every man is engaged to perform what his duty and justice require.[15]

Assumpsit therefore is an equitable action based upon a cause of action founded on either an express simple contract or a contract *implied* from the facts of some transaction or *presumed* by the courts by a resort to fiction from the justice of the situation.

These contracts are classified by the schoolmen, with more or less recognition in the courts, as express, implied and quasi-contracts, although the line of demarcation between the last two has never been very clearly marked out by the courts.[16]

C. Classification.—**1. General Statement.**—There are two forms of the action of assumpsit, special assumpsit and general assumpsit.[17]

When may the pleader adopt the form general assumpsit, and when may his declaration be special assumpsit? This is answered, of course, by marking the distinction between general and special assumpsit.

Stating this in the broadest terms, one may say that special assumpsit is always founded upon an actual contract and general assump-

fraudulent representations and by means of such false representations fraudulently and deceitfully obtained the property, etc., demanding judgment for the money. Gould, J., writes as follows: "The defendant himself received from Marvin large sums of money to which he was not entitled; and they have found that the plaintiffs are entitled to recover, not for any fraud, but for the money which the defendant had so received, and which, being so received, he had no right to retain. This state of facts does not necessarily require an action to be brought for the tort, even if it allows one to be so brought. Such facts always raise, in law, the implied promise, which was the contract-cause of action in *indebitatus assumpsit*, for money had and received. Having money that rightfully belongs to another, creates a debt; and wherever a debt exists without any express promise to pay, the law implies a promise; and the action always sounds in contract. Under the Code this implied promise is treated as a fiction, and the facts (out of which the prior law raised the promise) are to be stated without any designation of a form of action; and the law gives such judgment as, being asked for, is appropriate to the facts." . . . (The plaintiffs demanded judgment for the money, $6,559.62.) "What valid objection is there to treating these words ('fraudulently and by deceit') as mere inducement, containing a statement of the facts which show that Marvin's payment was not a voluntary one with knowledge of the facts?"

14. Hawkes *v.* Saunders, Cowp. 289, 294, 98 Eng. Reprint 1091.

Promises in law only exist when there is *no express* stipulation between the parties, per Buller, J., in Toussaint *v.* Martinnant, 2 T. R. 100, 105, 100 Eng. Reprint 55.

15. See Spence Eq. Jur. 249.

16. See Andrews' Am. Law (2d ed.) 694, 695.

17. Andrews' Steph. Pl. 86.

sit is never founded upon an actual contract. In other words, general assumpsit always involves implication, presumption or resort to fiction. When the object of the action is merely to recover money which has become due in respect to a past completed or executed consideration, arising at the express or implied request of the defendant, then the common counts will suffice. In such actions the object is always to recover that which belongs to, or has become due to, the plaintiff.

By special assumpsit, in contradistinction to general assumpsit, is meant declaring specially, that is to say, by setting out all facts showing the intention of the parties, the nature of the transaction, the real consideration, the real promise, the performance by the plaintiff of conditions, the defendant's non-performance, and the damages sustained by the plaintiff. The complaint or declaration in special assumpsit is always upon the theory that it sets forth actual facts, whereas in general assumpsit the promise is in all cases implied or presumed, and is alleged as a sequence from the facts alleged as inducement.

2. **Special Assumpsit.**—a. *Definition.*—Special assumpsit, then, is an action for the recovery of damages for the breach of those legal obligations which are created by express agreement, either written or oral, direct or circumstantial.[18]

b. *History.* — Special assumpsit is an action on the case in the nature of deceit. The root of liability in special assumpsit, as in deceit, is detriment or damage. At first special assumpsit was regarded as a tort action, but it is now classed as a contract action. The action grew up out of the authority given by Parliament in 1285 to the clerks in chancery to issue writs in *consimili casu* with the existing writ, when no writ was found for a case similar in its facts to one for which a writ already existed. When the action became known as a contract action the detriment to the promisee became the consideration for the contract, which was then unilateral. Later special assumpsit was extended to the bilateral contract, when the promise to sustain a detriment became the consideration.[19]

18. Will's Gould Pl. 48, Andrews' Steph. Pl. 86.

19. Young *v.* Taylor, 36 Mich. 25; Willis Contracts, 42; 2 Har. Law Rev. 1; Holmes Com. Law, 247-288.

The tortious character of the action of special assumpsit is shown by the fact that in the earliest actions where a breach of promise is alleged such statement is for the purpose of excusing suing in an old action and the breach of promise is merely incidental, the gist of the action being the negligent injury to property. Street, Foundations of Legal Liability, 173.

Case not assumpsit is the proper action for breach of contract if accompanied by fraud, or breach of duty growing out of contract. Alabama G. S. R. Co. *v.* Norris (Ala.), 52 So. 891; Morgan *v.* Patrick & Smith, 7 Ala. 185; Bates *v.* Bates Mach. Co., 230 Ill. 619, 82 N. E. 911.

A declaration in assumpsit may not be amended to one in case for deceit. Flanders *v.* Cobb, 88 Me. 488, 34 Atl. 277, 51 Am. St. Rep. 410.

In special assumpsit the writ need not be in trespass on the case; it is sufficient if in case. Special as-

sumpsit is an action on the case. **Ala.** Stovall *v.* Nabors, 1 Ala. 218. **Ill.** Carter *v.* White, 32 Ill. 509. **Miss.**—Smith *v.* Warren, 2 How. 895. **Ore.** Baldro *v.* Tolmie, 1 Ore. 176.

Case and assumpsit are often concurrent remedies. See Mulford *v.* Bangor, R. & E. Co., 104 Me 233, 71 Atl. 759.

Waiver of Tort.—As to the right to waive the tort and sue in assumpsit, see the titles "**Case,**" and "**Choice and Election of Remedies.**"

Case and Assumpsit Compared.—**Ala.**—Wilkinson *v.* Moseley, 18 Ala. 288; Mardi's Admrs. *v.* Shackleford, 4 Ala. 493. **Ark.**—Ferrier *v.* Wood, 9 Ark. 85. **Me.**—Hathorn *v.* Calef, 53 Me. 471. **S. C.**—Sinclair's Exrs. *v.* Bank, 2 Strobh. 344. **Vt.**—Lawson *v.* Crane, 74 Atl. 641.

A declaration in assumpsit for fraudulent representations is authorized by the statutes of Michigan. 3 Comp. Laws, §10421; Hokanson *v.* Oatman (Mich.), 131 N. W. 111; Hallett *v.* Gordon, 128 Mich. 364, 87 N. W. 261.

"The ancient remedy for a false warranty was an action on the case sounding in tort. Stuart *v.* Wilkins, 1 Doug. 18; Williamson *v.* Allison, 2 East 447. The remedy by *assumpsit* is comparatively of modern introduction. In Williamson *v.* Allison, Lord Ellenborough said it had 'not prevailed generally above forty years.' In Stuart *v.* Wilkins, Lord Mansfield regarded it as a novelty, and hesitated to give it the sanction of his authority. It is now well settled, both in English and American jurisprudence, that either mode of procedure may be adopted. Whether the declaration be in *assumpsit* or tort, it need not aver a *scienter*. And if the averment be made it need not be proved. Williamson *v.* Allison, 2 East, 466; Gresham *v.* Postan, 2 Car. & P. 540; Brown *v.* Edgington, 2 Man. & G. 279; Holman *v.* Dord, 12 Barb. 336; House *v.* Fort, 4 Blackf. 293; Trice *v.* Cochran, 8 Grat. 449; Lassiter *v.* Ward, 11 Ired. 443. One of the considerations which led to the practice of declaring in *assumpsit* was that the money counts might be added to the special counts upon the warranty. Williamson *v.* Allison, 2 East, 441. If the declaration be in tort, counts for deceit may be added to the special counts, and a recovery may be had for the false warranty or for the deceit, according to the proof. Either will sustain the action. Vail *v.* Strong, 10 Vt. 457; Brown *v.* Edgington, 2 Man. & G. 279." Schuchardt *v.* Allen, 1 Wall. (U. S.) 359, 371, 17 L. ed. 642, 645, *per* Swayne, J. See also Coopwood *v.* McCandless (Miss.), 54 So. 1007; and the title "**Warranty.**"

"The plaintiff declares, in substance, that he bargained with the defendant for the purchase of a diamond, and that the defendant sold him the diamond for a certain price by 'falsely and fraudulently warranting' it to be a perfect stone, when, in fact, it was not a perfect stone, but defective in certain respects stated, and that the defendant thereby 'falsely and fraudulently deceived him.' The service was by arrest, and the case stands on a motion to dismiss. The defendant argues that no scienter is alleged; that the declaration is in case for a breach of warranty; that there could be no recovery without proving the warranty; and that this conclusively determines that the action is founded on contract. No point is made distinguishing between the counts. In 2 Chitty's Pleading, 279, there is a form for declaring in assumpsit on a warranty, and at page 679 there is one for declaring in tort on a warranty. The latter form is the one used here. The two forms were joined in one declaration in Dean *v.* Cass, 73 Vt. 314, 50 Atl. 1085, and the second was held to be in tort and improperly joined with the first. So the declaration before us may be classed, without special examination, as in form a declaration in tort. In pursuing the inquiry further it will be well to have in mind the nature of a warranty, and the history and characteristics of the remedies permitted for a breach of it. The ordinary warranty relates to the condition of the property at the time of the sale. Such a warranty, if broken at all, is broken when made. The breach consists in the fact that the property is not as it is stated to be. The warranty may be made merely as an assumption of a contract obligation, or it may be deceitfully made with a knowledge of its falsity. In either case it is made to induce the purchase. Personal actions are either for breaches of contract or for wrongs

c. *Scope.* — (I.) When Action Will Not Lie. — (A.) Judgments. — Special assumpsit will not lie on a judgment, or debt of record,[20] whether of the same or a sister state,[21] or a judgment rendered by a justice of the peace of the same state.[22] Debt is the proper remedy.

(B.) Specialties. — Special assumpsit will not lie for breach of a contract under seal,[23] nor on an award rendered pursuant to a submission under seal,[24] nor on an oral modification of a contract under

unconnected with contract; assumpsit being in the first class, and case in the second. Chitty, 97. The original action on the case, permitted in suits for which the established forms were not adapted, was not similar to the present action of assumpsit, but resembled rather the present form of a declaration in case for a tort. Chitty, 99. It was at first difficult to distinguish assumpsit from case; and the early decisions in actions on warranties were made before the boundary between the two remedies was well defined. Note to Chandelor *v.* Lopus, 1 Smith Lead. Cas. 178. The practice of declaring in tort for warranty broken originated in this early period; and the remedy then adopted continued in almost exclusive use until the middle of the eighteenth century. . . . The difference between assumpsit and case as remedies for wrongs of this character was comparatively of little importance when our earliest cases upon the subject were decided. The subsequent abolishment of imprisonment for debt has introduced an element which cannot be ignored in reviewing the subject at this date. It is not necessary to consider further the construction, technicalities, and classification of the different forms employed, nor to anticipate the question of practice that may arise in connection with their use. It is enough to say that if a plaintiff wishes to proceed by arrest, he must allege a case that entitles him to arrest. That right cannot be given by mere form or classification. The test must be the nature of the action as determined by its substance. It is said in Beeman *v.* Buck, 3 Vt. 53, 21 Am. Dec. 571, that assumpsit is supported by proof of the sale, a warranty, and the breach of it, and that nothing more is required in tort. If the declaration in tort requires the same and only the same proof as the one in assumpsit, it is manifestly a declaration in tort only in name. The declaration before us is so framed that nothing more is required. It discloses a warranty false in fact, but not false to the knowledge of the warrantor. If the plaintiff recovers upon this declaration, it will be solely by force of the contract." Caldbeck *v.* Simanton, 82 Vt. 69, 71 Atl. 881.

20. Wass *v.* Bucknam, 40 Me. 289; Andrews *v.* Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213.

21. **Ark.**—Morehead *v.* Grisham, 13 Ark. 431. **Ky.**—Garland *v.* Tucker, 1 Bibb 361. **Me.**—McKim *v.* Odom, 12 Me. 94.

22. James *v.* Henry, 16 Johns. (N. Y.) 233, 8 Am. Dec. 313; Bain *v.* Hunt, 10 N. C. 572.

23. **U. S.**—Marine Ins. Co. *v.* Young, 1 Cranch 332, 2 L. ed. 126. **Ala.**—Reed *v.* Scott, 30 Ala. 640; Sommerville *v.* Stephenson & Johnson, 3 Stew. 271. **Cal.**—Baker *v.* Cornwall, 4 Cal. 15. **Ill.**—Deverill *v.* Salisbury, 61 Ill. 316. **Ind.**—Fletcher *v.* Piatt, 7 Blackf. 522. **Ky.**—Rankin *v.* Darnell, 11 B. Mon. 30, 52 Am. Dec. 557. **Me.**—Dunn *v.* Auburn El. Motor Co., 92 Me. 165, 42 Atl. 389; Pope *v.* Machias, etc., Co., 52 Me. 535. **Mass.**—Richards *v.* Killam, 10 Mass. 239. **Miss.**—Pierce *v.* Lacy, 23 Miss. 193. **Mo.**—Brown *v.* Gauss, 10 Mo. 265. **Pa.**—Quigley *v.* DeHaas, 98 Pa. 292. **R. I.**—Conroy *v.* Equitable Ac. Co., 27 R. I. 467, 63 Atl. 356; Crandall *v.* Johnson, 26 R. I. 250, 58 Atl. 765. **Vt.**—McKay *v.* Darling, 65 Vt. 639, 27 Atl. 324.

24. Knight *v.* Trim, 89 Me. 469, 36 Atl. 912; Admrs. of Tullis *v.* Sewell, 3 Ohio 510; Tait *v.* Atkinson, 3 U. C. Q. B. 152.

seal when the modification is according to the provisions thereof,[25] or when the modification is without consideration.[26] Covenant, or debt, is the proper remedy.

But special assumpsit will lie for breach of a contract where the seal is inoperative,[27] or on a parol authority which is executed by an instrument under seal,[28] or on an instrument acknowledged before a foreign notary,[29] or on an oral modification of the specialty, or on a substituted contract,[30] or against a lessee accepting a lease under seal,[31] or against a vendee of a contract to sell land when the statute does not require the vendee's signature,[32] or, on a contract where the seal is affixed by an agent without authority,[33] or when statutes have modified the common law by permitting the action of assumpsit to be brought where assumpsit, debt or covenant would lie at the common law.[34]

(C.) No Privity. — The general common law rule is that a third person who is not a party to a contract cannot sue in special assumpsit for breach of the same.[35] Some courts are strict in the application of this rule.[36] Most courts permit the third person to sue either if the promise is for his benefit and the promisee is at the time indebted to the third person,[37] or if assets are placed in the possession of the

25. Hamilton *v.* Hart, 109 Pa. 629.

26. Miller *v.* Watson, 7 Cow. (N. Y.) 39; Harley *v.* Parry, 18 Pa. 44.

What Is a Seal.—Williams Use, etc., *v.* Young, 3 Ala. 145.

Objection Waived.—Harris *v.* Morse, 49 Me. 432, 77 Am. Dec. 269.

27. **U. S.**—LeRoy *v.* Beard, 8 How. 451, 12 L. ed. 1151. **N. M.**—Excelsior Mfg. Co. *v.* Wheelock, 6 N. M. 410, 28 Pac. 772. **N. C.**—Kent *v.* Edmonston, 49 N. C. 529. **R. I.**—Providence Tel. Pub. Co. *v.* Crahan En. Co., 24 R. I. 175, 52 Atl. 804.

28. Jones *v.* Horner, 60 Pa. 214.

29. Hitchcock *v.* Cloutier, 7 Vt. 22.

30. **Ala.**—McVoy *v.* Wheeler, 6 Port. 201. **Me.**—Baldwin *v.* Emery, 89 Me. 496, 36 Atl. 994. **Md.**—Mutual Fire Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673. **Mass.**—The Proprietors *v.* Hovey, 21 Pick. 417. **Pa.**—Carrier *v.* Dilworth, 59 Pa. 406. **Va.** Baird *v.* Blaigrove, 1 Wash. 170.

31. Compton *v.* Jones, 4 Cow. (N. Y.) 13; First Cong. M. H. Soc. *v.* Rochester, 66 Vt. 501, 29 Atl. 810.

32. Swisshelm *v.* The Swissvale Laund. Co., 95 Pa. 367.

33. Bank of Metropolis *v.* Guttschlick, 14 Pet. (U. S.) 19, 10 L. ed. 335; Horner *v.* Beasley, 105 Md. 193, 65 Atl. 820.

34. **Ill.**—City of Shawneetown *v.* Baker, 85 Ill. 563; Protection Life Ins. Co. v. Palmer, 81 Ill. 88; Willenborg *v.* Illinois Cent. R. Co., 11 Ill. App. 298. **Mich.**—Christy *v.* Farlin, 49 Mich. 319, 13 N. W. 607. **Pa.**—Corry *v.* Pennsylvania R. Co., 194 Pa. 516, 45 Atl. 341. **W. Va.**—State *v.* Harmon, 15 W. Va. 115.

35. **U. S.**—National Bank *v.* Grand Lodge, 98 U. S. 123, 25 L. ed. 75, where Mr. Justice Strong pointed out that "the decisions are not all reconcilable." **Ala.**—Blackshear *v.* Burke, 74 Ala. 239. **Ark.**—Cummins *v.* James, 4 Ark. 616. **Ind.**—Farlow *v.* Kemp, 7 Blackf. 544. **Mich.**—Randall *v.* Higbee, 37 Mich. 40; Pipp *v.* Reynolds, 20 Mich. 88. **N. Y.**—Simson *v.* Brown, 68 N. Y. 355; Garnsey *v.* Rogers, 47 N. Y. 233, 7 Am. Rep. 440. **Vt.**—Miller *v.* Wilbur, 76 Vt. 73, 56 Atl. 280; Warden *v.* Burnham, 8 Vt. 390. **Va.**—Ross *v.* Milne, 12 Leigh 204.

36. Morrill *v.* Lane, 136 Mass. 93; Prive *v.* Easton, 4 Barn. & Ad. 433, 24 E. C. L. 96, 110 Eng. Reprint 518; Tweddle *v.* Atkinson, 1 B. & S. 393, 101 E. C. L. 393, *discrediting* Dutton *v.* Poole, 2 Lev. 210, 83 Eng. Reprint 523.

37. **U. S.**—Hendrick *v.* Lindsay, 93 U. S. 143, 23 L. ed. 855. **Ala.**—Huck-

promisor by the promisee for the benefit of the third person;[38] and a few courts permit the third person also to sue if the contract is merely made for his sole benefit and not primarily for the benefit of the original debtor.[39]

abee *v.* May, 14 Ala. 263. **Cal.**—Morgan *v.* The Overman S. M. Co., 37 Cal. 534. **Colo.**—Green *v.* Morrison, 5 Colo. 18; Lehow *v.* Simonton, 3 Colo. 346. **Conn.**—Steene *v.* Aylesworth, 18 Conn. 244; Treat *v.* Stanton, 14 Conn. 445. **Ill.**—Snell *v.* Ives, 85 Ill. 279; Beasley *v.* Webster, 64 Ill. 458; Eddy *v.* Roberts, 17 Ill. 505. **Ind.**—Davis *v.* Galloway, 30 Ind. 112, 95 Am. Dec. 671. **Ia.**—Johnson *v.* Knapp, 36 Iowa 616, code. **Kan.**—Anthony *v.* Herman, 14 Kan. 494, code. **Me.**—Bohanan *v.* Pope, 42 Me. 93. **Mass.**—Arnold *v.* Lyman, 17 Mass. 400, 9 Am. Dec. 154; Sullivan *v.* Holker, 15 Mass. 374; Brewer *v.* Dwyer, 7 Cush. 337. **Minn.**—Kramer *v.* Gardner, 104 Minn. 370, 116 N. W. 925; Jefferson *v.* Asch, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618, 25 L. R. A. 257; Stariha *v.* Greenwood, 28 Minn. 521, 11 N. W. 76 (code). **Mo.**—Fitzgerald *v.* Barker, 70 Mo. 685; Rogers *v.* Gosnell, 58 Mo. 589. **N. J.**—Joslin v. N. J. Car. Spr. Co., 36 N. J. L. 141. **N. Y.**—Lawrence *v.* Fox, 20 N. Y. 268; Blunt *v.* Boyd, 3 Barb. 209. **Ohio.**—Thompson *v.* Thompson, 4 Ohio St. 333. **Pa.**—DeHaven *v.* Bartholomew, 57 Pa. 126. **R. I.**—Urquhart *v.* Brayton, 12 R. I. 169. **Wis.**—Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67; Bassett *v.* Hughes, 43 Wis. 319; Putney *v.* Farnham, 27 Wis. 187, 9 Am. Rep. 459.

"The general principle, that if one person contracts for the benefit of a third person, such third person may maintain an action on the agreement, has been applied since early in the seventeenth century in a large number of cases, the facts in each differing to some extent. The leading case in England is Dutton *v.* Poole (1 Ventris, 318, 332), decided in the reign of Charles II. The plaintiff declared in assumpsit that his wife's father being seized of certain lands now descended to the defendant and being about to cut a thousand pounds' worth of timber to raise a portion for his daughter, the defendant promised to the father in consideration that he would forbear to fell the timber, that he would pay the daughter one thousand pounds. After verdict for the plaintiff on non-assumpsit, it was moved in arrest of judgment that the father ought to have brought the action and not the husband and wife. The court said: 'It might have been another case if the money had been to have been paid to a stranger; but there is such a nearness of relation between the father and the child, 'tis a kind of debt to the child to be provided for, that the plaintiff is plainly concerned.' The judgment was affirmed in the Exchequer (2 Lev. 212; Raym. 302). Some criticism having been expressed as to the soundness of this decision. Lord Mansfield said of it a hundred years later, that it would be difficult to conceive how a doubt could have been entertained about the case. (Martyn *v.* Hind, Cowp. 443; Doug. 142.) The case has been repeatedly followed in this state. The principle established by this case has been applied to contracts entered into by a father for the benefit of his daughter and by a husband for the benefit of his wife. As to the latter instance, see Buchanan *v.* Tilden (158 N. Y. 109). In the case before us we have a municipality entering into a contract for the benefit of its inhabitants, the object being to supply them with pure and wholesome water at reasonable rates. While there is not presented a domestic relation like that of father and child or husband and wife, yet it cannot be said that this contract was made for the benefit of a stranger." Pond *v.* New Rochelle Water Co., 183 N. Y. 330, 337, 76 N. E. 211.

38. **Ky.**—Allen *v.* Thomas, 3 Metc. 198, 77 Am. Dec. 169. **N. H.**—Wiggin *v.* Wiggin, 43 N. H. 561, 80 Am. Dec. 192. **N. Y.**—Weston *v.* Barker, 12 Johns. 276, 7 Am. Dec. 319. **Vt.**—Crampton *v.* Ballard's Admr., 10 Vt. 251.

39. Second Nat. Bank *v.* Grand Lodge, 98 U. S. 123, 25 L. ed. 75; Hendrick *v.* Lindsay, 93 U. S. 143, 23 L. ed. 855; Austin *v.* Seligman, 21 Blatchf.

(D.) Inferred Contracts.—General assumpsit and not special assumpsit is the proper action for breach of an inferred contract, *i. e.*, a contract implied of fact.[40]

(II.) When Action Will Lie.—(A.) Breach of Contracts.—Special assumpsit will lie for the breach of all express contracts or contracts all of whose terms are assented to in speech or writing, whether the same are proved by direct or circumstantial evidence.[41]

(B.) Breach of Certain Quasi-Contracts.—Special assumpsit will not ordinarily lie for breach of obligations created by law, but where the obligations partake of the nature of assumpsit rather than debt, that is, are other than to pay money, special assumpsit will lie. Obligations of this nature are found in certain statutory and customary obligations.[42]

d. *Pleading.*—**(I.) The Declaration.**—(A.) Joinder of Parties.—Joint promisees must sue jointly or it is ground for non-suit or plea in abatement, and joint promisors are necessary parties and must be sued jointly.[43] In an action against joint promisors judgment must

(U. S.) 506, 18 Fed. 519; Williston's Wald's Pollock Contracts, 242-244.

40. 2 Street, Foundations of Legal Liability, 202. But see McKelvey Com. Law Pl. 23.

41. Dermott *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762.

As to when *indebitatus assumpsit* will also lie, see *infra*, I, C, 2, c, (I), (A); also (II), (A).

42. **U. S.**—Carrol *v.* Green, 92 U. S. 509, 23 L. ed. 738. **Ky.**—Elliott *v.* Gibson, 10 B. Mon. 438; Ellis *v.* Henry's Admr., 5 J. J. Marsh. 247. **Me.**—School Dist. No. 2 *v.* Tebbetts, 67 Me. 239; Farwell *v.* City of Rockland, 62 Me. 296; Sanford v. Haskell, 50 Me. 86; Stimpson *v.* Sprague, 6 Me. 470; Stimpson *v.* Gilchrist, 1 Me. 202. **Md.** Appeal Tax Court *v.* Paterson, 50 Md. 354; Dashriel *v.* Mayor of Baltimore, 45 Md. 615. **Mass.**—Central Br. Corp. *v.* Abbott, 4 Cush. 473; Dickinson *v.* Winchester, 4 Cush. 114, 50 Am. Dec. 760; Parker *v.* Dennie, 6 Pick. 227. **N. H.**—Hillsborough County *v.* Londonderry, 43 N. H. 451. **N. Y.**—Arnold *v.* Suffolk Bank, 27 Barb. 424. **Vt.**—Wheeler *v.* Wilson, 57 Vt. 157; Pawlett *v.* Sandgate, 19 Vt. 621. But see: **Mass.**—M'Millan *v.* Eastman, 4 Mass. 378. **Vt.**—Town of Charleston *v.* Stacy, 10 Vt. 562. **Eng.**—Couch *v.* Steel, 3 El. & Bl. 402, 77 E. C. L. 402; Jones *v.* Bright, 5 Bing. 533, 15 E. C. L. 529; Schlencker *v.* Moxsy, 3 Barn. & C. 789, 10 E. C. L. 227, 107 Eng. Reprint 926; Morgan *v.* Ravey, 6 H. & N. 265, 30 L. J. Ex. 131, 3 L. T. 784; Austin *v.* Great Western R. Co., L. R. 2 Q. B. 442; George *v.* Skivington, 5 Exch. 1.

43. **Mich.**—Halliett *v.* Gordon, 122 Mich. 567, 81 N. W. 556. **N. Y.**—Robertson *v.* Smith, 18 Johns. 459, 9 Am. Dec. 227; Doe *v.* Halsey, 16 Johns. 34, 8 Am. Dec. 293. **W. Va.**—Sandusky *v.* West Fork O. & N. G. Co., 63 W. Va. 260, 59 S. E. 1082.

A joint action cannot be maintained on a promissory note signed and sealed by one of the makers and only signed by the other two. Biery *v.* Haines, 5 Whart. (Pa.) 563.

Special assumpsit will lie against a corporation on a note made by its authorized agent. Proctor *v.* Webber, 1 D. Chip. (Vt.) 371.

In an action by two for breach of warranty, if there is a failure to prove that they are jointly interested, the name of the one not interested may be struck out. Winsor *v.* Lombard, 18 Pick. (Mass.) 57.

In an action on a joint contract, if some of the defendants are out of the state with no place in the state for the service of summons, the writ may be served on those within the state and proceedings had against them. Tappan *v.* Bruen, 5 Mass. 193.

In Harwood *v.* Roberts, 5 Me. 441, an action was brought against two of four joint and several promisors, but the court held that the plaintiff must sue one or all, or show that the others

be taken against all or none, unless some of the defendants make a personal defense, as infancy, when a *nolle prosequi* should be entered as to them and judgment rendered as to the others.[44]

(B.) Joinder of Counts. — The plaintiff may insert in his declaration as many counts as he pleases, whether he has one or several causes of action, but each count should disclose on its face a distinct right of action unconnected with that stated in any of the other counts.[45]

(C.) General Essentials. — In order to show a good cause of action in special assumpsit, the declaration should contain a statement of the plaintiff's right and the violation thereof by the defendant.[46] If any fact which is of the gist of the action is not averred, the declaration is not cured by verdict.[47]

(D.) Variance. — The proof must conform to the contract as laid; otherwise there is a variance.[48] A variance is a substantial departure from the issue, in the evidence adduced, if the same is in some matter

are dead or incapable of being sued.

Copartners making a special contract to do work must join as plaintiffs. Fish *v.* Gates, 133 Mass. 441.

44. **Ill.**—Gribbin *v.* Thompson, 28 Ill. 61; Fuller *v.* Robb, 26 Ill. 246; Russell *v.* Hogan, 2 Ill. 552. **Me.**—Cutts *v.* Gordon, 13 Me. 474, 29 Am. Dec. 520. **Mass.**—Woodward *v.* Newhall, 1 Pick. 500. **N. Y.**—Hartness *v.* Thompson, 5 Johns. 160. **Pa.**—Ridgely *v.* Dobson, 3 Watts & S. 118.

In an action against two, if one defaults he is not a competent witness for the other. Pillsbury *v.* Nelson, 2 N. H. 283.

45. Will's Gould Pl. 352.

A count upon a promise by two may be joined with a count upon a promise by two and a third deceased. Wheeler *v.* Thom, 2 N. H. 397.

A declaration containing a number of counts, each containing sufficient allegations to support it either in tort or assumpsit, is good on demurrer, for it is not a joinder of tort and contract actions. Church *v.* Mumford, 11 Johns. (N. Y.) 479.

46. Will's Gould Pl. 355.

A declaration sets forth a good cause of action which alleges that defendants on a certain day in a certain county made their promissory note in writing, that they thereby promised to pay plaintiff on demand with interest until paid $458; that they then and there delivered their note to plaintiff and promised the plaintiff to pay the same according to the tenor and effect thereof; that plaintiff afterwards and on a certain day in said county duly demanded payment of the defendant according to the tenor and effect of said note, but the defendant did not pay the same. Beardsley *v.* Southmayd, 14 N. J. L. 534.

A declaration against a carrier for failure to deliver goods is good, if it alleges a promise, consideration, performance of condition precedent of notice, and breach. Chesapeake & O. R. Co. *v* Stock & Sons, 104 Va. 97, 51 S. E. 161.

A declaration is sufficient if it avers a promise or undertaking, though without the word "promise," a legal consideration, breach and injury. Union Stopper Co. *v.* McGara, 66 W. Va. 403, 66 S. E. 698.

47. Chichester *v.* Vass, 1 Call (Va.) 83, 1 Am. Dec. 509.

48. **Ala.**—Findlay *v.* Stevenson, 3 Stew. 48. **Conn.**—Chittenden *v.* Stevenson, 26 Conn. 442; Bunnel *v.* Taintor's Admr., 5 Conn. 273; Bulkley *v.* Landon, 2 Conn. 404. **Ill.**—Manifee *v.* Higgins, 57 Ill. 50; Reading *v.* Linnington, 12 Ill. App. 491. **Ind.**—Bartlett *v.* Pittsburgh, C. & St. L. R. Co., 94 Ind. 281; Cranmer *v.* Graham, 1 Blackf. 406. **Ky.**—Bannister *v.* Weathersford, 7 B. Mon. 271; Brown *v.* Warner, 2 J. J. Marsh. 37. **Me.**—Kidder *v.* Flagg, 28 Me. 477. **Md.**—Walsh *v.* Gilmor, 3 Har. & J. 383. **Va.**—Harris *v.* Harris, 2 Rand. 431.

which in point of law is essential to the charge or claim.[49] In case of a variance there is no right to recover,[50] or if recovery is allowed it is ground for a new trial,[51] unless the same is waived.[52]

49. Keiser *v.* Topping, 72 Ill. 226.

If the declaration alleges "run down boat in the Thames near the half way" and the proof is "run down boat in the half way in Thames," there is no variance. Drewry *v.* Twiss, 4 T. R. 558, 100 Eng. Reprint 1174.

The declaration alleges that plaintiff promised to put premises in repair and defendant promised to keep them in repair. The proof is that plaintiff promised to keep the premises insured and to rebuild in case of fire. This is a variance. Beech *v.* White, 12 Ad. & El. 668, 40 E. C. L. 156.

A special count alleges a promise to deliver soil or breeze. The proof is a promise to deliver soil. This is a variance. Cooke *v.* Munstone, 4 Bos. & P. N. R. (Eng.) 351.

In Beene *v.* Cahawba & M. R. Co., 3 Ala. 660, suit was instituted in a mistaken name, but the right name was carried into the declaration with an averment that defendant was served with process issued in a mistaken name. The court held that the variance between the writ and the declaration could be pleaded in abatement and that the defect was not cured by the declaration.

When the declaration alleges a contract to have been made in Feb. 20, 1868, to repair a still within six months and the proofs show that the contract was made on the first of March to complete the still in thirty days, there is no substantial variance, as time is not of the essence of the contract. Frazer *v.* Smith, 60 Ill. 145.

In a declaration a note is described as bearing date April 6, 1864, when the one produced in evidence bears date September 6, 1864. Such variance is fatal. But if the execution of the note is proved, the note is then admissible in evidence under the common counts, and the variance cannot be raised. Streeter *v.* Streeter, 43 Ill. 155.

It is a variance to allege "defendant to deliver to plaintiff pork of nineteen hogs" and prove "all the pork he could spare." Mastin *v.* Toncray, 3 Ill. 216.

There is no variance when letters containing a contract bear a date differing from that named in the declaration. Trench *v.* Hardin County Can. Co., 67 Ill. App. 269.

A declaration alleges a lease (as consideration for the promise) one year from April 1, to continue from year to year. The proof is a written lease bearing date February 28 for one year. This is a variance. Keyes *v.* Dearborn, 12 N. H. 52.

If the plaintiff declares on a written instrument as bearing a particular date, a mistake in date is fatal. Not so, if he declares on a contract without reference to the instrument. Drown *v.* Smith, 3 N. H. 299.

There is a variance when the declaration alleges a breach of promise to pay for half of land on a certain day, when the contract is to pay for all. Crawford *v.* Morrell, 8 Johns. (N. Y.) 253.

If the promise declared on is absolute, and the one proved is conditional, it is a variance. Starnes *v.* Erwin, 32 N. C. 226.

So, the consideration must be substantially proved as laid, or there is a variance. If the consideration alleged is to build a ship while the evidence is that the consideration is to finish a ship partly built, there is a variance. **U. S.**—Smith *v.* Barker, 22 Fed. Cas. No. 13,013. **Ala.**—Jardan *v.* Roney, 23 Ala. 758. **Ky.**—Carrell *v.* Collins, 2 Bibb 429. **N. H.**—New Hampshire Mut. Fire Ins. Co. *v.* Hunt, 30 N. H. 219; Knox *v.* Martin, 8 N. H. 154.

50. **Del.**—Porter *v.* Beltzhoover, 2 Harr. 484. **Ill.**—Heidelmeier *v.* Hecht, 145 Ill. App. 116. **Ind.**—Armacost *v.* Lindley, 116 Ind. 295, 19 N. E. 138. **Miss.**—Fowler *v.* Austin, 1 How. 156, 26 Am. Dec. 701. **Neb.**—Knickerbocker, etc. Co. *v.* Hall, 3 Nev. 194. **Tenn.** Wilson *v.* Smith, 5 Yerg. 379. **Tex.** Orynski *v.* Menger, 15 Tex. Civ. App. 448, 39 S. W. 388. **Eng.**—Beech *v.* White, 12 Ad. & El. 668, 40 E. C. L. 156.

51. Baltimore & O. R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664.

52. Muldoon *v.* Meriwether, 25 Ky. L. Rep. 2085, 79 S. W. 1183.

(E.) AMENDMENT. — A plaintiff may apply for an amendment to his declaration at any time before judgment, so long as the amendment will not change the nature or cause of the action.[53]

53. **Ind.**—Sanders *v.* Hartge, 17 Ind. App. 243, 46 N. E. 604. **Me.**—Flanders *v.* Cobb, 88 Me. 488, 34 Atl. 277, 51 Am. St. Rep. 410. **N. H.**—Brown *v.* Leavitt, 52 N. H. 619, *overruling* Stevenson *v.* Mudgett, 10 N. H. 338, 34 Am. Dec. 155.

The form of action cannot be changed by amendment from assumpsit to debt. Knight *v.* Trim, 89 Me. 469, 36 Atl. 912.

A declaration against two or more cannot be amended by striking out the name of one. Redington *v.* Farrar, 5 Me. 379.

A declaration may be amended after verdict by altering the day on which the promise was made. Bailey *v.* Musgrave, 2 Serg. & R. (Pa.) 219.

Where the declaration has been materially amended defendant has the right to file additional pleas, and to refuse it is error. Johnson *v.* Glover, 19 Ill. App. 585.

Statutes sometimes permit a declaration to be amended so as to change the form of action from covenant to assumpsit, or assumpsit to covenant. Monahan *v.* Fidelity Mut. Life Ins. Co., 242 Ill. 488, 90 N. E. 213, 134 Am. St. Rep. 337; Stebbins *v.* The Lancashire Ins. Co., 59 N H. 143, *overruling* Brown *v.* Leavitt, 52 N. H. 619.

New Hampshire Practice.—"Under the liberal practice in vogue in this state since the decision in Stebbins *v.* Insurance Co., 59 N. H. 143, if not from an earlier date, it has been customary for the court, if justice would be promoted, to allow amendments in legal proceedings, either of form or substance, provided that in so doing the rights of third parties would not be interfered with and the case could be rightly understood by the court. P. S. 1901, c. 222, §§ 7, 8. The underlying principle seems to be that a litigant should be accorded such remedies and methods of stating his grievance as may be necessary 'to meet the meritorious contingencies of his case.' Brooks *v.* Howison, 63 N. H. 382, 389. He has been permitted by amendment to change an action of traspass to land into a bill in equity for specific performance of an agreement to convey the land (Uncanoonuck Road Co. *v.* Orr, 67 N. H. 541, 41 Atl. 665); an action of debt for rent into assumpsit for use and occupation (Meredith, etc., Ass'n. *v.* Drill Co., 66 N. H. 539, 30 Atl. 1119); trespass to land to assumpsit for use and occupation (Elsher *v.* Hughes, 60 N. H. 469; and assumpsit to case for flowing land (Morse *v.* Whitcher, 64 N. H. 591, 15 Atl. 207). These decisions are sufficient to illustrate the principle, and to demonstrate that the trial justice was acting in accordance with the established practice in permitting the plaintiff to amend his declaration by substituting a count in case. The plaintiff could have inserted in the original draft of his writ counts in assumpsit and case. Broadhurst *v.* Morgan, 66 N. H. 480, 29 Atl. 553. What could have been done originally may be accomplished by amendment, if justice will be promoted thereby. It would seem that prudence would have dictated the insertion of both counts in the original draft to meet the meritorious contingencies of the plaintiff's case. What he is seeking to recover is compensation for the injury he received while in the defendant's employment. If the defendant's agent had authority to make the contract of settlement, the plaintiff would obtain his compensation in the count in assumpsit. If the agent was without authority to make the contract, then he would obtain it in the count in case. The subject-matter involved in the two counts is the same, although the issues raised are different. Meredith, etc., Ass'n. *v.* Drill Co., 67 N. H. 450, 39 Atl. 330. By declaring in assumpsit the plaintiff misconceived his remedy, as facts essential to the maintenance of his supposed right did not exist. Noyes *v.* Edgerly, 71 N. H. 500, 504, 505, 53 Atl. 311. But by misconceiving his remedy he did not preclude himself from asserting his actual rights in a new action, or by amendment. Gould *v.* Blodgett, 61 N. H. 115. In Gould *v.* Blodgett the action was assumpsit for the price of a horse rake, which the plaintiff

(F.) Necessary Specific Allegations. — (1.) Promise. — Assignment. — In special assumpsit the promise is of the gist of the action and must be alleged. An express promise should be laid; a recital is not enough.[54] A promise need not be again alleged if the suit is on an instrument and the instrument contains a promise.[55] The promise

understood his agent had sold to the defendant. At the trial before the referee, it turned out that the agent did not sell the rake as he was authorized, but delivered it to the defendant in payment of his own pre-existing debt. Upon filing the report, the trial court allowed the plaintiff to amend his declaration by filing a count in trover, and it was held that the amendment was properly allowed. This case cannot be distinguished from the present one. As the amended count relates to the same subject-matter as the original count, and the case can be rightly understood by the court, and as it does not appear that the rights of third parties will be interfered with by the allowance of the amendment, while the plaintiff would be put to unnecessary expense if required to bring a new action, the trial court was warranted in finding that justice required that the plaintiff's motion should be granted." Sanborn *v.* Boston & M. R. R. (N. H.), 79 Atl. 642.

54. **Ala.**—Hill's Admr. *v.* Nichols, 50 Ala. 336. **Ill.**—Keyes *v.* Binkert, 48 Ill. App. 259. **S. C.**—Wingo *v.* Brown, 12 Rich. 279. **Va.**—Southern R. Co. *v.* Wilcox, 98 Va. 222, 35 S. E. 355; Cooke *v.* Simms, 2 Call 39; Winston's Exr. *v.* Francisco, 2 Wash. 187. **W. Va.**—Wheeling M. & F. Co. *v.* Wheeling S. & I. Co., 62 W. Va. 288, 57 S. E. 826.

Subsequent Promise.—The allegation of a promise subsequent to the declaration is bad. Waring *v.* Yates, 10 Johns. (N. Y.) 119.

Equivalent Word.—It is not necessary to use the word "promised;" an equivalent word is sufficient. **U. S.**—Cummings *v.* Synnott, 120 Fed. 84, 56 C. C. A. 490. **Pa.**—Reilly *v.* Crown Petroleum Co., 213 Pa. 595, 63 Atl. 253. **W. Va.**—Union Stopper Co. *v.* McGara, 66 W. Va. 403, 66 S. E. 698; Wheeling Mold & F. Co. *v.* Wheeling Steel & I. Co., 62 W. Va. 288, 57 S. E. 826.

An inference of law from the contract set out in the declaration is not enough. Coffin *v.* Hall, 106 Me. 126, 75 Atl. 385.

Construction. — According to the context such words as "promised," "undertook," "agreed," may refer either to a "duty" or to a promise properly speaking. Chesapeake & O. R. Co. *v.* Stock & Sons, 104 Va. 97, 51 S. E. 161.

"The word 'undertook' may, and often does, import a promise as used in the concrete case. But whether it does or not depends upon the construction of the pleading, and if its meaning is ambiguous, then, after verdict, it must be taken in a sense that will sustain the verdict, for a verdict cures ambiguity. 1 Chit. Pl. (13th Am. Ed.) 268; Huntingtower *v.* Gardiner, 1 B. & C. 297; Avery *v.* Hoole, Cowp. 825. Now, although the word 'undertook,' as used in the first part of the allegation in question, being followed, as it is, by an infinitive phrase, is capable of being construed to import a binding contract on the part of the defendants to do the things mentioned in that part, namely, to reduce the fracture and set the bone in a proper and skillful manner, yet it is also capable of being construed to mean, especially when taken with the rest of the allegation, no more than that they accepted the retainer, and undertook, in the sense of taking in hand, and entering upon, the performance of the duties thereof. This view is strengthened by the way the word 'undertook' is used in the last part of the allegation, where it is not followed by an infinitive phrase, but the language is, 'and undertook the care and charge of said leg and the cure thereof,' which is hardly capable of being construed into a binding obligation. This sustains the verdict, as it makes the action case." Lawson *v.* Crane & Hall, 83 Vt. 115, 74 Atl. 641.

An action on "case" is construed assumpsit, though "proper care" is alleged to have been a "duty." Cook *v.* Haggarty, 36 Pa. 67.

55. Woodson *v.* Moody, 4 Humph. (Tenn.) 303.

may be alleged *in haec verba,* or according to its legal effect, but it must be definite and the time it was made should be alleged.[56] An alternative promise should be declared on as such, plaintiff averring his election.[57] If a declaration does not allege a promise of the defendant it is demurrable,[58] and the defect is not cured by verdict.[59] In case the plaintiff is suing as assignee the right to sue as assignee must be positively averred.[60] This is an issuable fact and may be traversed.[61]

(2.) Consideration. —In special assumpsit the consideration must be alleged fully and truly.[62] If the same is not alleged at all the declaration does not state a cause of action; if not stated truly a variance will result. In order to state a sufficient consideration for a unilateral contract the declaration must allege the performance of the act for which the promise is offered with a knowledge thereof and intent to accept the same, as the consideration is executed.[63] All that is necessary to state a sufficient consideration for a bilateral contract is to allege the making of the promise for which the counter promise is offered.[64] If the consideration is not alleged judgment will be ar-

56. **Ill.**—North *v.* Kizer, 72 Ill. 172; White *v.* Thomas, 39 Ill. 227. **Mass.**—Avery *v.* Inhab. of Tyringham, 3 Mass. 160, 3 Am. Dec. 105. **N. H.**—Atlantic Fire Ins. Co. *v.* Sanders, 36 N. H. 252. **S. C.**—Brennan *v.* Shelton, 2 Bailey 152.

Time.—Plaintiff need not prove that promise was made at time alleged, unless time is material. **Ala.**—Hogan *v.* Alston, 9 Ala. 627. **Cal.**—Biven *v.* Bostwick, 70 Cal. 639, 11 Pac. 790. **Fla.**—Dawkins *v.* Southwick, 4 Fla. 158.

57. Hatch *v.* Adams, 8 Cow. (N. Y.) 35.

58. Weid *v.* Dixon, 55 W. Va. 191, 46 S. E. 918.

59. Clark *v.* Reed, 12 Smed. & M. (Miss.) 554; McNulty *v.* Collins, 7 Mo. 69; Muldrow *v.* Tappan, 6 Mo. 276.

60. **U. S.**—Myers *v.* Davis, 6 Blatchf. 77, 17 Fed. Cas. No. 9,986. **Fla.**—Hooker *v.* Gallagher, 6 Fla. 351. **Mass.**—Gilbert *v.* Nantucket Bank, 5 Mass. 97. **Mich.**—Rose *v.* Jackson, 40 Mich. 29.

61. Byxbie *v.* Wood, 24 N. Y. 607.

62. **Conn.**—Hendrick *v.* Seeley, 6 Conn. 176; Rossiter *v.* Marsh, 4 Conn. 196. **Ga.**—Dickey & Co. *v.* Leonard, 77 Ga. 151. **Ill.**—Indianapolis B. & W. R. Co. *v.* Rhodes, 76 Ill. 285. **Ind.** Salmon *v.* Brown, 6 Blatchf. 347. **Ia.**—Decker & Co. *v* Bishop, Morris 62. **Ky.**—Stephens *v.* Crostwait, 3 Bibb 222; Bruner *v.* Stout, Hard. 225. **Md.**—Wright *v.* Gilbert, 51 Md. 140; Dent's Admr. *v.* Scott, 3 Har. & J. 28. **Mass.** Hemmenway *v.* Hickes, 4 Pick. 497. **N. H.**—Smith *v.* Webster, 48 N. H. 142; Smith *v.* Wheeler, 29 N. H. 334. **N. Y.** Bailey *v.* Freeman, 4 Johns. 280; Powell *v.* Brown, 3 Johns. 100. **Pa.**—Cunningham *v.* Shaw, 7 Pa. 401; Whitall *v.* Morse, 5 Serg. & R. 358. **S. C.**—Douglass *v.* Davie, 2 McCord 218; Brooks *v.* Lowrie, 1 Nott & McC. 342. **Tenn.**—Brown *v.* Parks, 8 Humph. 294. **Utah**—Felt *v.* Judd, 3 Utah, 414, 4 Pac. 243. **Vt.**—People's Bank *v.* Adams, 43 Vt. 195. **Eng.**—Streeter *v.* Horlock, 1 Bing. 34, 8 E. C. L. 233.

"For valuable consideration" not enough. Wickliffe *v.* Hill, 4 Bibb (Ky.) 269. *Contra,* Carter & Nye *v.* Graves, 9 Yerg. (Tenn.) 446.

It has been held that in a court of limited jurisdiction the consideration as well as promise must be averred to be within the jurisdiction. Grover *v.* Gould, 20 Wend. (N. Y.) 227, 32 Am. Dec. 533.

63. Morrow *v.* Waltz, 18 Pa. 118; Stemper *v.* Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296.

64. **Conn.** — Russell *v.* Slade, 12 Conn. 455. **Mass.**—Lent *v.* Paddleford,

rested,[65] unless one is proved, when the failure will not be fatal after verdict.[66] It is not necessary to allege the consideration in a declaration on a note, if the note expresses the same.[67]

(3.) Performance of Conditions. —If the promise sued on is conditional it must be so alleged,[68] and the declaration must then allege the happening of conditions precedent, if casual,[69] and the performance of conditions precedent (according to the manner), if promissory,[70] or some legal excuse for non-performance,[71] or the plaintiff is not entitled to recover. In the case of concurrent conditions all that the declaration need allege is readiness and willingness to perform.[72] Failure to allege performance of conditions precedent is cured by verdict.[73] Conditions subsequent may be omitted,[74] and if the promises are independent the plaintiff can maintain his action without pleading performance.[75]

10 Mass. 230, 6 Am. Dec. 119. **N. Y.**—Livingston *v.* Rogers, 1 Caine 487, 583. **W. Va.**—Bannister *v.* Victoria C. & C. Co., 63 W. Va. 502, 61 S. E. 338.

A declaration on mutual promises which fails to allege a promise by plaintiff and that defendant promised in consideration thereof is demurrable. Grover *v.* Ohio River R. Co., 53 W. Va. 103, 44 S. E. 147.

65. Moseley *v.* Jones, 5 Munf. (Va.) 23.

66. Kellam *v.* Kellam, 94 Pa. 225.

67. Connolly *v.* Cottle, 1 Ill. 364; Richmond *v.* Patterson, 3 Ohio 368.

68. Wait *v.* Morris, 6 Wend. (N. Y.) 394; Nat. Val. Bank *v.* Houston, 66 W. Va. 336, 66 S. E. 465.

69. Meyers *v.* Phillips, 72 Ill. 460; Independent Order of Mut. Aid *v.* Paine, 17 Ill. App. 572; National Val. Bank *v.* Houston, 66 W. Va. 336, 66 S. E. 465.

70. **Ala.**—Langdon *v.* Williams, 22 Ala. 681. **Conn.**—Andrews *v.* Ives, 3 Conn. 368. **Ind.**—Hill *v.* Hill, 121 Ind. 255, 23 N. E. 87; Continental Life Ins. Co. *v.* Houser, 89 Ind. 258; Ewing *v.* Codding, 5 Blackf. 433. **Md.**—Consolidation Coal Co. *v.* Shannan, 34 Md. 144. **N. Y.**—Lester *v.* Jewett, 11 N. Y. 453; Wait *v.* Morris, 6 Wend. 394; Smith *v.* Brown, 17 Barb. 431. **Ohio.**—Trott *v.* Sarchett, 10 Ohio St. 241. **R. I.**—Woonsocket U. R. Co. *v.* Orray Taft & Co., 8 R. I. 411. **Wis.**—Maynard *v.* Tidball, 2 Wis. 34. **Eng.**—Stephens *v.* DeMedina, 4 Ad. & El. (N. S.) 422, 45 E. C. L. 420; Atkinson *v.* Smith, 14 Mees. & W. 695.

Notice.—**Ala.**—Fay *v.* Hall, 25 Ala. 704; Lawson *v.* Townes, Oliver & Co., 2 Ala. 373. **Ark.**—Jones *v.* Robinson, 8 Ark. 484. **Mass.**—Perry *v.* Botsford, 5 Pick. 189.

Demand.—**Ala.**—Kennon *v.* McRae, 3 Stew. & P. 249, 23 Am. Dec. 393. **Ark.**—Taylor *v.* Spears, 6 Ark. 381, 44 Am. Dec. 519; Bradley *v.* Farrington, 4 Ark. 532; Byrd *v.* Cummins, 3 Ark. 592. **Mass.**—Griswold *v.* Plumb, 13 Mass. 298. **W. Va.**—Merchants & M. Bank *v.* Evans, 9 W. Va. 373.

A demand by telephone and refusal by telephone, without identification of defendant or his agent therewith, does not show a breach. Delugio *v.* Barney, 23 R. I. 626, 51 Atl. 425.

71. **Ill.**—Expanded Metal F. Co. *v.* Boyce, 233 Ill. 284, 84 N. E. 275. **Mass.**—Newcomb *v.* Brackett, 16 Mass. 161. **Eng.**—Planche *v.* Colburn, 8 Bing. 14, 21 E. C. L. 203.

72. **U. S.**—Darland *v.* Greenwood, 1 McCrary 337, 2 Fed. 660. **Ill.**—Cottingham *v.* Owens, 71 Ill. 397; Henderson *v.* Wheaton, 40 Ill. App. 538. **Mass.**—Palmer *v.* Sawyer, 114 Mass. 1. **W. Va.**—Davisson *v.* Ford, 23 W. Va. 617.

73. Rogers *v.* Love, 2 Humph. (Tenn.) 417; Bailey *v.* Clay, etc., 4 Rand. (Va.) 346.

74. Rockford Ins. Co. *v.* Nelson, 65 Ill. 415.

75. Dey *v.* Dox, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; Close *v.* Miller, 10 Johns. (N. Y.) 90; Stavers *v.* Curling, 3 Bing. N. C. (Eng.) 355.

Jury.—The question of performance is for the jury. Guilford *v.* Mason, 24 R. I. 386, 53 Atl. 284.

Time of commencement of action need not be averred. Cook *v.* Rice, 3 N. H. 60.

(4.) **Breach.** — The declaration in special assumpsit, in order to state a cause of action, must allege a breach of contract in such a way as to show a violation of the right of the plaintiff created by such contract. Otherwise it is subject to demurrer.[76] Several breaches may be alleged in one count.[77] If the declaration contains several counts the defendant should be charged with a breach in each instead of *in toto*.[78]

(5.) **Damage.** — The declaration should allege the amount of the damage or injury caused by the breach of contract. Nominal damages are recoverable without such allegation, if, otherwise, there is a cause of action.[79] General damages can be recovered on a general allegation of damage but not to exceed the sum laid in the declaration.[80] Special damages are not recoverable at all for injuries which do not necessarily result unless the same are specially pleaded, and then not to exceed the amount laid in the declaration.[81]

(II.) The Pleas.[82] — (A.) THE GENERAL ISSUE. — **(1.) What May Be Shown in General.** — In special assumpsit the general issue is called the plea of non assumpsit, and in it the defendant "says that he did not undertake or promise in manner and form as the said . . . hath above complained."[83] Under the general issue the defendant

76. Brickey *v.* Irwin, 122 Ind. 51, 23 N. E. 694 (code); Farnsworth *v.* Mason, Brayt. (Vt.) 194.

In an action of special assumpsit on a note payable in installments, plaintiff alleges that two installments have elapsed and that the whole sum of the note is due. Defendant demurs. The last allegation may be rejected as surplusage. Tucker *v.* Randall, 2 Mass. 283.

A declaration on a promise to pay in promissory notes does not allege a breach in alleging that defendant has not paid money. Withers *v.* Knox, 4 Ala. 138.

77. Smith *v.* Boston, C. & M. R., 36 N. H. 458.

78. Montgomery Mfg. Co. *v.* Thomas, 20 Ala. 473; Ellis *v.* Turner's Admr., 5 Munf. (Va.) 196.

79. Willis Damages, 34, 35.

80. Willis Damages, 37. **Ill.**—Kelley *v.* Third Nat. Bank, 64 Ill. 541. **Ky.**—Baltzell *v.* Hickman, 4 Litt. 265. **Miss.**—Geren *v.* Wright, 8 Smed. & M. 360. **S. C.**—Covington *v.* Lide's Exrs., 1 Bay 158. **Tenn.**—Crabb's Exr. *v.* Nashville Bank, 6 Yerg. 332.

Matters of aggravation alleged do not change a count in assumpsit to tort. Hoey *v.* Harty, 48 Mich. 191, 12 N. W. 44.

A copy of a note filed without a statement signed by the plaintiff or his attorney, showing the amount due, is insufficient under the act of 1887 to entitle the plaintiff to a judgment in the absence of an affidavit of defense. Gould *v.* Gage, 118 Pa. 559, 12 Atl. 476.

81. Kock & Co. *v.* Merk, 48 Ill. App. 26; Baker *v.* Liscoe, 7 T. R. 171, 101 Eng. Reprint 916; Willis Damages, 27, 37, 38.

The liquidation of damages is a matter of evidence and need not be pleaded. Clarke *v.* Gray, 6 East 564, 102 Eng. Reprint 1404.

82. Classification of pleas: dilatory pleas; pleas to the jurisdiction of the court; pleas to the disability of plaintiff; pleas in abatement of the writ, or count; pleas to the action; the general issue; a special plea in bar. Will's Gould Pl., 94-97; Andrews' Steph. Pl., 136, 146.

83. Andrews' Steph. Pl., 231.

Defendants cannot sever in pleading. Meagher *v.* Bachelder, 6 Mass. 444.

"Never indebted as alleged" is a proper plea in an action of assumpsit in Maryland. Code, art. 75, §23. Fisher *v.* Diehl, 94 Md. 112, 50 Atl. 432.

A plea of the general issue that defendant did not "promise in manner

may in general give in evidence anything which tends to deny his liability, either because he was never indebted, or because his liability has been extinguished (that is, that the plaintiff does not have a subsisting cause of action), but not matters which affect the remedy merely.[84]

(2.) **Particular Matters Which May Be Shown.**—(a.) *Payment.*—Payment may be given in evidence under the general issue.[85] Payment after the commencement of suit cannot be given under the general issue except in reduction of damages.[86]

(b.) *Accord and satisfaction* may be shown under the general issue.[87]

(c.) *Release.*—A release may be given under the general issue.[88]

(d.) *Former Recovery.*—Former recovery, or adjudication, may be given under the general issue.[89]

(e.) *Assignment.*—Plaintiff's insolvency and assignment of property to trustees may be shown under the general issue.[90]

or form," omitting "undertake or," is good, as undertake and promise are equivalent words. Shufeldt *v.* Fidelity Sav. Bank, 93 Ill. 597.

If two be sued on a joint promise and one appears, the general issue should be "he and the other defendant did not promise." Butman *v.* Abbot, 2 Me. 361.

"Not guilty" in assumpsit is cured by verdict. Cavene *v.* McMichael, 8 Serg. & R. (Pa.) 441.

Non est factum not proper plea. Town of Winsor *v.* Hallett, 97 Ill. 204; Lamb *v.* Holmes, 60 Ill. 497.

84. **U. S.**—Craig *v.* State of Missouri, 4 Pet. 410, 7 L. ed. 903. **Ill.**—Wilson *v.* King, 83 Ill. 232; American Cent. Ins. Co. *v.* Birds Bldg. & L. Assn., 81 Ill. App. 258; Huff *v.* Wolfe, 48 Ill. App. 589. **N. Y.**—Edson *v.* Weston, 7 Cow. 278. **Pa.**—Falconer *v.* Smith, 18 Pa. 130. **Va.**—Virginia F. & M. Ins. Co. *v.* Buck, 88 Va. 517, 13 S. E. 973.

But see, on tender, Dunlop *v.* Funk, 3 Har. & M. (Md.) 318.

The rule as to what is admissible under the general issue is the same in special assumpsit as in general assumpsit. Although it would seem that special matters of defense which accrue subsequently to the making of the promise should not be admissible under the general issue in special assumpsit, the rule is otherwise, and anything which shows that an obligation never existed or that it has been extinguished may be shown. A general denial differs from the general issue in that affirmative defenses are not admissible under a general denial, and the reason is that the general denial merely denies those particular facts alleged in the complaint, while the general issue covers everything which disproves a subsisting liability. Will's Gould Pl., 499-502; Bliss Code Pl., §§324, 330; Ensey *v.* The Cleveland & St. L. R. Co., 10 Ind. 178.

85. **U. S.**—Jeffrey *v.* Schlasinger, Hempst. 12, 13 Fed. Cas. No. 7,253a. **Ala.**—McMillan *v.* Wallace, 3 Stew. 185. **Cal.**—Wetmore *v.* San Francisco, 44 Cal. 294. **Ind.**—Mahon *v.* Gardner, 6 Blackf. 319. **N. J.**—Dingee *v.* Letson, 15 N. J. L. 259. **N. Y.**—Clark *v.* Yale, 12 Wend. 470. **Vt.**—Worthen *v.* Dickey, 54 Vt. 277; Britton *v.* Bishop, 11 Vt. 70.

86. **N. H.**—Pemigewasset Bank *v.* Brackett, 4 N. H. 557. **N. J.**—Hendrickson *v.* Hutchinson, 29 N. J. L. 180. **N. Y.**—Boyd *v.* Weeks, 2 Denio 321, 43 Am. Dec. 749.

In the same way an award *pendente lite* cannot be given. Harrison *v.* Brock, 1 Munf. (Va.) 22.

87. First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

88. Bartleman *v.* Douglass, 1 Cranch C. C. 450, 2 Fed. Cas. No. 1,073; Dawson *v.* Tibbs, 4 Yeates (Pa.) 349.

89. Niles *v.* Tottman, 3 Barb. (N. Y.) 594. See Bennett *v.* Pulliam, 3 Ill. App. 185.

90. Kennedy *v.* Ferris, 5 Serg. & R. (Pa.) 394.

(f.) *Rescission.* — A rescission of a contract, or a substitution of a new contract, may be shown under the general issue.[91]

(g.) *Breach.* — Discharge by breach may be shown under the general issue.[92]

(h.) *Judgment.* — Discharge by judgment is admissible under the general issue.[93]

(i.) *Illegality.* — The illegality of the agreement may be shown under the general issue.[94]

(j.) *Non-execution.* — Non assumpsit sworn to puts in issue the execution of the writing sued on.[95]

(k.) *Incapacity.* — Lack of contractual capacity may be shown under the general issue.[96]

(l.) *Fraud.* — Fraud or deceit, may be shown under the general issue.[97]

(m.) *No Consideration.* — The want of consideration or the failure of consideration (discharge by casual condition subsequent), may be shown under the general issue.[98]

(n.) *Readiness To Perform.* — Readiness to perform may be shown under the general issue.[99]

(o.) *No Title.* — That the plaintiff, or his assignor, has no title may be shown under the general issue.[1]

91. Heaton *v.* Myers, 4 Colo. 59; Ward *v.* Athens M. Co., 98 Ill. App. 227.

92. **U. S.**—Kelley *v.* Fahrney, 123 Fed. 280, 59 C. C. A. 298. **Ala.**—Robinson *v.* Windham, 9 Port. 397. **Ill.**—Western Assn. Co. *v.* Mason, 5 Ill. App. 141. **N. Y.**—Wilt *v.* Ogden, 13 Johns. 56.

93. Insurance Co. *v.* Harris, 97 U. S. 331, 24 L. ed. 959.

94. **Ala.**—Matthews *v.* Turner, 2 Stew. & P. 239. **Del.**—Cleadon *v.* Webb, 4 Houst. 473. **Ga.**—Johnson *v.* Ballingall, 1 Ga. 68. **Ky.**—Jones *v.* Pryor, 1 Bibb 614.

"Under a general denial, the defendant may give evidence tending to disprove any fact which the plaintiff is bound to prove in order to recover. But in this case it neither appeared from the complaint or the evidence presented by the plaintiff that the contract was illegal, and as we have already shown when the plaintiff rested the evidence established a cause of action. The general denial put in issue all matters which the plaintiff was bound to prove; nothing more. He was required to prove the contract entered into by defendant which was, on its face, valid. Having accomplished that he could not be compelled to enter into a controversy over matters not appearing in the contract involving the question of its validity or invalidity because he had not been notified by the answer that the defendant proposed to assert his own participation in that which was a violation of law as a shield against the consequences of his agreement." Milbank *v.* Jones, 127 N. Y. 370, 28 N. E. 31. See Ah Doon *v.* Smith, 25 Ore. 89, 34 Pac. 1093.

95. Gray *v.* Tunstall, Hempst. 558, 10 Fed. Cas. No. 5,730.

96. **Me.**—Fuller *v.* Bartlett, 41 Me. 241. **Mass.**—Mitchell *v.* Kingman, 5 Pick. 431. **N. J.**—Dacosta *v.* Davis, 24 N. J. L. 319. **S. C.**—Evans *v.* Terry, 1 Brev. 80.

97. Strong *v.* Linington, 8 Ill. App. 436; Sill *v.* Rood, 15 Johns. (N. Y.) 230.

98. **Me.**—Clark *v.* Holway, 101 Me. 391, 64 Atl. 642. **Mo.**—Block *v.* Elliott, 1 Mo. 275. **N. M.**—Staab *v.* Ortiz, 3 N. M. 33, 1 Pac. 857. **S. C.**—Talbert *v.* Cason, 1 Brev. 298.

99. Robinson *v.* Bachelder, 4 N. H. 40.

1. Emley *v.* Perrine, 58 N. J. L. 472, 33 Atl. 951.

(3.) **Effect of Giving Notice of Special Matters.** — A special plea, or a notice under the general issue giving notice of special matter, will be rejected if the matter therein set up can be given under the general issue.[2]

(4.) **What Admitted By.** — (a.) *Everything Not Traversed.* — Whatever is traversible and not traversed is admitted.[3]

(b.) *Legal Sufficiency of Declaration.* — By pleading the general issue the defendant impliedly admits the legal sufficiency of the declaration.[4]

(c.) *Character of Person Suing.* — By pleading the general issue the defendant admits the character of the person suing and the character in which he is sued.[5]

(B.) SPECIAL PLEAS.[6] — Tender,[7] statute of limitations,[8] bankruptcy,[9] non-joinder of proper parties defendant,[10] jurisdiction,[11] disability of plaintiff to sue,[12] set-off,[13] and many other matters[14] can be taken advantage of only by being specially pleaded. The defendant is also at liberty to plead specially any matters in avoidance of the contract or discharge of the action.

(III.) Demurrer. — Either party may demur to the pleading of his adversary. A demurrer denies the legal sufficiency of the allegations demurred to and tenders an issue of law instead of fact. A demurrer may be general or special. A general demurrer is sufficient where

2. N. Y.—Smith *v.* Gregory, 8 Cow. 114. Vt.—University of Vermont *v.* Baxter's Est., 42 Vt. 99. W. Va.—Bennett *v.* Perkins, 47 W. Va. 425, 35 S. E. 8.

3. Capital City Mut. F. Ins. Co. *v.* Detwiler, 23 Ill. App. 656.

4. The Wrought Iron Br. Co. *v.* Comrs. of Highways, 101 Ill. 518.

5. Coffee *v.* Eastland, 5 Fed. Cas. No. 2,945; Tillman *v.* Ailles, 5 Smed. & M. (Miss.) 373, 43 Am. Dec. 507.

6. A plea in bar to the whole action when the matters set forth bar only a part is not good. Farquhar *v.* Collins, 3 A. K. Marsh. (Ky.) 31.

A brief statement filed with the general issue may amount to one or more pleas in bar. Moore *v.* Knowles, 65 Me. 493.

Plea, "is not guilty of matters therein alleged" is not appropriate and may be stricken from file. Cunyus *v.* Guenther, 96 Ala. 564, 11 So. 649.

If defendant sets up a condition subsequent which would avoid his liability he should allege the fulfilling of the condition, or the plea will be bad. Smith *v.* Riddell, 87 Ill. 165.

7. Will's Gould Pl., 501; Hinchy *v.* Foster, 3 McCord (S. C.) 428.

8. Bullard *v.* Lopez, 7 N. M. 624, 41 Pac. 516; Armstrong *v.* Dalton, 15 N. C. 568.

9. Will's Gould Pl., 501.

10. Ives *v.* Hulet, 12 Vt. 314; Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338; Rutler & Co. *v.* Sullivan, 25 W. Va. 427.

11. Will's Gould Pl., 405. See Herring *v.* Poritz, 6 Ill. App. 208.

12. Will's Gould Pl., 420.

13. Bell *v.* Crawford, 8 Gratt. (Va.) 110. See Clark *v.* Fensky, 3 Kan. 389; Meagher *v.* Morgan, 3 Kan. 372, 87 Am. Dec. 476.

14. A plea of partial failure of performance is not good as it does not authorize rescission. Franklin *v.* Miller, 4 Ad. & El. 599, 31 E. C. L. 148.

A plea that defendant sued as principal, indorsed the suit (in suit) as guarantor is good on demurrer. Dibble *v.* Duncan, 2 McLean 553, 7 Fed. Cas. No. 3,880.

A plea in abatement, in a suit on a note, that the writ and indorsement do not show the sum demanded is a good plea, but the court may permit an amendment. Foster *v.* Collins, 5 Smed. & M. (Miss.) 259.

Puis darrein continuance is not a waiver of other pleas previously filed.

the objection is on a matter of substance.[15] A special demurrer is necessary where the objection turns on a matter of form, and no objection can be taken advantage of which is not minutely set forth,[16] and if a declaration containing such defects is not demurred to it is cured by verdict.[17] A general demurrer to the whole declaration will be overruled if any count is good.[18] A demurrer runs through the record, so that a demurrer to a plea will reach a substantial defect in the declaration.[19] Defendant cannot demur and plead to the same count.[20] If a demurrer is overruled it is error to enter final judgment.[21]

(IV.) Replication. — The replication must support the declaration.[22] It need not traverse immaterial matter in plea.[23] If it is double it is demurrable.[24]

Heyfrom *v.* Mississippi Union Bank, 7 Smed. & M. (Miss.) 434.

A defendant may abandon any part of his defense during trial, in the discretion of the court. He may withdraw general issue in assumpsit and rely on special pleas. Leonard *v.* Patton, 106 Ill. 99.

In the absence of a plea and of the defendant the court impaneled a jury and upon the verdict rendered judgment without entering default. This is error, as default should have been entered. Lehr *v.* Vandveer, 48 Ill. App. 511.

In an action of special assumpsit, with pleas of non-assumpsit, payment and accord and satisfaction, a verdict that the defendant did assume and undertake negatives all the pleas. Martin *v.* Williams, 7 Humph. (Tenn.) 220.

Plea of surety that he was not to pay note, or of one maker that he was to be discharged on part payment, is bad on demurrer. Dundy *v.* Gamble, 59 Ga. 434; Shed *v.* Pierce, 17 Mass. 623.

Plea that plaintiff is not owner of note is demurrable if not verified. Jennings v. Cummings, 9 Port. (Ala.) 309.

The defendant must plead specially a tender, a set-off, the statute of limitations, a discharge in bankruptcy, that the plaintiff has become an alien enemy since the making of the contract; and he is at liberty to plead any matter which either shows that the contract is voidable or void, like infancy, lunacy, coverture, duress, lack of consideration, illegality, and statute of frauds; or shows that the contract has been discharged, like rescission, performance, and payment; or that the action thereon has been discharged, like bankruptcy, accord and satisfaction, arbitration, release, judgment, and merger, though the same are admissible under the general issue 1 Chit. Pl., 473-475.

15. Andrews' Steph. Pl., 220.

16. Bogardus *v.* Trial, 2 Ill. 63; Iron Clad Dryer Co. *v.* Chicago Tr. & Sav. Bank, 50 Ill. App. 461.

17. Bemis *v.* Faxon, 4 Mass. 263; Twp. of East Union *v.* Comrey, 100 Pa. 362.

Under the Virginia code, 1887, §3272, which provides that on demurrer the court shall not regard any defect in a declaration unless there be omitted something so essential that judgment according to law and the very right of the cause cannot be given, a declaration is not subject to demurrer because of the omission of the usual allegation of a promise to pay. City of Newport News *v.* Potter, 122 Fed. 321, 58 C. C. A. 483.

18. **Ala.**—The Bank of Mobile *v.* Huggins' Admr., 3 Ala. 206. **Ind.**—Board of Comrs. *v.* Harrington, 1 Blackf. 260. **Ky.**—Abby *v.* Ferguson, 1 T. B. Mon. 99. **Va.**—Gray *v.* Kemp, 88 Va. 201, 16 S. E. 225.

19. Myrick *v.* Merritt, 22 Fla. 335.

20. Pettibone *v.* Stevens, 6 Hill (N. Y.) 258.

21. **Ill.**—Armstrong *v.* Webster, 30 Ill. 333. **Mich.**—Mason *v.* Reynolds, 33 Mich. 60. **Miss.**—Rodgers *v.* Hunter, 8 Smed. & M. 640.

22. Will's Gould Pl., 93.

23. Austin *v.* Walker, 26 N. H. 456.

24. Wadleigh *v.* Pillsbury, 14 N. H. 373.

e. *Conflict of Laws.* — The proper action is determined by the *lex fori*;[25] substantive matters by the *lex loci*.[26]

3. General Assumpsit.—a. *Definition.*—General assumpsit is an action of assumpsit for the recovery of damages for the breach of the promise implied by law in quasi-contracts, in inferred contracts, and on contracts performed except for the payment of money.[27]

b. *History.*—General assumpsit, so called because there are general forms devised for stating the various causes of action, is an action on the case in the nature of debt. The explanation of general assumpsit is found in the older action of debt, which lay for any pecuniary demand which could be reduced to certainty, whether created by contract, custom, or record. The consideration in general assumpsit, as in debt, is *quid pro quo*, or benefit to the promisor (defendant). General assumpsit is bounded by the limits of debt, except as it was extended to inferred contracts and other quasi-contracts (because of their analogy to debts) by the quantum and common counts. It owed its origin to the desire of the court of Queen's Bench for more extensive jurisdiction and to its freedom from various technicalities that hampered the action of debt. Its classic count was, being indebted he promised; its typical consideration was a precedent debt. Debt was a real rather than a personal action, but the debt was generally created by a promise to pay a definite amount of money. *Indebitatus assumpsit* was not maintained on such promise, for debt was the remedy on it, but on the new promise to pay the debt,—at first express, then implied. General assumpsit, unlike special assumpsit, did not create a new substantive right, but merely introduced a new form of procedure, in its beginning. At first general assumpsit was allowed on any debt created by simple contract. Then it was extended to promises implied in fact, or inferred contracts, though they did not create a technical debt. Finally it was extended to all the modern quasi-contracts for the payment of money.[28]

In an action of trespass on the case on premises with a plea of non-assumpsit and payment, if there is no replication there is no issue, and until there is a replication a jury should not be sworn to try the issues. Miles *v.* Rose, Hempst. 37, 17 Fed. Cas. No. 9,544a.

In an action of assumpsit on a note, with a plea alleging all of the elements of fraud, a replication denying the fraudulent representation is good on demurrer. Bradner *v.* Demick, 20 Johns. (N. Y.) 404.

A replication alleging a promise to pay (and therefore money), when the proof is a promise to pay in good notes, is no bar to the statute of limitations. Taylor *v.* Stedman, 35 N. C. 97.

A replication to a plea of the statute of limitations of six years must allege that the defendant was out of the state till within six years before the cause of action, to make that sort of an answer good. Shapley *v.* Felt, 3 N. H. 121.

25. **Md.**—Trasher *v.* Everhart, 3 Gill & J. 234. **Mass.**—McClees *v.* Burt, 5 Mete. 198. **N. H.**—Douglas *v.* Oldham, 6 N. H. 150.

26. Kimball *v.* Kimball (N. H.), 73 Atl. 408.

27. Andrews' Steph. Pl., 86n; Will's Gould Pl., 48; Willis Contracts, 4, 8-10. General assumpsit "rests only on a legal liability springing out of a consideration received." Cutter *v.* Powell, 2 Sm. L. C. (8th ed.) 48, note.

28. 2 Har. L. Rev. 16-19, 53-69. **U. S.**—Collins *v.* Johnson, Hempst. 279,

c. *Scope.*— (I.) When Action Will Not Lie.—(A.) Express Contract Unperformed.— General assumpsit will never lie for any breach of a contract except the refusal or failure to pay a definite amount of money. In order to lie a debt must be created. Otherwise the law will not imply a promise in fact when there is an express promise. Special assumpsit is the remedy if any.[29]

(B.) Judgments. —*Indebitatus assumpsit* will lie on a foreign judg-

6 Fed. Cas. No. 3,015a. **Ark.**—Wolf *v.* Irons, 8 Ark. 63. **Ga.**—Mahaffey *v.* Petty, 1 Ga. 261. **Eng.**—Brill *v.* Neele, 3 Barn. & Ald. 208, 5 E. C. L. 264, 106 Eng. Reprint 638; Slade's Case, 4 Coke 92b, 76 Eng. Reprint 1074.

Either *indebitatus assumpsit* or debt will lie on account. Collins *v.* Johnson, Hempst. 279, 6 Fed. Cas. No. 3,015a.

Debt and *indebitatus assumpsit* distinguished. Metcalf *v.* Robinson, 2 McLean 363, 17 Fed. Cas. No. 9,497; McGinnity *v.* Laguerenne, 10 Ill. 101.

If the statute of limitations has run against a debt, in declaring in debt count on the acknowledgment, in *indebitatus assumpsit,* on the original promise. Butcher *v.* Hixton, 4 Leigh (Va.) 519.

29. **U. S.**—Perkins *v.* Hart, 11 Wheat. 237, 6 L. ed. 463. **Ala.**—Dees *v.* Self Bros, 51 So. 735; Ezell *v.* King, 93 Ala. 470, 9 So. 534; Burkham *v.* Spiers, 56 Ala. 547; Vincent *v.* Rogers, 30 Ala. 471. **Ark.**—Bernard *v.* Dickins, 22 Ark. 351; Jackson *v.* Jones, 22 Ark. 158; Coster *v.* Davies, 8 Ark. 213, 46 Am. Dec. 311. **Cal.**—Kalkmann *v.* Baylis, 17 Cal. 291. **Conn.**—Leonard *v.* Dyer, 26 Conn. 172, 68 Am. Dec. 382; Winton *v.* Meeker, 25 Conn. 456; Russell *v.* South Britain Soc., 9 Conn. 508. **Del.**—Truitt *v.* Fahey, 3 Penne. 573. **Ill.**—Expanded Mut. F. Co. *v.* Boyce, 233 Ill. 284, 84 N. E. 275; Elder *v.* Hood, 38 Ill. 533. **Ind.**—Swift *v.* Williams, 2 Ind. 365; Johnson *v.* Clark, 5 Blackf. 564; Hoagland *v.* Moore, 2 Blackf. 167. **Ia.**—Lorton *v.* Agnew, Morris 64. **Ky.** Carson *v.* Allen, 6 Dana 395; Markley *v.* Withers, 4 T. B. Mon. 14; Halley *v.* M'Cargo, 4 Bibb 349. **La.**—Mazureau *v.* Morgan, 25 La. Ann. 281; Willis *v.* Melville, 19 La. Ann. 13. **Me.**—Holden Steam M. Co. *v.* Westervelt, 67 Me. 446; Jenks *v.* Mathews, 31 Me. 318. **Md.**—Speake *v.* Sheppard, 6 Har. & J. 81. **Mich.**—Applebaum *v.* Goldman, 155 Mich. 369, 121 N. W. 288; Bedier *v.* Fuller, 106 Mich. 342, 64 N. W. 331; Bromley *v.* Goff, 75 Mich. 213, 42 N. W. 810; Butterfield *v.* Seligman, 17 Mich. 95. **Mo.**—Reifschneider *v.* Beck, 129 S. W. 232; Williams *v.* Chicago, S. F. & C. R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; Ingram *v.* Ashmore, 12 Mo. 574; Chambers *v.* King, 8 Mo. 517; Stollings *v.* Sappington, 8 Mo. 118; Helm *v.* Wilson, 4 Mo. 41, 28 Am. Dec. 336. **Neb.**—Mayer *v.* Bryck, 46 Neb. 221, 64 N. W. 691; Powder R. L. S. Co. *v.* Lamb, 38 Neb. 339, 56 N. W. 1019. **N. H.**—Colburn *v.* Pomeroy, 44 N. H. 19. **N. J.**—Stewart Mfg. Co. *v.* Iron Clad Mfg. Co., 67 N. J. L. 577, 52 Atl. 391; Voorhees *v.* Combs, 38 N. J. L. 494; Perdicaris *v.* Trenton City Br. Co., 29 N. J. L. 367. **N. Y.**—Brundage *v.* Village of Port Chester, 102 N. Y. 494, 7 N. E. 398; Clark *v.* Smith, 14 Johns. 326. **N. C.**—Winstead *v.* Reid, 44 N. C. 76, 57 Am. Dec. 571. **Pa.**—Powelton Coal Co. *v.* McShain, 75 Pa. 238. **S. C.**—Geer *v.* Brown, 11 Rich. 42. **Tenn.**—Thompson *v.* French, 10 Yerg. 452. **Tex.**—Gammage *v.* Alexander, 14 Tex. 414. **Vt.**—Hemenway *v.* Smith, 28 Vt. 701. **W. Va.**—Robinson *v.* Welty, 40 W. Va. 385, 22 S. E. 73. **Wis.**—Tietz *v.* Tietz, 90 Wis. 66, 62 N. W. 939. **Eng.**—Read *v.* Rann, 10 Barn. & C. 438, 21 E. C. L. 106, 109 Eng. Reprint 513; Ferguson *v.* Carrington, 3 Car. & P. 457, 14 E. C. L. 387; Hulle *v.* Heightman, 2 East 145, 102 Eng. Reprint 324; Cutter *v.* Powell, 6 T. R. 320, 101 Eng. Reprint 573; Weston *v.* Downes, 1 Doug. 23, 99 Eng. Reprint 19.

If in special assumpsit the plaintiff cannot recover because of a variance, but there is a good contract unperformed in evidence, he cannot recover on the common counts. Hooper *v.* Eiland, 21 Ala. 714.

ment, but debt is the only action that will lie on a domestic judgment,[30] unless assumpsit is permitted by statute.[31]

(C.) Specialties.—General assumpsit will not lie upon a contract under seal.[32] The proper action is either covenant or debt. But if a simple contract is substituted for a contract under seal, assumpsit and not covenant will lie.[33] Several states have by statute modified the rule so as to permit the action of assumpsit on all demands formerly recoverable in debt, covenant and assumpsit.[34]

(D.) Rent, Title.—General assumpsit does not lie against a trespasser for rent,[35] nor to try the title to real estate.[36]

30. **U. S.**—Mellin *v.* Horlick, 31 Fed. 865. **Ala.**—Knapp's Exr. *v.* Kingsbury, 51 Ala. 563. **Mass.**—Buttrick *v.* Allen, 8 Mass. 273, 5 Am. Dec. 105. **S. C.**—Lambkin *v.* Nance, 2 Brev. 99. **Eng.**—Harris *v.* Saunders, 4 Barn. & C. 411, 10 E. C. L. 373, 107 Eng. Reprint 1112.

The obligation of record is the only quasi-contract in the nature of debt which is not enforceable by an action in general assumpsit. 2 Har. L. Rev. 64.

31. Detroit Sav. Bank *v.* Ziegler, 49 Mich. 157, 13 N. W. 496, 43 Am. Rep. 456; Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396.

32. **U. S.**—Fresh *v.* Gilson, 5 Cranch C. C. 533, 9 Fed. Cas. No. 5,112. **Ala.**—Smith *v.* Sharp, 50 So. 381; Horton *v.* Ronalds, 2 Port. 79; Hatch *v.* Crawford, 2 Port. 54. **Conn.**—New London City Nat. Bank *v.* Ware River R. Co., 41 Conn. 542. **Ky.**—Hubbard *v.* Beckwith, 1 Bibb 492. **Me.**—Bowes *v.* French, 11 Me. 182. **Md.**—Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 1 Am. Rep. 398. **Mass.**—Codman *v.* Jenkins, 14 Mass. 93. **N. H.**—Knowlton *v.* Tilton, 38 N. H. 257; Little *v.* Morgan, 31 N. H. 499. **N. Y.**—Wood *v.* Edwards, 19 Johns. 205. **N. C.**—Wilson *v.* Murphey, 14 N. C. 352.

General assumpsit does not lie on an award when it is made pursuant to submission under seal. McCargo *v.* Crutcher, 23 Ala. 575; Holmes *v.* Smith, 49 Me. 242. But see Averill *v.* Buckingham, 36 Conn. 359.

Where there is privity a party may waive his right to sue on a sealed note, sue in *indebitatus assumpsit* on the original consideration and introduce the note in evidence. Hanna *v.* Pegg, 1 Blackf. (Ind.) 181.

An injunction bond without a seal is a simple contract. Cox *v.* Vogh, 33 Miss. 187.

Corporation liable, if seal ineffective. **N. J.**—Baptist Church *v.* Mulford, 8 N. J. L. 182. **N. Y.**—Randall *v.* Van Vechten, 19 Johns. 60, 10 Am. Dec. 192. **S. C.**—Garvey *v.* Colcock, 1 Nott & M. 231.

33. **Conn.**—Hinsdale *v.* Eells, 3 Conn. 377. **Mass.**—Munroe *v.* Perkins, 9 Pick. 298, 20 Am. Dec. 475. **N. Y.**—Miller *v.* Watson, 7 Cow. 39. **Vt.**—Smith *v.* Smith, 45 Vt. 433; Briggs *v.* Vermont Cent. R. Co., 31 Vt. 211; Barker *v.* Troy & R. R. Co., 27 Vt. 766.

Recovery may be had in *indebitatus assumpsit* for work, labor and materials for work done under an agreement under seal, if the original covenant is broken so that there is no recovery on it. Jewell *v.* Schroeppel, 4 Cow. (N. Y.) 564.

34. **Me.**—Rumford Falls Boom Co. *v.* Rumford Falls Paper Co., 96 Me. 96, 51 Atl. 810. **Pa.**—Charles *v.* Scott, 1 Serg. & R. 294. **W. Va.**—Middle States, etc. Co. *v.* Engle, 45 W. Va. 588, 31 S. E. 921.

35. **Ala.**—Swanson *v.* Brown, 160 Ala. 432, 49 So. 675; Eastland *v.* Sparks, 22 Ala. 607. **Cal.**—Sampson *v.* Schaeffer, 3 Cal. 196. **Eng.**—Salmon *v.* Smith, 1 Saund. 206, 85 Eng. Reprint 209.

See 2 Har. L. Rev. 377-380.

But a tenancy is not necessary. Lazarus *v.* Phelps, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. ed. 363, where defendant who had pastured cattle on plaintiff's unfenced lands was held liable for use and occupation.

36. **Ill.**—King *v.* Mason, 42 Ill. 223, 89 Am. Dec. 426. **Pa.**—Lewis *v.* Robinson, 10 Watts 338. **W. Va.**—Parks *v.* Morris, 63 W. Va. 51, 59 S. E. 753.

As to action under statute, see Rum-

(E.) No Privity.—General assumpsit will not lie for breach of a contract to pay money to a third person,[37] unless such contract creates a debt, as where one person puts money into a second person's hands for the benefit of a third person.[38]

(F.) Tort Without Benefit to Estate.—A person cannot waive his tort action and sue in general assumpsit when the tort does not benefit the wrongdoer's estate, though it may injure the estate or person of the plaintiff.[39] Under any circumstances, if the wrongdoer does not convert money, or sell the goods appropriated and convert them into money, no form of general assumpsit will lie except the action for goods bargained and sold, and such action is not permitted in all jurisdictions.[40]

(G.) Voluntary Services.—General assumpsit will not lie for money voluntarily paid out or services voluntarily rendered;[41] nor for benefits conferred against the express declaration of a party unless the law throws an obligation on him.[42]

ford Falls Boom Co. *v.* Rumford Falls Paper Co., 96 Me. 96, 51 Atl. 810.

37. **Mass.**—Rogers *v.* Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478. **Mich.**—Labadie *v.* Detroit L. & N. R. Co., 125 Mich. 419, 84 N. W. 622; Carpenter *v.* Graham, 46 Mich. 531, 9 N. W. 841. **N. Y.**—Mason *v.* Munger, 5 Hill 613.

But see Hall *v.* Marston, 17 Mass. 575.

38. **Ala.**—Wooten *v.* Steele, 98 Ala. 252, 13 So. 563; Hitchcock *v.* Lukens & Son, 8 Port. 333. **N. H.**—Knapp *v.* Hobbs, 50 N. H. 476. **N. J.**—Budd *v.* Hiler, 27 N. J. L. 43. **N. C.**—Draughan v. Bunting, 31 N. C. 10. **Pa.**—Wynn's Admr. *v.* Wood, 97 Pa. 216.

39. **Mich.**—Plefka *v.* Detroit United R., 147 Mich. 641, 111 N. W. 194. **Neb.**—Carson R. Lumb. Co. *v.* Bassett, 2 Nev. 249. **N. H.**—Page *v.* Babbit, 21 N. H. 389. **R. I.**—Whipple *v.* Stephens, 25 R. I. 563, 57 Atl. 375. **Vt.**—Stearns *v.* Dillingham, 22 Vt. 624, 54 Am. Dec. 88.

40. **Ala.**—Crow *v.* Boyd's Admr., 17 Ala. 51. **Ark.**—Hutchinson *v.* Phillips, 11 Ark. 270. **Ga.**—Woodruff *v.* Zaban & Son, 133 Ga. 24, 65 S. E. 123, 134 Am. St. Rep. 186. **Mass.**—Allen *v.* Ford, 19 Pick. 217. **Mich.**—McCormick H. M. Co. *v.* Waldo, 128 Mich. 135, 87 N. W. 55; Grinnell *v.* Anderson, 122 Mich. 533, 81 N. W. 329; Watson *v.* Stever, 25 Mich. 386. **Mo.**—Sandeen *v.* Kansas City, etc. R. Co., 79 Mo. 273. But see Gordon *v.* Bruner, 49 Mo. 570. **N. H.**—Smith *v.* Smith, 43 N. H. 536. **N. Y.**—Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. 803, 8 L. R. A. 217. **Pa.**—Reilly *v.* Crown P. Co., 213 Pa. 595, 63 Atl. 253; Boyer *v.* Bullard, 102 Pa. 555. **R. I.**—Wilder *v.* Aldrich, 2 R. I. 518. **Vt.**—Saville, Somers & Co. *v.* Welch, 58 Vt. 683, 5 Atl. 491.

Under Michigan statutes assumpsit will not lie unless property is converted into money, unless there is a trespass on realty or some contract relation between plaintiff and defendant. Lyon *v.* Clark, 129 Mich. 381, 88 N. W. 1046.

When a contract is procured by fraud the party defrauded cannot waive the tort action and sue in *indebitatus assumpsit*, without first rescinding the express contract. **U. S.**—Cummings *v.* Synnott, 120 Fed. 84, 56 C. C. A. 490. **Cal.**—Bechtel *v.* Chase, 156 Cal. 707, 106 Pac. 81. **Ill.**—Ingersoll *v.* Moss, 44 Ill. App. 72.

See Camp *v.* Pulver, 5 Barb. (N. Y.) 91; Crown Cycle Co. *v.* Brown, 39 Ore. 285, 64 Pac. 451.

41. **Me.**—Moody *v.* Moody, 14 Me. 307. **Mich.**—Coe *v.* Wager, 42 Mich. 49, 3 N. W. 248. **N. J.**—Force *v.* Haines, 17 N. J. L. 385. **N. Y.**—Ingraham *v.* Gilbert, 20 Barb. 151. **Eng.**—Child *v.* Morley, 8 T. R. 610, 101 Eng. Reprint 1574.

42. Jewett *v.* Inhab. of Somerset, 1 Me. 125; Earle *v.* Coburn, 130 Mass. 596.

(H.) Not for Breach of Certain Quasi-Contracts.—General assumpsit will not lie on a contract of record, nor on those statutory, official, and customary obligations other than to pay a definite amount of money.[43]

(II.) When Action Will Lie.—(A.) Express Contract Performed Except to Pay Money.—*Indebitatus assumpsit* in original form or on the common counts, will lie for the recovery of a definite amount of money due by express contract, if all the other terms of the contract are performed, for the contract creates a debt and the law raises an assumpsit on the creation of every simple debt; the buyer's words of agreement not only operates as a grant, but also import a promise.[44]

43. 2 Har. L. Rev. 64; Metropolitan R. Co. *v.* Dist. of Columbia, 132 U. S. 1, 10 Sup. Ct. 19, 33 L. ed. 231.

The common counts do not lie for breach of implied warranty. Austin *v.* Beall (Ala.), 52 So. 657; Walker *v.* T. & G. Forbes, 25 Ala. 139, 60 Am. Dec. 498; Sanitary Dist. of Chicago *v.* McMahon, 110 Ill. App. 510.

One should declare specially against a surety where his character appears on the face of the instrument. Butler *v.* Rawson, 1 Denio (N. Y.) 105.

44. With the modern conceptions of contract which are the outgrowth of the development of the consensual contract it is hard to conceive of the theory of permitting the action of *indebitatus assumpsit* in the case stated in the proposition. Why was not the suit directly on the promise made in creating the debt, alleging the benefit to the promisor as the consideration? Because this field had already been preempted by the action of debt. Special assumpsit knew no consideration other than the detriment to the promisee. Debt had already been allowed for the recovery of a definite amount of money when quid pro quo had been given. The promise in question, therefore, created a debt, and special assumpsit would not lie thereon. The only way assumpsit was introduced into this territory was by the action on the case in the nature of debt. This was first allowed where there was an express promise to pay the precedent debt, and then it was allowed on the precedent debt without such promise because of the fiction that the law created the promise. The bilateral contract, after it has become executed on one side, may easily create a debt, so that nothing is more natural than that *indebitatus* should be held to lie both where the debt is created at once and where it is created only after part performance of a bilateral contract on which special assumpsit would also lie. **U. S.**—Bank of Columbia *v.* Patterson's Admr., 7 Cranch 299, 3 L. ed. 351; Holloway & Bro. *v.* White-Dunham Shoe Co., 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704; Dawes & Co. *v.* Peebles' Sons, 6 Fed. 856; Fontaine *v.* Aresta, 2 McLean 127, 9 Fed. Cas. No. 4,905; Ames *v.* LeRue, 2 McLean 216, 1 Fed. Cas. No. 327. **Ala.**—Stafford *v.* Sibley, 106 Ala., 189, 17 So. 324; Beadle *v.* Graham's Admr., 66 Ala. 99; Darden *v.* James, 48 Ala. 33; Dukes *v.* Leowie, 13 Ala. 457. **Ark.**—Bertrand *v.* Byrd, 5 Ark. 651. **Conn.**—Canfield *v.* Merrick, 11 Conn. 425. **Del.**—Massey *v.* Greenbaum Bros., 5 Penne. 20, 58 Atl. 804; Hurlock *v.* Murphy, 2 Houst. 550. **Ga.**—Dobbins *v.* Pyrolusite M. Co., 75 Ga. 450; Hancock *v.* Ross, 18 Ga. 364. **Ill.**—Oleese *v.* Mobile F. & T. Co., 211 Ill. 539, 71 N. E. 1084; McArthur Bros. Co. *v.* Whitney, 202 Ill. 527, 67 N. E. 163; Sands *v.* Potter, 165 Ill. 397, 46 N. E. 282, 56 Am. St. Rep. 253; First Nat. Bank *v.* Hart, 55 Ill. 62; Thomas *v.* Caldwell, 50 Ill. 138; Leach & Son *v.* Alphons Custodis & C. Co., 110 Ill. App. 338; Grand *v.* Chicago Daily News Co., 92 Ill. App. 129. **Ind.**—Brown *v.* Perry, 14 Ind. 32; Russell *v.* Brandham, 8 Blackf. 277. **Ia.**—Buford & Co. *v.* Funk, 4 Greene 493. **Kan.**—Emslie *v.* City of Leavenworth, 20 Kan. 562, code. **Ky.** Scott *v.* Messick, 4 T. B. Mon. 535; Cochran *v.* Tatum, 3 T. B. Mon. 404. **Md.**—Young *v.* Boyd, 107 Md. 449, 69 Atl. 33; Walsh *v.* Jenvey, 85 Md. 240, 36 Atl. 817; Fairfax Forrest M. & M. Co. *v.* Chambers, 75 Md. 604, 23 Atl.

Indebitatus assumpsit will lie in the above case whether the sum specified is payable in money or in specific goods, for upon failure to deliver the goods promised, the obligation is converted into a money obligation.[45] Where an express contract contains nothing more than

1024. **Mass.**—Tebbetts *v.* Pickering, 5 Cush. 83, 51 Am. Dec. 48; Felton *v.* Dickinson, 10 Mass. 287. **Mich.**—Nicol *v.* Fitch, 115 Mich. 15, 72 N. W. 988, 69 Am. St. Rep. 542; Nugent *v.* Teachout, 67 Mich. 571, 35 N. W. 254. **Miss.**—New Orleans, etc. R. Co. *v.* Pressley, 45 Miss. 66. **Mo.**—Moore *v.* Gans & Sons Mfg. Co., 113 Mo. 98, 20 S. W. 975; Mansur *v.* Botts, 80 Mo. 651; Wilson *v.* Wilson, 106 Mo. App. 501, 80 S. W. 711. **N. H.**—Hale *v.* Handy, 26 N. H. 206. **N. J.**—Risley *v.* Beaumont, 71 N. J. L. 372, 59 Atl. 145. **N. Y.**—Hurst *v.* Litchfield, 39 N. Y. 377; Hosley *v.* Black, 28 N. Y. 438; Farron *v.* Sherwood, 17 N. Y. 227 (code does not change common law rule); Peltier *v.* Sewall, 12 Wend. 386. **Pa.**—McManus *v.* Cassidy, 66 Pa. 260; Edwards *v.* Goldsmith, 16 Pa. 43; Kelly *v.* Foster, 2 Binn 4. **R. I.**—McDermott *v.* Wilhelmina etc. Soc., 24 R. I. 527, 54 Atl. 58. **Tenn.**—Blackmore *v.* Wood, 3 Sneed 470; Sublett *v.* McLin, 10 Humph. 181; Allen *v.* McNew, 8 Humph. 46. **Vt.**—Hersey *v.* Northern Assur. Co., 75 Vt. 441, 56 Atl. 95; Bradley *v.* Phillips, 52 Vt. 517. **Va.**—Baltimore & O. R. Co. *v.* Polly, 14 Gratt. 447; Brown *v.* Ralston, 9 Leigh 532. **W. Va.**—Lord *v.* Henderson, 65 W. Va. 321, 64 S. E. 134; Moore *v.* Supervisors of Wetzel County, 18 W. Va. 630. **Eng.**—Studdy *v.* Sanders, 2 D. & R. 347, 16 E. C. L. 93; Streeter *v.* Horlock, 1 Bing. 34, 8 E. C. L. 233; Pinchon's Case, 9 Coke 86b, 77 Eng. Reprint 859; Slade's Case, 4 Coke 92b, 76 Eng. Reprint 1074.

The count for work and labor will not lie when there is a special contract, though it has been executed by the plaintiff. O'Connor *v.* Dingley, 26 Cal. 11.

The common counts are founded on the implied promises to pay money in consideration of antecedent debts. Parker & Son *v.* Clemons, 80 Vt. 521, 68 Atl. 646.

The acts of 1896 changed the common law in Vermont so that *indebitatus assumpsit* will lie to recover on an insurance policy. Hersey *v.* Northern Assur. Co., 75 Vt. 441, 56 Atl. 95.

In a suit in *indebitatus assumpsit* on a contract performed, except for the payment of money, evidence of value is inadmissible. Edwards *v.* Goldsmith, 16 Pa. 43; Baltimore & O. R. Co. *v.* Polly, 14 Gratt. (Va.) 447.

The common counts, *e. g.*, money lent, money paid at request, and money had and received by defendant to plaintiff's use, will, in America, generally lie on a bill of exchange or a promissory note. This resulted from the extension of debt into the field of the law merchant. **Ill.**—Lane *v.* Adams, 19 Ill. 167. **Mass.**—Tebbetts *v.* Pickering, 5 Cush. 83, 51 Am. Dec. 48. **N. Y.**—Smith *v.* Smith, 2 Johns. 235, 3 Am. Dec. 410.

General assumpsit will not lie on a collateral guaranty for it creates no debt, but it will lie if the undertaking is original. **Ill.**—Power *v.* Rankin, 114 Ill. 52, 29 N. E. 185; Runde *v.* Runde, 59 Ill. 98; Adams *v.* Westlake, 92 Ill. App. 616. **Md.**—Elder *v.* Warfield, 7 Har. & J. 391. **N. Y.**—Northrup *v.* Jackson, 13 Wend. 85.

45. **Ark.**—Peay *v.* Ringo, 22 Ark. 68. **Ill.**—McKinnie *v.* Lane, 230 Ill. 544, 82 N. E. 878, 120 Am. St. Rep. 338. See Meyers *v.* Schemp, 67 Ill. 469. **Md.**—Marshall *v.* McPherson, 8 Gill & J. 333; Lyles *v.* Lyles' Exrs., 6 Har. & J. 273. **Mo.**—St. Louis F. D. Ins. Co. *v.* Soulard, 8 Mo. 665. **N. Y.**—Taplin *v.* Packard, 8 Barb. 220. **Tenn.**—Vance's Admr. *v.* Jones, Peck 328. **Tex.**—Short *v.* Abernathy, 42 Tex. 94. **Vt.** Wilkins *v.* Stevens, 8 Vt. 214. **Wis.**—Bradley *v.* Levy, 5 Wis. 400.

Some courts hold that the plaintiff in such case should declare specially. **Ala.**—Nesbitt *v.* Ware & McClanahan, 30 Ala. 68. **Ind.**—Carlisle *v.* Dunn, 5 Blackf. 605. **Ky.**—Sparks *v.* Simpson's Admr., 3 J. J. Marsh. 110; Spratt *v.* M'Kinney, 1 Bibb 595. **N. H.**—Ranlett *v.* Moore, 21 N. H. 336. **Va.**—Brooks *v.* Scott's Exr., 2 Munf. 344.

When a special contract to pay rent in repairs is proven, there cannot be a recovery in *quantum meruit*. Baldwin *v.* Lessner, 8 Ga. 71.

the law would imply, the plaintiff has his option to declare specially or in general assumpsit.[46]

(B.) Inferred Contracts.—General assumpsit, in the form of the *quantum meruit* or *quantum valebat* counts, will lie for the recovery of damages for the breach of a promise implied in fact to pay as much as the plaintiff reasonably deserves for goods or services rendered at request.[47]

(C.) Quasi-Contracts Generally.[48]—**(1.) Money Laid Out at Request or in Doing What Another Is Legally Obliged to Do.**—*Indebitatus assumpsit*, in the form of a count for money paid for defendant's use will lie to recover the amount of money laid out by one person for another at the latter's request,[49] or when the payment is necessary for the former's protection,[50] or when one does what another is legally obliged to do and the latter subsequently approves of the same.[51]

(2.) Benefits Obtained by Fraud or Appropriation.—*Indebitatus assumpsit*, in the form of a count for money had and received by the defendant to the plaintiff's use, will lie to recover damages against a wrongdoer who obtains benefits by his tortious act, either when he converts money,[52] or when he converts goods and by a sale receives

46. **Ind.**—Scholz *v.* Schneck's Estate, 91 N. E. 730. **Me.**—Davis *v.* Smith, 79 Me. 351, 10 Atl. 55. **N. H.**—Sanburn *v.* Emerson, 12 N. H. 57. **N. J.**—Princeton & K. T. Co. *v.* Gulick, 16 N. J. L. 161.

47. **Ala.**—Jonas *v.* King, 81 Ala. 285, 1 So. 591; Aikin *v.* Bloodgood, 12 Ala. 221. **Colo.**—Ford *v.* Rockwell, 2 Colo. 376. **Conn.**—Cunningham *v.* Delohery Hat Co., 74 Atl. 881. **Del.**—Richards *v.* Richman, 5 Penne. 558, 64 Atl. 238. **Ind.**—Board of Comrs. *v.* Gibson, 158 Ind. 471, 63 N. E. 982. **Me.**—Rumford Falls Boom Co. *v.* Rumford Falls P. Co., 95 Me. 186, 49 Atl. 876. **Md.**—Gambrill *v.* Schooley, 89 Md. 546, 43 Atl. 918. **Mass.**—Hobbs *v.* Massosoit Whip Co., 158 Mass. 194, 33 N. E. 495. **Mich.**—Chapman *v.* Dease, 34 Mich. 375. **N. H.**—Fogg *v.* Portsmouth Atheneum, 44 N. H. 115, 82 Am. Dec. 189. **Pa.**—McCullough *v.* Ford Nat. Gas. Co., 213 Pa. 110, 62 Atl. 521.

A promise implied in fact is classified as a true contract, and not as a quasi-contract. Yet the action of special assumpsit does not lie thereon for want of an express promise. Debt cannot be maintained thereon, for the amount is not liquidated. Hence, for centuries at the common law there was no common law action whatever, and no recovery was possible until the action of general assumpsit (not special assumpsit as we should have expected) was extended to cover this class of cases. The obligation did not resemble a strict debt so much as it did the obligation enforced by special assumpsit, so in order to bring the new doctrine into harmony with the accepted theory of consideration, it was at first said that the promise was by fiction coupled with the prior request, but when the promise implied in fact was fully understood this was found not to be necessary. 2 Har. L. Rev. 58-62.

48. The common counts are applicable to every case where money (or goods) have been received which in equity and good conscience ought to be refunded. Thompson *v.* Thompson, 5 W. Va. 190.

49. Fry *v.* Talbott, 106 Md. 43, 66 Atl. 664; Brown *v.* Fales, 139 Mass. 21, 29 N. E. 211.

50. **Ala.**—Smith *v.* McGehee, 14 Ala. 404. **Cal.**—Leeke *v.* Hancock, 76 Cal. 127, 17 Pac. 937. **Ill.**—City of Chicago *v.* Pittsburg, etc., R. Co., 146 Ill. App. 403. **Me.**—Todd *v.* Tobey, 29 Me. 219. **Eng.**—See Stokes *v.* Lewis, 1 T. R. 20, 99 Eng. Reprint 949.

51. Gleason *v.* Dyke, 22 Pick. (Mass.) 390.

52. **U. S.**—Gibson *v.* Stevens, 3 McLean 551, 10 Fed. Cas. No. 5,401. **Ala.** Steiner *v.* Clisby, 103 Ala. 181, 15 So. 612. **Ill.**—McDonald *v.* Brown, 16 Ill.

money therefor;[53] and *indebitatus assumpsit*, in the form of a count for goods sold and delivered, will lie to recover damages for the tortious taking of goods.[54] Under such circumstances the person injured waives his tort action and counts on a fictitious sale which the defendant is not in a position to deny. Recovery may be had though

32. **Me.**—Penobscot R. Co. *v.* Mayo, 67 Me. 470, 24 Am. Rep. 45; Howe *v.* Clancy, 53 Me. 130. **Mass.**—Boston, etc., Corp. *v.* Dana, 1 Gray 83. **N. J.** Westcott *v.* Sharp, 50 N. J. L. 392, 13 Atl. 243. **N. Y.**—Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726, code. **Ore.**—Hornefius *v.* Wilkinson, 51 Ore. 45, 93 Pac. 474. **Vt.**—Elwell *v.* Martin, 32 Vt. 217. **Wis.**—Western Assur. Co. *v.* Towle, 65 Wis. 247, 26 N. W. 104, code. **Eng.**—Neate *v.* Harding, 6 Exch. 349.

53. **U. S.**—Steam Stone Cutter Co. *v.* Sheldons, 21 Blatchf. 260, 15 Fed. 608. **Ala.**—Bradfield *v.* Patterson, 106 Ala. 397, 17 So. 536; Smith *v.* Jerngan, 83 Ala. 256, 3 So. 515; Upchurch *v.* Norsworthy, 15 Ala. 705. **Ark.**—Chamblee *v.* McKenzie, 31 Ark. 155; Hudson *v.* Gilliland, 25 Ark. 100. **Del.** Hutton *v.* Wetherald, 5 Harr. 38. **Ga.**—Southern R. Co. *v.* Born Steel Range Co., 122 Ga. 658, 50 S. E. 488. **Ill.**—Crell *v.* Kirkham, 47 Ill. 344. **Ind.**—James *v.* Gregg, 17 Ind. 84. **Ky.** Daniel *v.* Daniel, 9 B. Mon. 195; Guthrie *v.* Wickliffe, 1 A. K. Marsh. 83. **Me.**—Quimby *v.* Lowell, 89 Me. 547, 36 Atl. 902; Shaw *v.* Coffin, 58 Me. 254, 4 Am. Rep. 290. **Mass.**—Gilmore *v.* Wilbur, 12 Pick. 120, 22 Am. Dec. 410. **Mich.**—Nelson *v.* Kilbride, 113 Mich. 637, 71 N. W. 1089. **Miss.**—Isaacs *v.* Hermann & Moss, 49 Miss. 449. **N. H.**—Woodbury *v.* Woodbury, 47 N. H. 11, 90 Am. Dec. 555; White *v.* Brooks, 43 N. H. 402. **N. Y.**—Harpending *v.* Shoemaker, 37 Barb. 270; Cobb *v.* Dows, 9 Barb. 230. **N. C.**—Olive *v.* Olive, 95 N. C. 485; Wall *v.* Williams, 91 N. C. 477. **Pa.**—Gray *v.* Griffith, 10 Watts 431. **Vt.**—Kidney *v.* Persons, 41 Vt. 386, 98 Am. Dec. 595; Phelps *v.* Conant, 30 Vt. 277. **W. Va.**—Maloney *v.* Barr, 27 W. Va. 381. **Wis.**—Ellfott *v.* Jackson, 3 Wis. 649.

Money had and received will lie where the goods tortiously taken are manufactured into a different article and in that state sold for money. Gilmore *v.* Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410.

An infant may avoid his special contract given for a settlement of a tort, but he is liable on the original cause of action in *indebitatus assumpsit* for money received. Shaw *v.* Coffin, 58 Me. 254, 4 Am. Rep. 290. See Baker *v.* Huddleston, 3 Baxt. (Tenn.) 1.

A plaintiff cannot waive his tort action and sue for money had and received when the defendant merely exchanges the goods taken for other goods. Fuller *v.* Duren, 36 Ala. 73, 76 Am. Dec. 318; Kidney *v.* Persons, 41 Vt. 386, 98 Am. Dec. 595.

Money had and received will lie by a depositary against the maker of a note who takes it from his possession. Penobscot R. Co. *v.* Mayo, 60 Me. 306.

54. **U. S.**—Phelps *v.* Church, 99 Fed. 683, 40 C. C. A. 72. **Ark.**—Johnson & Kemby *v.* Reed, 8 Ark. 202 (see later cases). **Cal.**—Chittenden *v.* Pratt, 89 Cal. 178, 26 Pac. 626; Roberts *v.* Evans, 43 Cal. 380; Fratt *v.* Clark, 12 Cal. 89. **Ga.**—Harral *v.* Wright, 57 Ga. 484. **Ill.**—City of Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090; Toledo, W. & W. R. Co *v.* Chew, 67 Ill. 378. **Mass.**—Brown *v.* Holbrook, 4 Gray 102. **Mich.**—Brown *v.* Foster, 137 Mich. 35, 100 N. W. 167 (code); Castner *v.* Darby, 128 Mich. 241, 87 N. W. 199 (code); Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240; McLaughlin *v.* Salley, 46 Mich. 219, 9 N. W. 256. **Miss.**—Evans *v.* Miller, 58 Miss. 120, 38 Am. Rep. 313. **Mo.**—Johnson *v.* Strader, 3 Mo. 359. **Mont.**—Galvin *v.* Mac M. & M. Co., 14 Mont. 508, 37 Pac. 366. **N. H.** Hill *v.* Davis, 3 N. H. 384. **N. J.**—Moore *v.* Richardson, 68 N. J. L. 305, 53 Atl. 1032. **N. Y.**—Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216; McGoldrick *v.* Willits, 52 N. Y. 612; Runyon *v.* Marclay, 54 Barb. 164; Beardsley *v.* Benders, 123 N. Y. Supp. 35, code. **N. D.**—Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133. **Ohio.**—Barker *v.* Cory, 15 Ohio 9. **Pa.**—Pryor *v.* Morgan, 170 Pa. 568, 33 Atl. 98; Satterlee *v.* Melick, 76 Pa. 62. **Tenn.**—Whitaker *v.* Pos-

the wrongdoer is a bailee.[55] Some jurisdictions do not permit the count for goods sold and delivered for a tortious taking of goods, and there *indebitatus assumpsit* will not lie unless the goods have been resold.[56]

(3.) Benefits Obtained by Compulsion.—General assumpsit, in the form of a count for money had and received by the defendant to the plaintiff's use, will lie for money obtained by duress,[57] or undue influence, [58] or where it is improperly exacted under compulsion of law,

ton, 120 Tenn. 207, 110 S. W. 1019; Huffman *v.* Hughlett, 11 Lea 549. **W. Va.**—Walker *v.* Norfolk & W. R. Co., 67 S. E. 722. **Wis.**—*In re* Heber's Will, 139 Wis. 472, 121 N. W. 328 (code); Smith *v.* Schulenberg, 34 Wis. 41; Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782. **Eng.**—Smith *v.* Hodson, 4 T. R. 211, 100 Eng. Reprint 979; Russell *v.* Bell, 10 Mees. & W. 340.

The original owner may sue the person to whom goods converted have been resold. Smith *v.* Schulenberg, 34 Wis. 41.

Action for goods sold and delivered will not lie against a public officer taking property and selling it in good faith under color of lawful authority. Osborn *v.* Bell, 5 Denio (N. Y.) 370, 49 Am. Dec. 275.

Indebitatus assumpsit will lie in these jurisdictions though services of servants, etc., instead of goods are appropriated. Jones *v.* Buzzard, Hempst. 240, 13 Fed. Cas. No. 7,206a; Foster *v.* Stewart, 3 Moore & S. 191, 105 Eng. Reprint 582; Lightly *v.* Clouston, 1 Taunt. (Eng.) 112.

Action for goods sold and delivered will not lie where the wrongdoer damages personal property but does not intend to claim it as his own. Reynolds Bros. *v.* Padgett, 94 Ga. 347, 21 S. E. 570.

To recover in *indebitatus assumpsit* for goods sold there must be fraud or unfair dealing or other circumstance from which an implication may arise. There cannot be a recovery for a deficiency in lumber when defendant took logs to saw into lumber. Satterlee *v.* Melick, 76 Pa. 62.

55. **Cal.**—Lehmann *v.* Schmidt, 87 Cal. 15, 25 Pac. 161. **Del.**—Guthrie *v.* Hyatt, 1 Har. 446. **Ga.**—Bates *v.* Bigby, 123 Ga. 727, 51 S. E. 717; Farmers' & M. Bank *v.* Bennett & Co., 120 Ga. 1012, 48 S. E. 398; Cooper *v.* Berry, 21 Ga. 526, 68 Am. Dec. 468. **Ill.**—Ives *v.* Hartley, 51 Ill. 520; Gentle *v.* Stephens, 87 Ill. App. 190; Farson *v.* Hutchins, 62 Ill. App. 439. **Ind.**—Babb *v.* Babb, 89 Ind. 281; Cox *v.* Reynolds, 7 Ind. 257; Smith *v.* Stewart, 5 Ind. 220. **N. H.**—Seavey *v.* Dana, 61 N. H. 339; Graves *v.* Ticknor, 6 N. H. 537. **N. J.**—Mott *v.* Pettit, 1 N. J. L. 344. **N. Y.**—Berly *v.* Taylor, 5 Hill 577; Beardslee *v.* Richardson, 11 Wend. 25, 25 Am. Dec. 596. **Pa.**—Zell *v.* Dunkle, 156 Pa. 353, 27 Atl. 38; Michener *v.* Dale, 23 Pa. 59. **S. C.**—Tindall *v.* McCarthy, 44 S. C. 487, 22 S. E. 734. **Tenn.**—Ott *v.* Whitworth, 8 Humph. 494. **Vt.**—Scott *v.* Lance, 21 Vt. 507. **Va.**—Lawson's Exr. *v.* Lawson, 16 Gratt. 230, 80 Am. Dec. 702.

Book account will not lie for money which bailee fails to deliver. Drury *v.* Douglas, 35 Vt. 474. See Bradfield *v.* Patterson, 106 Ala. 397, 17 So. 536.

56. **Ala.**—Miller *v.* King, 67 Ala. 575. **Ark.**—Bowman *v.* Browning, 17 Ark. 599. **Ga.**—Barlow *v.* Stalworth, 27 Ga. 517. **Me.**—Quimby *v.* Lowell, 89 Me. 547, 36 Atl. 902. **Miss.**—Mhoon *v.* Greenfield, 52 Miss. 434. See Jamison *v.* Moon, 43 Miss. 598. **Pa.**—Gray *v.* Griffith, 10 Watts 431. **Vt.**—Winchell *v.* Noyes, 23 Vt. 303.

One cannot waive his tort and sue in *indebitatus assumpsit* if the effect is to give jurisdiction to a court which otherwise would not have it. Finlay *v.* Bryson, 84 Mo. 664.

Quantum meruit will lie to recover value of services rendered by a free negro held by the defendant as a slave. Hickam *v.* Hickam, 46 Mo. App. 496; Peter *v.* Steel, 3 Yeates (Pa.) 250.

57. Willis Contracts, 14, 15.

58. Willis Contracts, 13, 14.

or as a condition precedent to the performance of a public duty.[59]

(4.) Benefits Conferred in Reliance on Unenforcible Contract. — General assumpsit, in some of its forms, will lie for recovery for benefits which have been conferred in reliance on a contract which is deviated from by consent,[60] or which is substantially performed, though not strictly complied with,[61] or which has been mutually rescinded,[62] or which has been terminated by the happening of a condition,[63] or whose performance is prevented by the default of the other party,[64]

59. **U. S.**—Curtis *v.* Fiedler, 2 Black 461, 28 L. ed. 273. **Ala.**—Duncan *v.* Ware's Exrs., 5 Stew. & P. 119, 24 Am. Dec. 772. **Conn.**—Johnson *v.* Norwich, 31 Conn. 407.

60. Wright *v.* Morris, 15 Ark. 444; Cox *v.* McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Lacy Mfg. Co. *v.* Los Angeles G. & E. Co., 12 Cal. App. 37, 106 Pac. 413.

61. **Conn.** — Pinches *v.* Swedish Church, 55 Conn. 183, 10 Atl. 264. **Ill.** Shepard *v.* Mills, 173 Ill. 223, 50 N. E. 709; Munger *v.* Towslee, 38 Ill. 40. **Md.**—Brooke *v.* Quynn, 13 Md. 379. **Mass.**—Snow *v.* Inhab. of Ware, 13 Metc. 42; Hayward *v.* Leonard, 7 Pick. 181, 19 Am. Dec. 268. **Mich.**—Andre *v.* Hardin, 32 Mich. 324. **Mo.**—Cann *v.* Rector, 111 Mo. App. 164, 85 S. W. 994. **N. Y.**—Ladue *v.* Seymour, 24 Wend. 60. **Ore.**—Todd *v.* Huntington, 13 Ore. 9.

62. **U. S.**—Chesapeake & O. Canal Co. *v.* Knapp, 9 Pet. 541, 9 L. ed. 222; Columbus Safe-Dep. Co. *v.* Burke, 88 Fed. 630, 32 C. C. A. 67; Dawes & Co. *v.* Peebles' Sons, 6 Fed. 856. **Ala.**—Kirkland *v.* Oates, 25 Ala. 465. **Ark.** Prince, Chace & Co. *v.* Thomas, 15 Ark. 378. **Ill.**—Catholic Bishop *v.* Bauer, 62 Ill. 188. **Ind.**—Barber *v.* Lyon, 8 Blackf. 215. **Ia.**—Stewart *v.* Craig, 3 Greene 505. **N. M.**—Daly *v.* Bernstein, 6 N. M. 380, 28 Pac. 764. **Ohio.**—Fitch *v.* Sargeant, 1 Ohio 352. **Pa.**—Crossgrove *v.* Himmelrich, 54 Pa. 203. **S. C.**—Suber *v.* Pullin, 1 S. C. 273. **Tenn.** — Allen *v.* McNew, 8 Humph. 46. **Wis.**—Mann *v.* Stowell, 3 Pinn. 220. **Eng.**—Towers *v.* Barrett, 1 T. R. 133, 99 Eng. Reprint 1014.

63. **Mich.**—Redding *v.* Lamb, 81 Mich. 318, 45 N. W. 997. **N. J.**—Sherwin *v.* Sternberg, 77 N. J. L. 117, 71 Atl. 117; Weart *v.* Hoagland's Admr., 22 N. J. L. 517; Glover *v.* Collins, 18 N. J. L. 232. **N. Y.**—Jones *v.* Judd, 4 N. Y. 411. **Vt.**—Groot *v.* Story, 41 Vt. 533.

64. **U. S.**—Ankeny *v.* Clark, 148 U. S. 345, 13 Sup. Ct. 617, 37 L. ed. 475; Conrad *v.* Conrad, 4 Dall. 130, 1 L. ed. 771; Michigan Y. & P. Co. *v.* Busch, 143 Fed. 929, 75 C. C. A. 109. **Ark.**—Lafferty *v.* Day, Williams & Co., 7 Ark. 258. **Cal.**—Rose *v.* Foord, 96 Cal. 152, 30 Pac. 1114; Reynolds *v.* Jourdan, 6 Cal. 108. **Conn.**—Lyon *v.* Annable, 4 Conn. 350. **Ill.**—Booker *v.* Wolf, 195 Ill. 365, 63 N. E. 265; Guerdon *v.* Corbett, 87 Ill. 272; Sanger *v.* Chicago, 65 Ill. 506; Selby *v.* Hutchinson, 9 Ill. 319; Neagle *v.* Herbert, 73 Ill. App. 17. **Ind.**—Barickman *v.* Kuykendall, 6 Blackf. 21. **Ia.**—Dibol *v.* W. & F. H. Minott, 9 Iowa 403. **Ky.**—Morford *v.* Ambrose, 3 J. J. Marsh, 688. **La.**—Brown *v.* Snow, 14 La. Ann. 848. **Me.** Wright *v.* Haskell, 45 Me. 489. **Md.** Bull *v.* Shuberth, 2 Md. 38. **Mass.**—Canada *v.* Canada, 6 Cush. 15. **Mich.** Township of Buckeye *v.* Clark, 90 Mich. 432, 51 N. W. 528; Aldine Mfg. Co. *v.* Barnard, 84 Mich. 632, 48 N. W. 280; Mooney *v.* York Iron Co., 82 Mich. 263, 46 N. W. 376; Mitchell *v.* Scott, 41 Mich. 108, 1 N. W. 968. **Mo.**—McCulloch *v.* Baker, 47 Mo. 401. **N. H.** Carroll *v.* Giddings, 58 N. H. 333. **Tex.**—Raycraft *v.* Johnston, 41 Tex. Civ. App. 466, 93 S. W. 237. **Vt.**—Chamberlain *v.* Scott, 33 Vt. 80; Derby *v.* Johnson, 21 Vt. 17. **W. Va.**—Lipscomb *v.* Lipscomb, 66 W. Va. 55, 66 S. E. 8. **Eng.**—Hesketh *v.* Blanchard, 4 East 144, 102 Eng. Reprint 785.

But a plaintiff cannot sue in general assumpsit for benefits conferred pursuant to an express contract when he himself is guilty of breach, unless such breach is caused by sickness or the other party waives the default. **Ala.**—Hunter *v.* Waldron, 7 Ala. 753; Givhan *v.* Dailey's Admx., 4 Ala. 336. **Ill.**—Wilderman *v.* Pitts, 29 Ill App. 528. **Me.**—Hayden *v.* Inhab. of Madison, 7 Me. 76. **Mass.**—Stark *v.* Parker, 2 Pick. 267, 13 Am. Dec. 425. **Pa.**—

or which is void for mistake, etc.,[65] or which is avoided for incapacity of party,[66] or unenforcible because of not fulfilling the requirements of the statute of frauds.[67] *Quantum meruit* will lie for services received under such reliance, money had and received for money paid, *quantum valebat* for goods furnished, etc.

(5.) **Benefits Conferred by Mistake of Fact.**—*Indebitatus assumpsit*, in the form of a count for money had and received, will lie for money paid under a mistake of fact.[68]

(III.) **Classification.**[69]—(A.) INDEBITATUS ASSUMPSIT.—This remedy, generally concurrent with debt, embraces:—

(1.) **Money Counts.**—(a.) *Money Paid for defendant's use*, which lies when money has been laid out at request or when plaintiff is under legal liability to pay the same for defendant or in doing what another is legally obliged to do and the act is ratified.[70]

(b.) *Money Had and Received by Defendant to Plaintiff's Use.*—This is an action of very wide application and lies whenever the defendant has money in his possession which in equity and good conscience belongs to the plaintiff.[71]

Algeo *v.* Algeo, 10 Serg. & R. 235. *Contra*—**U. S.**—Michigan Y. & P. Co. *v.* Busch, 143 Fed. 929, 75 C. C. A. 109. **Mich.**—Williams *v.* Crane, 153 Mich. 89, 16 N. W. 554. **Neb.**—West *v.* Van Pelt, 34 Neb. 63, 51 N. W. 313. **N. H.**—Britton *v.* Turner, 6 N. H. 481, 26 Am. Dec. 713.

65. Willis Contracts 20.

General assumpsit will lie against a corporation for benefits received, though the act is *ultra vires*. **U. S.**—De La Vergne, etc., Mach. Co. *v.* German Sav. Inst., 175 U. S. 40, 20 Sup. Ct. 20, 44 L. ed. 65. **Cal.**—Brown *v.* Board, etc., 103 Cal. 531, 37 Pac. 503. **Mich.**—Cicotte *v.* County of Wayne, 59 Mich. 509, 26 N. W. 686; Donovan *v.* Halsey, Fire Engine Co., 58 Mich. 38, 24 N. W. 819; Endriss *v.* County of Chippewa, 43 Mich. 317, 5 N. W. 632. **N. Y.**—Dunn *v.* Rector, 14 Johns. 118. **N. C.**—Clowe *v.* Imperial Pine Product Co., 114 N. C. 304, 19 S. E. 153. **Pa.**—Overseers, etc., of N. W. *v.* Overseers of S. W., 3 Serg. & R. 117. **S. C.**—Waring *v.* Catawba Co., 2 Bay 109. **Vt.**—Poultney *v.* Wells, 1 Aik. 180.

66. Willis Contracts, 19.

67. Booker *v.* Wolf, 195 Ill. 365, 63 N. E. 265.

68. **Ala.**—Moore *v.* Smith, 19 Ala. 774. **Conn.**—Sage *v.* Hawley, 16 Conn. 106, 41 Am. Dec. 128. **Me.**—Gooding *v.* Morgan, 37 Me. 419. **Md.**—Scott *v.* Leary, 34 Md. 389. **Mass.**—Haven *v.* Foster, 9 Pick. 112, 19 Am. Dec. 353. **Miss.**—Bank of Louisiana *v.* Bullard, 7 How. 371. **N. C.**—Mitchell *v.* Walker, 30 N. C. 243. **Tenn.**—Wilson *v.* Greer, 7 Humph. 513.

See Bailey *v.* Railroad Co., 22 Wall. (U. S.) 604, 22 L. ed. 840.

69. For the various applications of these counts, see *supra*, I, C, 3, c, (II).

Indebitatus assumpsit is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes a promise to fulfil that obligation; but the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Curtis *v.* Fiedler, 2 Black 478 [67 U. S. XVII. 276]; Cary *v.* Curtis, 3 How. 236; Philadelphia *v.* Collector, 5 Wall. 732 [72 U. S. XVIII. 617]; Elliott *v.* Swartwout, 10 Pet. 150; Bend *v.* Hoyt, 13 Pet. 267." Bailey *v.* New York Cent. & H. R. R. Co., 22 Wall. (U. S.) 604, 641, 22 L. ed. 840, *per* Clifford, J.

70. 1 Chit. Pl. 340.

71. 1 Chit. Pl. 340-342, and the following cases: **U. S.**—Gaines *v.* Miller,

(c.) *Money lent and advanced,* which lies whenever money is loaned to defendant, though delivered to a third person.[72]

(d.) *Interest,* which in general lies for the recovery of interest at the legal rate, whatever the cause of action, if there exists a claim for

111 U. S. 395, 4 Sup. Ct. 426, 28 L. ed. 466; Nash *v.* Towne, 5 Wall. 689, 18 L. ed. 527. **Cal.**—Trower *v.* San Francisco, 152 Cal. 479, 92 Pac. 1025, 15 L. R. A. (N. S.) 183 (annotated case), fees received by an official under an unconstitutional statute. **Ga.**—Butts County *v.* Jackson Bkg. Co., 129 Ga. 801, 60 S. E. 149, 15 L. R. A. (N. S.) 567 (annotated case), where the county was not authorized to borrow. **Kan.**—Simmonds *v.* Long, 80 Kan. 155, 101 Pac. 1070, 23 L. R. A. (N. S.) 553 (annotated case), where agents received money on a contract which principal refused to carry out. **Miss.**—O'Conley *v.* City of Natchez, 1 Smed. & M. 31, 40 Am. Dec. 87. **N. Y.**—Hess *v.* Fox, 10 Wend. 436. **Okla.**—Allsman *v.* Oklahoma City, 21 Okla. 142, 95 Pac. 468, 16 L. R. A. (N. S.) 511. **S. C.**—Luther *v.* Wheeler, 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746, money loaned to a municipality corporation which had no power to borrow.

"The action of *assumpsit* for money had and received, it is said by Lord Mansfield (Burr., 1012, Moses *v.* Macfarlen), will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in Stratton *v.* Rastall (2 T. R. 370), 'that this action has been of late years extended on the principle of its being considered like a bill in equity. And, therefore, in order to recover money in this form of action the party must show that he has equity and conscience on his side, and could recover in a court of equity.' These are the general grounds of the action as given from high authority. There must be room for implication as between the parties to the action, and the recovery must be *ex equo et bono,* or it can never be. If the action is to depend on the principles laid down by these judges, and especially by Buller, a case of hardship merely could scarcely be founded upon them; much less could one of injustice or oppression, nor even one which arose from irregularity or indiscretion in the plaintiff's own conduct. So far as the liability of agents in this form of action appears to have been considered, the general rule certainly is, that the action should be brought against the principal and not against a known agent, who is discharged from liability by a *bona fide* payment over to his principal, unless anterior to making payment over he shall have had notice from the plaintiff of his right and of his intention to claim the money. The absence of notice will be an exculpation of the agent in every instance. . . . We have thus stated, and will here recapitulate, the principles on which the action for money had and received may be maintained. They are these: 1st. Whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to refund. 2d. In the case of an agent, where such agent is not notoriously the mere carrier or instrument for transferring the fund, but has the power of retaining, and before he has paid over has received notice of the plaintiff's claim, and a warning not to part with the fund. 3d. Where there exists a privity between the plaintiff and the defendant." Cary *v.* Curtis, 3 How. (U. S.) 236, 11 L. ed. 576, *per* Daniel, J. And see Nash *v.* Towne, 5 Wall. (U. S.) 689, 18 L. ed. 527.

Contract Rescinded.—Money paid on such a contract may be recovered. Ankeny *v.* Clark, 148 U. S. 345, 13 Sup. Ct. 617, 37 L. ed. 475; Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. (U. S.) 541, 9 L. ed. 222.

72. 1 Chit. Pl. 340. See **U. S.**—Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326, 5 L. ed. 100. **Conn.** Dean *v.* Mann, 28 Conn. 352. **Ky.**—Willoughby *v.* Spear's Admr., 4 Bibb 397.

damages for the loss of a right of pecuniary value as of a definite time.[73]

(e.) *Account stated,* which lies for a balance due when there is an acknowledgment by the defendant that a sum certain is due and also where arbitrators award a sum of money to be due unless the submission is by bond, excepting against an infant.[74]

73. Willis Damages, 87, 88.

Illegal Contract.—"Lord Mansfield, in Smith *v.* Bromley, 2 Doug. 696, *n.*, as long ago as 1760, laid down the doctrine, which has ever since been followed, in these words: 'If the Act be in itself immoral, or a violation of the general laws of public policy, both parties are *in pari delicto,* but where the law violated is calculated for the protection of the subject against oppression, extortion and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover. In that case the plaintiff had given the defendant money to sign her brothers' bankrupt certificate, and she was allowed to recover it back, the law prohibiting any creditor from receiving money for such a purpose. Whilst the general principle has been frequently recognized, the application of it to particular cases has been somewhat diverse. Mr. Frere, in his note to Smith *v.* Bromley (supra) thus sums up the result of the cases: A recovery can be had, as for money had and received (1) where the illegality consists in the contract itself, and that contract is not executed—in such case there is a *locus paenitentiae,* the *delictum* is incomplete, and the contract may be rescinded by either party; (2) where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where the one party is the principal offender and the other only criminal from a constrained acquiescence, in such illegal conduct—in such case there is no parity of *delictum* at all between the parties, and the party so protected by the law, or so acting under compulsion, may, at any time resort to the law for his remedy, though the illegal transaction be completed." Thomas *v.* City of Richmond, 12 Wall. (U. S.) 349, 358, 20 L. ed. 453, *per* Bradley, J.

In Pari Delicto.—No recovery where the contract has been executed. Harriman *v.* Northern Securities Co., 197 U. S. 244, 25 Sup. Ct. 493, 49 L. ed. 739.

Mistake of Facts.—Money paid under a mistake of fact may be recovered in this form of action on the theory that the consideration has failed. United States *v.* Barlow, 132 U. S. 271, 10 Sup. Ct. 776, 33 L. ed. 347, *citing* Kelly *v.* Solari, 9 Mees. & W. (Eng.) 54.

See the title "**Mistake.**"

Mistake of Law.—For money so paid this action will not lie. Bodeau *v.* United States, 130 U. S. 439, 9 Sup. Ct. 579, 32 L. ed. 997.

See the title "**Mistake.**"

Duress.—"It is settled by many authorities that money paid by a person to prevent an illegal seizzue of his person or property by an officer claiming authority to seize the same, or to liberate his person or property from illegal detention by such officer, may be recovered back in an action for money had and received, on the ground that the payment was compulsory, or by duress or extortion. Under this rule, illegal taxes or other public exactions, paid to prevent such seizure or remove such detention, may be recovered back, unless prohibited by some statutory regulation to the contrary." Lamborn *v.* Dickinson County Comrs., 97 U. S. 181, 24 L. ed. 926. See also March *v.* Bricklayers' & Plasterers' Union No. 1, 79 Conn. 7, 63 Atl. 291, 4 L. R. A. (N. S.) 1198; Kilpatrick *v.* Germania L. Ins. Co., 183 N. Y. 163, 75 N. E. 1124, 2 L. R. A. (N. S.) 574 (annotated case); and the title "**Duress.**"

Indebitatus assumpsit will not lie to collect interest due on a promissory note not due; there must be a separate count when the principal is recovered. Brooks *v.* Holland, 21 Conn. 388.

74. Chit. Pl. 343. **U. S.**—Wyman *v.* Fowler, 3 McLean 467, 30 Fed. Cas. No. 18,114. **Conn.**—Ashley *v.* Hill, 6

(2.) **Debt Founded On.**—(a.) *Use and occupation,* which was a statutory form of *indebitatus assumpsit* created by act of Parliament, and which will lie for the recovery of rent where the demise is not by deed if the relation of landlord and tenant exists, but will not lie against a mere trespasser.[75]

(b.) *Board and Lodging.*[76]

(c.) *Goods Sold and Delivered.*—This will lie where goods have been sold and actually delivered, though under a special contract if the promise is to pay in money and the credit has expired,[77] or where a tort action for goods converted is waived.

(d.) *Goods bargained and sold,* which will lie where the defendant has purchased goods but refuses to accept the same provided the title has passed.[78]

(e.) *Work, labor, service and materials,* which will lie where services have been rendered under a special contract, if its terms have been wholly performed by the plaintiff, and the remuneration is to be in money, but not if not wholly performed by plaintiff though performance is prevented by defendant.[79]

Conn. 246. **Ill.**—Bedell *v.* Janney, 9 Ill. 193; Throop *v.* Sherwood, 9 Ill. 92. **Mass.**—Fanning *v.* Chadwick, 3 Pick. 420, 15 Am. Dec. 233. **Mich.**—Gooding *v.* Hengston, 20 Mich. 439. **Miss.**—McCall *v.* Nave, 52 Miss. 494. **Pa.**—Tassey *v.* Church, 4 Watts & S. 141. **Vt.**—Parker & Son *v.* Clemons, 80 Vt. 521, 68 Atl. 646. **Eng.**—Foster *v.* Allanson, 2 T. R. 479, 100 Eng. Reprint 258.

75. 2 Har. L. Rev. 377-380. **U. S.**—Bigby *v.* United States, 188 U. S. 400, 23 Sup. Ct. 468, 47 L. ed. 519; Hill *v.* United States, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. ed. 862; Lloyd *v.* Hough, 1 How. 153, 11 L. ed. 83. **Ala.**—Wilson *v.* Taylor, 148 Ala. 672, 41 So. 824; Meaher *v.* Pomeroy, 49 Ala. 146; Weaver *v.* Jones, 24 Ala. 420; Price *v.* Pickett, 21 Ala. 741. **Ill.**—Hill *v.* Coal & M. Co., 103 Ill. App. 41. **Md.**—Stockett *v.* Watkins, 2 Gill & J. 326, 20 Am. Dec. 438; Hoffar *v.* Dement, 5 Gill 132, 46 Am. Dec. 628. **Mass.**—City of Boston *v.* Biney, 11 Pick. 1, 22 Am. Dec. 353. **N. H.**—Hill *v.* Boutell, 3 N. H. 502. **N. J.**—Perrine *v.* Hankinson, 11 N. J. L. 181. **Tenn.**—Rhodes *v.* Crutchfield, 7 Lea 518. **Vt.**—Bachop *v.* Hill, 54 Vt. 507.

76. "Board and lodging" are included within the meaning of goods delivered and services performed. Berkowsky *v.* Specter, 79 Ill. App. 215.

77. Chit. Pl. 338-339; Schutz *v.* Jordan, 141 U. S. 213, 11 Sup. Ct. 960, 35 L. ed. 705; Leeds *v.* Burrows, 12 East 1, 104 Eng. Reprint 1.

78. Chit. Pl. 339.

79. Chit. Pl. 339; Allen *v.* Jarvis, 20 Conn. 38; Bishop *v.* Perkins, 19 Conn. 300; Hall *v.* Cannon, 4 Harr. (Del.) 360.

The right to recover depends "on the principle of general law that one who accepts the benefit of such services shall be held liable to pay what they are reasonably worth." Delaware, etc., Nav. Co. *v.* Reybold, 142 U. S. 636, 12 Sup. Ct. 290, 35 L. ed. 1141. And see Goddard *v.* Foster, 17 Wall. (U. S.) 123, 21 L. ed. 589.

"While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment of the price, he may sue on the contract, or in *indebitatus assumpsit,* and rely upon the common counts. In either case the contract will determine the rights of the parties. When he has been guilty of fraud, or has willfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner or

(B.) Quantum Meruit and Quantum Valebat. —These actions lie for damages for breach of inferred contracts, or promises implied in fact,[80] and for benefits conferred in reliance on unenforcible contracts.[81]

(IV.) Pleading.—(A.) The Declaration.—**(1.) Joinder of Counts.**—The declaration may join the common counts with a count in special assumpsit.[82] The common counts may be joined in the same declaration,

not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit*. He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by the fault of the defendant, the cost of the work or materials has been increased, in so far the jury will be warranted in departing from the contract prices. In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and time of the performance. There is great conflict and confusion in the authorities upon this subject. The propositions we have laid down are reasonable and just, and they are sustained by a preponderance of the best considered adjudications. Cutler *v.* Powell, 2 Sm. L. Cas. 1.'' Ingle *v.* Jones, 2 Wall. (U. S.) 1, 10, 17 L. ed. 762, *per* Swayne, J.

80. See cases *supra*, I, C, 2, c, (II), (B).

''Assuming that an express contract had been proven which covered not only the details of the work and labor to be done and performed and material to be furnished, but also the price to be paid for these, plaintiff had a clear right to abandon this contract and sue in assumpsit, and if an express contract had been proven, notwithstanding the suit was not on it but on a quantum meruit or quantum valebat, the measure of the recovery by plaintiff would be the amount stated in the contract.'' Reifschneider *v.* Beck, 148 Mo. App. 725, 129 S. W. 232.

81. See cases *supra*, I, C, 3, c, (II), (C), (4).

Work in Chain Gang.—One who is wrongfully compelled to perform work for another may waive the tort and recover from the latter the value of the services. Hamby *v.* Collier (Ga.), 71 S. E. 431, *citing* the following cases: **Ark.**—Greer *v.* Critz, 53 Ark. 247, 13 S. W. 764. **Ind.**—Patterson *v.* Prior, 18 Ind. 440, 81 Am. Dec. 367; Patterson *v.* Crawford, 12 Ind. 241. **Mo.**—Hickam *v.* Hickam, 46 Mo. App. 496. **Pa.**—Peter *v.* Steel, 3 Yeates 250.

82. **Ala.**—Kirkpatrick *v.* Bethany, 1 Ala. 201. **Mich.**—First Nat. Bk. *v.* Steele, 136 Mich. 588, 99 N. W. 786; Carland *v.* Western U. Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280. **Mo.**—McCormick H. & M. Co. *v.* Blair, 124 S. W. 49. **N. J.**—Bruen *v.* Ogden, 18 N. J. L. 124. **N. Y.**—Tuttle *v.* Mayo, 7 Johns. 132. **N. C.**—Burton *v.* Rosemary Mfg. Co. 132 N. C. 17, 43 S. E. 480. **S. C.**—Barnes *v.* Gorman, 9 Rich. 297. **Tenn.**—Irwin *v.* Bell, 1 Overt. 485. **Va.**—Kennaird *v.* Jones, 9 Gratt. 183. **Wis.**—Manning *v.* Galland, etc., Co., 141 Wis. 199, 124 N. W. 291, code.

In McCormick Harv. Mach. Co. *v.* Blair, 146 Mo. App. 374, 124 S. W. 49, the court said: ''There can be no doubt that a count in assumpsit for goods sold and delivered may be joined with a count on a promissory note, and it seems to be the practice, in cases of the character here involved, to permit the suit to proceed on the note in a separate count, and the original cause of action in another. Of course, in those circumstances each cause of action asserted in the separate counts arises out of the original consideration, and the law will only permit one recovery for the same indebtedness. Therefore, if the recovery is allowed on the notes, a judgment should always be given against the assertion of the indebtedness on the original consideration, and vice versa, if the recovery is allowed on the count in assumpsit, the judgment should go against the notes.'' In this case the petition contained three counts. ''The first two declare upon promissory notes

and all the money counts may be joined in one count.[83] If the declaration contains special and common counts, plaintiff cannot resort to the common counts if there is in fact a special contract, unless he abandons the special count at the outset or fails to prove the special.[84] Plaintiff cannot abandon a special count and recover on common, after a trial which has proceeded on the theory of the special count.[85] Plaintiff cannot be compelled to elect as to which count he will proceed on,[86] but where he has two or more causes of action in one count he may be compelled to elect.[87] Neither debt nor a tort action can be joined with the common counts.[88]

(2.) **Joinder of Parties.** —Joint owners must sue jointly when waiving a tort action.[89] Joint promisees must sue jointly. If a legal right is violated by the joint act or default of two or more, they must all be joined as defendants.[90] If one of several joint defendants lives out of the state, plaintiff may discontinue as to him and get judgment against the others.[91] Non-joinder and misjoinder are generally taken advantage of by a plea in abatement, but if the proof supporting the objection to

and the third count declares in assumpsit for an amount alleged to be due for a harvesting machine sold to the defendant. The indebtedness sued for in the third count is for the same consideration as that represented by the two promissory notes declared upon in the first and second counts."

"Counts for money had and received may be joined with special counts; and where, as in this case, the special counts are for damages for the non-delivery of goods, it is perfectly competent for the plaintiff, if the price was paid in money or money's worth, to prove the allegations of the special counts and introduce evidence to support the common counts; and if it appears that the defendant refused to deliver the goods, and that he has converted the same to his own use, the plaintiff, at his election, may have damages for the non-delivery of the goods, or he may have judgment for the price paid and lawful interest." Nash *v.* Towne, 5 Wall. (U. S.) 689, 18 L. ed. 527, 530.

83. **Conn.** — Main *v.* First School Dist. of Preston, 18 Conn. 214. **Me.**—Criffin *v.* Murdock, 88 Me 254, 34 Atl. 30. **Mass.**—Whitwell *v.* Brigham, 19 Pick. 117. **Mich.**—Tregent *v.* Maybee, 54 Mich. 226, 19 N. W. 962. **N. Y.**—Nelson *v.* Swan, 13 Johns. 483.

See Buckingham *v.* Waters, 14 Cal. 146.

84. **Ala.**—Morcland *v.* Ruffin, Minor 18. **Del.**—Morris *v.* Burton, 4 Harr. 53. **Mich.** — Berringer *v.* Cobb, 58 Mich. 557, 25 N. W. 491; Beecher *v.* Pattee, 40 Mich. 181; Wyman *v.* Crowley, 33 Mich. 84. **Miss.**—Morrison *v.* Ives, 4 Smed. & M. 652. **N. Y.**—Robertson *v.* Lynch, 18 Johns. 451. **Pa.**—Carvill *v.* Garrigues, 5 Pa. 152.

85. Wyatt *v.* Herring, 90 Mich. 581, 51 N. W. 684; Wetmore *v.* McDougall, 32 Mich. 276.

86. Norris *v.* Durham, 9 Cow. (N. Y.) 151; Matthieu *v.* Nixon, 1 McCord (S. C.) 571.

87. Union Nat. Bk. *v.* Lyons, 220 Mo. 538, 119 S. W. 540.

88. **Conn.** — Phelps *v.* Hurd, 31 Conn. 444. **Ill.**—Cruikshank *v.* Brown, 10 Ill. 75. **Ky.**—Wickliffe *v.* Davis, 2 J. J. Marsh. 69. **Vt.**—Joy *v.* Dill, 36 Vt. 333.

If the writ is in debt and declaration in assumpsit, it is cured by verdict. Shenk *v.* Mingle, 13 Serg. & R. (Pa.) 29. See Haynes *v.* Brown, 36 N. H. 545.

89. Woodward *v.* Sutton, 1 Cranch C. C. 351, 30 Fed. Cas. No. 18,009; Irwin's Admr. *v.* Brown's Exrs., 35 Pa. 331.

90. Will's Gould Pl. 387; Dundas *v.* Muhlenberg's Exrs., 39 Pa. 351; Bishop *v.* Harrison's Admr., 2 Leigh (Va.) 532.

91. Rand *v.* Nutter, 56 Me. 339.

the same is inconsistent with any material part of the declaration advantage may be taken of it under the general issue.[92]

(3.) General Allegations. —In *indebitatus assumpsit* the declaration should set out a legal liability of the defendant for a debt charged, and a promise to pay in consideration thereof, for the purpose of establishing the plaintiff's right, and then set forth the defendant's wrong, or breach.[93] If the suit is on a contract executed except for the payment of money, it is sufficient to set out the indebtedness without specially stating the contract.[94] In the *quantum meruit* and the *quantum valebat* counts the fact that the plaintiff has performed work, or furnished goods is alleged directly as a consideration for the promise to pay as much as the plaintiff deserved, or goods were reasonably worth, without alleging that by reason thereof a debt had arisen, followed by an allegation of the reasonable worth of the services or goods, and with the allegation of a breach.[95]

(4.) Variance.— The allegations in general assumpsit are so general that there is little danger of a variance, but if the proof offered does not conform to the allegations it should be rejected, or if admitted is fatal.[96]

92. Will's Gould Pl. 451; Mellandy *v.* N. E. P. Union, 36 Vt. 31; Wilson *v.* McCormick, 86 Va. 995, 11 S. E. 976; Kayser *v.* Disher, 9 Leigh. (Va.) 357.

Appointment of guardian *ad litem* for infant. Barclay *v.* Govers, 1 Cranch. C. C. 147, 2 Fed. Cas. No. 973.

It may be proved by parol that Alexander and A. H. are the same person. Payton *v.* Tappan, 2 Ill. 387.

A declaration is demurrable which joins counts against an administrator *de bonis non* with count against him individually. Godbold *v.* Roberts' Admr., 20 Ala. 354.

93. **U. S.**—Derk P. Yonkerman Co. *v.* Chas. H. Fuller's Avd. Agency, 135 Fed. 613. **Ala.**—Maury *v.* Olive, 2 Stew. 472. **Cal.**—De Witt *v.* Porter, 13 Cal. 171; Freeborn, Goodwin *v.* Glazer, 10 Cal. 337. **Ill.**—Zjednoczenie *v.* Sadecki, 41 Ill App. 329. **Ky.**—Lunderman *v.* Lunderman, 2 J. J. Marsh. 597.

If the introduction of the declaration is in debt (or trover) but the counts are in assumpsit, the declaration is in assumpsit. Ayers *v.* Richards, 12 Ill. 146; Morford *v.* White, 53 Ind. 547.

To support the common counts it is necessary to prove everything which it would be necessary to aver if the count was special. Landrum *v.* Brookshire, 1 Stew. (Ala.) 252.

94. Olcese *v.* Mobile F. & T. Co., 211 Ill. 539, 71 N. E. 1084; Baker *v.* Corey, 19 Pick. (Mass.) 496.

In a conditional promise the declaration should allege the conditional undertaking, the happening of the condition, that thereby the defendant became liable to pay, and thereupon undertook and promised (with failure to pay). Massachusetts Mut. Life Ins. Co. *v.* Kellogg, 82 Ill. 614.

"Defendant being indebted to the plaintiff in the sum of $———, according to account annexed, in consideration thereof promised," is sufficient. Rider *v.* Robbins, 13 Mass. 284. See Burton & Co. *v.* Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

Pleadings lost may be supplied by copy. Hartford Fire Ins. Co *v.* Vanduzer, 49 Ill. 489.

95. McKelvey Com. Law Pl. 28.

The time of the accruing of the indebtedness is immaterial, provided it is a day prior to the commencement of suit.

96. **Ala.**—Strickland *v.* Burns, 14 Ala. 511. **Conn.**—Zacarino *v.* Pallotti, 49 Conn. 36. **Ill.**—Chicago *v.* C. & N. W. R. Co., 186 Ill. 300, 56 N. E. 795. **Ia.**—Payne *v.* Couch & Kinsman, 1 Greene 64, 46 Am. Dec. 497. **Mo.**—Kennerly *v.* Somerville, 68 Mo. App. 222. **N. Y.**—Richardson *v.* Smith, 8 Johns. 439; 1 Chit. Pl. 337.

(5.) Amendment. — An amendment will not be allowed if it introduces a new cause of action, but otherwise it will be granted in the discretion of the trial court.[97]

(6.) Bill of Particulars. — The defendant may require a bill of particulars of the declaration, or the plaintiff, of the set-off, before pleading to the merits.[98] A bill of particulars is a detailed informal statement of a plaintiff's cause of action, or of a defendant's set-off.[99] A party failing to demand a bill of particulars must be prepared to meet any case admissible under the common counts.[1] A party is confined in proof to items in the bill of particulars.[2] An account annexed is a part of the declaration, but a bill of particulars is not.[3]

97. **Me.**—Holmes *v.* Robinson Mfg. Co., 60 Me. 201; Brewer *v.* East Machias, 27 Me. 489. **Mass.**—Swan *v.* Nesmith, 7 Pick. 220, 19 Am. Dec. 282; **N. H.**—Griffin *v.* Simpson, 45 N. H. 18. **Vt.**—Carter *v.* Hosford, 48 Vt. 433.

A declaration in general assumpsit may be amended by allowing a declaration in debt to be filed. Bishop *v.* Silver Lake M. Co., 62 N. H. 455.

A declaration with a special count on a note and a count for money had and received may be amended by adding a new count for money paid. J. S. & W. P. Libbey *v.* Pierce, 47 N. H. 309.

A declaration containing the common counts for goods sold and delivered may be amended by adding a special count on the contract made at the time. Rogers *v.* Phinney, 13 N. J. L. 1.

A declaration with a count for work and labor cannot be amended by adding counts for use and occupation and for goods, wares and merchandise sold. Thompson *v.* Phelan, 22 N. H. 339.

A declaration containing the common *indebitatus* counts counting on a sale, cannot be amended by adding a count upon a guaranty. Brodek & Co. *v.* Hirschfield, 57 Vt. 12.

98. Randall *v.* Glenn, 2 Gill (Md.) 430; Mercer *v.* Sayre, 3 Johns. (N. Y.) 248.

99. An account filed with the count is not a bill of particulars. Carter *v.* Tuck, 3 Gill (Md.) 248.

A count on an account annexed, without the account, may be amended by using the bill of particulars for the account. Tarbell *v.* Dickinson, 3 Cush. (Mass.) 345.

A bill of particulars with abbreviations is sufficient. Harris *v.* Christian, 10 Pa. 233.

1. Hall *v.* Woodin, 35 Mich. 67.

In the common counts the only reason why the plaintiff must show in what respect the defendant is indebted to him is that it may appear that he is not suing on a debt of record or specialty. 1 Chit. Pl. 337.

2. **Conn.**—Zacarino *v.* Pallatti, 49 Conn. 36. **Ind.**—Harding *v.* Griffin, 7 Blackf. 462. **Md.**—Southern Bldg. & Loan Assn. *v.* Price, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206. **Mich.**—Bennett *v.* Smith, 40 Mich. 211. **N. H.**—Merrill *v.* Russell, 12 N. H. 74. **N. Y.** Carter *v.* Hope, 10 Barb. 180.

If the bill of particulars exceeds the amount claimed in the declaration, plaintiff may remit the excess. Butler *v.* Millett, 47 Me. 492.

Plaintiff may show statute of frauds. Wright *v.* Dickinson, 67 Mich. 590, 42 N. W. 849.

Proof of handwriting. Robinson *v.* Dibble's Admr., 17 Fla. 457.

3. **Me.**—Bennett *v.* Davis, 62 Me. 544. **Vt.**—Aseltine *v.* Perry, 75 Vt. 208, 54 Atl. 190. **Va.**—Geo. Campbell Co. *v.* Angus Co., 91 Va. 438, 22 S. E. 167; Wright *v.* Smith, 81 Va. 777, 54 Atl. 190.

An account filed with the declaration must be intelligible, but if it gives notice of the character of claim it is sufficient without items. Burwell *v.* Burges, 32 Gratt. (Va.) 472; Moore *v.* Mauro, 4 Rand. (Va.) 488.

Plaintiff does not waive common counts by failing to file account. Federation Wd. Glass Co. *v.* Cameron G. Co., 58 W. Va. 477, 52 S. E. 518.

When a statute requires the affidavit of plaintiff or his agent to an account filed, "bookkeeper" does not import such agency. Merriman Co. *v.*

(7.) **Special Allegations.**—(a.) *Request by Defendant.* —In general assumpsit it is unnecessary to allege a request by defendant in the case of the counts for goods sold and delivered, for goods bargained and sold, for money lent, for money had and received, and on an account stated, as a sale, loan, and statement of account are the acts of both parties, and the receipt of money for which money had and received lies is the act of defendant alone;[4] but it is necessary to allege a request though it is not necessary to prove the same but the facts in the count for money paid,[5] and it is necessary to allege and prove a request in the counts for services and in the *quantum meruit* and *quantum valebat* counts.[6]

(b.) *Consideration.* — The declaration in general assumpsit must allege a consideration. In the ordinary *indebitatus* counts this is done by alleging a precedent debt on one of the common counts (benefit to promisor),[7] and in the *quantum* counts by alleging the precedent performance of work or sale and delivery of goods (detriment to promisee).[8]

(c.) *Promise.*—The declaration in general assumpsit must allege an express promise to pay the amount of the debt charged (common counts), or reasonable worth (*quantum* counts), or the declaration is bad on demurrer.[9] There is no such thing as an implied promise in

Thomas & Co., 103 Va. 24, 48 S. E. 490.

A declaration under the Code of 1880 which accurately specifies two items in a suit for board and for money received, is sufficient without a bill of particulars. Tierney *v.* Duffy, 59 Mass. 364.

4. Langdell Contracts, §96.

5. Langdell Contracts, §96.

6. **Ala.**—McCrary *v.* Brown, 50 So. 402; Kanjutsky *v.* Tennessee C. & I. R. Co., 154 Ala. 316, 45 So. 676. **Mont.**—Conrad Nat. Bk. *v.* Great Northern R. Co., 24 Mont. 178, 61 Pac. 1. **N. H.**—Allen *v.* Woodward, 22 N. H. 544. **N. Y.**—Hicks *v.* Burhans, 10 Johns. 243; Comstock *v.* Smith, 7 Johns. 87. **Pa.** Stoever *v.* Stoever, 9 Serg. & R. 434. **Eng.**—Hayes *v.* Warren, 2 Str. 933, 91 Eng. Reprint 950.

Request proved by circumstantial evidence. Hill *v.* Packard, 69 Me. 158.

Request Inferred.—Cape Elizabeth *v.* Lombard, 70 Me. 396; Oatfield *v.* Waring, 14 Johns. (N. Y.) 188.

7. **Ala.**—Carlisle *v.* Davis, 9 Ala. 858. **Conn.**—Lyon *v.* Alvord, 18 Conn. 66. **Ky.**—Beauchamp *v.* Bosworth, 3 Bibb 115. **Miss.**—Brown *v.* Webbler, 6 Cush. 560. **Vt.**—Harding *v.* Cragie, 8 Vt. 501.

8. McKelvey Com. Law Pl. 28.

9. **Conn.**—Story *v.* Barrell & G., 2 Conn. 665. **Ind.**—Ferguson *v.* Rhodes, 7 Blackf. 262. **Me.**—Coffin *v.* Hall, 75 Atl. 385. **Mich.**—Hoard *v.* Little, 7 Mich. 468. **N. Y.**—Candler *v.* Rossiter, 10 Wend. 487. **Utah.**—Kilpatrick, etc., Co. *v.* Box, 13 Utah 494, 45 Pac. 629.

Under code procedure either a promise must be alleged or the facts from which the law will imply a promise. **Ind.**—Watkins *v.* DeArmond, 89 Ind. 553. **Md.**—Swem *v.* Sharretts, 48 Md. 408. **Mo.**—Wells *v.* Pacific R. R., 35 Mo. 164.

"It is sufficient under the code to state facts in an action in assumpsit from which a promise to pay will be implied. (Nat'l Bank *v.* Landis, 34 Mo. App. 433, 440.) This petition alleges the execution, signing and delivery to R. B. Palmer & Sons of a negotiable promissory note and states the principal, the date of execution, date of maturity and the interest as they are given in the note. A promissory note is defined to be 'An unconditional promise in writing for the payment of a certain sum of money absolutely.' (3 Kent, Comm., 74; Daniel, Nego. Inst., sec 28.) An allegation that a promissory note was executed and delivered necessarily implies a promise by the maker to pay, and an allegation that such a note was

pleading,[10] the fact is implied appears only in evidence and not upon the record.

(d.) *Request of Payment.* —The declaration in general assumpsit is good though it does not allege a request of payment by plaintiff, as it is a consequence of the cause of action disclosed.[11] But where a demand is necessary to give a cause of action it should be alleged or the declaration is defective.[12]

(e.) *Amount Claimed.* —The *quantum meruit* and *quantum valebat* counts should allege what the services or goods are reasonably worth, and the common counts should state the amount of the indebtedness, together with the amount of damage caused by failure to pay. Plaintiff may recover less but not more than the sum set out in the declaration.[13]

(f.) *Breach.* —The declaration in general assumpsit should allege a breach.[14]

(g.) *Forms Peculiar to Various Counts.* —In the common form of *indebitatus assumpsit* it was alleged that on a certain date the defendant was indebted to the plaintiff in a certain sum of money for money paid for defendant's use (or for money had and received by defendant to plaintiff's use, or for money lent and advanced, or for goods sold and delivered, or for goods bargained and sold, or for work, labor and services, or materials (as the case might be), at defendant's request; that being so indebted the defendant, in consideration thereof, promised to pay said sum when requested; but that he has not paid said sum though requested and still refuses to pay the same to plaintiff's damage in a certain sum. The counts of *quantum meruit* and *quantum valebat* are like the regular *indebitatus* count except that the services performed and the goods sold and delivered were alleged directly as the consideration for the promise to pay as much as the plaintiff deserved, or the

executed and delivered to a person or persons named (in this case Palmer & Son) implies a promise to pay whomsoever is mentioned. This might not follow from a mere allegation that it was delivered to said person, but when the averment is also that it was executed to it he is sufficiently designated as the payee to give him, prima facie, the right to transfer the note by assignment. In the case of Bank *v.* Landis, cited supra, the pleader described the note as one whereby, for value received, the defendant promised to pay to the order of the plaintiff the sum mentioned. This, however, was but a statement of the terms of the note and not a distinct averment of a promise to pay; and the contention in that case was there should have been a distinct averment. Though in the present case the petition does not describe the note as containing a promise to pay, the description of it as a promissory note implies that it contained such a promise." Bick *v.* Clark, 134 Mo. App. 544, 114 S. W. 1144.

10. Will's Gould Pl. 210; Higgins *v.* Germaine, 1 Mont. 230; Douglas & Varnum *v.* Morrisville (Vt.), 79 Atl. 391.

11. Forrest *v.* Jones, 7 Ala. 493; Henderson *v.* Howard, 2 Ala. 342; 1 Chit. Pl. 322-323.

12. **Ind.** — Ferguson *v.* Dunn's Admr., 28 Ind. 58. **Mo.**—Horine *v.* Bone, 69 Mo. App. 481. **Pa.**—Dewart *v.* Masser, 40 Pa. 302; Willet *v.* Willet, 3 Watts 277.

13. **Ala.**—Tankersley *v.* Childers, 23 Ala. 781. **Ill.**—Sawyer *v.* Daniels, 48 Ill. 269. **Pa.**—Slitzell *v.* Michael, 3 Watts & S. 329. **Vt.**—Wheeler *v.* Shed, 1 D. Chip. 208.

14. 1 Chit. Pl. 335; McKelvey Com. Law Pl. 29.

goods were reasonably worth; that the plaintiff deserved a named sum, or the goods were reasonably worth a named sum, etc. In the account stated it was alleged that on a day named the defendant accounted with the plaintiff, etc., and that upon such accounting, the defendant having been found in arrear and indebted, in consideration thereof, promised to pay, etc.[15]

(B.) THE PLEAS.—**(1.) The General Issue.**—(a.) *What May Be Shown Under, in General.*—In general assumpsit, under the general issue the defendant may in general introduce anything growing out of or concerning the transaction which shows that the plaintiff *ex aequo et bono* is not entitled to recover because he has no subsisting debt, either because it never existed, or because it has been extinguished.[16]

(b.) *Particular Matters Which May Be Shown.*—(AA.) *Payment*—In general assumpsit payment may be shown under the general issue,[17] if made before commencement of suit; if made after plea, it can be given only in mitigation of damages.[18]

(BB.) *Former Adjudication.*—Under the general issue in general assumpsit may be given a record of a former adjudication between the same parties on the same cause of action.[19]

(CC.) *Action Premature.*—Under the general issue in general assumpsit may be shown that the action was commenced before the debt was due.[20]

(DD.) *Non-joinder of Parties.*—Under the general issue in general assumpsit the non-joinder or misjoinder of parties plaintiff or defendant may be taken advantage of if the proof which shows the mistake is in-

15. 1 Chit. Pl., 335-336; Bradley *v.* Davenport, 6 Conn. 1; Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542.

16. **U. S.**—McCrea *v.* Parsons, 112 Fed. 917, 50 C. C. A. 612; Crane El. Co. *v.* Clark, 80 Fed. 705, 26 C. C. A. 100. **Ala.**—Wadsworth *v.* First Nat. Bk., 124 Ala. 440, 27 So. 460; Meredith *v.* Richardson, 10 Ala. 828. **Ga.**—Causey *v.* Cooper, 41 Ga. 409.

A plea showing a good defense to a note without answering counts in declaration is bad. Anonymous, 19 Wend. (N. Y.) 226.

Effect of denial of promise, or of indebtedness. Levinson *v.* Schwartz, 22 Cal. 231, 83 Am. Dec. 64; Wells *v.* McPike, 21 Cal. 215.

Nil debet is a nullity as a plea to a plea to a declaration in assumpsit. **Fla.**—Poppell *v.* Culpepper, 56 Fla. 515, 47 So. 351. **Ill.**—Kock & Co. *v.* Merk, 48 Ill. App. 26. **Wis.**—Crane Bros. Mfg. Co. *v.* Morse, 49 Wis. 368, 5 N. W. 815.

Accord and satisfaction not open. Grinnell *v.* Spink, 128 Mass. 25.

Set-off not admissible. Sangston *v.* Maitland, 11 Gill & J. (Md.) 286.

Statute in regard to champerty and maintenance cannot be shown. Best *v.* Strong, 2 Wend. (N. Y.) 319, 20 Am. Dec. 607.

17. **Ala.**—Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484. **Cal.**—Mickle *v.* Heinlen, 92 Cal. 596, 28 Pac. 784. **Ky.**—Wheatley *v.* Phelps, 3 Dana 302. **Mass.**—Bayliss & M. *v.* Fettyplace, 7 Mass. 325. **Mich.**—Brennan *v.* Tietsort, 49 Mich. 397, 13 N. W. 790. **N. Y.**—Drake *v.* Drake, 11 Johns. 531. **Ohio.**—Sapp *v.* Laughead, 6 Ohio St. 174. **Pa.**—Fisher *v.* Ball, 93 Pa. 390; Beals *v.* See, 10 Pa. 56, 49 Am. Dec. 573.

18. Phleger *v.* Ivins, 5 Harr. (Del.) 118; Moore *v.* M'Nairy, 12 N. C. 319.

19. Young *v.* Black, 7 Cranch (U. S.) 565, 3 L. ed. 440; Arnold *v.* Paxton, 6 J. J. Marsh (Ky.) 503; Cook *v.* Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157.

20. Rainey *v.* Long, 9 Ala. 754; Kahn *v.* Cook, 22 Ill. App. 559.

consistent with any material part of the declaration; otherwise the mistake is pleadable in abatement.[21]

(EE.) *Malperformance.* —Malperformance may be shown under the general issue in general assumpsit.[22]

(FF.) *Fraud.*—Fraud may be shown under the general issue.[23]

(GG.) *Statute of Frauds.*—The statute of frauds may be shown under the general issue.[24]

(c.) *Notice of Special Matters.* —A defendant cannot under the general issue give notice of special matters which can be shown under the general issue.[25]

(d.) *What Admitted by.*—(AA.) *General Assumpsit.*—By pleading the general issue the defendant precludes himself from objecting to the introduction of a special contract in evidence in an action in general assumpsit.[26]

(BB.) *Character of Party Suing.*—The general issue admits the character of the party suing in general assumpsit.[27]

(e.) *Amendment.* —Power of amendment is discretionary with the court.[28]

(2.) **Special Pleas.** —Tender, set-off, the statute of limitations, that the plaintiff has become an alien enemy after the making of the contract and discharge in bankruptcy cannot be given under the general issue and must be pleaded specially;[29] and the defendant is at liberty

21. Henricksen *v.* Mudd, 33 Ill. 470; Fairbanks *v.* Badger, 46 Ill. App. 644; Marshall *v.* Jones, 11 Me. 54, 25 Am. Dec. 260; Will's Gould Pl. 451.

22. Gaw *v.* Wolcott, 10 Pa. 43; Heck *v.* Shener, 4 Serg. & R. (Pa.) 249, 8 Am. Dec. 700.

23. Thomas *v.* Grise, 1 Penne. (Del.) 381, 41 Atl. 883.

24. Eastwood *v.* Kenyon, 11 Ad. & El. 438, 39 E. C. L. 127.

25. **Ill.**—Wadhams *v.* Swan, 109 Ill. 46. **N. J.**—Little *v.* Bolles, 12 N. J. L. 171. **Pa.**—Uhler *v.* Sanderson, 38 Pa. 128. **Vt.**—Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14. **Va.**—Fire Assn. of Phila. *v.* Hogwood, 82 Va. 342, 4 S. E. 617. **Eng.**—Hayselden *v.* Staff, 5 Ad. & El. 153, 31 E. C. L. 307.

Evidence of set-off is not admissible without notice. Judson *v.* Eslava, Minor (Ala.) 2.

26. Willis *v.* Fernald, 33 N. J. L. 206.

27. **Me.**—Swift etc. Co *v.* Brown, 77 Me. 40. **Miss.**—Peek *v.* Thompson, 23 Miss. 367. **Ohio.**—M. E. Church *v.* Wood, 5 Ohio 283. But see **Ala.**—Nabors *v.* Shippey, 15 Ala. 293. **Md.**—Winchester *v.* Union Bk., 2 Gill & J. 73, 19 Am. Dec. 253. **Ohio.**—Lewis *v.* Bank of Kentucky, 12 Ohio 132, 40 Am. Dec. 469.

28. Aldridge *v.* Grider, 13 Smed. & M. (Miss.) 281.

29. **Misjoinder.**—White *v.* Perley, 15 Me. 470.

Jurisdiction.—Empire C. & C. Co. *v.* Hull C. & C. Co., 51 W. Va. 474, 41 S. E. 917.

Statute of Limitations.—**Ala.**—Wilson *v.* Calvert, 18 Ala. 274. **Conn.**—Robbins *v.* Harvey, 5 Conn. 335. **Eng.**—Lee *v.* Rogers, 1 Lev. 110, 83 Eng. Reprint 322.

Plaintiff not owner (waiving tort action). Phelps *v.* Church, 115 Fed. 882, 53 C. C. A. 407.

Puis Darrein Continuance.—Johnson *v.* Kibbee, 36 Mich. 269.

Special Agreement.—Krouse *v.* DeBlois, 1 Cranch C. C. 138, 14 Fed. Cas. No. 7,937; Stoll *v.* Ryan, 3 Brev. (S. C.) 238.

Set-off.—Sangston *v.* Maitland, 11 Gill & J. (Md.) 286.

Accord and Satisfaction.—Grinnell *v.* Spink, 128 Mass. 25.

Declaration on the Money Counts Alone.—A plea in bar setting up matters in defense to certain notes intended to be given in evidence under it is bad, though the bill of particulars contains copies of the same. Dibble *v.* Kempshall, 2 Hill (N. Y.) 124.

to plead any matters in avoidance of the obligation or discharge of the action, though the same are admissible under the general issue.[30]

(C.) Demurrer. —The principles governing the demurrer in general assumpsit are like those in special assumpsit.[31] A demurrer should be taken before a plea.[32] Judgment should be for plaintiff, unless for misjoinder of actions, if one count in the declaration is good, whether defendant demurs or enters to the whole declaration a plea which is good only to one count.[33] After judgment for plaintiff on demurrer a writ of inquiry should be issued to ascertain the damages.[34] It is error to enter final judgment while there are unsettled issues of fact.[35]

(D.) Replication. —The replication must support the declaration. If it does not, there is a departure, which is fatal on demurrer.[36] A reply of a new promise to a plea of the statute of limitations or discharge in bankruptcy is not a departure, but a reply of fraud is a departure.[37]

(V.) Verdict and Judgment. — The verdict must be responsive to the issue and, if a general verdict for the plaintiff, should contain a finding of the amount of the damages, not to exceed the amount claimed,[38] if

Presumption as to Filing.—Tomlinson *v.* Hoyt, 1 Smed. & M. (Miss.) 515.

30. **Payment.**—**Ala.**—Haley *v.* Coller, Minor 63. **Ark.**—Hill *v.* Austin, 19 Ark. 230. **N. J.**—Somerville *v.* Stewart, 48 N. J. L. 116, 3 Atl. 77. **N. Y.**—New York Dry Dock Co. *v.* M'Intosh, 5 Hill 290; Hughes *v.* Wheeler, 8 Cow. 77. **Pa.**—Stillwell *v.* Rickards, 152 Pa. 437, 25 Atl. 831; Hamilton *v.* Moore, 4 Watts & S. 570. **W. Va.**—Douglass *v.* Cent. Land Co., 12 W. Va. 502.

Set-off may be given under plea of payment in Mississippi. Henry *v.* Hoover, 6 Smed. & M. (Miss.) 417.

The general issue filed at a subsequent term amounts to a waiver of a plea in abatement filed at return term. Alliston *v.* Lindsey, 12 Smed. & M. (Miss.) 656.

Such matters were required by the Hilary rules of 1834 to be specially pleaded. Martin Civ. Proc. 258.

Motion to set aside attachment. Downes *v.* Phoenix Bk. of Charleston, 6 Hill (N. Y.) 297.

31. *Supra*, p. 175.

32. Ciccotte *v.* County of Wayne, 44 Mich. 173, 6 N. W. 236.

33. **U. S.**—French *v.* Tunstall, Hempst. 204, 9 Fed. Cas. No. 5,104. **Ala.**—Werth *v.* Montgomery etc. Co., 89 Ala. 373, 7 So. 198. **Ill.**—Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

34. Stanton *v.* Henderson, 1 Ind. 69.

35. Houghton *v.* Tolman, 74 Vt. 467, 52 Atl. 1032; Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996.

36. Griswold *v.* National Ins. Co., 3 Cow. (N. Y.) 96; Sterns *v.* Patterson, 14 Johns. (N. Y.) 132.

37. **Mich.**—Craig *v.* Seitz, 63 Mich. 727, 30 N. W. 347. **N. Y.**—Shippey *v.* Henderson, 14 Johns. 178. **S. C.**—Allen v. Mayson's Exrs., 3 Brev. 207, 7 Am. Dec. 458. See also **Ala.**—Merrill *v.* Worthington, 155 Ala. 281, 40 So. 477. **Ill.**—Betts *v.* Francis, 1 Ill. 165. **Eng.** Chandler *v.* Vilett, 2 Saund. 120, 85 Eng. Reprint 836.

When a declaration contains several counts, if the count on which judgment is rendered is good, judgment will not be reversed. McCredy *v.* James, 6 Whart. (Pa.) 547.

First enter interlocutory judgment in case of default. Strong *v.* Catlin, 3 Pin. (Wis.) 121.

Plaintiff is entitled to recover if the evidence of defendant taken with his shows that defendant is indebted to him upon any count of the declaration. Sandoval C. & M. Co. *v.* Main, 23 Ill. App. 395.

Declaration with bill of particulars against two jointly, evidence, part of items against both, part against one; verdict only for items against both. Enos v. Stansbury, 18 W. Va. 477.

Jury is necessary if the price is not ascertained. Phillips *v.* Malone, Minor (Ala.) 110.

Waiver of inquiry of damages. Jackson *v.* Dotson, 110 Va. 46, 65 S. E. 484.

38. Martin Civ. Proc. 309.

damages are claimed. The final judgment, when given in plaintiff's favor, is that he recover a specified sum, assessed by a jury, or found on reference to a master, and full costs of suit.[39]

II. UNDER CODE PROCEDURE.—In those states which have abolished the old forms of actions and adopted in their stead one single formless action for the pursuit of all remedies, based upon a statement of the facts from which the primary right arises, and also of the facts which constitute the violation of such primary right as the cause of action, the distinctions between the forms of special assumpsit and general assumpsit are no longer important; but even in those states the reform procedure has not affected the substantive rights then existing, whether antecedent or remedial, nor has it created any new causes of action; it simply unifies the system of pleading and procedure. Fictions are abolished; and, though perhaps contrary to the fundamental principle of the new procedure, a complaint in substantially the same form and with the same allegations as the old counts in general assumpsit is generally upheld, and even the common law rule in regard to suing in such form of action when there is a special contract is still in force.[40]

39. On default the court is not authorized to render final judgment by default without the intervention of a jury. **Ala.**—Porter *v.* Burleson & Davis, 38 Ala. 343; Beville *v.* Reese, 25 Ala. 451. **Cal.**—Hunt *v.* San Francisco, 11 Cal. 250. **Miss.**—Mississippi Cent. R. Co. *v.* Fort, 44 Miss. 423.

Verdict for defendant under general issue, surplusage and rejected. Neely *v.* Sensening, 150 Pa. 520, 24 Atl. 748.

In general assumpsit against two, if one defaults, but the other sets up a defense which negatives right to recover against either, plaintiff cannot recover against one defaulting. Bowman *v.* Noyes, 12 N. H. 302; Williams *v.* M'Fall, 2 Serg. & R. (Pa.) 280. See Edmonson *v.* Barrell, 2 Cranch. C. C. 228, 8 Fed. Cas. No. 4,284.

Affidavit of defense is sufficient to prevent judgment. Smith *v.* Elder, 167 Pa. 487, 31 Atl. 735.

If one count is defective, verdict general, judgment will be arrested. Joy *v.* Dill, 36 Vt. 333.

40. Pomeroy's Code Remedies, §§13, 436; Bliss Code Pl., §§6, 156. **Cal.**—Pleasant *v.* Samuels, 114 Cal. 34, 45 Pac. 998; Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158. **Md.**—Smith *v.* Woman's Medical College, 110 Md. 441, 72 Atl. 1107. **N. Y.**—Cropsey *v.* Sweeney, 27 Barb. 310.

ATTACHMENT

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CROSS-REFERENCES:

Execution; Garnishment.

As to liability for wrongful attachment, see the title "Malicious Prosecution."

I. DEFINITION.—An attachment is an extraordinary remedy, ancillary to an action at law, whereby, before judgment, a contingent lien is acquired on the property of a debtor to secure any judgment which may be recovered against him in the action.[1]

1. **Ark.**—Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711. **Cal.**—Myers *v.* Mott, 29 Cal. 359, 89 Am. Dec. 49; Allender *v.* Fritts, 24 Cal. 447; Nail *v.* Superior Court, 11 Cal. App. 27, 103 Pac. 902. **Colo.**—Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664. **Conn.**—Morgan *v.* New York Nat. Bldg., etc. Assn., 73 Conn. 151, 46 Atl. 877; Hollister *v.* Goodale, 8 Conn. 332. **Ind.** United States Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832. **Ind. Ter.**—McFaddin *v.* Blocker, 2 Ind. Ter. 260, 48 S. W. 1043, 58 L. R. A. 878. **Ia.**—Bowen *v.* Port Huron Engine, etc. Co., 109 Iowa 255, 80 N. W. 345, 77 Am. St. Rep. 539, 47 L. R. A. 131. **Kan.**—Bishop *v.* Smith, 66 Kan. 621, 72 Pac. 220. **Neb.**—Reed *v.* Maben, 21 Neb. 696, 33 N. W. 252. **N. H.**—Bryant *v.* Warren, 51 N. H. 213. **N. J.**—Leonard *v.* Stout, 36 N. J. L. 370. **N. Y.**—Schundt *v.* Calm, 3 Alb. L. J. 389. **Ohio.**—Rempe & Son *v.* Ravens, 68 Ohio St. 113, 67 N. E. 282. **Ore.**—Sheppard *v.* Yocum, 11 Ore. 234, 3 Pac. 824. **Vt.**—Clark *v.* Patterson, 58 Vt. 676, 5 Atl. 564. **Wis.**—Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421.

The judgment establishes the existence of the demand upon which the attachment is predicated and the security taken; whereas, before, it was only alleged and presupposed for the purpose of the security. Kittredge *v.* Warren, 14 N. H. 509, *quoted* in Nail *v.* Superior Court, 11 Cal. App. 27, 103 Pac. 902.

A Remedy for the Collection of a Debt.—Evans-Snider-Buel Co. *v.* McFadden, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900. And see Courtney *v.* Pradt, 160 Fed. 561, 87 C. C. A. 463.

"**An order of attachment is an execution** by anticipation." Delaplain *v* Armstrong, 21 W. Va. 211. See also Patterson *v.* Perry, 10 Abb. Pr. (N. Y.) 82; Rempe & Son *v.* Ravens, 68 Ohio St. 113, 67 N. E. 282.

As a Species of Distress.—"At common law an attachment, as part of the service of process in a civil suit, is a species of distress, in which the effects attached were the ancient *vadii* or pledges. When the defendant did not appear on a summons to answer to the plaintiff, an attachment issued, and his chattels were seized by the sheriff to compel his appearance; but when he had appeared, he was entitled to his chattels in the same plight in which they were attached; if he did not appear, but made default, the chattels attached were forfeited." Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

A judgment lien is not an attachment. Beardsley *v.* Beecher, 47 Conn. 408; Tefft *v.* Providence Washington Ins. Co., 19 R. I. 185, 32 Atl. 914, 61 Am. St. Rep. 761.

Foreign and Domestic Attachments. Foreign attachment is a remedy against debtors that are absent and non-resident, while domestic attachment is a remedy against resident debtors absconding or concealing themselves. Fuller *v.* Bryan, 20 Pa. 144.

In Leach *v.* Cook, 10 Vt. 239, the court said that foreign attachment, under the statutes, lies in three classes of cases. (1) When the debtor keeps concealed; (2) When he has absconded or removed; or (3) When he never resided within the state. See also generally, *infra*, VIII.

The custom of London was foreign attachment.

"**The difference between an attach-of personal property and a garnishment** is very great. In the former the property attached is actually taken into the possession of the officer holding the writ, and is under his custody and control, while in garnishment proceedings the property is left in the hands of the garnishee." Santa Fe Pac. R. Co. *v.* Bossut, 10 N. M. 322, 62 Pac. 977.

Attachment Distinguished From Execution.—Attachment is mesne process, execution final. A writ of attachment has the characteristics of an execution in its first stage. Covell *v.* Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390; Herman Goepper & Co. *v.* Phoenix Brew. Co., 25 Ky. L. Rep. 84, 74 S. W. 726.

An attachment and conveyance under it are equivalent to an execution

II.. INTRODUCTION EXPLANATORY OF THE PROCEEDING.

A.—Origin of the Proceeding.—Attachment laws had their origin in the local custom which existed in London, Exeter, and, perhaps, in a few other cities of England.[2]

The procedure was entirely governed by the special custom, and further than this was unknown to the common law. In the United States the remedy is purely statutory.[3]

B. Nature of the Proceeding.—1. **In General.**—The provisional remedy, by attachment is in the nature of process of execution, and amounts to an execution in advance of trial and judgment.[4]

2. As in Personam or In Rem.—An attachment proceeding is *in personam* when there has been service upon the defendant, on his person, at his domicil or last residence, or a general appearance by the

executed. Inglis *v.* Sailors' Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617, *per* Mr. Justice Johnson.

Attachment and Process in Admiralty Distinguished.—The process of attachment is not a proceeding *in rem*, as known and practised in admiralty, and does not bear any analogy to such a proceeding, "as the suit in all such cases is a suit against the owner of the property and not against the property as an offending thing, as in case where the libel is *in rem* in the Admiralty Court to enforce a maritime lien in the property." Leon *v.* Galceran, 11 Wall. (U. S.) 185, 20 L. ed. 74.

Attachment and Detinue.—"In both acts of enforcing rights through writs of execution and attachment the plaintiff's attitude and insistence is, and must be, that the property right in and the right to the possession of the personalty is not primarily in him, the plaintiff. In the detinue suit the plaintiff's attitude and insistence is, and must be, that he has a property right, general or special, in the chattel, and is entitled to the immediate possession thereof. In the former suit the actor's effort is to subject the chattel to the satisfaction of his demand, and in the latter the effort is to obtain possession of the chattel. In one the possession, as between the parties litigant, is the point of contention, and in the other judicial power is invoked, not to transpose the possession between the parties, but to convert the chattel into a means of satisfaction of a demand." Johnson *v.* New Enterprise Co., 163 Ala. 463, 30 So. 911.

2. 1 Roll. Ab. 552; 1 Com. Dig. 580; Chicago, etc., R. Co. *v.* Sturm, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. ed. 1144; McClenachan *v.* McCarty, 1 Dall. (U. S.) 375, 1 L. ed. 183.

3. **U. S.**—Fisher *v.* Consequa, 2 Wash. C. C. 382, 9 Fed. Cas. No. 4,816. **Ill.**—Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581. **Mass.**—Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28. **N. J.**—Welsh *v.* Blackwell, 14 N. J. L. 344. **S. C.**—Blair *v.* Morgan, 59 S. C. 52, 37 S. E. 45, *per* McIver, C. J., *dissenting*. **Tex.**—Kildare Lumb. Co. *v.* Atlanta Bank, 91 Tex. 95, 41 S. W. 64.

And see many of the cases cited throughout this article, especially those having reference to the causes in which attachments may be issued and the necessity of compliance with the statutory provisions, and also as to the construction of statutes.

At Common Law.—"The practice of attaching the effects of a defendant, and holding them to satisfy a judgment, which the plaintiff may recover, when, perhaps, judgment may be for the defendant, is unknown to the common law, and is founded on our statute law, explained by an usage founded in the ordinances in force under the colonial charter." Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

The jurisdiction is special and extraordinary and is limited by the statute. **Ill.**—Haywood *v.* Collings, 60 Ill. 328. **Md.**—Boarman *v.* Patterson, 1 Gill 372, 381. **Mich.**—Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812.

4. **Ark.**—McGuire & Co. *v.* Barnhill, 89 Ark. 209, 115 S. W. 1144.

defendant,[5] or when, under the statute, it is a means adopted for enforcing the debtor's appearance.[6] It is, however, in the nature of an action *in rem* when commenced upon substituted service and there has been no personal service, and when the defendant has not entered a

Ohio.—Ward & Co. *v.* Howard, 12 Ohio St. 158. **S. D.**—Deering, etc., Co. *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Without Process or Garnishment.—If the levy of an attachment, like that of an execution, is made as upon the lands and tenements of the debtor, its operation is no greater than the levy of an execution. It has the like effect before judgment that an execution has after judgment. Shorten *v.* Drake, 38 Ohio St. 76, 85-86.

5. **Ky.**—Brand *v.* Brand, 116 Ky. 785, 76 S. W. 868; Duncan *v.* Wickliffe, 4 Met. 118. **La.**—Williams *v.* Kimball, 8 Mart. (N. S.) 351, holding that the action is an ordinary one *in personam*, and the service of the attachment is a mere incident in the suit. **Miss.**—Lester *v.* Watkins, 41 Mass. 647; Philips *v.* Hines, 33 Miss. 163; Miller *v.* Ewing, 8 Smed. & M. 421. **Tex.**—Green *v.* Hill, 4 Tex. 465. **Wis.**—Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421.

Attachment Against Resident Defendant.—**Ala.**—Betancourt *v.* Eberlin, 71 Ala. 461. **Mo.**—Baehman *v.* Lewis, 27 Mo. App. 81. **N. M.**—Southern Cal. Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345.

Not Strictly In Rem.—Chevallier *v.* Williams & Co., 2 Tex. 239: "A proceeding to enforce the payment of a debt or demand by attachment against the defendant's personal property within the jurisdiction of the court partakes in its nature and character of a proceeding *in rem* and also of an action *in personam*. If the defendant is served within the jurisdiction, or appears generally, the proceeding is in the nature of a personal action. He is liable in such case to a personal judgment, if the indebtedness is established, irrespective of the property seized, with the added incident that the property attached remains liable under the control of the court to answer to the demand established against the defendant by the final judgment of the court. If there be no such service or appearance of the defendant, then the proceeding is in its nature *in rem*, or, more accurately speaking, *quasi in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. The attachment does not bring the defendant into court. Its object is to give the plaintiff execution against the thing attached. And where there is no service within the jurisdiction, and not appearance, the judgment, of course, cannot go beyond the property attached. The proceeding in such case being against the property, if the attachment be set aside the *res* is gone; and if there be no service or appearance, the jurisdiction of the court to further proceed is also gone. If, however, the defendant has been served, or has generally appeared in the case, its jurisdiction is retained though the attachment is dissolved. These views are statements of mere elementary principles and are supported by the following authorities and cases: Brown on Jurisdiction, §§59, 71, 72; Bailey on Jurisdiction, 220, 221; Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931; Freeman *v.* Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565." Griffin Co. *v.* Howell (Utah), 113 Pac. 326, 328. See also Bishop *v.* Fennerty, 46 Miss. 570; Goldmark *v.* Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720.

A Foreign Attachment Is in the First Instance a Proceeding In Rem.—It may be converted into a suit *in personam* by the absent debtor coming in and entering special bail to the action. Until that is done it continues to be *in rem*. Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675, quoting from Shooter *v.* McDuffie, 5 Rich. L. (S. C.) 63. To the same effect, see Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931.

6. Albany City Ins. Co. *v.* Whitney, 70 Pa. 248, wherein the court said that "foreign attachment is but a process by which to commence a personal action. It seizes property to compel an appearance. It can be

general appearance.[7] However, strictly speaking, such a suit is not a proceeding *in rem*, as the object of a proceeding purely *in rem* is to ascertain the right of every possible claimant, while limited proceedings *in rem* are not based on any allegation that the right of property is to be determined between any other persons than the parties to the suit.[8]

dissolved upon entering bail, and when dissolved, the judgment against the defendant is *in personam.*" See also Perkins *v.* Norvell, 6 Humph. (Tenn.) 151, pointing out that though the property attached will be held for the satisfaction of the debt, if the debtor does not appear and replevy, the attachment is a means adopted for the security of the creditor, and for enforcing the debtor's appearance.

7. **U. S.**—Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931; Calderhead *v.* Downing, 103 Fed. 27. **Ala.**—De Arman *v.* Massey, 151 Ala. 639, 44 So. 688. **Cal.**—See Wait *v.* Kern River Min., etc., Co., 157 Cal. 16, 106 Pac. 98, *per* Angelotti, J. **Ia.**—Elliott *v.* Stevens & Co., 10 Iowa 418; Wilkie *v.* Jones, Morris 97. **Kan.**—Jessup *v.* Atchison, etc., R. Co., 79 Kan. 429, 100 Pac. 472. **La.**—Broughton *v.* King, 2 La. Ann. 569; Williams *v.* Kimball, 8 Mart. (N. S.) 351. **Me.**—Eastman *v.* Wadleigh, 65 Me. 251, 20 Am. Rep. 695. **Md.**—Brent *v.* Taylor, 6 Md. 58. **Mass.**—Merriman *v.* Currier, 191 Mass. 133, 77 N. E. 708. **Miss.**—Crump *v.* Wooten, 41 Miss. 611. **N. J.**—Bainbridge *v.* Allen, 70 N. J. Eq. 355, 61 Atl. 706. **N. M.**—Southern Cal. Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345. **Ohio.**—Taylor *v.* McDonald, 4 Ohio 150. **Ore.**—Katz *v.* Obenchain, 48 Ore. 352, 85 Pac. 617, 120 Am. St. Rep. 821; Winter *v.* Norton, 1 Ore. 42. **Utah.**—Bristol *v.* Brent, 103 Pac. 1076. **Can.**—Stabb's Assignees *v.* Stabb's Trustees, Newf. L. Rep. (1817-1828) 267.

"The process of attachment, as it existed under the common law, differed in its nature and object from the provisional remedy now known by that name. Its original purpose was to acquire jurisdiction of the defendant by compelling him to appear in court through the seizure of his property, which he forfeited if he did not appear, or furnish sureties for his appearance. (3 Bl. Com. 280; 1 Rolle, Abr. Customs of London, K. 13; Kneeland, Attachm. §6; Drake, Attachm. §5; Ashley, Attachm. 11; Locke, Foreign Attachm. 12.) It was part of the service of process in a civil action through a species of distress, in which the goods attached were the ancient vadii or pledges. (Bond *v.* Ward, 7 Mass. 123, 128; Gilbert, Law Distress, 24.) As said in the case last cited: 'The practice of attaching the effects of a defendant, and holding them to satisfy a judgment, which the plaintiff may recover, when, perhaps, judgment may be for the defendant, is unknown to the common law, and is founded on our statute law.' Its present purpose is not to compel appearance by the debtor, but to secure the debt or claim of the creditor. It is a proceeding *in rem.*" Penoyar *v.* Kelsey, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248, *per* Vann, J.

As to application of doctrine of res judicata, see the title "Former Adjudication."

The combined effect of two statutes, one giving an attachment as auxiliary to a suit commenced by process against the person to secure a sufficient fund for the payment of the judgment, to be recovered against the defendant *in personam* and the other giving an attachment *in rem*, to subject all the property of non-residents and absconding debtors to distribution among all their creditors, "is to enable a creditor, whenever he can bring his debtor into court by personal service, to secure his own debt by attachment; and as others had equal opportunity, he gets the benefit of his superior diligence. But if personal service cannot be had, so that no one is in fault, but all equally unfortunate, then notice must be given, and all may come in and have distribution." Winter *v.* Norton, 1 Ore. 42, 44.

8. **U. S.**—Mankin *v.* Chandler, 2 Brock, 125, 16 Fed. Cas. No. 9,030. **Mich.**—Hale *v.* Chandler, 3 Mich. 531. **Mo.**—McCord, etc., Merc. Co. *v.* Bettles, 58 Mo. App. 384. **Pa.**—Megee *v.* Beirne, 39 Pa. 50. **Vt.**—Woodruff *v.* Taylor, 20 Vt. 65. **Wis.**—Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421.

3. As an Original Proceeding.—Under the statutes and the system of practice which formerly generally prevailed, and which authorized the seizure of the property of a debtor who, by reason of non-residence or flight, could not be served personally with process, the proceeding was in the form or nature of an original or judicial attachment.[9] In some jurisdictions, the class of attachments which are issued on the ground that the defendant is a non-resident or an absconding debtor, and upon whom notice is served by publication, seems still to be understood as original attachments, as distinguished from attachments against residents, issued on a ground involving fraud on the part of the debtor, and upon whom process can and must be personally served, or against non-residents or absconding debtors who have entered an appearance.[10]

The doctrine of the maritime law "is not applicable to a statutory attachment. The real suit is in favor of and against individual persons. The property itself is, in no sense of the word, a party to the suit, but is brought before the court as ancillary or in aid of the remedy against the real party, who is presumed to be the owner of it." (Bray *v.* McClury, 55 Mo. 128.) But in the dissenting opinion in this case it is said that "Attachment suits founded upon constructive service are essentially in the nature of proceedings *in rem*, and the seizure of the property, or obtaining possession of the *res*, is, therefore, the basis of the court's jurisdiction."

"**A proceeding upon attachment under the Virginia statute**, as to the parties bound by it, has the effect of a suit in equity to enforce a trust or lien, rather than a proceeding in the English exchequer or admiralty against personal property, without specified parties, to which, however, all persons are deemed parties. The attachment and subsequent proceeding holds and disposes of the rights of the parties who have appeared, absolutely, and of those who have not appeared, but against whom publication has been made, subject to their appearance and the assertion of their rights as authorized." Houston *v.* McCluney, 8 W. Va. 135.

9. Egan *v.* Lumsden, 2 Disney (Ohio) 168; Elliott *v.* Jackson, 3 Wis. 649.

In actions ex contractu, an attachment, as an original process, will lie; and a proper levy and return, with publication, is sufficient to confer on the court jurisdiction of the cause, and authorize it to proceed to final judgment, as if the defendant was in court by personal service. But the ancillary attachments in actions, both in form *ex contractu* and *ex delicito*, are subsidiary or mesne process, and not operative to bring the party before the court. Swan *v.* Roberts, 2 Coldw. (Tenn.) 153, 158.

The levy of an attachment on personalty which is exempt, cannot affect the defendant's exemption, but the levy, although it be released on that account, will bring the defendant before the court. Hadley *v.* Bryars, 58 Ala. 139.

10. **Ala.**—Reynolds & Elston *v.* Culbreath, 14 Ala. 581. **N. M.**—Southern Cal. Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345. **Tenn.**—Warner *v.* Yates & Co., 118 Tenn. 548, 102 S. W. 92.

Where an attachment is sued out on the ground of the non-residence of the defendant, and a judgment *in rem* alone is sought, there is but one suit, and that the attachment. Southern Cal. Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345.

Where process is served upon the person, the attachment is auxiliary process. Hillman *v.* Anthony, 4 Baxt. (Tenn.) 444.

A Maryland statute providing that attachments may be issued against non-residents or absconding debtors in cases arising *ex contractu* where the damages are unliquidated, and in actions for wrongs independent of contract, upon a declaration verified by affidavit and a bond, and that the practice shall in all other particulars conform to the practice and proceedings against non-residents and absconding

4. As an Ancillary Proceeding.—Under the codes and modern statutes it is generally held that the remedy by attachment is not an independent, distinct proceeding, but is merely incident to, and in aid of, the main action which is commenced concurrently with or before the proceeding in attachment.[11]

debtors in action *ex contractu* for liquidated damages, has relation to an original, and not to an ancillary proceeding. Steuart *v.* Chappell, 100 Md. 538, 60 Atl. 625.

In North Carolina it has recently been held that an attachment proceeding, when the defendant is not within reach of the process of the court and cannot be personally served, may be commenced by the filing of the affidavit, to be followed by publication. This decision seems to place this class of attachments back among those authorized by former statutes when the defendant was a non-resident, and which issued either in the form of an original or a judicial attachment and without any notice until there had been a levy or caption of the goods of the debtor, when advertisement was required if the defendant resided without the jurisdiction. Peters Grocery Co. *v.* Collins Co., 142 N. C. 174, 55 S. E. 90.

11. **U. S.**—Naumburg *v.* Hyatt, 24 Fed. 898, under the North Carolina code. **Cal.**—Myers *v.* Mott, 29 Cal. 359, 89 Am. Dec. 49; Low *v.* Adams, 6 Cal. 277; Bailey *v.* Aetna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416. **Ill.** Moore *v.* Hamilton, 7 Ill. 429. **Ind.** Hoffman *v.* Henderson, 145 Ind. 613, 44 N. E. 629; State *ex rel.* Mason *v.* Miller, 63 Ind. 475; Robbins *v.* Alley, 38 Ind. 553; Excelsior Fork Co. *v.* Lukens, 38 Ind. 438; Fechheime *v.* Hays, 11 Ind. 478; United States Capsule So. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832. **Ia.**—Baldwin *v.* Buchanan, 10 Iowa 277. **Kan.**—Bishop *v.* Smith, 66 Kan. 621, 72 Pac. 220; Bundrem *v.* Denn, 25 Kan. 430. **La.**—United States *v.* Murdock, 18 La. Ann. 305, 89 Am. Dec. 651. **Mich.**—Fletcher *v.* Morrill, 78 Mich. 176, 44 N. W. 133. **N. M.**—Southern Cal. Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345. **N. Y.**—Lowenthal *v.* Hodge, 55 Misc. 374, 105 N. Y. Supp. 670; Houghton *v.* Ault, 16 How. Pr. 77; Fraser *v.* Greenhill, 3 N. Y. Code Rep. 172. **N. C.**—Toms *v.* Warson, 66 N. C. 417; Mixer, etc., Co. *v.* Excelsior Oil, etc., Co., 65 N. C. 552; Marsh *v.* Williams, 63 N. C. 371. **N. D.**—Jewett Bros. *v.* Huffman, 14 N. D. 110, 103 N. W. 408. **S. D.**—Quebec Bank *v.* Carroll, 1 S. D. 1, 44 N. W. 723. **Tenn.**—Templeton *v.* Mason, 107 Tenn. 625, 65 S. W. 25. **W. Va.** Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

"An attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall." If defendant cannot be sued in the district the court cannot issue attachment against his property. *Ex parte* Des Moines & M. R. Co., 103 U. S. 794, 26 L. ed. 461.

An ancillary attachment is a proceeding in aid of the personal action, when the debtor has been served, or has appeared in court, so as to be liable to a personal judgment. Southern Cal. Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345.

Characterized by separate pleadings and a distinct practice. Staab *v.* Hersch, 3 N. M. 153, 3 Pac. 248, holding that the affidavit is not sufficient as a declaration.

That an attachment can no longer be granted under the revised statutes or under the non-imprisonment act, see Sullivan *v.* Presdee, 9 Daly (N. Y.) 552.

Under a Maryland statute providing that when two summons have been returned *non est* against the defendant the plaintiff upon proof of his claim shall be entitled to an attachment, and the same proceedings shall thereupon be had as in attachment issued against absconding debtors, this is ancillary to a suit actually pending, wherein the plaintiff has failed to secure the service of a summons upon the defendant. Steuart *v.* Chappell, 100 Md. 538, 60 Atl. 625.

A statute authorizing an attachment for the enforcement of mechanics' liens is not original or ancillary. Such attachment cannot be used as the leading process to bring defendants before the court, but is auxiliary in its nature and collateral to the original or

5. As a Special Proceeding or a Provisional Remedy.—Attachment is frequently referred to as a special and extraordinary proceeding.[12] This refers, probably, not strictly to special proceedings as technically understood, but to the fact that the right to the remedy is dependent entirely upon statute and was unknown to the common law. Under the codes and modern statutes, an attachment is a provisional remedy which, generally, may be had either at or after the commencement of the action in the cases and on the grounds prescribed by statute.[13]

C. OBJECT OF THE PROCEEDING.—The ancient theory that the purpose of the proceeding was to compel the appearance of a defendant who was without the jurisdiction of the court [14] obtained under early statutes in this country.[15]

leading process by which a suit is commenced. Warner *v.* Yates & Co., 118 Tenn. 548, 102 S. W. 92.

A defective affidavit on which the attachment was founded furnishes no sufficient ground for interfering with the final judgment on the merits. Nesqually Mill Co. *v.* Taylor, 1 Wash. Ter. 1.

12. **Fla.**—Haber & Co. *v.* Nassitts, 12 Fla. 589. **Mich.**—Van Norman *v.* Circuit Judge, 45 Mich. 204, 7 N. W. 796; Buckley *v.* Lowry, 2 Mich. 418. **Miss.**—Rankin *v.* Dulaney, 43 Miss. 197.

13. **U. S.**—Naumburg *v.* Hyatt, 24 Fed. 898, under the North Carolina Code. **Ark.**—Ferguson *v.* Clidwell, 48 Ark. 195, 2 S. W. 711. **Ky.**—Duncan *v.* Wickliffe, 4 Met. 118; Moore *v.* Sheppard, 1 Met. 97. **Mont.**—Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356. **N. Y.**—Fraser v. Greenhill, 3 N. Y. Code Rep. 172. **S. D.**—Deering, etc., Co. *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Instead of the former proceeding of an independent action, the order of attachment is under the code only a provisional remedy to be allowed after the suit is commenced. Egan *v.* Lumsden, 2 Disney (Ohio) 168.

An "action" and not a "special proceeding" under the code definition of the latter term. Allen *v.* Partlow, 3 S. C. 417. See also Gibson *v.* Sidney, 50 Neb. 12, 69 N. W. 314.

14. Cheatham *v.* Trotter, Peck (Tenn.) 198. See *supra*, II.

15. **Del.**—Vogle *v.* New Grenada Canal, etc., Co., 1 Houst. 294. **Pa.** Albany City Ins. Co. *v.* Whitney, 70 Pa. 248, wherein the court said that upon entering bail the attachment is dissolved and the judgment against the defendant is *in personam*. **Tenn.** Perkins *v.* Norvell, 6 Humph. 151; Green *v.* Shaver, 3 Humph. 139; Cheatham *v.* Trotter, Peck 198.

In the Nature of Distringas or Outlawry.—Barney *v.* Patterson, 6 Har. & J. (Md.) 182, wherein the court said: "By the common law, where a defendant was summoned, and would not appear, his goods were liable to be proceeded against by attachment and distress infinite, and the goods seized were forfeited to the King; and where the defendant was abroad or kept out of the way so that he could not be arrested, the plaintiff might proceed against him to outlawry, which was also attended with a forfeiture to the King of all his goods and chattels." See also, that the proceeding is in the nature of distringas or distress. **Miss.**—Myers *v.* Farrell, 47 Miss. 281. **N. Y.** Penoyar *v.* Kelsey, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248. **Pa.**—Fitch *v.* Ross, 4 Serg. & R. 557, wherein the court said: "The declared object of the act was to prevent non-residents from withdrawing their effects from the State, leaving their debts unpaid."

Foreign attachment is a proceeding *in rem*, by attachment of a non-resident's goods, with the primary object of compelling an appearance to answer the plaintiff's suit. Longwell *v.* Hartwell, 164 Pa. 533, 30 Atl. 495. See also Reynolds *v.* Howell, 1 Marv. (Del.) 52, 31 Atl. 875; Biddle *v.* Girard Nat. Bank, 109 Pa. 349; Fitch *v.* Ross, 4 Serg. & R. (Pa.) 557; H. R. Claflin Co. *v.* Weiss Bros., 16 Pa. Co. Ct. 247, 251. And see the title "Garnishment."

When, from non-residence or flight, a debtor is beyond the process of judicial tribunals, the purpose of the

Modern Doctrine.—Generally, however, under modern statutes, the object of the proceeding is not to coerce the appearance of the defendant, but to obtain a lien upon property that is within reach of process to secure the payment of any judgment that may be recovered by the plaintiff in the main action.[16]

III. GENERAL RULES GOVERNING CONSTRUCTION AND OPERATION OF STATUTES.—A. Constitutionality.—By the levy of an attachment, the plaintiff acquires an interest in property which may become definite, fixed, certain, and vested by the ultimate recovery. So a repealing statute taking away the right to an attachment on the ground on which the levy was made is not applicable to a pending case in the face of a constitutional provision against the enactment of retrospective laws.[17] Decisions construing alleged discriminating statutes are given in the notes.[18]

statute is to compel his appearance to answer the demand of the plaintiff, and on failure of appearance, to apply such property to the just end of satisfying his debts. Risewick *v.* Davis, 19 Md. 82.

16. **U. S.**—Adler *v.* Roth, 2 McCrary 445, 5 Fed. 895. **Ala.**—Phillips *v.* Ash's Heirs, 63 Ala. 414. **Ark.**—Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711. **Cal.**—Low *v.* Adams, 6 Cal. 277. **Conn.**—Hollister *v.* Goodale, 8 Conn. 332, 21 Am. Dec. 674. **D. C.** Robinson *v.* Morrison, 2 App. Cas. 105, 129. **Ill.**—People *v.* Cameron, 7 Ill. 468. **Ind.**—Hoffman *v.* Henderson, 145 Ind. 613, 44 N. E. 629; Excelsior Fork Co. *v.* Lukens, 38 Ind. 438. **Kan.** Bundrem *v.* Denn, 25 Kan. 430. **Ky.** Francis *v.* Barnett, 84 Ky. 23. **La.** Adams *v.* Day, 14 La. 503, a conservatory measure. **Md.**—Risewick *v.* Davis, 19 Md. 82; Brent *v.* Taylor, 6 Md. 58. **Miss.**—Myers *v.* Farrell, 47 Miss. 281; Saunders *v.* Columbus L. Ins. Co., 43 Miss. 583. **N. Y.**—Penoyar *v.* Kelsey, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248; Robinson *v.* National Bank, 81 N. Y. 385, 393, 37 Am. Rep. 508; Finn *v.* Mehrbach, 30 Civ. Proc. 242, 65 N. Y. Supp. 250. **Ohio.** Ward & Co. *v.* Howard, 12 Ohio St. 158. **Ore.**—Oliver *v.* Wright, 47 Ore. 322, 83 Pac. 870. **Tenn.**—Templeton *v.* Mason, 107 Tenn. 625, 65 S. W. 25. **W. Va.**—Wall *v.* Norfolk & W. R. Co., 52 W. Va. 485, 44 S. E. 294, 94 Am. St. Rep. 948, 64 L. R. A. 501.

The purpose of the remedy is accomplished by holding the property until the judgment is rendered. Myers *v.* Mott, 29 Cal. 359, 89 Am. Dec. 49.

To Confer Jurisdiction.—While generally the disposition of the proceedings in attachment does not determine the status of the parties to the action, the levy may be necessary to confer jurisdiction if there is no personal service. Baldwin *v.* Buchanan, 10 Iowa 277. And see Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665.

The abolition of imprisonment for debt has had the effect of enlarging remedies against defendant's property. Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105, 129. See also Blair *v.* Winston, 84 Md. 356, 35 Atl. 1101; Boyd *v.* Buckingham, 10 Humph. (Tenn.) 434.

17. National Bank of Commerce *v.* Riethmann, 79 Fed. 582, 25 C. C. A. 101 (construing a Colorado statute); Mulnix *v.* Spratlin, 10 Colo. App. 390, 50 Pac. 1078; Day *v.* Madden, 9 Colo. App. 464, 48 Pac. 1053. See also McFadden *v.* Blocker, 2 Ind. Ter. 260, 48 S. W. 1043; Hannahs *v.* Felt, 15 Iowa 141. But in Myers *v.* Mott, 29 Cal. 359, 89 Am. Dec. 49, the court, after pointing out that attachment is merely auxiliary, said that the legislature may give, withhold or limit an attachment, at their pleasure, without impairing any substantial right of either party.

18. An Oklahoma statute requiring a bond from the plaintiff in case of attachment against the property of a resident is not violative of the 14th amendment to the federal constitution in not requiring a like bond as a condition to the issuance of attachment against the property of a non-resident. Central L. & T. Co. *v.* Campbell Commission Co., 173 U. S. 84, 19 Sup. Ct.

B. Construction Generally.—It is generally held that, as an attachment is a harsh proceeding and one unknown to the common law, being purely statutory and in derogation of common right, the statutes with respect thereto must be strictly construed;[19] that attachments can be granted only in the cases expressly provided for;[20] and that by those who seek to enforce their demands by the aid of such a remedy there

346, 43 L. ed. 623, *affirming* 5 Okla. 396, 49 Pac. 48. See also Pyrolusite Manganese Co. *v.* Ward, 73 Ga. 491. For, it was held in Marsh *v.* Steele, 9 Neb. 96, 1 N. W. 869, 31 Am. Rep. 406, is such a statute in conflict with Art. IV., Sec. 2, of the Constitution of the United States, which provides "that citizens of each State shall be entitled to all privileges and immunities of citizens of the several States."

An attachment statute not requiring personal service as between citizens of, and as to property in, the state is unobjectionable. Betancourt *v.* Eberlin, 71 Ala. 461.

19. **Cal.**—Gow *v.* Marshall, 90 Cal. 565, 27 Pac. 422; Sonza *v.* Lucas (Cal. App.), 100 Pac. 115. **Ga.**—Levy *v.* Millman, 7 Ga. 167. **Ia.**—Wilkie *v.* Jones, Morris 97. **La.**—Russell *v.* Wilson, 18 La. 367. **N. M.** Staab *v.* Hersch, 3 N. M. 153, 3 Pac. 248. **N. Y.**—Penoyar *v.* Kelsey, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248. **Tex.**—Chevallier *v.* Williams & Co., 2 Tex. 239.

And see the cases cited in the following notes.

20. **Ala.**—Taliaferro *v.* Lane, 23 Ala. 369. **Ariz.**—Ordenstein *v.* Bones, 2 Ariz. 229, 12 Pac. 614. **Ark.**—Kellogg *v.* Miller, 6 Ark. 468; Hynson *v.* Taylor, 3 Ark. 552. **Cal.**—Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17; Drake *v.* DeWitt, 1 Cal. App. 617, 82 Pac. 982. **Colo.**—Rocky Mountain Oil Co *v.* Central Nat. Bank, 29 Colo. 129, 67 Pac. 153. **Del.** Smith *v.* Armour, 1 Penne. 361, 40 Atl. 720. **Ga.**—Forbes Piano Co. *v.* Owens. 120 Ga. 449, 47 S. E. 938. **Ill.** Firebaugh *v.* Hall, 63 Ill. 81; Moore *v.* Hamilton, 7 Ill. 429. **La.**—Bussey & Co. *v.* Rothschilds, 26 La. Ann. 258; Gordon *v.* Bailio, 13 La. Ann. 473; New Orleans *v.* Garland, 11 La. Ann. 438; Denegre *v.* Milne & Co., 10 La. Ann. 324; Shropshire *v.* Russell, 2 La. Ann. 961. **Mich.**—Jaffray *v.* Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645; Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812; Van Norman *v.* Circuit Judge, 45 Mich. 204, 7 N. W. 796; Mathews *v.* Densmore, 43 Mich. 461, 5 N. W. 669. **Minn.**—Pierse *v.* Smith, 1 Minn. 82. **Miss.**—Nethery *v.* Belden, 66 Miss. 490, 6 So. 464. **Mo.**—Kingsland *v.* Worsham, 15 Mo. 657; Temple *v.* Cochran, 13 Me. 116. **Neb.** Farak *v.* Schuyler First Nat. Bank, 67 Neb. 463, 93 N. W. 682; Handy *v.* Brong, 4 Neb. 60. **N. J.**—Van Emburgh *v.* Pullinger, 16 N. J. L. 457. **N. Y.**—Rosenzweig *v.* Wood, 30 Misc. 297, 63 N. Y. Supp. 447; Sullivan *v.* Presdee, 9 Daly 552 (holding that where a statute provides that when a defendant is not a resident of the city of New York the summons shall be returnable in not less than two nor more than four days from its date, and another statute makes an attachment returnable in not less than six days before the return day of the summons, a plaintiff cannot obtain a valid writ of attachment where the defendant is a non-resident of the city of New York). **Ohio.**—Taylor *v.* McDonald, 4 Ohio 150; Hoyman *v.* Beverstock, 4 Ohio Cir. Dec. 491, 8 Ohio C. C. 473. **Okla.**—Jaffray *v.* Wolf, 1 Okla. 312, 33 Pac. 945. **S. C.**—Addison *v.* Sujette, 50 S. C. 192, 28 S. E. 948; Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665. **Tex.**—Kildare Lumb. Co *v.* Atlanta Bank, 91 Tex. 95, 41 S. W. 64. **W. Va.**—Delaplain & Co. *v.* Armstrong, 21 W. Va. 211; Carrothers *v.* Sargent, 20 W. Va. 351.

A statement that the defendant was "about to leave the state and defraud his creditors" cannot be construed to be an allegation that he was about to remove his property out of the state, without leaving sufficient remaining for the payment of his debts. Besides, under the statute, that the defendant had refused to pay or secure the debt due the plaintiffs is a necessary part of the allegation. Upp *v.* Neuhring, 127 Iowa 713, 104 N. W. 350.

must be a strict observance of,[21] or a substantial compliance with all the requirements and regulations prescribed by the statute under

Especially as Against Non-resident Debtors.—Mills *v.* Findlay, 14 Ga. 230; Britton *v.* Gregg, 96 Ill. App. 29.

It is by virtue of positive, not negative, law that the court can gain jurisdiction of the property of a defendant by attachment, and when the positive provisions do not authorize an attachment on the ground of non-residence, authority for so doing is not furnished by a section providing in what cases an undertaking may not be required, and if required, its character and mode of approval. Hough *v.* Dayton Mfg. Co., 66 Ohio St. 427, 64 N. E. 521.

A Fair Interpretation.—While the provisions of the code in reference to this remedy must be strictly construed and followed, they should be fairly interpreted, so as to give them a consistent and efficient operation in proper cases. Roberts *v.* Landecker, 9 Cal. 262. See also Elliott *v.* Jackson, 3 Wis. 649.

Practical Construction.—The attachment law as to removing one's property out of the state must receive a sensible and practical construction. Philadelphia Invest. Co. *v.* Bowling, 72 Miss. 565, 17 So. 231.

21. **Ark.**—Bush *v.* Visant, 40 Ark. 124; Hynson *v.* Taylor, 3 Ark. 552. **Cal.**—Roberts *v.* Landecker, 9 Cal. 262. **Conn.**—Munger *v.* Doolan, 75 Conn. 656, 55 Atl. 169. **Ind.**—Marnine *v.* Murphy, 8 Ind. 272; United States Capsule Co. *v.* Isaacs, 25 Ind. App. 533, 55 N. E. 832.

Where There Is no Personal Service or Appearance of the Defendant.—Ill. Britton *v.* Gregg, 96 Ill. App. 29. **Ky.**—Pool *v.* Webster & Co., 3 Met. 278. **La.**—Natchez First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25; Frellson *v.* Stewart, 14 La. Ann. 832; Price *v.* Merritt, 13 La. Ann. 526; Planters' Bank *v.* Byrne, 3 La. Ann. 687; Graham *v.* Burckhalter, 2 La. Ann. 415; Erwin *v.* Commercial, etc., Bank, 12 Rob. 227; Putnam *v.* Grand Gulf R., etc., Co., 3 Rob. 232; Purdee *v.* Cocke, 18 La. 482; Jackson *v.* Warwick, 17 La. 436; Millandon *v.* Foucher, 8 La. 582; Lacy *v.* Kenley, 3 La. 16. **Md.** McPherson *v.* Snowden, 19 Md. 197. **Mich.**—Buckley *v.* Lowry, 2 Mich. 418. **Minn.**—Caldwell *v.* Sibley, 3 Minn. 406, holding that state bonds were personal property and capable of manual delivery, and that when they were not attached by being taken into actual possession and entire control of the officer, the levy would not hold. **Miss.**—Rankin *v.* Dulaney, 43 Miss. 197. **Mo.**—Bryant *v.* Duffy, 128 Mo. 18, 30 S. W. 317. **Mont.**—Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356. **Neb.** Buchanan *v.* Edmisten, 1 Neb. (Unof.) 429, 95 N. W. 620, holding that where the petition, affidavits, published notices, process, judgments and proceedings down to but not including the order of confirmation of the sale, described the defendant as O. P. Buchanan, and the land attempted to be levied upon and sold was that of P. O. Buchanan, and there was no personal service, the proceedings were void. **N. M.**—Dye *v.* Crary, 12 N. M. 460, 78 Pac. 533. **S. C.**—Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665; Wagener *v.* Booker, 31 S. C. 375, 9 S. E. 1055; National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028; Wando Phosphate Co. *v.* Rosenberg, 31 S. C. 301, 9 S. E. 969. **S. D.**—Deering, etc., Co. *v.* Warren, 1 S. D. 35, 44 N. W. 1068. **Tex.**—Kildare Lumb. Co. *v.* Atlanta Bank, 91 Tex. 95, 41 S. W. 64; Cox *v.* Reinhardt, 41 Tex. 591; Wooster *v.* McGee, 1 Tex. 17. **Wash.**—Holman *v.* Cooper, 48 Wash. 24, 92 Pac. 781. **Wis.**—Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971; Wiley *v.* Aultman & Co., 53 Wis. 560, 11 N. W. 32.

The form prescribed by statute should be followed; and when no form is specified, there should be a substantial compliance with all the requirements of the law in this regard. Shockley *v.* Bullochs, 18 Ga. 283.

Exclusive of Other Method.—All proceedings to subject the property of non-residents not actually served, and who do not appear to the action, are in derogation of the common law, and nothing is to be presumed in favor of the jurisdiction. When the statute provides a method by which the property may be reached it is not only to be strictly followed, but it must be followed to the exclusion of any other

which it is obtained in order to give validity to the attachment.[22]

Liberal Construction.— It is frequently pointed out, however, that attachment laws, being intended for the benefit of creditors, should receive a liberal construction with a view to effect their purpose,[23] and the rule requiring a strict construction was abandoned in some jurisdictions when it was found, by persistent enactments, that the remedy was a favorite of the legislature,[24] or when expressly modified by statutory provisions prohibiting a strict construction or requiring a liberal construction.[25] The purpose of such statutes, however, is the de-

method not also clearly provided. Grigsby *v.* Barr, 14 Bush (Ky.) 330, holding that the statutes will not permit the property of a non-resident, constructively summoned, to be taken for the satisfaction of a claim, when there is no actual seizure of the property and no lien asserted.

No Presumptions Indulged.—There must be no uncertainty in attachments which is not explained in the proceedings themselves, for no presumptions will be resorted to for the purpose of sustaining them. Focke *v.* Hardeman, 67 Tex. 173, 2 S. W. 363, *citing* Espey *v.* Heidenheimer, 58 Tex. 662.

22. **Ill.**—Haywood *v.* Collins, 60 Ill. 328. **Md.**—Shivers *v.* Wilson, 5 Har. & J. 130, 9 Am. Dec. 497. **Wis.**—Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100.

23. **U. S.**—Fisher *v.* Consequa, 2 Wash. C. C. 382, 9 Fed Cas. No. 4,816. **Ky.**—Spalding *v.* Simms, 4 Met. 285. **Miss.**—Barrow *v.* Burbridge, 41 Miss. 622, construing a general statute to include non-resident creditors); Augusta Bank *v.* Conrey, 28 Miss. 667; Bryan *v.* Lashley, 13 Smed. & M. 284; Dandridge *v.* Stevens, 12 Smed. & M. 723. **N. Y.**—Lenox *v.* Howland, 3 Caines 323. **Pa.**—Strock *v.* Little, 45 Pa. 416.

Especially as Against Absconding Debtor.—Jones *v.* Buzzard, 2 Ark. 415.

When the defect is jurisdictional the courts have no right nor authority to disregard it. Cole *v.* Utah Sugar Co., 35 Utah 148, 99 Pac. 681.

Other decisions holding that a strict construction must be given are probably under laws which may have been borrowed from and based on the local customs of London, Exeter, etc. Hannibal, etc. R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581.

Distinction Between Causes and Procedure.—Jackson *v.* Burke, 4 Heisk. (Tenn.) 610.

While a strict compliance on the part of the attaching creditor with the statute is required, in construing the meaning of the law as to the causes in which attachments may issue a liberal construction should be followed. Stiff *v.* Fisher, 2 Tex. Civ. App. 346, 21 S. W. 291. See also Vollmer *v.* Spencer, 5 Idaho 557, 51 Pac. 609, declaring that a statute requiring all statutes to be liberally construed applies only where it is necessary to construe a statute. The rule to be applied is this: "If there is any uncertainty as to what the statute requires, construe the statute liberally, but the requirements or acts to be performed, when the statute is so construed, must be strictly performed."

24 Vance *v.* Copper, 2 Coldw. (Tenn.) 497; Hills *v.* Lazelle, 5 Sneed (Tenn.) 363; Runyan *v.* Morgan, 7 Humph. (Tenn.) 210.

25. **Ala.**—Pearsoll *v.* Middlebrook, 2 Stew. & P. 406, as to a statute directing "that the several acts of this state, in relation to attachments, shall not be rigidly and strictly construed." **Ga.**—Irvin *v.* Howard, 37 Ga. 18; Force & Co. *v.* Hubbard, 26 Ga. 289 (as to substantial compliance). **N. J.** Stout *v.* Leonard, 37 N. J. L. 492, *reversing* 36 N. J. L. 370; Thompson *v.* Eastburn, 16 N. J. L. 100. **Wash.** Bender *v.* Rinker, 21 Wash. 633, 59 Pac. 503.

In Stafford *v.* Mills, 57 N. J. L. 574, 32 Atl. 7, Lippincott, J., said: "While this is an extraordinary writ and only to be invoked when the debtor is, as an absconding or absent debtor, beyond the reach of the ordinary process of the court, yet the act of the legislature authorizing the writ is to be beneficially construed in order to detect fraud, advance justice and benefit the creditor, and its purposes are not to be thwarted by any secret resolves or intentions of the debtor on

tection of fraud, and they do not nullify the rule of strict construction for all purposes.[26]

C. Prospective or Retrospective Operation.— **Prospective Operation.** It is held in some jurisdictions that a new attachment statute or a statute amending the attachment law, which does not go into effect until after an attachment was sued out, does not affect the pending case,[27] and this must necessarily be so when the statute is prospective in terms.[28] And so, under this rule, a statute which repeals a certain ground for which an attachment might have been issued has no effect upon attachment proceedings pending when it became a law.[29]

this subject. He is to be judged by ordinary and obvious *indicia.*''

26. The attachment act provides that it shall be construed in the most liberal manner for the detection of fraud, but no such question arises when the question is as to the propriety of issuing an alias writ. In such a case the statute must be strictly construed; if it contains no authorization of such a writ none can be issued. Pack, Wood & Co. *v.* American Trust, etc., Bank, 172 Ill. 192, 50 N. E. 326, *affirming* 70 Ill. App. 177.

27. Frankenheimer *v.* Slocum, 24 Ala. 373; Risewick *v.* Davis, 19 Md. 82.

A statute authorizing a summary judgment to be entered on a bond given by the defendant for the release of the property, is not a remedial statute, and does not apply to pending cases. Thompson *v.* Smith, 8 Mo. 723.

Georgia Act, August, 20, 1906 (Acts 1906, p. 120), providing that ''the writ of attachment shall not be used to subject in this state wages of persons who reside out of the state and which have been earned wholly without the state,'' applied to proceedings pending in Georgia courts, and not reduced to judgment, at the time of when the act went into effect. Lears *v.* Seaboard Air Line Ry., 3 Ga. App. 614, 60 S. E. 343.

28. A statute placing attachment creditors on an equal footing with bona fide purchasers for a valuable consideration, which is expressly limited to conveyances thereafter made, cannot have a retroactive effect. Greenleaf *v.* Edes, 2 Minn, 264.

A provision that ''This act shall not extend to or affect any existing debt, contract, note or judgment,'' does not save a ground of, or right to an attachment which existed when the amendatory act was passed, but only has the effect of preventing a then existing ''debt, contract, note, or judgment,'' from being affected by the enlargement or change. Hough *v.* Dayton Mfg. Co., 66 Ohio St. 427, 64 N. E. 521.

Contracts ''Made After the Passage of the Act.''—When, as amended, a statute authorizes attachments on contracts ''made after the passage of this act,'' the words refer to contracts made after the passage of the original statute and not as of the time of the amendment. O'Connor *v.* Blake, 29 Cal. 312.

29. National Bank *v.* Riethmann, 79 Fed. 582, 49 U. S. App. 144, 25 C. C. A. 101 (wherein the court said that this also results from the provision of the bill of rights, ordaining that no law retrospective in its operation shall be passed); Mulnix *v.* Spratling, 10 Colo. App. 390, 50 Pac. 1078; Day *v.* Madden, 9 Colo. App. 464, 48 Pac. 1053. But in Stephenson *v.* Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489, it was held that when a foreign attachment law was repealed without any cause in the repealing act providing for pending suits, a pending attachment suit was at an end upon the taking effect of the repealing act.

If a deed of assignment for the benefit of creditors, the purpose of which was to hinder and delay creditors, gives grounds for attachment, a statute enacted pending the attachment is not intended to be retroactive as to disturb rights and liabilities incurred before its passage, although so far as the practice is concerned, the new act applies in winding up assigned estates. Fitch *v.* Duckwall, 25 Ky. L. Rep. 1535, 78 S. W. 185.

Retrospective Operation.— On the other hand, under the rule that the legislature may enlarge, modify, or confer a remedy for existing legal rights, without infringing any principle of the constitution, it is held that a new attachment law or an amendment to such a statute operates upon existing causes of action,[30] and especially may statutes merely affecting the procedure upon the remedy by attachment be applied to causes then pending.[31]

D. Several Statutes.—Remedial statutes, which are not inconsistent, are to be regarded as cumulative.[32] Several statutes must be construed together.[33] When general and special statutes respecting at-

30. Coosa River Steam Boat Co. *v.* Barclay, 30 Ala. 120.

A statute giving the remedy of attachment in a case to which it did not before apply, but in which the plaintiff had another remedy, the language in which is general and unrestricted, extends to all cases whether then existing or to arise thereafter. Green *v.* Anderson, 39 Miss. 359.

31. **A statute permitting an amended or substituted affidavit** applies to pending actions, since it relates only to the remedy in that it prescribes and regulates a mere matter of procedure. Rosenthal *v.* Wehe, 58 Wis. 621, 17 N. W. 318.

A special statute restricting provision as to the time of making motions to dissolve attachments to causes then pending is cited in Kennedy *v.* Mitchell, 4 Fla. 457, where the court regretted its passage. But *compare* Ridlon *v.* Cressey, 65 Me. 128, where it was held that an attachment which had been dissolved by the death of the debtor and a decree in insolvency, was not restored by a subsequent statute because, first, actions pending at the time of the passage of an act are not affected by it; and, second, an act that should undertake to restore an attachment already dissolved, and where the property had been conveyed to a *bona fide* purchaser, would be unconstitutional and void.

32. Bradley *v.* Interstate Land & Canal Co., 12 S. D. 28, 80 N. W. 141.

Different Remedies.—Haldeman *v.* Starrett, 23 Ill. 393.

33. Henrietta Min. etc., Co. *v.* Gardner, 173 U. S. 123, 19 Sup. Ct. 327, 43 L. ed. 637, *reversing* 5 Ariz. 211, 81 Pac. 1126; *In re* Barnet's Case, 1 Dall. (U. S.) 152, 1 L. ed. 77; Bradley *v.* Interstate Land, etc. Co., 12 S. D. 28, 80 N. W. 141; Finch *v.* Armstrong, 9 S. D. 255, 68 N. W. 740.

Repeal by implication by a later repugnant statute. Henrietta Min., etc., Co. *v.* Gardner, *supra.*

Plea to the Merits and to the Grounds for Attachment.—A statute providing that when plaintiff has filed with his declaration in the action of debt an affidavit stating the amount due and unpaid, no plea can be filed unless the defendant files his affidavit that nothing is due from him on plaintiff's demand, or that a certain less sum is all that is due, and a statute providing that if the defendant desires to controvert the existence of grounds stated in the affidavit, he may file a plea in abatement, denying the existence of such grounds, do not conflict but stand well together. Miller *v.* Fewsmith Lumber Co., 42 W. Va. 323, 26 S. E. 175.

Concurrent Remedy.—General provisions of a practice act, which are not by the terms thereof exclusive of the former practice under an attachment act, do not repeal the latter, but so far as cases covered by the attachment act are concerned, furnish a concurrent remedy. Hotel Registry Realty Corp. *v.* Stafford, 70 N. J. L. 528, 57 Atl. 145.

Effect of Repealing Section of the Code.—The code, having provided a method for subjecting the property of a non-resident to the payment of his debts due upon contract, by attachment, all laws previously enacted, and providing any other manner of proceeding, are repealed by the general repealing section of the code. Grigsby *v.* Barr, 14 Bush (Ky.) 330.

Repeal of Statute by Failure To Repeat Provision.—A statute requiring a levy upon personal property to be made in the presence of two residents of the county, is repealed by a later statute

tachments are inconsistent, the general law must yield to the special.[34]

E. Adjudging Rights According to the Lex Fori.—The liability of property to be seized and sold under a writ of attachment, and what are the proper modes of proceeding in making the attachment, are to be determined by the laws of the state in which the property is situated and the attachment is sued out,[35] and not by the law of the state in which the owner or claimant lives.[36] As also must any question of privilege or priority be thus determined.[37]

F. Existence of or Resort to Other Remedy.—*Existence of Other Remedy.*—It is held that when a party has a right to the remedy of attachment, it is unnecessary to consider whether he has any other remedy.[38] And so, under modern statutes generally, the purpose of which is to secure the property so as to have it forthcoming to satisfy the judgment, an attachment may issue although personal service might be had,[39] and the fact that a surety on a note sued on is solvent does not

which drops this provision and which seems to be a revision of the whole subject-matter and to be intended as a substitute for the previous statute, and which protects as fully the rights of parties and of all persons who may have any interest in the action. Campbell *v.* Case, 1 Dak. 17, 46 N. W. 504.

34. Farnsworth *v.* Terre Haute, etc., R. Co., 29 Mo. 75, holding that the provision of a general law declaring that foreign corporations shall be subject to the extraordinary process of attachment, under the same circumstances in which individuals may be either sued or attached, must yield to a special provision limiting the right of attachment against a foreign corporation to one whose chief office or place of business is out of the state.

35. French *v.* Hall, 9 N. H. 137, 32 Am. Dec. 341.

36. **U. S.**—Green *v.* Van Buskirk, 5 Wall. 307, 18 L. ed. 599. **N. J.**—Cronan *v.* Fox, 50 N. J. L. 417, 14 Atl. 119. **N. Y.**—Keller *v.* Paine, 107 N. Y. 83, 13 N. E. 635; Warner *v.* Jaffray, 96 N. Y. 248, 48 Am. Rep. 616. **S. C.**—Pegram & Co. *v.* Williams, 4 Rich. L. 219.

37. McGregor *v.* Barker, 12 La. Ann. 289.

While an lex loci governs in all questions touching the contract, the rights of parties in pursuing remedies upon it, or in enforcing claims growing out of it, or other claims against its subject-matter, are to be determined by **the laws of the country where those** rights are sought to be enforced. Ferguson *v.* Clifford, 37 N. H. 86.

38. Shepherd *v.* Shepherd, 51 Misc. 418, 100 N. Y. Supp. 401, *affirmed*, 117 App Div. 924, 103 N. Y. Supp. 1141.

See *infra*, VII.

Statute as to Inability to Find Defendant.—Under a statute authorizing an attachment of personal property in cases where "the officer cannot find the body of the defendant within his precinct," where the officer had opportunity to arrest the defendant, but waited until plaintiff's agent enticed the defendant out of the state and then attached the property of defendant, a plea in abatement to the attachment will be sustained. Nason *v.* Esten, 2 R. I. 337. See Weldon *v.* Wood, 9 R. I. 241.

39. Grubbs *v.* Colter, 7 Baxt. (Tenn.) 432; Boyd *v.* Buckingham & Co., 10 Humph. (Tenn.) 434.

A statute making a foreign corporation, doing business within the state, liable to be sued by persons having claims against it, does not make it any the less a foreign corporation and liable to be proceeded against by attachment. South Carolina R. Co. *v.* People's Sav. Inst., 64 Ga. 18.

When an attachment was issued on the ground that the defendant was removing out of the state, as that the ordinary process of the law could not be served on him, the defendant may raise an issue that he could have been served with the ordinary process of the law. Funk *v.* McCullough, 24 Miss.

deprive a party of his right to an attachment on proper grounds against the principal.[40]

Resort to Other Remedy.— When a plaintiff has invoked the remedy by attachment, he cannot, it has been held, resort to other remedies to the prejudice of the defendant, so long as he relies upon his attachment lien.[41] When, however, he has first resorted to any other particular remedy, it is held in some cases that this does not prevent the issuing of an ancillary attachment in the same suit if the statutory cause for an attachment is shown,[42] while other cases hold that property cannot be attached so long as such other remedy is relied on.[43]

481, wherein the court held that it was error to refuse to charge the jury as requested by the defendant, "that if the jury believe from the testimony that said Funk, the defendant, was in Natchez, with the property levied on, at the time the plaintiff applied for and took out the writ of attachment issued in this case; and if at that time the ordinary process of law could have been served on said Funk personally in said county of Adams, then the jury must find for the defendant Funk, in the issue joined."

40. Richardson *v.* Probst, 103 Iowa 241, 72 N. W. 521.

41. Roberts *v.* Landecker, 9 Cal. 262.

A debtor's person and estate cannot both be holden at the same time upon the same attachment. Daniels *v.* Wilcox, 2 Root (Conn.) 346.

Arrest Without Knowledge of Creditor.—Where, upon an original writ, property was attached by direction of the creditor, and between such attachment and the completion of the service by the delivery of a summons, the debtor was arrested and held to bail on the same writ, but without the direction or knowledge of the creditor, the attachment was held good as against and after attachment of the same property by another creditor, notwithstanding the intermediate arrest. Almy *v.* Wolcott, 13 Mass. 73.

42. Massey *v.* Walker, 8 Ala. 167; Wood *v.* Carter, 29 Ga. 580. These were cases of suits commenced by bail process.

A proceeding by attachment under the Pennsylvania Act of 1869 is not inconsistent with an action to recover the demand for goods sold and money loaned. Though there may be two recoveries, there can be but one satisfaction. The attachment was not, therefore, dissolved because of the pendency of the other action. Swartz *v.* Lawrence, 12 Phila. 181, 34 Leg. Int. 114.

A pending action in equity, in which a preliminary injunction had been obtained, was held not to abate an attachment in Meyers *v.* Rauch, 4 Pa. Dist. 333.

Proceedings under a deed of trust, and by attachment on other property, are concurrent remedies, and may proceed *pari passu.* The collection of the whole amount of the debt secured by the trust deed, by execution of the judgment in attachment, is an election to repudiate the action under the deed of trust. Yourt *v.* Hopkins, 24 Ill. 326.

43. Brinley *v.* Allen, 3 Mass. 561, after having arrested the body of the defendant on the same writ.

When a statute exempted the body from arrest on contracts, but did not change the form of the writ which had theretofore issued against the goods and chattels and for want thereof against the body of the defendant, it is no cause of abatement that the writ issued as an attachment of the property or body of the defendant. Langdon *v.* Dyer, 13 Vt. 273.

Under a Washington statute providing that the plaintiff shall not prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure, an attachment, while an ancillary proceeding, would be an additional remedy for one who has begun a suit for foreclosure. "It was to prohibit a mortgagee securing by writ of attachment or otherwise an additional remedy in anticipation of a deficiency judgment, while looking to the mortgage security, and before exhausting the same by foreclosure and

IV. SEVERAL ATTACHMENTS.—A. In the Same Cause.—In the absence of statute authorizing it, a second or double attachment as between the same parties on the same cause of action cannot be issued.[44]

sale." Advance Thresher Co. *v.* Schinke, 47 Wash. 162, 91 Pac. 645.

44. Ga.—Wilson *v.* Stricker & Co., 66 Ga. 575. Ill.—Peck, Woods & Co. *v.* American Trust, etc., Bank, 172 Ill. 192, 50 N. E. 326, *affirming* 70 Ill. App. 177. Mich.—Baxter *v.* Grove, 92 Mich. 291, 52 N. W. 294. N. J.—Del Hoyo *v.* Brundred, 20 N. J. L. 328; Harris *v.* Linnard, 9 N. J. L. 58. N. M.—Dye *v.* Crary, 12 N. M. 460, 78 Pac. 533, 13 N. M. 439, 85 Pac. 1038, 9 L. R. A. N. S. 1136, *affirmed* in 208 U. S. 515, 28 Sup. Ct. 360, 52 L. ed. 595.

In Smith-Frazer Boot, etc., Co. *v.* Derse, 41 Kan. 150, 21 Pac. 167, the court said that "where an action is pending between the same parties, in which an attachment is issued, it will be oppressive, and therefore an abuse of judicial process, to hold that the plaintiff might institute a second action for the same cause, and obtain another order of attachment, thus multiplying and increasing costs and expenses without any reasonable excuse."

Proceedings invalid because of fatally defective undertaking do not create valid liens upon the property nor operate to prevent a new proceeding upon a valid undertaking in the same action. Kern Valley Bank *v.* Koehn, 157 Cal. 237, 107 Pac. 111, *affirming* 10 Cal. App. 679, 103 Pac. 173.

After Two Non-Ests.—Where an attachment, issued under a statute providing that "there shall be issued with every attachment, a writ of summons against the defendant, and a declaration or short note expressing the plaintiff's cause of action shall be filed, and a copy thereof shall be sent with the writ to be set up at the Court-house door by the sheriff or other officer," has been dissolved after two returns of *non est*, the proceeding is out of court unless the quashing order be reversed on appeal, and a second attachment cannot be issued under a statute authorizing an attachment to issue in a pending action when two summons have been returned *non est*. "The plain meaning of this is that when an action is pending in any court of law, which the court in the exercise of its general jurisdiction has the power to try and decide, provided jurisdiction over the person of the defendant be obtained by service of the summons upon him, and in such a case there are two returns of *non est* to two successive writs of summons, then the judge is authorized to regard such returns as evidence that the defendant is a non-resident or absconding debtor; and, if the plaintiff's cause of action be such as would entitle him to an attachment on warrant, the judge is authorized and directed to order the attachment to issue, provided the plaintiff produces before him the same proof of his claim that he would be required to produce before the magistrate, in order to obtain his warrant to the clerk of the proper court to issue an attachment. When the attachment is thus ordered by the judge, it is subject to the same conditions, and the same proceedings must be had upon it, as if it were an attachment on warrant, with the single exception that the order of the judge supersedes and takes the place of the warrant of the magistrate. But the court in executing this power can look only to the returns made to the writs of summons issued in the action then pending before it, which has been brought in the ordinary way, and which invokes the exercise of its general jurisdiction. It cannot look to returns made in an attachment proceeding under a special, limited and statutory jurisdiction." Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573.

Original Attachment Followed by Ancillary.—Where a suit may be and has been commenced by an original attachment issued against the estate of the defendant, it may be followed by an ancillary attachment issued on any ground on which such an attachment may be granted. Brown *v.* Isbell, 11 Ala. 1009, the court saying: "It would perhaps be competent to dismiss the ancillary attachment, or quash the levy thereof, where the estate of the defendant levied on under the original attachment was unquestionably ample to satisfy the demand sought to be recovered. However, this may be, if the ancillary attachment was vexa-

Under statutory authority, without filing a new petition, affidavit or bond, successive writs of attachment between the same parties and in the same cause may issue,[45] when one writ has been abandoned,[46] or dissolved,[47] or the first was so irregular and unauthorized that it should be quashed on motion,[48] or if there is a failure to obtain sufficient property under the first writ to secure the debt, and other property is subsequently discovered,[49] and additional attachments may thus issue to different counties.[50]

tiously sued out, the plaintiff will be liable to respond to the defendant in an action for damages.''

A garnishee cannnot be brought in by an *alias* writ of attachment, and such a writ, not being authorized by statute, is void and no waiver would make it good. Dennison *v.* Blumenthal, 37 Ill. App. 385.

Rule of Court.—In Van Benschoten *v.* Fales, 126 Mich. 176, 85 N. W. 476, where property had been seized under the original writ and all that remained to be done was to summon the defendants, it was held that an alias writ should have issued under rule of court. Under constitutional authority conferred on the supreme court to modify and amend the practice in circuit courts a rule of court providing for alias writs is authorized, there being no statutory provision on the subject.

45. **La.**—Elliott *v.* Stevens & Co., 10 Iowa 418; Hamill, etc., Co. *v.* Phenicie, 9 Iowa 525. **N. Y.**—Mojarrieta *v.* Saenz, 80 N. Y. 547, 58 How. Pr. 505; Acker *v.* Jackson, 3 How. Pr. (N. S.) 160. **Tex.**—Bradshaw *v.* Tinsley, 4 Tex. Civ. App. 131, 23 S. W. 184, holding that when the petition and affidavit were filed on July 13th, and one attachment was issued on that day, another attachment of September 16th of the same year was not issued too remotely from the date of the petition and affidavit. **W. Va.**—Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510.

In Foote *v.* John E. Hall Com. Co., 84 Miss. 445, 36 So. 533, the writ had not been served by the sheriff as required by law. It was held that the court below erred in refusing the request for the alias writ, under the rule as laid down in Bates *v.* Crow, 57 Miss. 678, under a similar statute.

Showing of Continued Existence of Debt.—To support a petition for an order for a second attachment, there must be a showing under oath of the continued existence of the debt, and the necessity of the further process demanded. Favrot *v.* Delle Paine, 4 La Ann. 584.

46. Mojarrieta *v.* Saenz, 80 N. Y. 547, 58 How. Pr. 505.

Where first attachments were abandoned simply because the plaintiff did not have in the writs the right name of the defendant, and subsequent attachments were made on writs issued for the purpose of correcting the mistake, and the plaintiff and officer acted without fraud and in good faith, the subsequent attachments were valid even if the property was not returned to the owner before they were made. Brady *v.* Royce, 180 Mass. 553, 62 N. E. 960.

47. Anderson *v.* Land, 5 Wash. 493, 32 Pac. 107, 34 Am. St. Rep. 875.

48. Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510.

In Ladenburg *v.* Commercial Bank, 5 App. Div. 219, 39 N. Y. Supp. 119, it was held that an attachment is not invalidated merely because a prior attachment has been issued in the same action. Here the second attachment was issued to save the plaintiff's rights, which were jeopardized by an attack upon the previous attachment, which were attacked not upon the merits, but upon petty technicalities.

Set Aside on Insufficient Bond.—Harrison *v.* Poole, 4 Rob. (La.) 193.

49. Elliott *v.* Stevens & Co., 10 Iowa 418.

50. **Ia.**—Elliott *v.* Stevens & Co., 10 Iowa 418. **Mo.**—Magrew *v.* Foster, 54 Mo. 258. **Tex.**—Bradshaw *v.* Tinsley, 4 Tex. Civ. App. 131, 23 S. W. 184.

The appointment of a receiver to take charge of property including that levied upon by a writ of attachment

To Different Counties Generally. — Under statutory authority, several attachments may be issued in the same action to different counties,[51] as, where an attachment defendant has property in several counties,[52] or where there are several defendants who reside or have property in different counties.[53] And under various statutes it has been held that, the first affidavit being bad, a second attachment may be sued out upon a second affidavit stating a second ground.[54] And it has been held that it is no ground for dismissing a foreign attachment, instituted in a United States circuit court, that the plaintiff had sued out another attachment against the defendant in a state court, for the same cause of action, and afterwards discontinued it, when there is no evidence of

does not show a dismissal or abandonment of the attachment proceedings, and a second writ may be issued to seize property in another county, without a new affidavit and bond. Runner *v.* Scott, 150 Ind. 441, 50 N. E. 479.

51. Simpson *v.* East, 124 Ala. 293, 27 So. 436; Mojarrieta *v.* Saenz, 80 N. Y. 547, 58 How. Pr. 505.

Real or Personal Property in County of Suit.—Under a statute which provides that when the defendant "has property or effects" in different counties, that "separate writs may issue to every such county," it is immaterial whether the property in the county in which the suit is commenced is real or personal or both. Huxley *v.* Harrold, 62 Mo. 516.

52. Carter *v.* Arbuthnot, 62 Mo. 582. See Read *v.* Kirkwood, 19 Ark. 332. This statute seems to have been overlooked in Brocage *v.* Block, 7 Ark. 359, and Smith *v.* Block, 7 Ark. 358.

In Martinovich *v.* Marsicano, 150 Cal. 597, 89 Pac. 333, the court, construing Cal. Code Civ. Proc. §§537-540, and holding that the several writs may issue on one affidavit, said: "This provision of section 540, as we read it, was intended solely in aid of the plaintiff in attachment, and the whole purpose was to authorize such a plaintiff to have at one time two or more writs addresed to sheriffs of different counties, so that property of the defendant in various counties necessary to secure the plaintiff's claim may be levied on under the one proceeding for attachment instituted by him. The plaintiff in attachment is, by virtue of the showing made and security given, entitled to have as many writs issued to different sheriffs as he may see fit to demand. All writs so demanded and issued constitute parts of one proceeding to have the property of the defendant in the state levied on as security for any judgment that may be obtained, and have for their basis the affidavit and undertaking given to secure the remedy of attachment. If by his first demand he has failed to ask for and secure a writ for a county in which he almost immediately thereafter discovers attachable property necessary to his security, no good reason is apparent why he may not reach such property by procuring what he would have been entitled to as a matter of right in the first instance by including it in his demand to the clerk, thus accomplishing the same result that he would be enabled to obtain as to property subsequently discovered in a county for which a writ had issued, before the return of the attachment, by a simple direction to the sheriff. The mere fact that a writ has been issued as to one county of the state should not deprive the plaintiff of his right to a writ for any other county, and the statute does not, in our opinion, have such effect." See also Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

53. Runner *v.* Scott, 150 Ind. 441, 50 N. E. 479; Carter *v.* Arbuthnot, 62 Mo. 582.

54. Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791. See also Talhelm *v.* Hoover, 4 Pa. Co. Ct. 172.

"I can find nothing in the Code to prevent the granting of one attachment on the ground of non-residence and another on the ground of intent to defraud creditors by transfer of property." Rider *v.* Ellis, 123 N. Y. Supp. 1081, relying on *dicta* in Kibbe *v.* Wetmore, 31 Hun 424. And see Ladenburg *v.* Commercial Bank, 5 App. Div. 219, 39 N. Y. Supp. 119.

intention to harass the defendant;[55] and that the mere pending of an attachment by the plaintiff against the defendant, for the same cause of action, in another state, affords no ground for dissolving the attachment, although that was the first laid, since the funds found in one state may be quite insufficient to discharge the debt.[56]

Necessity for Return of First Attachment. — There is authority for a rule that an alias attachment cannot be issued when the original attachment has not been returned,[57] while on the other hand it has been held that a statute providing that "where any attachment has issued out of the circuit court in any county, it shall be lawful for the plaintiff, at any time before judgment, to cause an attachment to be issued to any other county of this state," authorizes the plaintiff to sue out a second attachment at any time before judgment, and he is not bound to wait until the first writ is returned showing that the levy is not sufficient to secure the payment of the plaintiff's demand.[58]

B. In Other Causes.— Successive attachments, at the suit of other plaintiffs and for other causes of action, may generally issue pending an attachment,[59] under the circumstances and upon the conditions suggested in another part of this article.[60]

C. Plea of Pendency of Another Suit.[61]—1. **In General.**— Under the rule that two suits between the same parties for the same subject-matter cannot be prosecuted at the same time, it is generally held that a pending suit may be pleaded in abatement of a subsequent attachment suit,[62] and that the pendency of an attachment suit may be

55. Fisher *v.* Consequa, 2 Wash. C. C. 382, 9 Fed. Cas. No. 4,816.

Though an order of attachment may have been discharged by a tribunal of co-ordinate jurisdiction, the plaintiff having sued out another, would have the right to ask the opinion of the court from which it issued as to its validity. Brooks *v.* Todd, 1 Handy (Ohio) 169.

If an original attachment is vacated, and a motion for issuing a new attachment obviating previous defects is not a renewal of the old motion, but one based upon a new state of facts, it requires no leave for its presentation. Selser Bros. Co. *v.* Potter Produce Co., 80 Hun 554, 30 N. Y. Supp. 527, *affirmed,* 144 N. Y. 646, 39 N. E. 494.

56. Clark *v.* Wilson, 3 Wash. C. C. 560, 5 Fed. Cas. No. 2,841.

57. Wallace, Elliott & Co. *v.* Plukart, 6 Pa. Co. Ct. 151.

The process is considered as an execution, and should be governed by the same principles, and the first writ should be returned before the second can legally issue. Baldwin *v.* Wright, 3 Gill (Md.) 241.

58. Morris *v.* School Trustees, 15 Ill. 266.

59. Duffin *v.* Wolf, 21 N. J. L. 475 (*disapproving* the dictum to the contrary in Cummins *v.* Blair, 18 N. J. L. 151); Brown *v.* Bissett, 21 N. J. L. 46; Halpin *v.* Hall, 42 Wis. 176.

An attachment in a state court is no bar to an attachment in a federal court on another cause of action, though between the same parties. "The rule of comity cannot be invoked unless the situation here will lead to conflict with the state court. No trouble about the res can arise. The attachment liens will be governed by the rules applicable to successive attachments under the state statutes, which furnish the rule of action for this court, since no federal statute governs the matter." Loewe & Co. *v.* Lawlor, 130 Fed. 633.

60. See *infra,* VI.

61. See generally the title "**Another Action Pending.**"

62. Monroe *v.* Reid, 46 Neb. 316, 64 N. W. 983, replevin suit.

In McKinsey *v.* Anderson, 4 Dana (Ky.) 62, the court said: "The pendency of the petition *when the attach-*

pleaded in abatement when it is shown that the pending attachment is in furtherance of the satisfaction of the same claim,[63] or one in which

ment was issued, would not *per se* have been sufficient to abate the latter. But the *continued* pendency of the petition *to the time of pleading in court,* furnished unanswerable matter in abatement of the *suit* which was last instituted."

When a suit by declaration was commenced on the same day an attachment was sued out against the goods of the defendant, it cannot be presumed that the attachment suit was commenced first, but, nothing appearing to the contrary from the record, it may be inferred that the suit by declaration was in fact first commenced. Wales *v.* Jones, 1 Mich. 254.

Verdict Obtained on Bail Process.—Where an attachment and a proceeding by bail process, on the same subject-matter and between the same parties, were sued out at the same time, and a verdict was obtained in the bail case, it was proper to dismiss the attachment. Such a case presents no reason for making an exception to the general rule. Clark *v.* Tuggle, 18 Ga. 604.

Motion.—"The contention on the part of the appellant that the question whether another action is pending for the same cause cannot be raised by a motion, but that it must be set up by plea or answer, cannot be sustained. One of the facts necessary to be shown by affidavit in order to obtain a warrant of attachment is that a cause of action exists; and if that is not only not shown, but is negatived, by the affidavits on the motion papers, then the attachment cannot stand. See Baum *v.* Bell, 28 S. C. 201, 5 S. E. 485." Ferst *v.* Powers, 58 S. C. 411, 36 S. E. 749.

But in Meyers *v.* Rauch, 4 Pa. Dist. 333, it was held that the merits of such a plea cannot be determined upon a motion to dissolve an attachment in advance of trial. And see Seeley *v.* Missouri, etc. R. Co., 39 Fed. 252.

That an interlocutory decree in an equity suit has been rendered by a federal court is no reason for dissolving an attachment in an action at law commenced in a state court and removed to the federal court. "It has never been decided that the pendency of a prior suit in equity is a good plea in abatement to a subsequent suit at law between the same parties." Seeley *v.* Missouri, etc., R. Co., 39 Fed. 252. But see Monroe *v.* Reid, 46 Neb. 316, 64 N. W. 983, and the title "Another Action Pending."

In Pennsylvania Only a Judgment Bars.—"This is held in the case of Miller *v.* Rohrer, 127 Pa. 384, where it is ruled that 'a proceeding by attachment under the Act of March 17, 1869, is to be regarded as a personal action,' and that 'the prior recovery of a final judgment in another proceeding between the same parties upon the same cause of action, is a bar to the recovery of a judgment in the proceeding by attachment; and this, though the defendant in the attachment filed no bond under section 3 of the Act.' Of course, there could be but one recovery between the same parties for the same cause of action. As is said in Brenner *v.* Moyer, 98 Pa. 274, a recovery in one extinguishes the right to recover in the other, and is to the plaintiff in lieu thereof, a security of a higher order. But there is no case that we can find wherein it has been held that a party could be barred from a recovery in one action because another action might be pending for the same thing. The moment, however, a recovery is had in either action, it must end both actions. We, therefore, agree with the principle decided by Schwartz *v.* Lawrence, 12 Phila. 181, that an attachment under the Act of 1869 may issue, although an action for the goods sold and delivered was pending at the time the attachment issued." Joseph Netter & Co. *v.* Harding, 6 Pa. Dist. 169, 172.

63. Dean *v.* Massey, 7 Ala. 601.

On the contrary, in Morton *v.* Webb, 7 Vt. 123, it was held that a plea in abatement, alleging the pendency of a proceeding in attachment, is not good against a subsequent suit *in personam.*

In Branigan *v.* Rose, 8 Ill. 123, the court said that if the defendant appeared in the attachment suit and converted it into a suit *in personam,* the plea in abatement should aver that fact. And in Stockham *v.* Boyd (Pa.)

other attachment proceedings are also attempted to be enforced.[64]

2. Suits in Different Jurisdictions.—The pendency of an attachment in one state is not pleadable in bar of a subsequent action in another state by the same plaintiff for the same cause against the same defendant,[65] although property sufficient to satisfy the demand has been levied on,[66] or where nothing is shown to have been made under the

12 Atl. 258, it was held that a pending attachment against a non-resident will not be abated by a pending action by summons in the same court.

As Dependent on Sufficiency of Attachment to Satisfy Claim.—Challiss *v.* Smith, 25 Kan. 563.

As Dependent on Validity of Attachment.—Minniece *v.* Jeter, 65 Ala. 222.

Suspending Proceedings in Second Suit.—Instead of pleading an attachment in abatement of the writ, the fact of the attachment pending for the same debt should be made known to the court, when it will either suspend all proceedings until the attachment suit is determined, or render judgment with a stay of execution, which can be removed or made perpetual, in whole or in part, as the exigency of the case may require. Crawford *v.* Slade, 9 Ala. 887, 44 Am. Dec. 463.

64. Scott, Trotter & Tilford *v.* Coleman, 5 Litt. (Ky.) 349, 351, 15 Am. Dec. 71.

In the Same County.—James *v.* Dowell, 7 Smed. & M. (Miss.) 333; Harris *v.* Linnard, 9 N. J. L. 58.

In Another County.—Property Levied on Insufficient.—Obtaining an attachment in chancery in one county, and levying it upon property not sufficient to pay the debt, is no objection to the prosecution by the same complainant of another suit by attachment in another county and attaching other property. Savary *v.* Taylor, 10 B. Mon. (Ky.) 334.

65. Osgood v. Maguire, 61 Barb., *affirmed*, 61 N. Y. 524. *Compare* Lawrence *v.* Remington, 6 Biss. 44, 15 Fed. Cas. No. 8,141, wherein it was held that the pendency of an attachment in another state for the same cause, the property attached there being sufficient to pay the judgment, is a bar to a second suit.

In Moore & Co. *v.* Emerick, 38 Ark. 203, the court said: "The *satisfaction of the debt* through the former attachment might be shown by plea in the nature of a plea *puis darrien continuance* at common law. It was something which did not exist when this suit began, and could not be used to show that this suit was wrongfully brought. At common law the plea could not, generally, be interposed as a complete bar to the suit."

Until the appearance of the defendant, attachment process in another state is not such an action pending, that is, it is not a proceeding against the person, as can be pleaded in bar to a suit elsewhere. Wilson *v.* Mechanics' Sav. Bank, 45 Pa. 488, 494, holding further that though the defendant enter an appearance to the attachment, and turned it into an action *in personam*, it would not be a bar to the action when the appearance was long after the action was brought.

To an action in assumpsit it cannot successfully be pleaded in bar that an attachment suit on the same cause is pending in another state. Barbe *v.* Glick, 20 Ill. App. 408. See also Douglass *v.* Phenix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118, wherein the court, distinguishing suits in garnishment from suits strictly *in personam*, said: "The pendency of a suit *in personam* in one State is not according to the general rule pleadable in abatement of a suit subsequently commenced in another State, between the same parties, on the same cause of action, although the courts of the state where the prior suit is pending had complete jurisdiction."

66. Hecker *v.* Mitchell, 5 Abb. Pr. (N. Y.) 453.

While the pendency of an attachment suit in another state is no bar to an attachment for the same cause in this state, the second attachment will be limited "to cover a sum adequate as additional security, unless the plaintiff choose to abandon the similar proceeding" in the other state. Trubee *v.* Allen, 6 Hun (N. Y.) 75.

attachment proceeding.[67] And where a suit in one court is commenced prior to the institution of proceedings under attachment in another court such proceeding cannot arrest the suit.[68]

And as between state and United States courts, it is held that where one of the courts has secured possession or dominion of specific property, the suit in the co-ordinate jurisdiction to affect the same property should not be dismissed, but before a seizure of the property is made therein it should be stayed until the proceedings in the court which first obtained jurisdiction of the property are concluded, or ample time for their termination has elapsed.[69]

V. PERSONS FOR AND AGAINST WHOM ATTACHMENT MAY BE ISSUED.—A. Persons Who May or May Not Have Attachment.—**1. In General.**—Besides the large general class of suitors who may be said without question to have the right to prosecute the actions in which the remedy of attachment is permitted, it has been specifically held that an attachment may be sued out by an administrator on a debt due to the estate,[70] by distributees on the property of an administrator who has absconded with the assets of the estate, when they can state the property taken and its value, and that all the debts of the ancestor have been paid and discharged,[71] and by the United States in an action in a state court,[72] or in a court in the District of Columbia.[73] But one suing under a fictitious name cannot have an attachment.[74]

An assignee of the demand sought to be collected may institute proceedings in his own name,[75] except where attachment is asked because "the plaintiff's debt was fraudulently contracted," such ground being personal to the contracting parties.[76]

2. Corporations.—A corporation may proceed by attachment as an incident of the power and liability of suing and being sued which pertains to all corporations unless taken away by positive enactment.[77]

67. Clampitt *v.* Newport, 8 La. Ann. 124.

68. King *v.* Phillips, 8 Bosw. (N. Y.) 603.

An attachment of a debt in the hands of the defendant by a process of a state court, after the commencement of a suit in a court of the United States, cannot affect the right of the plaintiff to recover in the suit. Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95.

69. Barber Asphalt Pav. Co. *v.* Morris, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761, *per* Sanborn, C. J., *citing* Zimmerman *v.* SoRelle, 80 Fed. 417, 25 C. C. A. 518, and Gates *v.* Bucki, 53 Fed. 961, 12 U. S. App. 69, 4 C. C. A. 116. *Compare* Nelson *v.* Foster, 5 Biss. 44, 17 Fed. Cas. No. 10,105.

70. McCoy *v.* Swan's Admx., 2 Har. & J. (Md.) 344.

71. Barrow *v.* Barrow, Smed. & M. Ch. (Miss.) 101.

72. United States *v.* Murdock, 18 La. Ann. 305, 89 Am. Dec. 651.

73. United States *v.* Ottman, 3 MacArthur (D. C.) 73, holding also that under U. S. Rev. St., §1001, the United States need not give the usual undertaking.

74. Davenport *v.* Doady, 3 Abb. Pr. (N. Y.) 409.

75. Besley *v.* Palmer, 1 Hill (N. Y.) 482.

76. Cheshire Provident Inst. *v.* Johnston, 5 Fed. Cas. No. 2,659 (Minnesota statute); Penoyar *v.* Kelsey, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248. See *infra*, VIII.

77. Swan *v.* Roberts, 2 Coldw. (Tenn.) 153.

3. Non-Residents. — a. *In General.* — An attachment may be issued at the suit of a non-resident under a statute granting the right to "any person,"[78] or to any creditor,[79] and in the absence of legislative enactment limiting the right to residents.[80]

b. *Foreign Corporations.* — If a foreign corporation has not complied with the requirements of an act fixing certain things as a prerequisite to its right to maintain any suit or action in any of the courts of the state, it cannot sue out a writ of attachment,[81] though it has been held

The term "persons" in attachment laws includes corporations as well as natural persons. Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Trenton Bkg. Co. *v.* Haverstick, 11 N. J. L. 171.

The words "creditor" and "debtor" include all persons, natural or corporate, capable of being debtors or creditors. Union Bank *v.* U. S. Bank, 4 Humph. (Tenn.) 369.

78. Johnstone *v.* Kelly (Del.), 74 Atl. 1099, *construing* 24 Del. Laws, c. 239, p. 644.

As Against Absconding Debtor.—McCready *v.* Kline, 28 N. C. 245.

A non-resident creditor cannot attach the property of his resident debtor when the latter has not absconded nor removed to avoid the ordinary process of the law. Taylor & Co. *v.* Buckley, 27 N. C. 384; Broghill *v.* Wellborn, 15 N. C. 511; see Hills *v.* Lazelle, 5 Sneed (Tenn.) 363, as to a statute which authorizes in terms a non-resident creditor to sue out an attachment.

79. Posey *v.* Buckner, 3 Mo. 604.

80. **Ala.**—Woodley *v.* Shirley, Minor 14. **Ind.**—McClerkin *v.* Sutton, 29 Ind. 407. **Miss.**—Barrow *v.* Burbridge & Co., 41 Miss. 622; Hosey *v.* Ferriere, 1 Smed. & M. 663. **Mo.**—Graham *v.* Bradbury, 7 Mo. 281. **N. Y.**—Matter of Marty, 2 Barb. 436, 3 How. Pr. 208, pointing out that *In re* Fitzgerald, 2 Caines 318, had been overruled.

A foreign administrator, with the will annexed, can sue out an order of attachment. Dunlap *v.* McFarland, 25 Kan. 488. See also Germantown Trust Co. *v.* Whitney, 19 S. D. 108, 102 N. W. 304, holding that a regularly appointed administrator in another state may bring suit in attachment, the administrator in this case being a corporation.

Residents of District of Columbia and Territories.—In Risewick *v.* Davis, 19 Md. 82, the court said that in some cases statutes "received a strict construction," holding that "the right to an attachment was confined to citizens of this State or some one of the United States, in contra-distinction to citizens of the Territories or District of Columbia, and of the United States." Citizenship was considered a jurisdictional fact necessary to be averred and proved, and that indifference to these decisions, statutes "were passed, from time to time, to enlarge the jurisdiction and extend the right until it is made common to all persons, natural or artificial, who can sue" in the courts of the state.

Compare Yerby *v.* Lackland, 6 Har. & J. (Md.) 446, which held that the statute confined the remedy to citizens of a state.

An alien was allowed an attachment under an absconding debtor act authorizing "any creditor residing out of the State" to sue out a writ in *Ex parte* Caldwell, 5 Cow. (N. Y.) 293, and Robbins *v.* Cooper, 6 Johns. Ch. (N. Y.) 186. But see Burk *v.* McClain, 1 Har. & M. (Md.) 236; *In re* Coates, 3 Abb. Dec. (N. Y.) 231, 12 How. Pr. 344.

Validity of Statute Denying Attachment to Non-Residents.—"Whatever privilege, benefit or advantage a resident citizen may derive from the *provisional* remedy of attachment, . . . is equally accessible and available to any citizen, of any State of the United States, because the constitution of the United States has declared that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states.'" Ward *v.* McKenzie, 33 Tex. 297, 7 Am. Rep. 261. But see *contra,* Kincaid *v.* Francis, Cooke (Tenn.) 49.

81. J. Walter Thompson Co. *v.* Whitehed, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51, *affirming* 86 Ill. App. 76.

that this rule is directed only against actions on contracts made within the state.[82]

c. *As Against a Non-Resident.* – The right of a non-resident to attach the property of a non-resident in a proper case, is generally recognized.[83]

In Reedy Elev. Co. *v.* American Grocery Co., 24 Misc. 678, 53 N. Y. Supp. 989 (*reversing* 23 Misc. 520, 51 N. Y. Supp. 1074, and *affirming* 48 N. Y. Supp. 619), is was held that "the papers upon which a foreign corporation doing business in the state, in relation to a transaction arising in such state, procures an attachment, must show, for the purposes of the attachment, that the corporation has complied with the provisions of the statute; and, if such fact does not appear in the papers upon which the warrant of atttachment was granted, the omission of such allegation therefrom is legal cause for vacating the warrant of attachment."

Under a South Dakota statute prohibiting a non-resident corporation from transacting in the state any business, acquiring or disposing of any property, instituting or maintaining any action at law or otherwise, until such corporation shall have filed a copy of its charter or articles of incorporation and appointed a resident agent upon whom service of process may be had, an attachment obtained without compliance with such requirement will be dissolved on motion. Bradley, Metcalf & Co. *v.* Armstrong, 9 S. D. 267, 68 N. W. 733.

By Assignee of Foreign Corporation. A statute requiring a foreign corporation to pay a license fee "does not prohibit the maintenance of an action by the assignee of a foreign corporation, and accordingly the question of compliance with the statute upon the part of the assignor is not material to the plaintiff's right to sue." Box Board, etc., Co. *v.* Vincennes Paper Co., 45 Misc. 1, 90 N. Y. Supp. 836.

82. Batchelder, etc., Co. *v.* Knopf, 54 App. Div. 329, 66 N. Y. Supp. 513, decided under a statute providing that "an action may be maintained by a foreign corporation in like manner and subject to the same regulations as where the action is brought by a domestic corporation, except as otherwise specifically prescribed by law," and holding that as the corporation did no business within the state it did not need a license. The contract was made in another state. The case of Reedy Elevator Co. *v.* American Grocery Co., 24 Misc. 678, 53 N. Y. Supp. 989, was distinguished on the ground that there the papers upon which the attachment was granted averred that the plaintiff was a foreign corporation doing business within the state.

Where the papers do not disclose the fact that the contract was made within the state, it is not necessary to aver compliance with the statutory condition in the matter of the certificate, for the purposes of an attachment. Box Board, etc., Co. *v.* Vincennes Paper Co., 45 Misc. 1, 90 N. Y. Supp. 836, *citing* Parmele Co. *v.* Haas, 171 N. Y. 579, 64 N. E. 440; Lukens Iron & Steel Co. *v.* Payne, 13 App. Div. 11, 43 N. Y. Supp. 376.

83. **Ill.**—Givens *v.* Merchants' Nat. Bank, 85 Ill. 442. **Ky.**—Gray *v.* Briscoe, 6 Bush. 687. **La.**—Tyson *v.* Lansing, 10 La. 444. **Md.**—Hodgson *v.* Southern Bldg. & L. Assn., 91 Md. 439, 46 Atl. 971, against a non-resident corporation. **N. Y.**—Ready *v.* Stewart, Code Rep. (N. S.) 297. **Pa.**—Mulliken *v.* Aughinbaugh, 1 Pen. & W. 117; H. B. Claflin Co. *v.* Weiss Bros., 16 Pa. Co. Ct. 247; John Ray Clark Co. *v.* Toby Val. Supply Co., 14 Pa. Co. Ct. 344; Long *v.* Girdwood, 28 W. N. C. 299. **S. C.**—Gibson *v.* Everett, 41 S. C. 22, 19 S. E. 286; Sheldon *v.* Blauvelt, 29 S. C. 453, 7 S. E. 593, 13 Am. St. Rep. 749, 1 L. R. A. 685. **Tenn.**—Merchant *v.* Preston, 1 Lea 280. **Tex.**—Grizzard *v.* Brown, 2 Tex. Civ. App. 584, 22 S. W. 252.

The defendant must appear to be indebted within the state. *In re* Fitch, 2 Wend. (N. Y.) 298; Matter of Marty, 3 Barb. (N. Y.) 229, *affirming*, on other grounds, 2 Barb. 436, 3 How. Pr. 208, 2 Edm. Sel. Cas. 454.

B. Persons Against Whom Attachment May Be Issued. — **1. In General.**[84] — Against a Trustee. —An attachment will not lie against a

Whether Home State Will Permit Remedy in Foreign Jurisdiction.—A citizen of one state may sue out an attachment against a corporation of the same state, at home or in a foreign jurisdiction, though such corporation has become insolvent and the attachment may result in a preference, when no law of the home state forbids it. Schindelholz *v.* Cullum, 55 Fed. 885, 12 U. S. App. 242, 5 C. C. A. 293.

Unliquidated Damages.—A statute providing that when any person being a non-resident of the state "'is indebted to any person also a non-resident, either by judgment, note, or otherwise,'" the process may be allowed, relates only to a cause of action for which either debt or *indebitatus assumpsit* will lie. Hazard *v.* Jordan, 12 Ala. 180. See also, *infra*, VII.

"The restriction in the statute is against a non-resident bringing an action against a foreign corporation; but there is no restriction in the statute against a foreign corporation bringing an action in this state against a non-resident." Flynn *v.* White, 122 App. Div. 780, 107 N. Y. Supp. 860.

"In an action brought by a foreign plaintiff against a foreign defendant to recover the agreed price of goods sold in a foreign state said foreign plaintiff is not entitled, under a warrant of attachment, to levy upon an indebtedness due the foreign defendant from a foreign corporation." Flynn *v.* White, 122 App. Div. 576, 107 N. Y. Supp. 860.

In Tennessee, under an early statute, an original attachment would not lie unless the plaintiff or defendant was a citizen of the state. A subsequent statute authorized an attachment by a non-resident against a non-resident in equity, and later at law in certain cases. See Taylor *v.* Badoux, 92 Tenn. 249, 21 S. W. 522; Decatur Bank *v.* Berry, 3 Humph. 590; Webb & Co. *v.* Lea, 6 Yerg. 473; Kincaid *v.* Francis, Cooke 49.

The law giving to non-resident creditors the benefit of the attachment law against non-resident debtors, passed in 1824, (Clay's Dig. 57, 9) was not intended to give them the benefit of this particular law. "It is confined by the terms of the act to cases where the non-resident debtor 'removes his property into, or holds property in this state.' With no propriety can this language be applied to the foreign executor or administrator, for if the property had ever come to his possession, it would not be subject to the attachment of the resident creditors, as was held in the case of Loomis *v.* Allen, *supra*. . . . The act of 1807, is, to say the least, one of doubtful policy, and is by its express terms, confined to cases where one contracting debts in this state, removes, leaving property behind him, and dies. In such a case, it seems to have been considered by the legislature proper, that the creditors of the deceased should have a remedy against the property, instead of compelling them to take out letters of administration, or seek payment from the foreign administrator. No such considerations apply in the case of the foreign creditor, and there is therefore no hardship in requiring him to take out administration, if he desires to subject property of the deceased in this state to the payment of his debts." Hemingway *v.* Moore, 11 Ala. 645.

84. **Fictitious Names.**—That an attachment cannot proceed against a defendant by a fictitious name, see Solinger *v.* Patrick, 7 Daly (N. Y.) 408.

An American consul residing abroad, sued as a member of a partnership the other member of which is not entitled to any privilege or exemption from legal process, may be proceeded against as a non-resident. Caldwell *v.* Barclay, 1 Dall. (U. S.) 305 n., 1 L. ed. 149 n.

One not liable for the debt sued for is not a proper party defendant. Beeler *v.* Perry, 128 Mo. App. 234, 107 S. W. 1008.

trustee as such,[85] either upon the ground that he is an absent debtor,[86] or a non-resident.[87]

Against a Guardian. — Where attachments of property in the hands of trustees of a principal debtor are wholly regulated by statute, and provision is not made for such a remedy against a guardian, an attachment, it has been held, will not lie,[88] and minors claiming redress against guardians cannot pursue them by ordinary attachment.[89]

Against an Insane Person. — It has been held that in an action at law which may be maintained against a lunatic, a proceeding against his estate by attachment is valid,[90] though not where it is necessary to establish an intent which by reason of insanity, the defendant could not have entertained, the intent not being one the existence of which is inferred from the act itself.[91]

Against a Minor. — When the contracts of a minor are binding upon him and may be reduced to judgment, they may be enforced by writs of attachment as in other cases in the absence of statutes to the contrary.[92]

85. Smith *v.* Riley, 32 Ga. 356.

Public Officer.—"No case of acknowledged authority is found which holds that a public officer of a state, charged with a trust created by a public statute of the state in respect to funds or securities in his possession, can be made liable in respect to them by an attachment in favor of a person not claiming under the trust. Decisions in analogous cases, as to persons holding property or funds by authority of a statute or of the law, under a trust imposed in regard to them, are numerous. Brookes *v.* Cook, 8 Mass. 247; Colby *v.* Coates, 6 Cush. 558; Columbian Book Co. *v.* De Golyer, 115 Mass. 67, 69; Harris *v.* Dennie, 3 Pet. 292; Buchanan *v.* Alexander, 4 How. 20. The principle was applied by the court of appeals of Virginia, in Rollo *v.* Andes Ins. Co., 23 Gratt. 509." Providence & S. S. S. Co. *v.* Virginia F. & M. Ins. Co., 11 Fed. 284.

86. Jackson *v.* Walsworth, 1 Johns. Cas. (N. Y.) 372.

87. Cox *v.* Henry, 113 Ga. 259, 38 S. E. 856.

88. Hanson *v.* Butler, 48 Me. 81. See also Ross *v.* Edwards, 52 Ga. 24, holding that the statute does not authorize an attachment against a lunatic or his guardian, both being non-residents.

Under a statute requiring every creditor of a ward to exhibit his claim to the guardian within six months after specified notice given and providing that, if he fails to do so, he shall be forever barred of all claim therefor against the guardian, unless there shall be surplus property in his hands, after paying all debts and expenses and allowances made by the probate court, a suit commenced by attachment and summons will be dismissed as to the attachment if the claim was not exhibited as required, but may be prosecuted to judgment under the summons. Wakefield Trust Co. v. Whaley, 17 R. I. 760, 24 Atl. 780.

As an Individual.—An attachment against a certain person "as commissioner over a lunatic," is a suit against the person named in his individual capacity, when such description is without meaning under the laws of the state. Ross *v.* Edwards, 52 Ga. 24.

89. Collins *v.* Batterson, 3 La. 242.

90. Weber *v.* Weitling, 18 N. J. Eq. 441. To the contrary, see Ross *v.* Edwards, 52 Ga. 24, when the guardian and lunatic are both non-residents.

91. Chambers, etc., Glass Co. *v.* Roberts, 4 App. Div. 20, 38 N. Y. Supp. 301, where attachment was sought on the ground that defendant had left the state with intent to defraud his creditors, "that intent will not be inferred," said Rumsey, J., "as a presumption from the simple act of departure."

92. Dillon *v.* Burnham, 43 Kan. 77, 22 Pac. 1016.

Against a Female Debtor. — Where females are exempt from imprisonment for debt, if under the attachment law a defendant can only appear and defend upon putting in special bail, a female debtor cannot be proceeded against by writ of attachment.[93] But under special statute an attachment may issue against a female debtor trading as a *feme sole*.[94]

2. Against Corporations.— Generally, an attachment will run against a corporation upon any ground which might properly be alleged against such a defendant.[95] Thus, an attachment may issue against a domestic

93. E. S. Higgins Carpet Co. *v.* Hamilton (N. J.), 28 Atl. 716; Van Emburgh *v.* Pullinger, 16 N. J. L. 457.

94. Brent *v.* Taylor, 6 Md. 58, under a statute authorizing an attachment in such a case, where it was held that the provisions of the general statutes should be observed, in so far as the same were not inconsistent with the design and purposes of the special statute.

A statute may provide for an attachment against a female debtor. See Davis *v.* Mahany, 38 N. J. L. 104.

95. State Nat. Bank *v.* Union Nat. Bank, 68 Ill. App. 25, *affirmed*, 168 Ill. 519, 48 N. E. 82; Marr *v.* Washburn, etc. Mfg. Co., 167 Mass. 35, 44 N. E. 1062.

The word "person" in an attachment law includes corporations, both foreign and domestic. Gokey *v.* Boston, etc. R. Co., 130 Fed. 994; Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

"He," "she," "they," relating to the word "defendant" in the act, does not exclude the idea of suit against a corporation. Mechanics' Nat. Bank *v.* Miners' Bank, 13 W. N. C. (Pa.) 515.

Exclusiveness of Special Statutes.— In Michigan Dairy Co. *v.* Runnels, 96 Mich. 109, 55 N. W. 617, the sole question was whether a writ of attachment may issue against a domestic corporation in the county of its location in favor of one also a resident of the county, in like cases as in suits between individuals. By statute a remedy by attachment was given against domestic corporations, other than railroad companies, in all cases in which the plaintiff resided in a county other than the home county of the corporation, and in case attachment of property could be had. The statute provided "for an affidavit which shall set out the cause for issuing the attachment, and, among others, prescribes that one sufficient cause shall be that the defendant is a foreign corporation. This reference to foreign corporations does not exclude the remedy against domestic corporations. The true construction, we think, is that while, as against foreign corporations, that fact alone is sufficient to authorize the writ, in a suit against a domestic corporation some other ground in the statute specified shall be set out."

A statute providing as a ground of attachment, "that the defendant is a corporation whose chief office or place of business is out of the state," does not authorize an attachment on that ground against a domestic corporation which is actively engaged in carrying on its principal business operations in this state, and therefore maintaining a place of business within its limits. It was held immaterial that the chief office was in another state, the chief place of business being within the state. Rocky Mountain Oil Co. *v.* Central Nat. Bank, 29 Colo. 129, 67 Pac. 153.

The assets of an insolvent corporation constitute a trust fund for the benefit of all its creditors, and no preference can be maintained based upon any action or proceeding of a creditor taken with knowledge of the insolvent condition of such corporation. An attachment so procured will be dissolved that the property may be restored to the receiver for ratable distribution. Compton *v.* Schwabacher Bros. & Co., 15 Wash. 306, 46 Pac. 338. But *compare* Reed *v.* Penrose, 2 Grant Cas. (Pa.) 472, wherein it was held that a general statute authorizing attachments against corporations includes insolvent as well as solvent corporations.

Upon Personal and Real Property.— Under a statute providing that "the property of any corporation . . . are liable to attachment on mesne process and levy on execution for debts

corporation upon an allegation that it is about to remove its property without the jurisdiction to the injury of the creditor,[96] but it cannot issue against a corporation under a provision authorizing the writ against an absent, absconding or concealed defendant.[97]

3. Against Deceased Persons, Estates or Successions.—An attachment cannot be sued out against a deceased person,[98] nor against the estate of such a person,[99] neither can a writ of attachment issue against an heir for the debt of his ancestor.[1]

Against Executor or Administrator.—Unless specially authorized by statute in certain cases,[2] an attachment cannot issue against an executor or an administrator, as this would interfere with the rule of law which requires the marshaling of assets, and the priority or equality of payment to the creditors of the estate,[3] though such a writ may issue upon

of the corporation in the manner prescribed by law," the lands as well as the personal property of a corporation are subject to attachment on mesne process. Poor *v.* Chapin, 97 Me. 295, 54 Atl. 753.

Under a New York statute authorizing an attachment against a domestic corporation when its principal place of business is not in the city of New York, when there are conflicting affidavits on the point whether that is or is not its principal place of business, it becomes a question of fact. It is not enough to declare in the certificate that a particular place is or will be its principal place of business, but such must be so in fact. Rothschild *v.* Dithredge Flint-Glass Co., 22 Civ. Pro. 314, 20 N. Y. Supp. 373, *distinguishing* Blumenthal *v.* Hudson Boot & S. Mfg. Co., 21 Civ. Proc. 217, 15 N. Y. Supp. 826, holding that a domestic corporation having once declared by its certificate of incorporation as to the principal place of business, it cannot claim another place as its principal place unless by filing an amendment certificate giving notice of such a change in conformity with the statute.

96. Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

97. Goldmark *v.* Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720; Ferrier *v.* American Glass Silvering Co., 34 How. Pr. (N. Y.) 496, 3 Abb. Pr. (N. S.) 419; McQueen *v.* Middleton Mfg. Co., 16 Johns. (N. Y.) 5.

98. Purnell *v.* Frank, 68 Miss. 639, 10 So. 60. But *compare* Bank of North America *v.* McCall, 4 Binn. (Pa.) 371, as to an attachment in a foreign country, wherein the court said that there is not anything so monstrous in the attachment of a dead man's property for the purpose of paying his debts, as to make the proceedings void on that account.

See, *infra*, VI.

99. Miller *v.* Leeds, 52 N. J. L. 366, 19 Atl. 261.

The creditor must provoke an administration of the estate in pursuance of law. Cheatham *v.* Carrington, 14 La. Am. 696.

In Tennessee, a statute authorized an attachment, "where any person liable for any debt or demand residing out of the state, dies, leaving property in the state." See Sharp *v.* Hunter, 7 Coldw. 389.

1. Peacocks *v.* Wildes, 8 N. J. L. 179. But in Carrington *v.* Didier, 8 Gratt. (Va.) 260, it was held that a creditor of a deceased debtor may proceed by foreign attachment against the heirs residing abroad to subject land or its proceeds, in the state, descended to them from the debtor.

2. **Ga.**—Holloway *v.* Chiles, 40 Ga. 346 (when the property of the deceased is about to be removed); Cox v. Felder, 36 Ga. 597. **Me.**—Thayer *v.* Comstock, 39 Me. 140. **N. J.**—Muller *v.* Leeds, 52 N. J. L. 366, 19 Atl. 261, in the case of joint debtors and only on affidavit that the executor either had absconded or was not resident in the state.

3. **U. S.**—Patterson *v.* McLaughlin, 1 Cranch C. C. 352, 18 Fed. Cas. No. 10,828. **N. J.**—Haight *v.* Bergh, 15 N. J. L. 183. **N. Y.**—*In re* Hurd, 9 Wend. 465. **S. C.**—Weyman *v.* Murdock, Harp. L. 125.

As Executrix De Son Tort.—Under a statute providing "that every original

a proper ground against one acting as executor or administrator when he is personally liable.[4]

4. Several Defendants.—If there is ground for an attachment against one of several defendants, though not as to the others, the writ may issue against him,[5] and when trespassers are jointly sued, and an attachment is the leading process, issuing on an affidavit that discloses a ground of attachment as to all the defendants, it is properly issued against the defendants jointly—that is, it is proper to embrace all the defendants in one writ.[6]

As Against Joint Debtors.—In many cases it is held that an attachment will not lie against a joint obligor, while the other remains subject to the ordinary process of the law,[7] though other cases hold that

writ issued against a female, founded on a contract, shall be a writ of summons,'' an attachment will not lie against an executrix *de son tort* in an action of assumpsit to recover for goods sold to the testator. Martin *v.* Hand, 11 R. I. 306.

4. *In re* Galloway, 21 Wend. (N. Y.) 32, 34 Am. Dec. 209; Wickham *v.* Stern, 18 Civ. Proc. 63, 9 N. Y. Supp. 803.

5. Brewster *v.* Honigsburger, 2 N. Y. Code Rep. 50; North West Bank *v.* Taylor, 16 Wis. 609.

6. Hadley *v.* Bryars, 58 Ala. 139.

7. Kouns *v.* Brown, 2 T. B. Mon. (Ky.) 146, holding that the word ''debtor'' should be understood to apply to one or more, as the demand may be sole, joint or several.

All Defendants Must Be Non-Residents.—Taylor *v.* McDonald, 4 Ohio 150.

The fact that one casually present was served with process is not ground for refusing the attachment which the statute allows upon the ground of the non-residence alone of the debtor having property in the state. Jackson *v.* Perry, 13 B. Mon. (Ky.) 231.

An attachment will not lie against an absent or absconding joint debtor or partner, if one or more of the joint debtors or partners reside within the state. Bright *v.* Hand, 16 N. J. L. 273; Barber *v.* Robeson, 15 N. J. L. 17; Leach *v.* Cook, 10 Vt. 239.

On Charge of Disposing of Property With Intent To Defraud Creditors.—An order, under a statute authorizing ''an order by a commissioner of a writ of attachment in all cases in which a capias ad respondendum might issue against a defendant or defendants on an action of contract,'' against two partners, adjudging that they are about to dispose of their property with the intention of defrauding creditors, cannot be sustained against either unless it is good against both. H. B. Claflin Co. *v.* Detelbach (N. J.), 28 Atl. 715.

On Ground of Collection Endangered By Delay.—Under a statute authorizing an attachment ''if the defendant have no property in this state subject to execution, or not enough thereof to satisfy the plaintiff's demand, and the collection of the demand will be endangered by delay,'' an attachment cannot be maintained against one of several obligors on promissory notes when the evidence shows conclusively not only that there was sufficient property subject to execution owned by those bound on the notes, but the collection of the demands would not have been endangered by delay. Francis *v.* Burnett, 84 Ky. 23.

An affidavit against two joint debtors, insufficient as to one, will not authorize an attachment against the property of both. Hamilton *v.* Knight, 1 Blackf. (Ind.) 25.

When a plea in abatement, denying that one was absent or concealed, was sustained, the attachment will be discharged as to all when the case was one in which all were sued as concealed or absent debtors. Leach *v.* Cook, 10 Vt. 239.

Where a statute authorizes an attachment against one or more of several joint debtors, and an attachment has been issued against all, the suit should not abate as to a defendant not amenable to the attachment, but the suit as to the attachment becomes severed and will proceed as to the one or more against whom it was properly issued. Jones *v.* Lunceford, 95 Ill. App. 210.

the plaintiff may proceed by attachment against the property of one alone of several joint obligors under circumstances which will justify that proceeding as against him under the provisions of the attachment law.[8]

As Against Joint and Several Debtors. — It is generally held, however, that where there are two or more debtors jointly and severally liable, the plaintiff may prosecute the suit against one or more upon ordinary process and against the others by attachment.[9]

5. Against Non-Residents.—a. *In General.*—Non-residence generally as a ground for issuing an attachment will be found treated in another part of this article.[10]

And under such a statute if an attachment is sued out upon two grounds against two joint defendants, upon allegations that one is about to remove from the state, with the intent to have his effects so removed, to the injury of his creditors, and also that both are about fraudulently to sell and assign their property and effects so as to hinder and delay their creditors, and the allegation as to both is not sustained as to one, the attachment must fall as to both. Lawrence *v.* Steadman, 49 Ill. 270, wherein the court said that had the affidavit against the one alone been filed, describing the claim as a joint debt, and a writ of attachment had issued against him, and the other had been summoned, and the issues had been found against them, a judgment would have been rendered against them for a recovery of the debt, and an order for the sale of the property of the one which had been seized under the attachment.

If there be a cause of attachment against one co-defendant, save for non-residency, an attachment should be allowed against the others under a statute providing that in an action for the recovery of money, where the action is against a defendant, or several defendants, who, or some one of whom, has departed from this state with intent to defraud his creditors, or so conceal himself that a summons cannot be served upon him, the plaintiff may have an attachment at or after the commencement of the action. Duncan *v.* Headley, 4 Bush (Ky.) 45; Mills *v.* Brown, 2 Met. (Ky.) 404.

8. Austin & Co. *v.* Burgett, 10 Iowa 302; Smith, etc. Co. *v.* Coopers, 9 Iowa 376; Patterson *v.* Stiles, 6 Iowa 54; Crump *v.* Wooten, 41 Miss. 611.

One a Non-Resident.—Baird *v.* Walker, 12 Barb. (N. Y.) 298, 2 Edm. Sel. Cas. 268.

One an Absconding Debtor.—*In re* Chipman, 14 Jones. (N. Y.) 217.

Under Statute Making Joint Obligation Joint and Several.—Jefferson County *v.* Swain, 5 Kan. 376. To the same effect, see Searcy *v.* Platte County, 10 Mo. 269.

9. **Ind.**—Higgins *v.* Pence, 2 Ind. 566; Leach *v.* Swaun, 8 Blackf. 68. **Ia.**—Chittenden & Co. *v.* Hobbs, 9 Iowa 417, *overruling* Courrier *v.* Cleghorn, 3 Greene 523; Ogilvie *v.* Washburn, 4 Greene 548. **Mo.**—Franciscus *v.* Bridges, 18 Mo. 208.

Under Statutory Authority.—Timberlake *v.* Thayer (Miss.), 16 So. 878; Swan *v.* Roberts, 2 Coldw. (Tenn.) 153.

Statute Providing for Judgment Against One or More.—A statute of Arkansas providing that judgment may be given " 'for or against one or more of several defendants,' " is as applicable to suits by attachment as to suits in any other form, and if a good ground of attachment against one whose property has been attached is proven it is enough. Allen *v.* Clayton, 11 Fed. 73, 5 McCrary 517, where the court said: "If the joint property had been attached a different question would have been presented."

10. See, *infra*, VIII.

Notwithstanding Louisiana Acts 1900, No. 23, non-residents are subject to attachment. Hornbeck *v.* Gilmer, 110 La. 500, 34 So. 651.

One who has held himself out as the president of a bank in another state, cannot deny that character nor aver in a controversy with one who has dealt with that institution while he acted as such, that he was not qualified to hold

Against an Alien.— An attachment may be levied on the property of foreigners residing outside the United States, and whether they have been residents of the state or not.[11]

b. *Foreign Corporations.*—An attachment may go against a foreign corporation as well as against natural persons.[12] The word "person"

that office, when by the charter of the bank the president is required to be a citizen of that state. St. Mary's Bank *v.* St. John, 25 Ala. 566, (under an equitable attachment statute).

11. Barney *v.* Patterson, 6 Har. & J. (Md.) 182; Hepburn's Case, 3 Bland (Md.) 95.

A party may not be a citizen for political purposes, and yet be a citizen for commercial or business purposes, and a debtor residing and doing business in the state is, in contemplation of attachment laws, a citizen of the state, and as such is liable to be proceeded against as an absconding debtor. Field *v.* Adreon, 7 Md. 209.

12. **Ga.**—South Carolina R. Co. *v.* McDonald, 5 Ga. 531. **Ill.**—Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124. **Ind.**—U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832. **La.**—Martin, etc. Co. *v.* Alabama Branch Bank, 14 La. 415. **N. Y.**—India Rubber Co. *v.* Katz, 65 App. Div. 349, 72 N. Y. Supp. 658; Maury *v.* American Motor Co., 25 Misc. 657, 56 N. Y. Supp. 316, *affirmed,* 38 App. Div. 623 (memo.), 57 N. Y. Supp. 1142; Condouris *v.* Imperial Turkish Tobacco, etc. Co., 3 Misc. 66, 22 N. Y. Supp. 695. **Va.**—Guarantee Co. *v.* First Nat. Bank, 95 Va. 480, 28 S. E. 909.

Though They Do Not Transact Business in the State.—Cincinnati, etc., R. Co. *v.* Pless, 3 Ga. App. 400, 60 S. E. 8.

Special Statute Not Exclusive.—A statute providing that attachments may issue against foreign corporations "who are transacting business within this state," is not exclusive of the right to issue an attachment against a foreign corporation not doing business in the state under the general law. Wilson *v.* Danforth, 47 Ga. 676.

Effect of Requirement to Give Special Bail.—The word person would embrace a corporation, but for the other provisions of the attachment law which seek to secure special bail to the plaintiff's action, on which the attachment is to be dissolved and the property attached to be dissolved. Vogle *v.* New Granada Canal, etc., Co., 1 Houst. (Del.) 294.

Forfeiture in Home State.—"If it be conceded it is proven this bank has forfeited its franchises under the laws of Rhode Island, the obligation of its contracts survives, and this action may be maintained on the ground it is a proceeding against the property of the bank not in the hands of a *bona fide* purchaser, to enforce payment. There is nothing in the comity which exists between states, that makes it improper our courts should afford this remedy, notwithstanding the fact, by the local laws of the state which created this corporation, its effect are in the hands of a receiver." City Ins. Co. *v.* Commercial Bank, 68 Ill. 348, 351.

Against Receiver of Insolvent Foreign Corporation.—In Pond *v.* Cooke, 45 Conn. 126, 29 Am. Rep. 668, it was held that property within the state, which when the attachment was sued out, was in the hands of the receiver of an insolvent foreign corporation, was not subject to the attachment, the court saying: "The statute of New Jersey, under which this receiver was appointed, authorizes proceedings against insolvent corporations, like the Watson Manufacturing Company, to settle their estates by dividing their property among their creditors in a similar manner to other insolvent statutes in other states where trustees are appointed. Obviously, in the State of New Jersey the property in question could not have been taken from the receiver by a creditor of the corporation; and we think it should not be done here." But see Dunlop *v.* Paterson Fire Ins. Co., 12 Hun (N. Y.) 627, where it was held that though a receiver had been appointed in the other state, property of a foreign corporation, actually within the state was liable to attachment at the suit of domestic creditors.

Dissolution of Corporation.—Attachment cannot be sustained against a foreign corporation after it has ceased to exist. Hintermeister *v.* Ithaca Organ, etc., Co., 3 Kulp (Pa.) 90.

includes bodies politic and corporate, both foreign and domestic,[13] and "debtor" includes a foreign corporation.[14]

When Engaged in Business Within the State. — A foreign corporation though engaged in business within the state, is held to be a non-resident within the meaning of attachment laws.[15] And some cases hold that a foreign corporation, though it has complied with the requirements of the law authorizing it to do business as a foreign corporation, and though it has an office and property, and does business, and exercises its corporate functions in the state, is still a non-resident and is amenable to process of foreign attachment,[16] while others hold that an attachment will not lie against a foreign corporation when the law confers upon it the right of transacting and carrying on within the state the business for which it was incorporated.[17]

13. Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124. See also: **Ga.**—South Carolina R. Co. *v.* McDonald, 5 Ga. 531. **Pa.**—Bushel *v.* Com. Ins. Co., 15 Serg. & R. 173. **Va.**—United States Bank *v.* Merchants' Bank, 1 Rob. 605.

14. South Carolina R. Co. *v.* McDonald, 5 Ga. 531; Voss *v.* Evans Marble Co., 101 Ill. App. 373. To the contrary, see McQueen *v.* Middletown Mfg. Co., 16 Johns. (N. Y.) 5.

15. **D. C.**—Barbour *v.* Paige Hotel Co., 2 App. Cas. 174. **Ga.**—South Carolina R. Co. *v.* People's Sav. Inst., 64 Ga. 18. **Va.**—Cowardin *v.* Universal Life Ins. Co., 32 Gratt. 445.

16. **Del.**—Albright *v.* United Clay Production Co., 5 Penne. 198, 62 Atl. 726. **Ill.**—Voss *v.* Evans Marble Co., 101 Ill. App. 373, relying upon Mineral Point R. Co. *v.* Keep, 22 Ill. 9. **Pa.**—Beal *v.* Toby Val. Supply Co., 13 Pa. Co. Ct. 273.

Statutory Immunities and Privileges of Home State.—When a statute confers on a foreign railroad corporation the right to extend its road through the state, and declares that it shall be entitled to all privileges, rights and immunities and subject to all such restrictions as are granted, made, and prescribed for its benefit and conferred on it by the act of incorporation of the state of its creation, such foreign corporation is not subject to attachment unless it is so subject in the state that created it. Martin & Merriwether *v.* Mobile, etc., R. Co., 7 Bush (Ky.) 116.

17. Phillipsburgh Bank *v.* Lackawanna R. Co., 27 N. J. L. 206, as it is a "corporation recognized by the laws of the state."

Under a New Jersey statute, which authorizes a writ of attachment against "corporations not created or recognized as corporations of this state by the laws of this state," a corporation, no matter where incorporated, which does not do business in the state, and does not have officers residing there upon whom process may be served, is non-resident. Brand *v.* Auto Service Co., 75 N. J. L. 230, 67 Atl. 19.

In Goldmark *v.* Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720, Depue, C. J., said: "Following the principle laid down in Evans *v.* Perrine, and the opinion of Chief Justice Beasley in that case, the true doctrine is to place a corporation not created or recognized by the laws of this state on the footing of a non-resident individual, exempt from writ of foreign attachment only when it does business in this state and has officers residing in this state upon whom process can be served at their homes."

As a Non-Resident.—A foreign corporation, having its chief office or place of business within the state, cannot be sued by attachment upon an allegation that "the defendant is not a resident of this state." Farnsworth *v.* Terre Haute, etc., R. Co., 29 Mo. 75.

Foreign Corporation Engaged in Interstate Commerce.—A provision that compliance with a statute requiring domestication as a condition to doing business within the state, would exempt a foreign corporation from attachment, does not apply to a foreign corporation engaged in interstate commerce in whole or in part, such a corporation not being required to comply with the statute. And a mere volun-

c. *Foreign Administrator or Executor.*—In some jurisdictions, statutes authorize the issuing of the writ of attachment against a foreign administration or executor,[18] otherwise it seems to be the general rule that an attachment will not lie against such persons in their representative capacity.[19]

VI. WHAT MAY BE ATTACHED.—A. In General.—Where an attachment statute is not general in terms as to the property of the defendant upon which the process may be levied, but prescribes the kind of property and interests therein upon which a levy may be made, the right to attach property and interests is strictly controlled by such statutory provisions.[20]

tary compliance with the statute does not change the status. Bigalow Fruit Co. *v.* Armour Car Lines, 74 Ohio St. 168, 78 N. E. 267, *reversing* 26 Ohio C. C. 496.

18. Taliaferro *v.* Lane, 23 Ala. 369 (holding that when an attachment debtor died before final judgment, the suit could not be revived against the foreign representative by a *scire facias*, as, although the debtor may have been a non-resident when the attachment was issued, it does not follow that he was so at the time of his death); Branch Bank *v.* McDonald, 22 Ala. 474; Lewis *v.* Reed, 11 Ind. 239.

Under the laws of the District of Columbia, foreign executors are not subject to attachment for debts due from their testators. Jordan *v.* Laubrum, 35 App. Cas. (D. C.) 89.

Whether Against Heirs or Personal Representative.—Under a statute providing that "in case of a debtor residing out of the state, the writ of attachment . . . . may issue against his heirs, executors, or administrators," in determining whether it should issue against the heirs or against the personal representatives, it was necessary to look to the nature and character of the action to be commenced, and to decide according to the answer to this question: were all the parties defendants in the state; against whom should the suit be brought for which the attachment is prosecuted? Lessee of Mitchell *v.* Eyster, 7 Ohio 257.

19. **U. S.**—Pringle *v.* Black, 2 Dall. 97, 1 L. ed. 305; McCombe *v.* Dunch, 2 Dall. 73, 1 L. ed. 294. **La.**—Debuys *v.* Yerby, 1 Mart. (N. S.) 380. **Pa.**—Williamson *v.* Beck, 8 Phila. 269; Kane *v.* Coyle, 20 W. N. C. 317.

In Courtney *v.* Pradt, 160 Fed. 561, 87 C. C. A. 463, the court said that an attachment cannot be sued out against an executor or administrator in his representative character, unless he is made liable by statute, in the courts of any state other than that in which he has received his appointment, with the exception in Kentucky and in some other states, that a suit against a foreign administrator or executor is permitted when he has removed to, and settled within, the state.

20. See the cases generally throughout this division.

Goods Not Capable of Being Returned in same Plight.—When no direction is given by statute, what goods might be the subject of attachment or distress, the question must be determined by the common law; and at common law goods could not be distrained which in consequence of the distress could not be returned in the same plight in which they were taken. Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

Everything of a tangible nature, excepting such things as the humanity of the law preserves to a debtor, and mere choses in action, may be subjected to attachment. Handy *v.* Dobbin, 12 Johns. (N. Y.) 220.

A mere right of property, not acquiesced in by the party in possession, and consequently not liable to seizure by mesne or final process, is not subject to attachment. Horton *v.* Smith, 8 Ala. 73, 42 Am. Dec. 628.

One in possession of goods as a trespasser, who takes them into another state in order that they may be levied upon there, cannot in that way confer jurisdiction on the courts of the latter state, though he may have an honest and valid claim. Rosencranz *v.* Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445, 97 Am. St. Rep. 609. See also Timmons *v.* Garrison, 4 Humph.

B. As Dependent Upon Right To Levy Execution. — Where the attachment statute gives the right, in more or less general terms, to levy the writ or warrant upon the property of the defendant, it is generally held that the kind of property upon which an attachment may be levied is that which may be taken and sold on execution,[21] though under many attachment statutes, the levy of an attachment is not limited to such property as may be levied on under a general execution.[22]

C. Particular Kinds of Property. — 1. Exempt Property. — It may be said in a general way that property, which by the constitutions and statutes of the respective jurisdictions is exempt from levy and sale under execution, is as free from seizure under attachment, as it is from process which authorizes a sale,[23] as also property which, from its nature or situation, has been considered as exempt according to the principles of the common law.[24]

(Tenn.) 148, as to a slave decoyed from the state of his residence.

A mere possibility is not attachable under a statute authorizing an attachment of the "estate or debts" of another. Young *v.* Young, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642, and note (denying the right to attach a contingent remainder).

Church Pews.—See the title "Religious Societies."

Property of Bankrupt.—See the titles "Bankruptcy Proceedings"; "Insolvency."

21. **Property Subject to Execution Is Attachable.**—Mass.—Heard *v.* Fairbanks, 5 Met. 111, 38 Am. Dec. 394; Pierce *v.* Jackson, 6 Mass. 242. N. H. Rogers *v.* Elliott, 59 N. H. 201, 47 Am. Rep. 192; Spencer *v.* Blaisdell, 4 N. H. 198, 17 Am. Dec. 412. Vt.—Lovejoy & Co. *v.* Lee, 35 Vt. 430.

Where fixed machinery may be levied upon under an execution as personal property, such property may be attached. Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611.

22. See, *infra*, next section.

A better criterion, in determining whether property be liable to attachment, is to ascertain what would be the rights of the defendant in the attachment against the garnishee, than to enquire whether the property would be liable to execution against the defendant. Peace *v.* Jones, 7 N. C. 256.

In Peace *v.* Jones, *supra*, the court said that whether the property is liable to execution is not the criterion to determine whether it is attachable, as an atachment may operate on bonds, simple contract debts, as negotiable instruments, etc., under a statute authorizing attachment of estate and effects.

"**Although an attachment is a special remedy at law,** and, in the absence of statutory authority, does not reach property or interests which can only be realized by the assistance of a court of equity, the tendency of legislation in this country has been to enlarge the operation of the writ, and subject interests and kinds of property to seizure under an attachment which are not subject to execution at law." Hankinson *v.* Page, 31 Fed. 184, *per* Wallace, J., *citing* Drake, Attachment, §7.

23. Exempt property is not attachable. Hadley *v.* Bryars, 58 Ala. 139; Wallace *v.* Barker, 8 Vt. 440.

An abandonment of the homestead subsequent to the levy would not give validity to a nullity, and would not create a lien where none before existed. Meyer *v.* Paxton, 4 Tex. Civ. App. 29, 23 S. W. 284.

Seamen's Wages.—See U. S. Rev. St. §4536, 6 Fed. Stats. Annot. 874, and the title "Seamen."

Wages.—See Park *v.* Matthews, 36 Pa. 28, 2 Grant Cas. 136, and the title "Garnishment."

Mechanic's Tools.—See Martindale *v.* Whitehead, 46 N. C. 64; Bell *v.* Douglass, 1 Yerg. (Tenn.) 397.

A wooden boot hanging as a sign at the door of a shoemaker's shop, is not a tool or implement of trade. Wallace *v.* Barker, 8 Vt. 440.

24. Cheshire Nat. Bank *v.* Jewett, 119 Mass. 241.

2. Real Property and Interests Therein. — a. *In General.* — Real estate is not attachable,[25] except under authority of a statute.[26] But the right to levy an attachment on real estate is recognized under the rule that when an execution and sale may be had upon real property, an attachment may be levied upon such property,[27] though the recognition of the right to levy upon land in case of a foreign attachment does not give the right to levy a domestic attachment thereon.[28]

b. *As Dependent on Amount of Personalty.* — In the absence of any positive limitations in an attachment statute restraining an officer from levying upon real property, until he has first exhausted all the personal property, or failed after search to find any, an officer may serve a writ issued against the "estate of the defendants" upon real property without having first subjected personal property.[29]

25. Hawes' Appeal, 50 Conn. 317; Continental Nat. Bank *v.* Draper, 89 Pa. 446; *In re* Miners' Bank, 13 W. N. C. (Pa.) 370.

An attachment founded on a capias returned "not found," cannot be levied on land. Murray *v.* Hamilton, Hard. (Ky.) 5.

26. Green *v.* Pyne, 1 Ala. 235; Davidson's Lessee *v.* Beatty, 3 Har. & M. (Md.) 594; Campbell *v.* Morris, 3 Har. & M. (Md.) 535.

Rents collected on attached lands were held to be subject to the lien in Young *v.* Hail, 6 Lea (Tenn.) 179. But see Columbia Bank *v.* Ingersoll, 21 Abb. N. C. 241, 1 N. Y. Supp. 54.

Under an insolvent act providing that when a writ of attachment shall have been issued in compliance with prescribed formalities, if the officer serving the same shall make a sworn return that he cannot find sufficient property to satisfy the attachment, the plaintiff may petition the court of probate for the appointment of a trustee to take possession of the property of the defendant for the benefit of his creditors, the officer must attach real estate if he can find enough to satisfy the claim. Hawes' Appeal, 50 Conn. 317.

The right to redeem land sold at judicial sale is an attachable interest. Herndon *v.* Pickard, 5 Lea (Tenn.) 702.

27. Fletcher *v.* Tuttle, 97 Me. 491, 54 Atl. 1110, holding that property conveyed by a third person to a wife and paid for by the husband cannot be the subject of attachment when no statutory provision has been made therefor.

Under the statute 5 Geo. II, ch. 7, lands became liable to be taken and sold by *fieri facias* in the same manner as goods and chattels, and have since been held to be subject to attachment by all the tribunals of the state. Barney *v.* Patterson, 6 Har. & J. (Md.) 182.

28. Graighle *v.* Notnagle, Pet. C. C. 245, 10 Fed. Cas. No. 5,679; Boyce *v.* Owens, 2 McCord L. (S. C.) 208, 13 Am. Dec. 711.

Where a statute authorizes a domestic attachment to be levied only on such effects as are in their nature capable of being removed, or moveable property on the point of, or in danger of immediate assignment, such an attachment cannot be levied on land. Jamieson *v.* Brodrick, 1 Brev. (S. C.) 396.

29. Isham *v.* Downer, 8 Conn. 282; Boggess *v.* Gamble, 3 Coldw. (Tenn.) 148.

In some states statutes require personal assets to be subjected, or a finding that there are none, before an interest in real estate can be attached. Davidson *v.* Simmons, 11 Bush (Ky.) 330; Camden *v.* Haymond, 9 W. Va. 680. See also Humphrey *v.* Wood, Wright (Ohio) 566.

Having attached personal property valued at more than double the debt claimed, a levy upon the real estate of the defendant is in violation of the positive prohibition of the statute. Tucker *v.* Byars, 46 Miss. 549.

Affidavit Required Before Final Sale of Realty.—An order of the court sustaining an attachment on real estate is valid notwithstanding the plaintiff has not filed a statutory affidavit that defendant had no personal estate subject to the payment of the debt, as

c. *Products of the Soil.* — Trees and grass growing can be attached only when a statute authorizes such remedy, and then the interest should be attached as real estate,[30] but hay is recognized as attachable property.[31]

Annual crops are liable to attachment when they have become mature and fitted for harvesting,[32] and it has even been held that an unripe annual growing crop is personal "property" within the meaning of an attachment statute.[33]

3. Personal Property. — a. *In General.* — By statute in many jurisdictions personal property, whether owned by corporate bodies,[34] or individuals,[35] has been made subject to attachment.

b. *Fixtures.* — Fixtures cannot be levied on as personal property,[36]

such affidavit is required only before the final judgment or order of sale of the realty of a non-resident. Lee *v.* Smyser, 96 Ky. 369, 29 S. W. 27. See also Freund *v.* Ireland (Ky.), 33 S. W. 89.

30. Phillips *v.* Pearson, 55 Me. 570. In Norris *v.* Watson, 22 N. H. 364, 55 Am. Dec. 160, holding that a growing crop of grass is not liable to attachment, the court said that statutes which authorize the mortgage of growing crops as personal property, and the attachment of personal property subject to mortgage, are not intended to make any change in the law relating to the attachment of growing crops.

Grass, though ripe and fit for harvest, is not subject to attachment, when it is not specified by the statute as property that may be so taken, and cannot be taken on execution at common law. Rogers *v.* Elliott, 59 N. H. 201, 47 Am. Rep. 192, wherein the court said: "Emblements were regarded as personal property, but that term does not include fruits which grow on trees which are not planted yearly, grass, and the like. It only includes those crops which grow yearly, and are raised annually by expense and labor, or great manurance or industry. The fruits and products of the earth, other than emblements, while they are hanging by the roots, are a part of the realty. As soon as they are gathered, they are personal estate."

31. Campbell *v.* Johnson, 11 Mass. 184; Barrett *v.* White, 3 N. H. 210, 14 Am. Dec. 352.

Where a tenant had been in possession for some time under a conditional contract of purchase, hay which had not been appropriated to the use of the landlord to reduce the amount agreed to be paid for the farm, may be attached as the property of the tenant. Garland *v.* Hilborn, 23 Me. 442.

32. Polley *v.* Johnson, 52 Kan. 478, 35 Pac. 8, 23 L. R. A. 258; Sawyer *v.* Twiss, 26 N. H. 345.

Corn or Other Growing Products of the Soil.—Cheshire Nat. Bank *v.* Jewett, 119 Mass. 241; Heard *v.* Fairbanks, 5 Met. (Mass.) 111, 38 Am. Dec. 394.

Tobacco stored in barns, hanging on poles, in process of curing, and in such condition that it could not be moved without great damage, may be attached under a statute which authorizes a return to the town clerk's office when an attachment is made of personal property, which by reason of its bulk or other cause, cannot be immediately moved. Cheshire Nat. Bank *v.* Jewett, 119 Mass. 241, wherein the court said: "The objection that the duties required to secure the crop are such as do not properly belong to the attaching officer, applies equally to all crops which require harvesting."

In Kentucky, the remedy in equity, provided for by statute on a return of "no property," may be pursued to subject a growing crop. Farmers' Bank *v.* Morris, 79 Ky. 157.

33. Raventas *v.* Green, 57 Cal. 254.

34. Wall *v.* Norfolk, etc., R. Co., 52 W. Va. 485, 44 S. E. 294, 94 Am. St. Rep. 948, 64 L. R. A. 501; Com. *v.* Fry, 4 W. Va. 721.

35. Rea *v.* Missouri, 17 Wall. (U. S.) 532, 21 L. ed. 707.

36. Mayhew *v.* Hathaway, 5 R. I. 283.

Fixtures in Sawmill.—An attach-

and where a creditor may attach removable fixtures as such, he must remove them from the premises while the tenant's right to remove them exists.[37]

c. *Shares of Stock in Incorporated Companies.* — While corporate stock is not subject to attachment at common law,[38] it has been made so by statute in most jurisdictions.[39] But it is generally held to be the

ment of all the debtor's real estate in a certain town including "the saw mill," creates a lien on a circular saw mill which was in and constituted a part of the sawmill building. Newhall *v.* Kinney, 56 Vt. 591.

Manure made upon a farm, in the ordinary course of husbandry, is a part of the real estate, and cannot be attached separately from the land. Sawyer *v.* Twiss, 26 N. H. 345.

37. Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611.

38. **U. S.**—Deacon *v.* Oliver, 14 How. 610, 14 L. ed. 563, involving a Maryland statute. **Del.**—Fowler *v.* Dickson, 74 Atl. 601. **Mich.**—VanNorman *v.* Jackson Circuit Judge, 45 Mich. 204, 7 N. W. 796. **Mo.**—Armour Bros. Bkg. Co. *v.* St. Louis Nat. Bank, 113 Mo. 12, 20 S. W. 690, 35 Am. St. Rep. 691; Foster *v.* Potter, 37 Mo. 525. **Tenn.**—Moore *v.* Gennett, 2 Tenn. Ch. 375. **Tex.**—Merchants' Mut. Ins. Co. *v.* Brower, 38 Tex. 230. **W. Va.**—Lipscomb's Admr. *v.* Condon, 56 W. Va. 416, 49 S. E. 392, 107 Am. St. Rep. 938, 67 L. R. A. 670.

"The Estate Both Real and Personal."—Though shares of stock in a corporation are defined to be personal property, a statute authorizing attachments to issue upon "the estate, both real and personal," does not authorize attachment of corporate stock when contemporary legislation shows that it was not intended to be included. Haley *v.* Reid, 16 Ga. 437.

"Debt or Any Property or Effects." Shares of stock in an incorporated company are not attachable as a "debt" or any "property or effects" of the debtor. Evans *v.* Monot, 57 N. C. 227.

Not Attachable in the District of Columbia.—Duncanson *v.* National Bank of Republic, 7 Mackey 348; Barnard *v.* Life Ins. Co., 4 Mackey 63.

39. Pease *v.* Chicago Crayon Co., 235 Ill. 391, 85 N. E. 619, 18 L. R. A. (N. S.) 1158, 14 Ann. Cas. 263, *affirming* judgment, 138 Ill. App. 513; Union Nat. Bank *v.* Byram, 131 Ill. 92, 22 N. E. 842. **Mo.**—Tufts *v.* Volkening, 122 Mo. 631, 27 S. W. 522 *affirming* 51 Mo. App. 7. **R. I.**—Beckwith *v.* Burrough, 13 R. I. 294. **Va.**—Shenandoah Val. R. Co. *v.* Griffith, 76 Va. 913; Chesapeake, etc., R. Co. *v.* Paine, 29 Gratt. 502. **W. Va.**—Lipscomb *v.* Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670.

Shares of Stock Assigned to Defraud Creditors.—"The statute in Michigan has made no provision for seizing under an attachment against one a share belonging *prima facie* to another, as an expedient to enable the attaching creditor to contest the title of the apparent owner." Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204, 7 N. W. 796.

The words "rights and credits" in a general attachment law include shares of stock. Curtis *v.* Steever, 36 N. J. L. 304. See also Castle *v.* Carr, 16 N. J. L. 394.

"Rights" and "effects" of the debtor cover shares of stock. Union Nat. Bank *v.* Byram, 131 Ill. 92, 22 N. E. 842; Thompson *v.* Wells, 57 Ill. App. 436. To the contrary, see Rhea *v.* Powell, 24 Ill. App. 77.

"Personal Property, Choses in Action, and Other Securities."—If a statute makes shares of stock personal property, and authorizes an attachment upon "the personal property, choses in action, and other securities," an attachment may be levied upon corporate stock. Lipscomb's Admr. *v.* Condon, 56 W. Va. 416, 49 S. E. 392, 107 Am. St. Rep. 938.

Rule in Massachusetts.—But an attachment of shares of stock is not authorized in Massachusetts by Rev. Laws, c. 167, §§69, 70, because those sections only apply where there is an attachment of goods by actual seizure of them. Athol Sav. Bank *v.* Bennett, 203 Mass. 480, 89 N. E. 632.

Under an Equitable Attachment Statute.—Stock held by defendant (nonresident) in a corporation is to be regarded as a chose in action, and con-

legal and not the equitable interest therein which is attachable.[40]

When Shares Assigned.— If an assignment of stock has not been entered on the corporate records, the stock may be attached as the property of the assignor.[41]

Dividends declared after the levy are covered by a valid attachment of stock.[42]

In Foreign Corporations.— The general rule is that statutes authorizing the attachment of shares of stock in a corporation do not apply to foreign corporations,[43] especially if the owner of the stock is also a non-

stitutes a portion of the equitable estate of its owner, and as such may be charged in equity under the ordinary powers of that court, and is expressly chargeable by attachment under an attachment statute. St. Mary's Bank *v.* St. John, 25 Ala. 566.

Bank Stock.—A statute providing for the attachment of shares in incorporated companies, applies to a bank in the absence of any provision regarding the matter in the statute incorporating the bank. Hussey *v.* Manufacturers', etc. Bank, 10 Pick. (Mass.) 415.

Though Certificate Not Within the State.—Whether a share of stock be treated as a "chose in action" or as some other kind of a "right," it is capable of being attached though the certificate of stock is outside the state. Cord *v.* Newlin, 71 N. J. L. 438, 59 Atl. 22.

40. Gypsum Plaster, etc. Co. *v.* Kent Circuit Judge, 97 Mich. 631, 57 N. W. 191; Beckwith *v.* Burrough, 13 R. I. 294.

Under a statute declaring that "in attaching shares of stock, or the interest of a stockholder in any corporation organized under the laws of this state, the levy shall be made in *the manner* provided by law for the seizure of such property on execution," the law confines the right to levy executions to cases where the debtor's status is that of stockholder and legal possessor of the interest. In case his right is merely equitable, or in case he has regularly passed to another the legal title so that, as against him, the transfer is good and is one the company is bound to recognize, the shares are not leviable on attachment or execution issued against his property. Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204, 7 N. W. 796.

A statute providing that "the rights or shares which the defendant has in stock of an association or corporation . . . may be levied upon," applies only to the legal title. Weller *v.* J. B. Pace Tobacco Co., 2 N. Y. Supp. 292.

On the contrary, in Middletown Sav. Bank *v.* Jarvis, 33 Conn. 372, it was held that an attachment might be levied at law upon an equitable interest.

41. Fiske *v.* Carr, 20 Me. 301; Lippitt *v.* American Wood Paper Co., 15 R. I. 141, 23 Atl. 111, 2 Am. St. Rep. 886. See also Fisher *v.* Essex Bank, 5 Gray (Mass.) 373. But in DeConeau *v.* Guild Farm Oil Co., 3 Daly (N. Y.) 218, it was held that notwithstanding a provision in a corporate charter, that the stock shall be transferable only on the books of the company on the surrender of the certificate, an assignment of stock, attended by a delivery of the certificate, is valid as between the parties to it, and vests in the vendee an equitable title, and the assignor has not an attachable interest.

42. Jacobus *v.* Monongahela Nat. Bank, 35 Fed. 395.

43. **Conn.**—Winslow *v.* Fletcher, 53 Conn. 390, 4 Atl. 250, 55 Am. Rep. 122. **Ill.**—Reid Ice Cream Co. *v.* Stephens, 62 Ill. App. 334. **Tenn.**—Moore *v.* Gennett, 2 Tenn. Ch. 375. See the title "Garnishment."

In Plimpton *v.* Bigelow, 93 N. Y. 592, *affirming* 63 How. Pr. 484, the court said: "The general principle that attachment proceedings can be effectual only against property within the jurisdiction is clearly recognized in the provisions of the code regulating proceedings by attachment. They authorize the attachment of debts, choses in action, rights by contract, and by section 647, shares of the defendant in

resident,[44] though some cases hold that an attachment may be levied upon shares of stock in such corporations.[45]

a corporation, subject, however, to the limitation that the property attached must be within the jurisdiction.''

A Question Certified.—'' 'Whether, where the certificates of stock of a foreign corporation belonging to a non-resident of the state are in possession of a resident of this state, as pledgee, the interest of the owner and pledgor can be levied upon under a warrant of attachment against such owner, made by service of a notice on the pledgee in the manner prescribed by subdivision 3 of section 649 of the code,' '' was answered in the affirmative. Simpson *v.* Jersey City Contracting Co., 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796, *affirming* 47 App. Div. 17, 61 N. Y. Supp. 1033, in which case the court, distinguishing the case of Plimpton *v.* Bigelow, 93 N. Y. 592, cited in the previous notes; said that in that case the plaintiff and the defendant were both non-residents of the state, and that it was attempted to attach shares of stock of a foreign corporation, which were owned by the non-resident defendant and the certificates of which were in his possession at his domicile.

Defendant's Interest May be Sold at Judicial Sale Under Order of Court.—Simpson *v.* Jersey City Contr. Co., 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796, *affirming* 47 App. Div. 17, 61 N. Y. Supp. 1033.

Right To Levy on Certificate.—Caffery *v.* Choctaw Coal, etc. Co., 95 Mo. App. 174, 68 S. W. 1049.

Rule in Massachusetts.—There is no provision in the Massachusetts statutes that shares of stock in a foreign corporation can be reached by attachment, except in the case of a corporation organized under the laws of the United States. Pinney *v.* Nevills, 86 Fed. 97.

Shares in National Bank.—A state statute providing for the attachment of shares of stock in corporations organized under the laws of the state, does not authorize the attachment of shares of stock in a national bank. Sowles *v.* National Union Bank, 82 Fed. 696, where it was further said that ''the laws of the United States provide for the transfer of shares in national banks, and what the effect of the transfer shall be, and this might exclude any effect of transfer proceedings by attachment under state laws.''

In Hagar *v.* Union Nat. Bank, 63 Me. 509, it was held that a national bank could attach the shares of stock of a stockholder in an action on an overdue note of the stockholder, discounted by the bank.

Stock in the Bank of the United States.—United States *v.* Vaughan, 3 Binn. (Pa.) 394, 5 Am. Dec. 375.

44. **U. S.**—Pinney *v.* Nevills, 86 Fed. 97, under Massachusetts statutes. **Ky.**—New Jersey, etc. Co. *v.* Traders' Deposit Bank, 104 Ky. 90, 46 S. W. 677, notwithstanding that the corporation is carrying on business through officers in the state. **Pa.**—Christmas *v.* Biddle, 13 Pa. 223.

A statute which authorizes ''the attachment of the shares of the defendant in any corporation,'' is to be construed in view of the fundamental principle that the *res* must be actually or constructively within the jurisdiction of the court issuing the attachment in order to any valid or effectual seizure. Ireland *v.* Globe Milling, etc., Co., 19 R. I. 180, 32 Atl. 921, 61 Am. St. Rep. 756, 29 L. R. A. 429, holding that, shares of stock owned by a non-resident defendant in a foreign corporation cannot be reached by process of attachment, although the officers of the corporation are within the state and the business of the corporation is being carried on herein.

Stock Pledged.—Shares of a foreign railroad company which have been pledged cannot be reached by attachment. Tweedy *v.* Bogart, 56 Conn. 419, 15 Atl. 374, *citing* Winslow *v.* Fletcher, 53 Conn. 396.

45. In Young *v.* South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752, it was held that under the statute a foreign corporation acquires the standing of a domestic corporation by complying with the requirements made a prerequisite to its doing business in Tennessee, and that its stock is then subject to attachment in the latter state, though the owner be a non-resident and the certificates are in his possession. The court relied upon Railroad *v.* Harris, 12 Wall. (U. S.) 65, 82, 20 L. ed. 354; Plimpton *v.* Bigelow, 93 N. Y. 592.

d. *Money and Bank Notes.* — Money, if in the possession of the defendant, or capable of being identified as his property, may be taken under an attachment, whether in the form of specie or of bank notes.[46]

e. *Property in Process of Manufacture.* — Under the rule that property cannot be attached when it cannot be returned to the owner in its original state, it has been held that goods in the process of production or manufacture cannot be attached,[47] though the rule only means that the officer is not bound to attach and risk the loss when the property would be entirely valueless and be destroyed by having the process of manufacture stopped.[48]

The officer is not bound to attach and carry forward the process of manufacture. Nor can he leave the goods in the debtor's possession or

So an attachment of such stock is authorized under a statute allowing the "shares of stock in any" corporation to be attached. Smith *v.* Pilot Min. Co., 47 Mo. App. 409.

46. **Mass.**—Wildes *v.* Nahant Bank, 20 Pick. 352; Knowlton *v.* Bartlett, 1 Pick. 271. **Miss.**—Philadelphia Invest. Co. *v.* Bowling, 72 Miss. 565, 17 So. 231. **N. H.**—Spencer *v.* Blaisdell, 4 N. H. 198, 17 Am. Dec. 412. **N. J.**—Crane *v.* Freese, 16 N. J. L. 305. **N. Y.**—Handy *v.* Dobbin, 12 Johns. 220. **Vt.**—Lovejoy *v.* Lee, 35 Vt. 430.

Treasury notes of the United States. State *v.* Lawson, 7 Ark. 391, 46 Am. Dec. 293.

If the officer can find the money and take it without committing a trespass. Maxwell *v.* McGee, 12 Cush. (Mass.) 137.

Money in Bank.—Negotiable Certificates of Deposit.—If a bank has issued to the depositor negotiable certificates of deposit, it has nothing in its possession belonging to the depositor upon which an attachment can operate. McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655.

Money paid in purchase of a draft no longer belongs to the purchaser and cannot be attached for his debt while the draft is outstanding and there has been no default upon it. Capital City Bank *v.* Parent, 134 N. Y. 527, 31 N. E. 976, 18 L. R. A. 240.

Money Collected by Another for Debtor.—Specific pieces of gold and silver coin, collected by an attorney on a claim for a client, cannot be attached in the hands of the attorney as the property of the client, as the client has merely a chose in action, and no property in the money until paid over. Maxwell *v.* McGee, 13 Cush. (Mass.) 137.

So as to Money in the Possession of an Auctioneer.—Meagher *v.* Campbell, 12 Misc. 426, 33 N. Y. Supp. 700, *affirming* 11 Misc. 114, 31 N. Y. Supp. 998.

47. **Bond** *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28, hides in a vat for tanning.

From Material Supplied by Another. When a carpenter undertook to make a desk for another out of certain lumber received from such person, and to furnish the other materials himself and take payment out of the surplus boards, it could not be properly attached by another after the carpenter had inserted materials found by himself, as the property and right to immediate possession were in the person who supplied the lumber. Stevens *v.* Briggs, 5 Pick (Mass.) 177.

48. Hale *v.* Huntley, 21 Vt. 147, holding that when part of the charcoal in charcoal pits was entirely finished, and the residue had so far progressed as to have been entirely burned to coal, though some labor and skill were still necessary in order to separate and preserve it properly, it might be attached.

Where charcoal pits were only about half burned, and entirely incapable of removal by the officer, and in such condition as to require constant and active care and attention of some person skilled in the business, for several days, in order to render the property of any value, the officer is not compelled to attach it. Wilds *v.* Blanchard, 7 Vt. 138.

in the possession of a third person and require him, against his consent, to put upon them his labor, time and experience.[49]

f. *Intermingled Goods.* — An attachment may be levied on the goods of a debtor notwithstanding they are intermingled with the goods of another so as not to be distinguishable, and the whole may be taken and held until such other person identifies his goods and demands a re-delivery,[50] but the whole of the goods cannot be taken, notwithstanding the goods of the other person are so intermingled with the goods of the debtor that the officer cannot distinguish them, if the owner is present and offers to select them.[51] If the goods belonging to each are easily and plainly distinguishable, the officer can levy only upon the goods of the attachment defendant,[52] and where they are of such a character that they may be identified and separated, it is the duty of the officer to make reasonable inquiry to distinguish them before he is justified in taking those of the other.[53]

g. *Perishable Goods.* — Because the goods are perishable is no

49. Herman Goepper & Co. *v.* Phoenix Brew. Co., 115 Ky. 708, 74 S. W. 726, *citing* Hill *v. Harris,* 10 B. Mon. (Ky.) 120, 1 Am. Rep. 542, a case involving beer in the tubs.

50. Wilson *v.* Lane, 33 N. H. 466; Lewis *v.* Whittemore, 5 N. H. 364, 22 Am. Dec. 466.

In order to justify an attachment of other property than that of the debtor, it is incumbent upon the sheriff to show that the goods were intermixed with those of the debtor in such manner that they could not, upon due inquiry, have been distinguished by the officer who made the attachment, or that the aid of the person claiming such property was required for that purpose. Walcott *v.* Keith, 22 N. H. 196.

Part of Mass of Property Sold and Not Delivered.—When property has been sold consisting of a part only of a larger mass, not delivered, not specially designated, and of which there is nothing to identify any particular part, no property passed, and an attachment may be levied upon the whole as the property of vendor. Merrill *v.* Hunnewell, 13 Pick (Mass.) 213.

Existence of Fraudulent Purpose.—In Taylor *v.* Jones, 42 N. H. 25, the court said that it is wholly immaterial whether there was any improper agreement or fraudulent contrivance between the debtor and the person with whose goods those of the debtor had become intermingled, if this had been brought about by the fault of such person.

In Parker *v.* Williams, 77 Me. 418, 1 Atl. 138, *following* Spafford *v.* True, 33 Me. 283, 33 Am. Dec. 621, it was held that not only where the property has been intermingled with the goods of another, carelessly or fraudulently, but also when it has been done designedly without the consent of the owner, it is the duty of the officer to attach the whole.

But in Capron *v.* Porter, 43 Conn. 383, it was held that unless goods have been intermingled fraudulently, with the purpose of frustrating an attachment on the part owned by the debtor, the goods of the other owner cannot be levied on though the goods may be inseparable by the creditor or officer.

51. Yates *v.* Wormell, 60 Me. 495.

It is the business of the owner, who has allowed them to be so confused, to separate his own from the debtor's. Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340. To the same effect, see Susskind *v.* Hall (Cal.), 44 Pac. 328.

52. Susskind *v.* Hall (Cal.), 44 Pac. 328.

53. Moore *v.* Bowman, 47 N. H. 494.

If two separate owners mingle their goods together, it is the duty of an officer who wishes to make an attachment upon a writ against one of them to ascertain, if he can, what portion of the goods belongs to each; and not to attach the whole of them without making the enquiry. Carlton *v.* Davis, 8 Allen (Mass.) 94.

ground for exempting them from attachment.[54] But the rule in Massachusetts seems to be otherwise.[55]

4. Liens. — A personal or common law lien is not an attachable interest.[56]

5. Intoxicating Liquors and Licenses. — It has been held that where a statute prohibits the sale of intoxicating liquors except by designated persons, and makes no exception as to sales by officers under judicial process, such property is not liable to attachment, when held lawfully,[57] but in other states, even when illegally kept for sale, the goods do not lose the character of property and are subject to attachment.[58]

The right to attach liquor licenses given by statute, has reference both to the certificate and to the privilege which it evidences.[59]

6. Public Conveyances. —**In General.** — By statute in many jurisdictions the rolling stock and other movable property of a railroad,[60] such as railroad cars and engines may be attached,[61] as may also stage coaches.[62]

Vessels. — If a ship or vessel may be considered as within the statutes authorizing attachments on property, a writ of attachment may be levied upon a ship or other vessel as well as upon any other kind of property in a suit against the master and the owners as the debtors of the plaintiff.[63]

54. Batchelder *v.* Frank, 49 Vt. 92; Chilley *v.* Jenness, 2 N. H. 87 (holding potatoes to be subject to attachment), and *disapproving* 6 Mass. 143.

In Chilley *v.* Jenness, *supra*, the court said that at common law they were probably not subject to attachment.

55. Crocker *v.* Baker, 18 Pick. (Mass.) 407, *citing* Bond *v.* Ward, 7 Mass. 123.

56. Kittredge *v.* Sumner, 11 Pick. (Mass.) 50, as to the lien of a pledgee. See also *supra*, VI, C, 3.

A mechanic's or manufacturer's lien is personal to himself, and is not attachable by his creditors as personal property, or a chose in action. Lovett *v.* Brown, 40 N. H. 511.

57. **Me.**—Nichols *v.* Valentine, 36 Me. 322. **Mass.**—Kiff *v.* Old Colony, etc. R. Co., 117 Mass. 591, 19 Am. Rep. 429; Ingalls *v.* Baker, 13 Allen 449. **R. I.**—Barron *v.* Arnold, 16 R. I. 22, 11 Atl. 298. **S. C.**—Lanahan *v.* Bailey, 53 S. C. 489, 31 S. E. 332, 69 Am. St. Rep. 884, 42 L. R. A. 297.

58. **Ia.**—Monty *v.* Arneson, 25 Iowa 383. **N. H.**—Tucker *v.* Adams, 63 N. H. 361. **Vt.**—Howe *v.* Stewart, 40 Vt. 146. *Compare* Nutt *v.* Wheeler, 30 Vt. 436, 73 Am. Dec. 316.

59. Quinnipiac Brewing Co. *v.* Hackbarth, 74 Conn. 392, 50 Atl. 1023.

60. Wall *v.* Norfolk, etc. R. Co., 52 W. Va. 485, 44 S. E. 294, 94 Am. St. Rep. 948, 64 L. R. A. 501.

61. Hall *v.* Carney, 140 Mass. 131, 3 N. E. 14; Boston, etc. R. Co. *v.* Gilmore, 37 N. H. 410, 72 Am. Dec. 336.

The attachment of freight cars not in actual use, is not forbidden by the interstate commerce act. DeRochemont *v.* New York Cent. R. Co. (N. H.), 71 Atl. 868.

62. Potter *v.* Hall, 3 Pick. (Mass.) 368, 15 Am. Dec. 226, in which it was held that an attachment could properly be levied upon a stagecoach about the time fixed for its departure, when part of the horses were fastened to it and the passengers were engaged and ready to take their seats, though such a conveyance might not be stopped and attached on mesne process when actually traveling.

63. **La.**—Haberle *v.* Barringer, 29 La. Ann. 410; Sibley *v.* Fernie, 22 La. Ann. 163; Nimick *v.* Louisiana Tehuantepec Co., 16 La. Ann. 46. **Mont.**—Dietrich *v.* Martin, 24 Mont. 145, 60 Pac. 1087, 81 Am. St. Rep. 419. **W. Va.** Com. *v.* Fry, 4 W. Va. 721.

7. Property In Custodia Legis. — a. *In General.* — The general rule is well established that property in the possession of the court,[64] or of an officer of the court,[65] or property held by a public officer,[66] or by a

A boat, cable and anchor appurtenant to a vessel may be attached while the vessel is at a wharf, as such articles are not then in use and necessary to the safety of the vessel. Briggs *v.* Strange, 17 Mass. 405.

Coal boats, intended for one voyage only and broken up and sold for lumber at the place of destination, are not such ships and vessels as are within the meaning and intention of the statute relating to the attachment of vessels. Parkinson *v.* Manny, 2 Grant Cas. (Pa.) 521.

A dredge boat is not within the operation of a statute authorizing an attachment against "boats and vessels of all descriptions, built, repaired or equipped, or running upon any of the navigable waters within the jurisdiction of the state." Knisely *v.* Parker, 34 Ill. 481.

A steam dredge and amalgamator used for mining purposes though called a "boat" is but a piece of mining machinery. Dietrich *v.* Martin, 24 Mont. 145, 60 Pac. 1087, 81 Am. St. Rep. 419.

Attachment as Against Libel.—An attachment of a vessel at common law against the agents for supplies, which is not a proceeding *in rem,* cannot prevail against a libel brought by the owners of the vessel. The Taranto, 1 Sprague 170, 23 Fed. Cas. No. 13,751.

64. Murrell *v.* Johnson, 3 Hill (S. C.) 12, money arising from a partition sale.

Where the entire proceeds of a sale have been paid into court under an order to that effect, and deposited in bank to the credit of the cause before an attachment is laid in the hands of the trustee, the funds are not liable to the process. Mattingly *v.* Grimes, 48 Md. 102.

Money paid into court upon a bill praying redemption cannot be attached. Withers *v.* Pemberton, 3 Coldw. (Tenn.) 56.

Money deposited in lieu of bail is a fund in court within the meaning of Ky. Civ. Code, §207, which provides how an attachment may be levied on such a fund. Landy *v.* Moritz, 33 Ky. L. Rep. 223, 109 S. W. 897.

Funds Deposited Without Order of Court.—The deposit of funds by an officer with the clerk of the court, not made by the authority of the court, is not within the rule protecting property in *custodia legis* from a levy. Lemly *v.* Ellis, 143 N. C. 200, 55 S. E. 629.

65. **Money in the hands of a trustee of the court** cannot be reached by process of attachment. Bentley *v.* Shrieve, 4 Md. Ch. 412.

Money in the hands of the clerk, deposited pending a suit for damages and a claim of set-off, there being no judgment, may be attached at the instance of a creditor. Trotter *v.* Lehigh Zinc Co., 41 N. J. Eq. 229, 3 Atl. 95 (relying upon Conover *v.* Ruckman, 33 N. J. Eq. 303), *affirmed* in 42 N. J. Eq. 456, 11 Atl. 25.

Possession Pending Appointment of Receiver.—Possession by a sheriff, merely for preservation of the property until the statutory time necessary before the appointment of a receiver should elapse, in an action between partners for a dissolution, without reference to the rights of creditors, is not such a possession *in custodia legis* as will prevent attachment. Ackerman *v.* Ackerman, 50 Neb. 54, 69 N. W. 388. See the title "Receivers."

Pending an Appeal.—When property has been taken into the custody of a master of the court by an order, it cannot be taken on a writ of attachment pending an appeal from a judgment adjudging the right of property therein. McKenzie *v.* Noble, 13 Rich. L. (S. C.) 147.

Personal property of an insane person in the hands of his guardian, who had returned to the probate court an inventory thereof, is not subject to attachment in an action against the insane person. Hale *v.* Duncan, Brayt. (Vt.) 132.

66. *In re* Shelly (Del.), 73 Atl. 796; Morris *v.* Penniman, 14 Gray (Mass.) 220, 74 Am. Dec. 675.

Under Ala. Code 1886, No. 2950, providing that money in the hands of the sheriff or other officer may be attached, money which is connected with an offense charged against the defendant, or which may be used as evidence against him on the prosecution may be

person serving in a fiduciary capacity,[67] cannot be attached, as it is then said to be *in custodia legis*, and is protected for reasons of public policy.[68] And it is immaterial how the property was brought under the control of the court, whether by attachment or by some other equivalent and lawful act.[69] Nor is property which has been unlawfully seized subject to attachment.[70] But a fuller treatment of this aspect of the subject will be found in another part of this work.[71] It is held that money deposited in lieu of a bond or undertaking in a judicial proceeding may be attached.[72]

removed by the officer and retained by him, and during the time it is in the hands of the officer or in possession of the court, it is subject to attachment. *Ex parte* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120. See also Warren *v.* Matthews, 96 Ala. 183, 11 So. 285, holding under the above statute, that when money taken from a person arrested upon a criminal charge has been attached in the hands of the sheriff and by him paid into court, as directed by the statute, it may again be attached in the hands of the clerk.

At common law the property in the hands of an officer is regarded as *in gremio legis*, and not subject to process; but by statute, it is subject to legal process. *Ex parte* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120.

Property in the custody of a United States officer on which the United States has a lien for duties (Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 683, *reversing* 5 Pick. (Mass.) 120; Dennie *v.* Harris, 9 Pick. (Mass.) 364; but *compare* Beech *v.* Abbott, 6 Vt. 586), or storage (Peabody *v.* McGuire, 79 Me. 572, 12 Atl. 630) cannot be attached by a state officer without an act of congress authorizing it (United States *v.* Murdock, 18 La. Ann. 305, 89 Am. Dec. 651).

This rule is established solely in the interest of the United States, to preserve their rights upon such property, and does not apply where the government is itself the attaching creditor. United States *v.* Murdock, 18 La. Ann. 305, 89 Am. Dec. 651.

67. Property Held by Executors or Administrators.—Property in the custody of executors, administrators and other fiduciaries is *in custodia legis*. Brewer *v.* Hutton, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804.

"The rule, however, is limited in its duration to the period of the fiduciary relation." *In re* Shelly (Del.), 73 Atl. 796.

68. See Lemly *v.* Ellis, 143 N. C. 200, 55 S. E. 629.

69. Lemly *v.* Ellis, 143 N. C. 200, 55 S. E. 629.

70. Pomeroy *v.* Parmlee, 9 Iowa 140, 74 Am. Dec. 328, holding that where property has been illegally and fraudulently seized and is being used as evidence, it is in the custody of the law and cannot then be seized under attachment.

Where an officer unlawfully gets possession of a debtor's property, as by breaking into his dwelling house without proper authority, and then attaches it on mesne process, the attachment will be void. Closson *v.* Morrison, 47 N. H. 482, 93 Am. Dec. 459.

"**The security of the public may justify the searching** of a prisoner confined in prison upon criminal or even civil process, and the taking from him of any property in his possession that would aid him to make an escape. It would probably be regarded under such circumstances as a reasonable search and seizure; but to allow private parties to take advantage of the circumstances in order that they may secure a personal benefit would be a violation of that faith which the commonwealth owes to persons held in custody under its authority and laws." Dahms *v.* Sears, 13 Ore. 47, 11 Pac. 891.

If an officer took advantage of his warrant, and an arrest under it, to take from his prisoner-property, not for any legitimate purpose, but simply for the purpose of attaching on writs he held, this would not justify the attachment. Closson *v.* Morrison, 47 N. H. 482, 93 Am. Dec. 459.

71. See the title "Garnishment."

72. Dunlop *v* Patterson F. Ins. Co., 74 N. Y. 145, 30 Am. Rep. 283 (money deposited in lieu of an appeal bond),

b. *Property Previously Attached.* — Goods which have been levied upon by one officer under a writ of attachment and have been taken into his possession, cannot legally be attached by another officer so as to interfere with the possession and custody of the first officer,[73] though other officers may make constructive levies and thus create successive liens,[74] or the other creditors may place their subsequent writs in the hands of the same officer, who may hold the property to satisfy the respective liens in the order of their priority.[75] But funds realized

affirming 12 Hun 627, wherein the court said: "In a certain sense the money was *in custodia legis*, and the attachment could not affect the possession of the clerk, nor divert the money in any wise from the special objects and purposes for which it was deposited. But, for other purposes, the title of the money remained in the insurance company, and in the event of two contingencies its rights thereto would be as complete as before the deposit."

Money Loaned to and Used by Party. Money deposited as cash bail, which had been borrowed by the defendant, when released on giving bond, cannot be attached as the property of the defendant before it is actually paid over to the true owner by the sheriff with whom is filed an order directing such payment. Rallings *v.* McDonald, 76 App. Div. 112, 78 N. Y. Supp. 1040.

73. **Ark.**—Derrick *v.* Cole, 60 Ark. 394, 30 S. W. 760. **N. H.**—Ela *v.* Shepard, 32 N. H. 277; Young *v.* Walker, 12 N. H. 502. **R. I.**—Kendrick *v.* Boston, etc., R. Co., 3 R. I. 235.

See also *infra*, XV.

By garnishment of a mortgagee, in possession of chattels mortgaged, such chattels are placed **in custodia legis**, and thenceforward the possession of the garnishee cannot be interfered with by a direct levy of a writ of attachment upon the property so as to postpone the rights of the party in whose favor the garnishment had been made. Grand Island Bkg. Co. *v.* Costello, 45 Neb. 119, 63 N. W. 376.

When goods attached remain intermingled with the other goods of the debtor, another officer may attach the whole. Sawyer *v.* Merrill, 6 Pick. (Mass.) 478.

A person summoned as trustee, is not in the condition of an attaching officer; and no injury will happen, if the goods be taken out of his possession into the custody of the law, provided he be secured **in such a portion** of them as will enable him to discharge himself from his liability as trustee. Burlingame *v.* Bell, 16 Mass. 318.

74. **Conn.**—Cole *v.* Wooster, 2 Conn. 203. **Mo.**—Patterson *v.* Stephenson, 77 Mo. 329. **Vt.**—Hall *v.* Walbridge, 2 Aik. 215.

75. **U. S.**—Livingston *v.* Smith, 5 Pet. 90, 8 L. ed. 57, under a New Jersey statute. **La.**—Hoy *v.* Eaton, 26 La. Ann. 169. **Md.**—Ginsberg *v.* Pohl, 35 Md. 505. **Mass.**—Robinson *v.* Ensign, 6 Gray 300; Wheeler *v.* Bacon, 4 Gray 550; Burlingame *v.* Bell, 16 Mass. 318. **Tex.**—Frieberg *v.* Elliott, 64 Tex. 367. **Wis.**—Halpin *v.* Hall, 42 Wis. 176.

A marshal who has served one attachment may receive and levy a subsequent one on the property in his possession. Naumburg *v.* Hyatt, 24 Fed. 898.

Relation of Deputies and Sheriff.— The act of a deputy is the act of the sheriff, and when the sheriff has levied an attachment, the deputy may levy upon the same property subject to the first attachment. Heye & Co. *v.* Moody, 67 Tex. 615, 4 S. W. 242. See also Claflin *v.* Furstenheim, 49 Ark. 302, 55 S. W. 291, holding that another deputy of the same principal may levy in his principal's name subject to the first attachment.

A deputy may levy upon property which already has been attached by the sheriff. Heye & Co. *v.* Moody, 67 Tex. 615, 4 S. W. 242.

As Distinct Officers.—The deputies of a sheriff, in relation to each other, must be considered as several officers with distinct rights, and when one deputy has attached goods by virtue of one writ, another cannot interfere. Denny *v.* Hamilton, 16 Mass. 402; Thompson *v.* Marsh, 14 Mass. 269; Vinton *v.* Bradford, 13 Mass. 114, 7 Am. Dec. 119. *Compare* Watson *v.* Todd, 5 Mass. 271.

from a sale under an attachment which is set aside belong to the debtor and may be attached.[76]

Lands may generally be levied on without an assertion of possession or dominion by the attaching officer, and so remain liable to be levied on at the instance of any other creditor. But the fact that land has been previously levied on by execution, by a different officer, cannot prevent a creditor from levying his attachment subsequently, and previously to its sale.[77]

c. *Property Previously Levied on by Execution.*[78] —Personal property, in the possession of an officer under execution, cannot be levied upon and seized by another officer,[79] though the same officer may levy thereon another attachment which will be a junior lien.[80]

When goods have been attached by a deputy sheriff, and left in possession of a keeper, another deputy sheriff cannot disturb the possession of such keeper by attempting to levy another attachment. Fellows *v.* Wadsworth, 62 N. H. 26.

Another deputy may levy his attachment, not by disturbing the possession of a deputy who has already taken possession of the property, but by delivering his writ to the deputy in possession. Robinson *v.* Ensign, 6 Gray (Mass.), 300.

Attachment by Special Deputy.—The fact that the first attachment was made by a special deputy will not permit another attachment to be levied on the same property by a general deputy; as the rule that a second attachment on the same property cannot be made by a different officer is founded, not upon the circumstance that a second attachment may be made by the same officer, but upon the inconvenience that must ensue, if, when one officer has the legal possession of goods, which are already in the custody of the law, another officer might be permitted to disturb that possession. Moore *v.* Graves, 3 N. H. 408.

Property Deposited With the Clerk. Where bonds, left by the sheriff with the plaintiff for safe-keeping, were turned over by the plaintiff to the clerk of the court, without any order of court, they were not in the custody of the law, and a second attachment might be levied thereon. Lemly *v.* Ellis, 143 N. C. 200, 55 S. E. 629.

76. Roddey *v.* Erwin, 31 S. C. 36, 9 S. E. 729.

A statute providing that when goods are sold and disposed of after an appraisal, the proceeds thereof shall be liable to be further attached, whilst remaining in the hands of the officer, as the property of the original defendant, presupposes a sale in compliance with the statute, the proceeds which can be attached are such as are in the officer's hands after and in pursuance of a legal attachment, appraisal and sale of the property attached, and not the proceeds of a sale illegal and unauthorized by law. Everett *v.* Herrin, 48 Me. 537.

77. Grigg *v.* Banks, 59 Ala. 311; Johnson *v.* Burnett's Admr., 12 Ala. 743.

Personalty and Realty Distinguished. Upon the levy of an attachment on personal property, the officer seizes them and holds them in his custody, and they cannot be levied on, seized or taken into possession by another officer; but real estate may be levied on and sold under a subsequent attachment, though the purchaser takes subject to the lien of the prior attachment, and to the control and ultimate action of the chancellor. Oldham *v.* Scrivener, 3 B. Mon (Ky.) 579.

78. **Attached Property Not Subject to Execution.**—See the title "Execution."

79. **U. S.**—Corning *v.* Dreyfus, 20 Fed. 426. **Tenn.**—Bradley *v.* Kesee, 5 Coldw. 223, 94 Am. Dec. 246. **Vt.**—Burroughs *v.* Wright, 19 Vt. 510.

80. Day *v.* Becher, 1 McMull (S. C.) 92.

Only by Garnishment.—Perry *v.* Sharpe, 8 Fed. 15.

As a general rule money received by an officer on execution cannot, before payment over, be attached in a suit against the execution creditor,[81] though the contrary has been held.[82]

Surplus money in the hands of an officer, arising from the sale of property after payment of all executions, may be attached in a suit against the execution defendant,[83] on a writ issued at the suit of an-

81. **U. S.**—Ross *v.* Clarke, 1 Dall. 354, 1 L. ed. 173. **Cal.**—Clymer *v.* Willis, 3 Cal. 363, 58 Am. Dec. 414. **Conn.**—Geary *v.* Shepard, 1 Root 544. **Mass.**—Thompson *v.* Brown, 17 Pick. 462. **N. C.**—Hunt *v.* Stevens, 25 N. C. 365. **Ohio.**—Dawson *v.* Holcomb, 1 Ohio 275, 13 Am. Dec. 618. **Pa.**—Fretz *v.* Heller, 2 Watts & S. 397. **S. C.**—Blair *v.* Cantey, 2 Speers 34, 42 Am. Dec. 360. **Vt.**—Conant *v.* Bicknell, N. Chip. 50.

Where one with whom money has been deposited is sued by the depositor, and a plea by the depositary of compensation out of the fund has been overruled, the depositary cannot surrender the money to the sheriff on an execution, and levy an attachment thereon upon the same plea. Purvis *v.* Breed, 7 La. Ann. 636.

Money in the hands of a United States marshall which he has collected on an execution, is held subject to the control of the federal court and cannot be attached in a suit commenced in a state court under a state statute allowing one holding goods of defendant to be surrendered as a trustee. Clarke *v.* Shaw, 28 Fed. 356.

As a Debt Due From Officer to Execution Plaintiff.—"The Court consider that the sheriff, or other officer, who collects money on an execution, becomes thereby indebted to the creditor for the amount collected; that he does not hold the identical pieces of money, or bills received, as the agent merely of the creditor, without being accountable for their loss, or their depreciation in value, if received in bills; and that there is no distinction, so far as it regards the right of any other creditor to appropriate the amount in satisfaction of a debt, between an indebtedness arising from this consideration, or any other." Prentiss *v.* Bliss, 4 Vt. 513, 24 Am. Dec. 631.

82. Conover *v.* Ruckman, 33 N. J. Eq. 303; Wehle *v.* Conner, 83 N. Y. 231. But *compare* Dubois *v.* Dubois, 6 Cow. (N. Y.) 494, holding that a levy upon money collected by, and in the hands of an officer on execution, is not a levy upon the goods and chattels of the person for whom it was collected, because the identical pieces of money collected are not necessarily to be paid over to him.

As a Right and Credit of Execution Plaintiff.—An attachment may be served upon money in the hands of the sheriff made upon execution, as a right and credit of the defendant in attachment, but it cannot be seized as money under an attachment in his hands, for the reason that it is not the goods and chattels of the plaintiff in the former suit until it is paid over to him. Crane *v.* Freese, 16 N. J. L. 305. See also Davis *v.* Mahany, 38 N. J. L. 104.

Payment Into Court.—"The effect of the levy upon the credit in the hands of the officer under execution, is to arrest the payment to the plaintiff in execution, in whose hands it might be concealed, and withdraw from the creditor, and to compel the officer to pay the proceeds of the execution into court, in strict conformity with the command of his writ." Davis *v.* Mahany, 38 N. J. L. 104, 108. See also Crane *v.* Freese, 16 N. J. L. 305.

The fact that the judgment debtor is an attaching creditor is immaterial. Wehle *v.* Conner, 83 N. Y. 231.

83. Gumbel *v.* Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. ed. 374; Jaquett's Admr. *v.* Palmer, 2 Har. (Del.) 144. See also Hill *v.* Beach, 12 N. J. Eq. 31, *distinguishing* Shinn *v.* Zimmerman, 23 N. J. L. 150, 55 Am. Dec. 260, holding that money due on a judgment recovered in a court of record, either in the state or in another state, cannot be attached in the hands of the defendant in such judgment on an attachment against the plaintiff therein.

Such surplus of money in the hands of a sheriff is the property of the defendant in the execution, and is held

other plaintiff in an entirely separate and distinct action.[84]

d. *Property Released on Bond.* — By statute in some jurisdictions, where a statutory bond has been given to try the right of property as against the attachment suit, the property is no longer in the custody of the law, and is subject to be levied on, as before the levy, to satisfy the debts of other creditors,[85] but where property has been released under a bond to redeliver the property as distinguished from a bond to satisfy the judgment, the defendant cannot be deprived of the power to redeliver the property by a seizure thereof under subsequent attachments.[86]

Goods Replevied. — In some cases it is held that where a claimant gives bond and thus regains possession, as the property is no longer in the custody of the law, it is subject to be levied on, as before the levy, to satisfy the debts of other creditors,[87] while other cases hold that when goods have been replevied, an officer has no authority to seize and remove them under a junior attachment, as they are considered by those courts to be still in the custody of the law.[88] Though it has been held that attached property delivered to a receiptor cannot be

by the sheriff in his private and not in his official capacity. Orr *v.* McBryde, 7 N. C. 235.

84. Ball *v.* Ryers, 3 Caines (N. Y.) 84.

Attachment lies against funds in sheriff's hands from execution sale where defendant under combination with a third party filled his store with goods bought of plaintiff and others, and then procured a third party to levy upon them and sell them under execution. Supplee *v.* Hughes, 2 W. N. C. (Pa.) 352.

85. Frieberg *v.* Elliott, 64 Tex. 367; Brown Mfg. Co. *v.* Watson, 3 Wills. Civ. Cas. §329. See the title "**Right of Property, Trial of.**"

86. Duncan *v.* Thomas, 1 Ore. 314.

87. Frieberg *v.* Elliott, 64 Tex. 367.

To Test Title of Plaintiff on Replevin.—Property attached was delivered up when the statutory bond was furnished. The goods were then in *statu quo* and could be attached by other parties to test the title of the posssesor and to subject the goods to the debts of the real owner. Patterson *v.* Seaton, 64 Iowa 115, 19 N. W. 869.

When a fraudulent vendee has replevined and has regained possession of property, substituting his bond, with surety, for the property, this circumstance does not prevent other creditors from attaching the property. Jacobi *v.* Schloss, 7 Coldw. (Tenn.) 385.

88. Cordaman *v.* Malone, 63 Ala. 556.

Where personal property is levied on under a writ of attachment and is replevied, either by the defendant, by a stranger in his behalf, or by a claimant who is not a party to the suit, and the property is delivered by the sheriff to such person, upon his executing a proper forthcoming bond in the manner prescribed by statute, the property is thus placed in the custody of the law, and a second attachment cannot be levied on it by the sheriff, so long as its status remains unchanged. Powell *v.* Rankin, 80 Ala. 316.

Pending the Result of the Replevin Suit.—Kingman First Nat. Bank *v.* Gerson, 50 Kan. 582, 32 Pac. 905; McKinney *v.* Purcell, 28 Kan. 446.

The possession of any other person obtained by a delivery bond which requires a return to the officer, if return thereof shall be adjudged, leaves the goods in the same situation, so far as another levy is concerned, as though yet in the hands of the officer who made the first levy. Eidson *v.* Woolcry, 10 Wash. 225, 38 Pac. 1025.

Under the statute in Texas relating to the trial of the right of property, property in the hands of a claimant, pending the proceedings relative to the claim, are *in custodia legis*. United States Carriage Co. *v.* Bay City Buggy Wks., 12 Tex. Civ. App. 52, 33 S. W. 381.

attached under a second attachment,[89] the general rule seems to be that property so situated may be conveyed by the debtor or be attached again at the suit of another creditor,[90] but not to the prejudice of the first attachment creditor.[91]

8. Property Fraudulently Disposed of. — a. *Interest of Vendor.* — The rule is well settled that property fraudulently conveyed or assigned may be attached in a suit against the vendor or assignor, whether such property be realty,[92] or personalty.[93]

89. Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39, wherein the court said that the dissolution of the first attachment at a subsequent time could, by no relation or fiction, strengthen and ratify what was a mere nullity.

90. Cole *v.* Wooster, 2 Conn. 203; Robinson *v.* Mansfield, 13 Pick. (Mass.) 139; Denny *v.* Willard, 11 Pick. (Mass.) 519, 22 Am. Dec. 389.

91. Brown *v.* Crockett, 22 Me. 537, holding that in the absence of statute, personal property attached and allowed to remain in or be returned to the possession of the debtor, can again be attached and held against the first attachment, especially if the creditor or officer had no knowledge of the previous attachment, and that a statute permitting property, when receipted for, to be left in possession of the defendant, alters the law no farther than to preculde a creditor from attaching the same property subsequently, to the prejudice of the first attachment, and the property may again be attached subject to the lien of the first attachment.

92. Thompson *v.* Baker, 141 U. S. 648, 12 Sup. Ct. 89, 35 L. ed. 889, as to Texas statute. **Ga.**—Maralson *v.* Newton, 63 Ga. 163. **Ill.**—McKinney *v.* Farmers' Nat. Bank, 104 Ill. 180; Getzler *v.* Saroni, 18 Ill. 511. **La.**—Price *v.* Bradford, 4 La. 35; Worth *v.* Gordon, 15 La. Ann. 221. **Mass.**—D'Arcy *v.* Mooshkin, 183 Mass. 382, 67 N. E. 339; Hamilton *v.* Cone, 99 Mass. 478 (stating former rule in Massachusetts). **Neb.**—Keene *v.* Sallenbach, 15 Neb. 200, 18 N. W. 75; Weil *v.* Lankins, 3 Neb. 384; Westervelt *v.* Baker, 1 Neb. (Unof.) 635, 95 N. W. 793. **N. J.**—Miller *v.* Jamison, 26 N. J. Eq. 404. **N. Y.**—Hall *v.* Stryker, 27 N. Y. 596; Dickey *v.* Bates, 13 Misc. 489, 35 N. Y. Supp. 525.

An interest in a contract to convey land, which has been fraudulently assigned, may be subjected to the lien of an attachment. Wise *v.* Tripp, 13 Me. 9.

Subsequent attachments of real estate fraudulently conveyed by an assignor by deeds good against him are superior in law and in equity to the title of assignees under a general assignment under the laws of Missouri and the common law. Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535.

Fraud of Grantee Only.—When a mortgagor and mortgagee have colluded to make use of the mortgage for the purpose, by an unfair sale, of hindering, delaying and defrauding creditors, the property might be liable to attachment under the statute; but if the supposed fraud is merely a fraud by the mortgagee upon the mortgagor, this alone would not bring the case within the statute and enable creditors to attach. Laflin *v.* Central Pub. House, 52 Ill. 432. In such a case where the law authorizes the mortgagor to have the sale, but not the mortgage, set aside, this would give a creditor no right of attachment, nor would he have such a right, in any case, under the statute, in the absence of a corrupt intent to defraud creditors, by collusion between the mortgagor and mortgagee. Laflin *v.* Central Pub. House, 52 Ill. 432.

93. Enous *v.* Tuttle, 3 Conn. 27; Starr *v.* Tracy, 2 Root (Conn.) 528; Pruden *v.* Leavensworth, 2 Root (Conn.) 129; Sinnickson *v.* Painter, 32 Pa. 384 (as to an assignment of a legacy or distributive share).

Garnishment is unnecessary under the particular statutes. Jordan *v.* Crickett, 123 Iowa. 576, 99 N. W. 163. See the title "Garnishment."

Assignment of Goods.—Frankle *v.* Douglas, 1 Lea (Tenn.) 476. See *supra*, VI, C, 3.

A Sale of Goods in Bulk.—A statute regulating sale of goods in bulk is in

Proceeds of Re-sale by Fraudulent Assignee.— In some cases it is held that when property has been conveyed in fraud of creditors and without consideration, and the fraudulent grantee conveys the property to an innocent purchaser for value, the proceeds of such sale are attachable as the property of the fraudulent grantor,[94] while other cases hold that the proceeds cannot be attached as the debtor's property, but that the only remedy of the creditor is to institute a creditor's suit and fasten a trust upon such proceeds for the benefit of creditors.[95]

b. *Interest of Vendee.* — A purchaser, who obtains property by fraud, acquires only a naked possession or title, and this gives no right to any of his creditors to attach the property in his possession.[96]

9. Equitable Interests. — a. *In General.* — The common law rule

derrogation of the common law and will be strictly construed, and a sale by one partner of his interest in a mercantile business to his co-partners is not within the statute, and the property is not subject to an attachment. Taylor *v.* Folds, 2 Ga. App. 453, 58 S. E. 683.

94. Heath *v.* Page, 63 Pa. 108, 3 Am. Rep. 533.

Equity Remaining in Grantor.— Where a trust deed was accepted from a fraudulent grantee without notice that the property had been conveyed in fraud of creditors, then the interest remaining in the judgment debtor, subject to attachment by his defrauded creditors is the entire interest reserved to the fraudulent grantee by the terms of the trust deed, namely, a right to a reconveyance upon payment of the indebtedness secured by the deed; and in case of default in its payment, and a sale of the land, a right to the surplus which might come from the proceeds of the sale after satisfaction of the debt secured. Brown *v.* Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314.

95. Lawrence *v.* Bank of Republic, 35 N. Y. 320, 31 How. Pr. 502; Matter of Freel, 55 How. Pr. (N. Y.) 386; Lanning *v.* Streeter, 57 Barb. (N. Y.) 33; Matter of Foley, 10 Daly (N. Y.) 4.

96. **Interest of Fraudulent Vendee Is Attachable.**—Parmele *v.* McLaughlin, 9 La. 436; Gasquet *v.* Johnston, 2 La. 514; Connor *v.* Follansbee, 59 N. H. 124.

The provisions of the statute of Elizabeth would be of little avail if a fraudulent grantee could pass the property over to a mere volunteer without notice of the fraud, and then claim on that ground that it or its proceeds were safe from the pursuit of creditors. It is only when the property comes into the hands of a purchaser who has paid a valuable consideration for it, it or its proceeds are protected by a want of notice of the fraud. Heath *v.* Page, 63 Pa. 108, 3 Am. Rep. 533.

Without Vendor's Fault.—No case is to be found "where there has been no fault on the part of the vendor of goods, except that he has been deceived, by the fraud of his vendee, that it has been holden that the creditors of such vendee could seize the goods, when he himself could not hold them, except where the debt accrued after the purchase of the goods in question, and upon their credit." Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121. See also Taylor *v.* Mississippi Mills, 47 Ark. 247, 1 S. W. 283.

An attachment upon property obtained by fraud does not give the attachment creditor a right of priority against the vendor who is not guilty of laches in the exercise of his right of avoiding the sale. Schweizer *v.* Tracy, 76 Ill. 345.

In a contest between an attaching creditor and a mortgagee, in which it was alleged that the mortgage was made in contemplation of insolvency and with a design to prefer, when no proof was taken on that issue, the land must be sold to satisfy first the mortgage debt, or to satisfy both debts, and if insufficient for that then the mortgage should have the preference. Mize *v.* Turner (Ky.), 22 S. W. 83.

that equitable interests are not subject to levy under execution or attachment is changed by statute in most jurisdictions.[97]

b. *Equitable Interests in Land.* — In the absence of statutory authority, the equitable interest of a debtor in land is not the subject of attachment,[98] but in most jurisdictions statutes now exist which expressly or by necessary implication authorize an attachment against equitable interests in land.[99]

97. Pelzer Mfg. Co. *v.* Pitts & Hartzog, 76 S. C. 349, 57 S. E. 29, 11 Ann. Cas. 665; Chase *v.* York County Sav. Bank, 89 Tex. 316, 36 S. W. 406, 59 Am. St. Rep. 48, 32 L. R. A. 785.

Equitable as Well as Legal Claim.— An equitable attachment statute provides a remedy by attachment against non-resident debtors, who have property in the state, whether their claim to such property be legal or equitable. See St. Mary's Bank *v.* St. John, 25 Ala. 566. See also, *infra*, VI, C, 9, c.

"Effects" and "All Other Property" Includes Equitable Interests.— Pelzer Mfg. Co. *v.* Pitts & Hartzog, 76 S. C. 349, 57 S. E. 29, 11 Ann. Cas. 665.

The words "the right, title and interest of any defendant therein," are broad enough to include equitable as well as legal interests. Tucker *v.* Denico, 26 R. I. 560, 59 Atl. 920, *affirmed*, 27 R. I. 239, 61 Atl. 642. See also, *infra*, VI, D, 10.

Where goods were transferred to endorsers of bills of exchange to secure them on their endorsement, a general creditor of the drawer of the bills cannot attach the proceeds of the sale of the goods as the property of the drawer of the bills as the drawer has only an equitable residuary interest in the goods. Cammack *v.* Floyd, 10 La. Ann. 351.

When a trustee holds slaves to divide among several persons, at different times, the interest of a beneficiary cannot be attached in the hands of the trustee; the statute subjecting equitable interests to execution does not cover such a case, because the trust was created, not alone for the defendant, but for him and others, whose rights were separate and distinct from his. Gillis *v.* McKay, 15 N. C. 172.

98. **Ill.**—Lowry *v.* Wright, 15 Ill. 95. **Mich.**—Grover *v.* Fox, 36 Mich. 453, holding that a contingent right to a conveyance is not a legal interest, but is a mere equity, and incapable of being held by levy at common law. **Ohio.**—Warner *v.* York, 25 Ohio C. C. 310, under a statute authorizing an attachment to be levied upon the lands and tenements of the defendant. **Tenn.** Blackburn *v.* Clarke, 85 Tenn. 506, 3 S. W. 505. See Rice *v.* O'Keefe, 6 Heisk. (Tenn.) 638.

Before a grant issues from the state, all the interest a person has in land drawn under a lottery act is an equitable right to acquire a title by paying the grant fees and taking a grant, and this is not subject to levy and sale. Garlick *v.* Robinson, 12 Ga. 340.

Hence, a levy attempted to be made on the interest of a pre-emptor upon the public land, before final entry, does not constitute a lien upon the equitable estate acquired by the pre-emptor upon final entry made after the attempted levy and before judgment in the attachment suit. McMillen *v.* Gerstle, 19 Colo. 98, 34 Pac. 681.

99. **Ill.**—Ladd *v.* Judson, 174 Ill. 344, 51 N. E. 838, 66 Am. St. Rep. 267; Laclede Bank *v.* Keeler, 103 Ill. 425; Wallace *v.* Monroe, 22 Ill. App. 602. **Kan.**—Shanks *v.* Simon, 57 Kan. 385, 46 Pac. 774; Bullene *v.* Hiatt, 12 Kan. 98. **Ohio.**—Wright *v.* Franklin Bank, 59 Ohio St. 80, 51 N. E. 876.

The words "property" (Louisville Bank *v.* Barrick, 1 Duv. (Ky.) 51) and "land" (Fish *v.* Fowlie, 58 Cal. 373) embrace equitable interests in land.

But, of course, if the the debtor has no equitable interest in the land, no attachment will lie against such property for his debts. Boyer *v.* Robinson, 43 Wash. 97, 86 Pac. 385.

Whether Subject to Execution.— Where a statute provides that "the writ of attachment may be levied on such property, and none other, as is or may be by law subject to levy under the writ of execution," to determine whether an equitable interest is subject to levy under an attachment, it must be ascertained whether it is subject to execution. Chase *v.* York

c. *Property Held in Trust.* — As Property of Trustee. — Persons holding property or funds under a trust imposed in regard to them, cannot be made liable in respect to them by an attachment at the suit of a creditor of the trustee,[1] unless they are *bona fide* creditors without no-

County Sav. Bank, 89 Tex. 316, 36 S. W. 406, 32 L. R. A. 785.

Under Contract for Purchase of Public Lands.—Under statutes respecting contracts for the sale or purchase of public lands and conveyances of improvements upon such lands, and the laws of the United States respecting the proving up of town sites for the benefit of the occupants, the interest of a person in improvements made under the laws respecting town sites may be reached by an attachment notwithstanding the town site has not been proved up by the probate judge in trust for the occupant. Fessler *v.* Haas, 19 Kan. 216.

A mere option is not such an equitable interests to execution does not Sheehy *v.* Scott, 128 Iowa 551, 104 N. W. 1139, 4 L. R. A. (N. S.) 365.

Enforced After Recovery of Judgment.—If upon sufficient cause an attachment is levied upon real estate belonging to the debtor, whether held in his own name or not, the creditor acquires a lien upon the interest of the debtor in the land, which he may enforce after the recovery of the judgment. Keene *v.* Sallenbach, 15 Neb. 200, 18 N. W. 75. See also Columbus First Nat. Bank *v.* Hollerin, 31 Neb. 558, 48 N. W. 392.

Action in Equity to Remove Obstructions.—Where a lien is obtained upon real estate by the levy of an attachment thereon the creditor may proceed by an action in equity to remove obstructions to the sale. Columbus First Nat. Bank *v.* Hollerin, 31 Neb. 558, 48 N. W. 392.

Mere Equity Not Coupled With Possession.—Where the interest of the attaching debtor in real estate is purely equitable and not coupled with possession, then an attachment cannot be validly levied, but resort must be had to a court of equity to bring together the legal and equitable estate, and decree the property to belong to the actual owner. Westervelt *v.* Hagge, 61 Neb. 647, 85 N. W. 852, 54 L. R. A. 333.

1. **U. S.**—Providence, etc., S. S. Co. *v.* Virginia F. & M. Ins. Co., 11 Fed. 284. **La.**—Davis *v.* Taylor, 4 Mart. (N. S.) 134. **N. H.**—Dow *v.* Sayward, 14 N. H. 9. **Me.**—Houghton *v.* Davenport, 74 Me. 590, wherein the court said that in proceedings at law, the creditor might have the superior right, but not so in equity, and the court further said that the above must not be confounded with the rule that the title of an execution creditor, under a levy upon the real estate of his debtor, is not affected by a notice of a prior conveyance not recorded, the creditor having no knowledge thereof at the time of his attachment upon his writ, as this must be regarded as exceptional, and as decided upon the peculiar language of the recording acts.

An attachment cannot be made to operate upon a mere legal title as against the equitable owners of real estate, where the parties claiming under the attachment have at the time the attachment is levied or are bound by law to take notice of the paramount equitable title. Tucker *v.* Vandermark, 21 Kan. 263. *Compare* Carney *v.* Emmons, 9 Wis. 114, holding that the levy of an attachment fastens upon whatever interest the trustee has in the property.

In Hart *v.* Farmers', etc., Bank, 33 Vt. 252, however, the court said that no title can be acquired by the levy of an attachment upon trust property for the personal debt of the trustee, even by a creditor of such trustee who had no knowledge of the trust.

Where a married woman and her husband had been in possession of land, openly, exclusively, and continuously for thirteen years, and the wife claimed a beneficial interest in the property, creditors of the one holding the legal title are put upon notice of the trust estate. Pinney *v.* Fellows, 15 Vt. 525.

Property purchased with money borrowed under an agreement with the lender to hold such property "in trust for security" cannot be saved from attachment by the debtors of the borrower on the ground of such secret trust, as that would be an evasion of the law respecting pledges and mort-

tice of the trust,[2] or the trustee has some interest in the trust fund.[3]

Interest of Beneficiary.— Where the proceedings under an attachment present no legal obstacle to the adjustment by the trustee of the affairs of the trust, and to the allowance of the claims and the payment of the fund to the parties really interested, an attachment may be levied upon the interest of a beneficiary,[4] but funds in the hands of a trustee are not liable to attachment and condemnation before the statement and ratification of a final account.[5]

gages. Huntington *v.* Clemence, 103 Mass. 482.

2. Porter *v.* Rutland Bank, 19 Vt. 410.

3. **Where a trustee has such a legal estate** as is subject to levy and sale under an execution against him, an attachment may be levied upon such estate. Stith *v.* Lookabill, 71 N. C. 25.

4. **U. S.**—Dumont *v.* Fry, 13 Fed. 423. **Md.**—Williams *v.* Jones, 38 Md. 555. **N. Y.**—Kelly *v.* Whiting, 51 How. Pr. 201.

"It is, perhaps, doubtful whether the provisions of the Code authorize an action to reach the interest of a beneficiary under a deed of trust, which involves the investigation and determination of conflicting claims and liens, which must be disposed of before it can be ascertained whether the defendant has a substantial interest." Kelly v. Whiting, 51 How. Pr. (N. Y.) 201.

Where a mother in dividing her property, conveyed the property originally intended for one son to another, without imposing upon the latter any trust but conferring upon him absolute discretion to use and dispose of the property as he might see fit, the one for whom the property was originally intended has no attachable interest, legal or equitable. Boyer *v.* Robison, 43 Wash. 97, 86 Pac. 385.

Where the income of a trust fund is secured absolutely for the life of the beneficiary, the interest of the *cestui que trust* is liable to attachment. Girard Life Ins., etc., Co. *v.* Chambers, 46 Pa. 485, 86 Am. Dec. 513.

Right Only to Proceeds of Rents and Profits and Sale.—Where an express trust, under a statute, vests in the trustee the whole title, legal and equitable, the only right that any beneficiary has is to share in the proceeds of the rents and profits when realized, and of the sale of the land when sold, and the only remedy that of proceedings to enforce the execution of the trust, and such a beneficiary has no attachable interest. Ward *v.* Waterman, 85 Cal. 488, 24 Pac. 930.

Interest of Beneficiary in Resulting Trust.—And a person in whose favor a trust is created by implication of law, by the payment of part of the purchase price of property and taking the title in the name of another, has an attachable interest in the property to the extent of the payments made by them. Cecil Bank *v.* Snively, 23 Md. 253.

Where a deed was made, not with intent to vest the title in the apparent vendee, but for the purpose of enabling the vendee to sell the property for the benefit of the vendor, it may be attached as the property of the vendor in a suit on a debt created after the deed was made. McCamant *v.* Batsell, 59 Tex. 363.

5. Groome *v.* Lewis, 23 Md. 137, 87 Am. Dec. 563. See McPherson *v.* Snowden, 19 Md. 197.

Reasons of the Rule.—Groome *v.* Lewis, 23 Md. 137, 87 Am. Dec. 563.

Insolvent Trust.—Where money remains in the hands of a trustee for the purpose of distribution *pro rata*, there not being enough to satisfy all the purposes of the trust, the distributive share, to which one of the persons will be so entitled, is not the subject of attachment at the suit of a creditor, under the attachment laws. Coffield *v.* Collins, 26 N. C. 486.

In Davis *v.* Garrett, 25 N. C. 459, it was held that a beneficial interest in negroes could not be attached, as, the legal estate vesting in the trustees, the property could not be sold under execution so as to divest the trustees of their estate.

Property Appropriated for Particular Purposes. — Property or funds in the hands of a trustee, which have been appropriated for a particular purpose, cannot be levied on by attachment,[6] though an attachment may be issued and levied upon the fund when the object was not carried out,[7] or when a surplus remains upon the settlement of the trust.[8]

d. *Equity of Redemption.* — The equity of redemption is subject to attachment under statutory provisions in most jurisdictions, either expressly or by implication,[9] but such interest was not attachable at com-

6. Van Horn *v.* Kittitas County, 28 Misc. 333, 59 N. Y. Supp. 883; Coe *v.* Beckwith, 31 Barb. (N. Y.) 339.

Funds deposited by a debtor in trust for certain creditors, cannot be attached as the property of the debtor. Sharpless *v.* Welsh, 4 Dall. (U. S.) 279, 1 L. ed. 833.

For Payment of Interest on Municipal Bonds.—Where a municipal corporation has deposited money for the special purpose of meeting the interest due upon the bonds of the city, an attachment cannot aftewarrds be levied on such funds in the possession of the depositary at the suit of a general creditor of the city. Hurd *v.* Farmers' L. & T. Co., 63 How. Pr. (N. Y.) 314.

For Payment of Corporate Coupons. Where a corporation deposited funds with brokers for the purpose of paying coupons, the brokers became vested with the title to the fund as trustees for the purposes of the trust, and the funds were not subject to attachment as the property of the corporation. Rogers Locomotive, etc., Wks. *v.* Kelley, 88 N. Y. 234.

Before Assent by Beneficiary.—A conveyance of an insolvent debtor of goods, in trust to pay the debts of a creditor without his assent, will not defeat an attachment made before the assent, for the goods still remain the property of the debtor, and as such are liable to attachment. Lane *v.* Jackson, 5 Mass. 157.

7. Chandler *v.* Booth, 11 Cal. 342.

8. Hearn *v.* Crutcher, 4 Yerg. (Tenn.) 461.

9. **U. S.**—Pratt *v.* Law, 9 Cranch 456, 3 L. ed. 791. **Ala.**—British, etc., Mtg. Co. *v.* Norton, 125 Ala. 522, 28 So. 31. **Conn.**—Davenport *v.* Lacon, 17 Conn. 278; Franklin *v.* Gorham, 2 Day 142, 2 Am. Dec. 86. **Me.**—Brown *v.* Allen, 92 Me. 378, 42 Atl. 793; Sawyer *v.* Mason, 19 Me. 49. **Md.**—Campbell *v.* Morris, 3 Har. & M. 535. **Mass.**—Bacon *v.* Leonard, 4 Pick. 277; Bigelow *v.* Willson, 1 Pick. 485. **Mich.**—Schloss *v.* Joslyn, 61 Mich. 267, 28 N. W. 96; Wilson *v.* Montague, 57 Mich. 638, 24 N. W. 851. **N. H.**—Eastman *v.* Knight, 35 N. H. 551; Kittredge *v.* Bellows, 4 N. H. 424. **Ohio.**—Carty *v.* Fenstemaker, 14 Ohio St. 457; Curd *v.* Wunder, 5 Ohio St. 92. **Vt.**—Chandler *v.* Dyer, 37 Vt. 345.

The analogy, as to personal property, to the equity of redemption in real estate is strong, for that was not liable to execution, either at common law, or by 29th Charles II.; and it is now liable in different states only by express statute, or by implication from other statutes, recognizing the equity of redemption in real estate as a legal, rather than an equitable interest. Haven *v.* Low, 2 N. H. 13, 9 Am. Dec. 25. See Holbrook *v.* Baker, 5 Me. 309, 17 Am. Dec. 236.

When possession is surrendered to the mortgagee, the legal title is in the mortgagee and the right of redemption in the mortgagee, and a creditor cannot attach the equity of redemption of the mortgagor. Hobbs *v.* The Interchange, 1 W. Va. 57.

The assignee of a note secured by mortgage, who did not take an assignment of the mortgage, may levy an attachment on the equity of redemption. Crane *v.* March, 4 Pick. (Mass.) 131, 16 Am. Dec. 329.

The purchaser of an equity of redemption sold on execution, has no attachable interest in the premises during the year within which it may be redeemed. Rogers *v.* Wingate, 46 Me. 436; Thornton *v.* Wood, 42 Me. 282.

The value of the equity of redemption is to be considered in determining whether it is sufficient to satisfy the claim. Hawes' Appeal, 50 Conn. 317.

If the value of such equity should be trifling, as compared with the

mon law.[10] It has been held that where an equity has been seized and sold on execution, the right which the debtor has to redeem such property is not liable to further attachment, but if the debtor mortgage this right, the equity still remaining in him is attachable.[11]

10. Choses in Action. — a. *In General.* — The right to attach choses in action depends upon the existence of statutory authority, either express or implied,[12] and though such interests may be attachable under the law, an attachment cannot be levied upon mere equitable rights therein, when equitable interests are not themselves the subject of attachment.[13]

Books of account are held not to be the subject of attachment, not being of any value in and of themselves,[14] unless there is specific statutory

amount of the mortgage, it might not, under the circumstances, be easily available by means of levy. If the mortgage should bear but a small proportion to the value of the property, such mortgage could not be regarded as embarrassing a creditor, who would be entitled to levy on it, for getting satisfaction of his debt. Moore *v.* Quint, 44 Vt. 97.

When Equity Successively Mortgaged.—Whenever real estate is conveyed in mortgage, an equity of redemption remains in the debtor, which the statute has subjected to attachment; and however frequently this right is successively mortgaged, the remaining equity is by law made liable to be attached by creditors. French *v.* Sturdivant, 8 Me. 246.

10. **U. S.**—Piatt *v.* Olliver, 2 McLean 267, 19 Fed. Cas. No. 11,115. *affirmed*, 3 How. 333, 11 L. ed. 622. **Mo.**—Pollock *v.* Douglas, 56 Mo. App. 487. **N. H.**—Haven *v.* Low, 2 N. H. 13, 9 Am. Dec. 25. **N. Y.**—Cutler *v.* James Goold Co., 43 Hun. 516, 7 N. Y. St. 106.

11. Reed *v.* Bigelow, 5 Pick. (Mass.) 281.

12. Bradford *v.* Gillespie, 8 Dana (Ky.) 67.

Choses in action are not goods, effects or credits within the statute. Perry *v.* Coates, 9 Mass. 537.

Action for Damages.—Under a statute authorizing the attachment of moneys and debts, only debts which are due by bonds, notes or books of account and which are capable of delivery can be attached, and not a mere right of action for damages. Burrill *v.* Letson, 2 Speers (S. C.) 378.

13. **Debts and choses in action are to be regarded as legal assets** under the attachment laws, whenever that process acts directly upon the legal title, but whenever they are so situated as to require the equitable powers of the court to place them in that situation, they must be treated as equitable assets only. Thurber *v.* Blanck, 50 N. Y. 80. See *supra*, VI, C, 9.

14. Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457; Cedar Rapids Pump Co. *v.* Miller, 105 Iowa 674, 75 N. W. 504, 67 Am. St. Rep. 322. See also Rosenthal *v.* Muskegon Circuit Judge, 98 Mich. 208, 57 N. W. 112, 39 Am. St. Rep. 535, 22 L. R. A. 693, holding that when books of accounts had been seized upon a writ which it was known could not be sustained, and copies were taken therefrom by counsel for the plaintiffs in the writ and the books then returned and the attachment proceedings discontinued, the court will order the copies so taken to be surrendered and may direct that the evidence be not used by them or by any one else in other proceedings.

Where no garnishment was served upon the debtors of the attachment defendant evidenced by accounts entered in books of accounts levied on, the account book debtors are in no way before the court. Gordonsville Milling Co. *v.* Jones (Tenn. Ch.) 57 S. W. 630. See also Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54; Cedar Rapids Pump Co. *v.* Miller, 105 Iowa 674, 75 N. W. 504, 67 Am. St. Rep. 322. And see the title "**Garnishment.**"

authority therefor.[15] Some cases hold that attachments on such property cannot be made under statutes authorizing the attachment of "goods and chattels,"[16] or "evidences of debt."[17] But a contrary rule has been announced in other cases.[18]

b. *Debts.* — In General. — While it is only by statutory authority that debts may be attached,[19] such authority has been very generally

Letters and correspondence are not subject to attachment under a statute allowing certain books and papers to be taken. Hergman *v.* Dettebach, 11 How. Pr. (N. S.) 46.

A levy upon books of account is a levy only on the materials which compose them, or the property represented by the books themselves, and does not prevent the person to whom the debts are due from pursuing any of his remedies for collection against his debtor. Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54, *citing* 2 Freem. Executions, §262.

Not Rendible Under Execution.— The goods attached must be such as are leviable and vendible under execution. Bradford *v.* Gillespie, 8 Dana (Ky.) 67.

A tax book in the hands of a sheriff for collection is not liable to be seized by a creditor of a person who is sheriff, under attachment proceedings, notwithstanding there is nothing due to the state or county on the tax book, the sheriff having settled all his taxes for those years, and there being a large amount due to the sheriff by the taxpayers. Davie *v.* Blackburn, 117 N. C. 383, 23 S. E. 321.

15. Fleisch *v.* National Bank of Commerce, 45 Mo. App. 225, holding that the statutory levy upon the books and accounts of the debtor impounds whatever debts and rights of action, present or prospective, are exhibited by the accounts contained in those books.

A seizure of books of account is not *per se* an attachment of the accounts therein entered, but is an incipient or inchoate levy, a preliminary step necessary to be taken in order to enable the court to acquire subsequent jurisdiction over the debtors thus disclosed. Kreher *v.* Mason, 33 Mo. App. 297; Elliott *v.* Bowman, 17 Mo. App. 693.

In New York Rubber Co. *v.* Gandy Belting Co., 5 Ohio Cir. Dec. 286, 11 Ohio C. C. 618, it was **held that the** levy of an attachment upon books of account gives the attaching creditor a preference over other creditors.

A statute which provides that a receiver appointed in attachment proceedings "shall take possession of all notes, due bills, books of accounts, accounts," etc., recognizes that a levy by attachment on accounts is a lien on the debt and gives the exclusive right to collect. Sloan *v.* Thomas Mfg. Co., 58 Neb. 713, 79 N. W. 728.

Domestic and Foreign Attachments. A domestic attachment act does not authorize the attaching of books of account, but by the foreign attachment act books of account are expressly mentioned, and authority is given to the attaching creditor to sue for and recover the debts. Reily *v.* Middleton, Dud. (S. C.) 21; Ohors *v.* Hill. 3 McCord L. (S. C.) 338.

16. Oystead *v.* Shed, 12 Mass. 506.

17. Rosenthal *v.* Muskegon Judge, 98 Mich. 208, 57 N. W. 112, 39 Am. St. Rep. 535, 22 L. R. A. 693; Brower *v.* Smith, 17 Wis. 410 (the court saying: "Those evidences of debt which may be attached by mere seizure, are only those which are complete and perfect evidences in themselves").

18. Williamson *v.* Eastern Bldg., etc., Assn., 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822.

19. **U. S.**—Franklin *v.* Ward, 3 Mason 136, 9 Fed. Cas. No. 5,055. **Conn.** Gager *v.* Watson, 11 Conn. 168. **Mass.** Sharp *v.* Clark, 2 Mass. 91.

Money awarded under a rule of court cannot be attached. *In re* Bridgman, 4 Fed. Cas. No. 1,867.

Moneys payable under a composition in bankruptcy cannot be reached by attachment. *In re* Kohlsaat, 18 N. B. R. 570, 14 Fed. Cas. No. 7,918.

A levy upon a debt due by a foreign corporation at the suit of a nonresident plaintiff, cannot be made. Bridges *v.* Wade, 113 App. Div. 350, 99 N. Y. Supp. 126. See *supra*, V.

conferred,[20] provided the situs of the debt is within the state,[21] and its payment is not dependent upon a contingency.[22] But if there is no indebtedness, there is of course nothing to attach.[23]

A Debt in Suit. — It has been held that a debt in suit may be attached in another court,[24] but this has been denied as to a debt in suit the jus-

20. Gager *v.* Watson, 11 Conn. 168 (as to "any debt"); Williamson *v.* Eastern Bldg., etc., Assn., 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822 (as to "personal property").

Under a statute providing that the levy of an attachment upon a cause of action arising upon a contract is a levy upon "the debt" represented thereby, it is the debt that exists at the time of service of the notice, and not indebtedness that afterwards arises under the same contract. Edison Electric Illum. Co. *v.* Gustavino Fire Proof Constr. Co., 16 App. Div. 350, 44 N. Y. Supp. 1026.

A debt due a vendor can be reached and held under an attachment. Kelly *v.* Babcock, 49 N. Y. 318.

An execution creditor has an interest in the lands upon which he has levied his execution, before the expiration of a year from the date of his levy, which is subject to be levied upon as his estate. Kidder *v.* Orcutt, 40 Me. 589.

Open accounts are "debts" which may be attached. Porter *v.* Young, 85 Va. 49, 6 S. E. 803.

Where a debt is due as matter of law and is not held in trust by the debtor for the benefit of another, such debt is attachable in a suit against the creditor. Kelly *v.* Roberts, 40 N. Y. 432.

A debt, payable in the future, may be attached by foreign attachment. Walker *v.* Gibbs, 2 Dall. (U. S.) 211, 1 L. ed. 352.

Though the securities cannot be reduced to possession, a debt may be secured by attachment. Williamson *v.* Eastern Bldg., etc., Assn., 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822.

A levy upon a surety's property for debt of principal is not payment by surety, therefore such a levy does not create a debt, due by principal to surety, which may be attached. Farmers' Nat. Bank *v.* National Bank, 4 Ky. L. Rep. 451.

21. Atwood *v.* Little Bonanza Quicksilver Co., 13 Cal. App. 594, 110 Pac. 344; Flynn *v.* White, 122 App. Div. 780, 107 N. Y. Supp. 860; Carr *v.* Corcoran, 44 App. Div. 97, 60 N. Y. Supp. 763; Lancaster *v.* Spotswood, 41 Misc. 19, 83 N. Y. Supp. 572; Wood *v.* Furtick, 16 Misc. 289, 39 N. Y. Supp. 173, *affirmed*, 17 Misc. 561, 40 N. Y. Supp. 687; Baker *v.* Doe (S. C.), 70 S. E. 431.

Contracts and debts are treated as having no situs or locality, and they follow the person of the creditor, and when the creditor as well as the debtor are out of the state, rights under such contracts are not the subject of attachment. Bates *v.* New Orleans, etc., R. Co., 4 Abb. Pr. (N. Y.) 72, 13 How. Pr. (N. Y.) 516. See also Willet *v.* Equitable Ins. Co., 10 Abb. Pr. (N. Y.) 193.

The situs of a debt is generally at the place where the creditor is domiciled. A declaration in attachment, based upon an attachment sued out against the defendant on the ground that he is a non-resident of the state, which alleges that the attachment has been executed by serving summons of garnishment upon the resident of the state, is amendable by averring that the debt due from the resident garnishee to the non-resident defendant is payable within the limits of the state. Glower *v.* Glidden Varnish Co., 120 Ga. 983, 48 S. E. 355; High *v.* Padrosa, 119 Ga. 648, 46 S. E. 859.

22. Herrmann & Grace *v.* New York City, 130 App. Div. 531, 114 N. Y. Supp. 1107; Bates *v.* New Orleans, etc., R. Co., 4 Abb. Pr. (N. Y.) 72, 13 How. Pr. 516.

23. McFadden *v.* Innes, 60 Misc. 543, 112 N. Y. Supp. 912.

24. Jones *v.* New York, etc., R. Co., 1 Grant Cas. (Pa.) 457.

It is not a "credit" in the hands of the trustee subject to an attachment. Howell *v.* Freeman, 3 Mass. 121.

In M'Carty *v.* Emlen, 2 Dall. (U. S.) 277, 1 L. ed. 380, the court said that a debt in suit was not attachable in England, because the superior courts could not allow causes pending be-

tice of which is controverted,[25] nor can a debt in suit in a court of the United States be attached in a state court as that would lead to a conflict of jurisdiction.[26]

Debts Due by Judgment. — Where there is a right to attach a debt, this includes a debt due by judgment,[27] and a judgment defendant may attach the amount of the judgment and execution against himself, in a suit against the plaintiff, for a claim equal or greater in amount.[28] As against an attachment of a judgment debt, no lien exists in favor of the attorney, or against the officer who had the execution.[29]

c. *Negotiable Notes.* — Negotiable paper, considered as choses in action, is not liable to levy and sale by writ of attachment when statutes have not provided for the attachment of such rights.[30] But statutes

fore them to be affected by the process of inferior tribunals exercising a jurisdiction by special custom.

25. Bingham *v.* Smith, 5 Ala. 651.

26. Early *v.* Rogers, 16 How. (U. S.) 599, 14 L. ed. 1074; Wallace *v.* M'Connell, 13 Pet. (U. S.) 136, 10 L. ed. 95; Henry *v.* Gold Park Min. Co., 15 Fed. 649; Thomas *v.* Woolridge, 2 Woods 667, 23 Fed Cas. No. 13,918.

27. **Del.**—Webster *v.* McDaniel, 2 Del. Ch. 297. **N. Y.**—Wehle *v.* Conner, 83 N. Y. 231; Arkenburgh *v.* Arkenburgh, 114 App. Div. 436, 99 N. Y. Supp. 1127; Egberts *v.* Pemberton, 7 Johns. Ch. 208. **Pa.**—Fithian *v.* New York, etc., R. Co., 31 Pa. 114; Jones *v.* New York, etc., R. Co., 1 Grant Cas. 457.

In Voorhis *v.* Letson, 2 Speers (S. C.) 378, it is held that a debt due by judgment in a United States court is not the subject of attachment on process from a state court.

The lien of an attachment covers a judgment recovered in aid thereof by the sheriff under a statute. Arkenburgh *v.* Arkenburgh, 114 App. Div. 436, 99 N. Y. Supp. 1127.

An attachment upon the property of a judgment plaintiff is a lien upon the judgment and execution which the sheriff holds in favor of the judgment plaintiff, and all moneys collected or received upon the same are liable to be applied upon any pudgments which may be recovered by reason of the proceedings under such attachment. Wehle *v.* Connor, 69 N. Y. 546, *reversing* 9 Jones & S. 201.

Foreign attachment on a debt evidenced by a judgment. Harter *v.* Harter, 4 Pa. Dist. 211.

At the Suit of the Depositary.—A judgment for a sum deposited in a bank may be attached at the suit of the bank. Citizens' Bank *v.* Hancock, 35 La. Ann. 41.

Money due on a judgment or decree is not subject to attachment. Conover *v.* Ruckman, 32 N. J. Eq. 685, *overruling* Davis *v.* Mahany, 38 N. J. L. 104; Crane *v.* Freese, 16 N. J. L. 305.

28. Richardson *v.* Gurney, 9 La. 285. See also Grayson *v.* Veeche, 12 Mart. (La.) 688, 13 Am. Dec. 384.

29. Gagar *v.* Watson, 11 Conn. 168.

30. Thompson *v.* Brown, 17 Pick. (Mass.) 462; Perry *v.* Coates, 9 Mass. 537; Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438.

In Prout *v.* Grout, 72 Ill. 456, the court said that a statute provides a mode for reaching promissory notes by the garnishee process. See the title "Garnishment."

Negotiable paper, indorsed in blank, is merely a security for a debt, and is a chose in action. Grosvenor *v.* Farmers', etc., Bank, 13 Conn. 104.

Interest coupons are choses in action which cannot be attached. Smith *v.* Kennebec, etc., R. Co., 45 Me. 547.

In Hands of Attorney for Collection. Notes not negotiable, or if negotiable, not endorsed, deposited in the hands of an attorney for collection, and in the possession of the attorney, uncollected, cannot be attached as goods and effects in his hands, as they are choses in action. Fitch *v.* Waite, 5 Conn. 117.

When Fraudulently Transferred.—If a note or bonds has been transferred, however fraudulently, no lien by attachment is possible, under a statute

which provide that "property,"[31] "estate and effects,"[32] or "credits and effects,"[33] shall be subject to attachment, have been construed to embrace promissory notes.

And notes not due may be attached,[34] the proceedings being moulded so as not to force premature payment.[35] In some jurisdictions notes must contain some provision indicating that they are payable in the state, before an attachment can issue.[36]

11. Interest in Insurance Policies. — The interest of the insured in an unmatured life insurance policy is not such as can be reached by attachment,[37] unless the policy has, at the time the attachment is issued, a cash surrender value.[38] Although a policy of insurance on the husband's life for his wife's benefit enures to her separate use and benefit and that of her children by the terms of the statute, it may be attached for her debts, without making the children parties to the proceeding.[39]

which requires the levy to be made "by taking the same into the sheriff's actual custody." Anthony *v.* Wood, 96 N. Y. 180, *reversing* 29 Hun 239.

Attachable as Chose in Action.—Situs of Security.—Where promissory notes under statutes regulating attachments are to be regarded as choses in action and not goods and chattels, and they are secured by mortgage on property, they are to be considered attachable property in the state in which the mortgaged property is situated and not in the state to which the holders of the notes have moved. Owen *v.* Miller, 10 Ohio St. 136, 75 Am. Dec. 502.

31. Fishburn *v.* Londershausen, 50 Ore. 363, 93 Pac. 1060, 14 L. R. A. (N. S.) 1234, 15 Am. & Eng. Ann. Cas. 975.

32. Peace *v.* Jones, 7 N. C. 256.

33. Scott *v.* Hill, 3 Mo. 88, 22 Am. Dec. 462.

34. Peace *v.* Jones, 7 N. C. 256.

A negotiable note, before it has been negotiated, may be attached on a demand against the payee, liable to be defeated by the transfer of the note at any time before it falls due; and even after the transfer, if it was merely voluntary, or fraudulently made, to protect the debt from creditors, it is attachable in the same manner. Enos *v.* Tuttle, 3 Conn. 27.

"Rights and Credits."—"A debt due to the defendant in attachment upon negotiable paper before its maturity is no less a right or credit of the defendant than a debt due upon the same paper after maturity or upon paper not negotiable. Debts due upon negotiable paper, therefore, whether before or after maturity, are by the terms of the statute made liable to attachment. . . . If after attachment, but before maturity, it passes into the hands of a *bona fide* holder for value without notice of the attachment, another and very different question is presented for solution." Briant *v.* Reed, 14 N. J. Eq. 271.

35. Bell v. Philadelphia Binding, etc., Co., 10 Pa. Super. 38, 44 W. N. C. 48.

36. Atwood *v.* Little Bonanza Quicksilver Co., 13 Cal. App. 594, 110 Pac. 344.

37. Marks *v.* Equitable Life Assur. Soc., 109 App. Div. 675, 96 N. Y. Supp. 551; Columbia Bank *v.* Equitable Life Assur. Soc., 79 App. Div. 601, 80 N. Y. Supp. 428.

Not Attachable Because Assignable. Day *v.* New England L. Ins. Co., 111 Pa. 507, 4 Atl. 748, 56 Am. Rep. 297.

38. Kratzenstein *v.* Lehman, 19 Misc. 600, 44 N. Y. Supp. 369, 18 Misc. 590, 42 N. Y. Supp. 237, 17 Misc. 64, 39 N. Y. Supp. 838, *affirming*, 19 App. Div. 228, 46 N. Y. Supp. 71; Campbell *v.* Home Ins. Co., 1 S. C. 158.

39. Troy *v.* Sargent, 132 Mass. 408, *following* Norris *v.* Massachusetts Mut. L. Ins. Co., 131 Mass. 294.

In New York a distinction is made between the interest of a married woman in an ordinary contract and under a policy of insurance.[40] And, under a statute declaring, in substance, that when the wife survives the husband the net amount of the insurance due shall be paid to her free from claims of her husband's creditors, it is held that, after maturity of the policy and before payment of the proceeds her creditors cannot reach her interest by attachment.[41]

12. Interests in Estates of Deceased Persons. — Distributive Shares. Under a statute predicated upon and intended to give effect and operation to the custom of London, it has been held that the distributive share of an absent debtor in the hands of an executor or administrator cannot be attached.[42] And even under statutes which authorize the attachment of such interests, an attachment cannot be levied until the statutory publication for creditors is proved to have been made,[43] or after the administration account has been adjusted and settled by the court.[44]

A legacy in the hands of an executor is not the subject of attachment in the absence of statutory authority,[45] nor is a personal legacy not

40. Eadie *v.* Slimmon, 26 N. Y. 9.

41. Amberg *v.* Manhattan L. Ins. Co., 56 App. Div. 343, 67 N. Y. Supp. 872 (*disapproving* Commercial Travelers' Assn. *v.* Newkirk, 16 N. Y. Supp. 177), and construing Laws, 1840, c. 80, Laws, 1858, c. 187, as amended by Laws 1870, c. 277.

Fraternal Societies,—Under the statute authorizing the organization of fraternal associations, the amount received by a widow as beneficiary under a policy issued to a member is exempt from the claims of her creditors as well as his. *In re* Lynch, 83 Hun 462, 31 N. Y. Supp. 1038, *affirmed* in 150 N. Y. 560, 44 N. E. 1125.

42. Brownlee *v.* Stengler, 2 Speer (S. C.) 520; Young *v.* Young, 2 Hill (S. C.) 425.

43. Gittings *v.* Russel, 49 Misc. 432, 99 N. Y. Supp. 853, holding that funds deposited by the defendant as the administrator of his wife's estate, to which, there having been no children, he is legally entitled subject to the rights of the intestate's creditors, are not subject to attachment in a suit against him personally.

Common law and equity jurisdiction being blended in the same tribunal, the interest of an heir at law of a deceased member of a benefit society in a sum to be realized by assessing the members of the association is attachable. Haukinson *v.* Page, 31 Fed. 184.

44. Fitchett *v.* Dolbee, 3 Harr. (Del.) 267, holding also that the attaching creditor may be required to give a refunding bond.

In Sinnickson *v.* Painter, 32 Pa. 384, under a statute providing that "all legacies given, and lands devised to any person," shall be liable to be attached, it was held that a foreign attachment will lie against a legacy or distributive share, before any settlement of the estate of a decedent; and it is in the power of the court to mould the judgment against the executor or administrator into such form, that no injustice will be done to anyone.

45. N. J.—Thorn *v.* Wright, 9 N. J. L. 115 note. **R. I.**—Gorman *v.* Stillman, 24 R. I. 264, 52 Atl. 1088. **S. C.** Brownlee *v.* Shingler, 2 Speers 520n; Young *v.* Young, 2 Hill 425.

When money has been bequeathed for a special use, with limitation over, it cannot be attached in a suit against the legatee. Chase *v.* Currier, 63 N. H. 90.

Spendthrift Trust.—A legacy which constitutes a spendthrift trust, is not attachable. Patterson *v.* Coldwell, 124 Pa. 455, 17 Atl. 18, 10 Am. St. Rep. 598.

charged on the land,[46] though of course such interests may be attached when allowed by statute.[47]

The interests of heirs[48] **and devisees** may be attached when the interests descend to and vest in the heirs or devisees.[49] Such interests cannot

46. Woodward's Exrs. *v.* Woodward, 9 N. J. L. 115, 17 Am. Dec. 462.

47. **Me.**—Cummings *v.* Garvin, 65 Me. 301. **Ohio.**—Orlopp *v.* Schueller, 26 Ohio C. C. 127. **Pa.**—Roth's Appeal, 94 Pa. 186.

When Debts Have Ceased to Be a Lien.—Brady *v.* Grant, 11 Pa. 361.

On Income From Trust Fund.—Though the interest of a residuary legatee in securities held as a trust fund which the trustees have full power to sell, at least for the purpose of reinvestment, may be subject to attachment, he has no attachment interest in any of the specific securities. Merriam *v.* Wagener, 74 Minn. 215, 77 N. W. 44.

Under a statute providing that "a legacy or distributive share of an estate in the hands of an executor, administrator or trustee may be attached in an action against the legatee or next of kin for his debt," the income from the *corpus* for life, as it accrues, is attachable. Baumann *v.* Ballantine, 76 N. J. L. 91, 68 Atl. 1114. To the same effect, see Park *v.* Matthews, 36 Pa. 28, 2 Grant Cas. 136.

But where the income from a trust estate is held for the beneficiaries "for their sole and separate use and shall be paid into their own hands respectively upon their own sole and separate receipt therefor," the duties of the trustee do not cease until the payment to the *cestui que trust*, and the interest of a beneficiary in the hands of the trustees is not subject to attachment. *In re* Hays, 201 Pa. 391, 50 Atl. 775.

A legacy chargeable on land may be attached in the hands of the devisee of the land, for a debt of the legatee. Woodward *v.* Woodward, 9 N. J. L. 115, 17 Am. Dec. 462. See Hewitt *v.* Durant, 78 Mich. 186, 44 N. W. 318.

Legacies due married women are subject to foreign attachment to secure payment for necessaries, under a married woman's act. Cleary *v.* Evans, 2 Pa. Co. Ct. 494.

An action at the instance of the sheriff in aid of the attachment will lie under §655 of the New York Code, Dunn *v.* Arkenburg, 31 Civ. Proc. 67, 48 App. Div. 518, 62 N. Y. Supp. 861 (*affirmed*, 165 N. Y. 669, 59 N. E. 1122, 166 N. Y. 600, 59 N. E. 1122), *citing* Bank *v.* Parent, 134 N. Y. 527, 31 N. E. 976, 18 L. R. A. 240; Backus *v.* Kimball, 62 Hun 122, 16 N. Y. Supp. 619.

48. Proctor *v.* Newhall, 17 Mass. 81 But see State *v.* Huxley, 4 Harr. (Del.) 343.

An administrator not having been appointed, that the courts in equity have jurisdiction against the heir of a non-resident debtor in a suit against the heirs to subject personal estate found in the state to the payment of debts, see Peterson *v.* Poignard, 6 B. Mon. (Ky.) 570.

Property belonging to a person in his capacity as executor is not liable to attachment under process against him personally, nowithstanding that on a final disposition he might be entitled, as heir of the same estate, to property equal to that held by him as executor. Glidden, etc. Varnish Co. *v.* Joy, 8 Ohio C. C. 157, 4 Ohio Cir. Dec. 323.

The undivided interest of an heir in land may be levied on by attachment pending administration; but this will not dispossess the administrator nor interrupt or interefere with the administration of the estate in any way, and the levy is subject to be defeated if it should be found necessary to resort to the land to pay the debts of the intestate. McClellan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

49. Roth's appeal, 94 Pa. 186.

A disclaimer of a devise made and promulgated in proper time and manner prevents the intended estate from vesting, but a disclaimer cannot be made two years after a will has been probated and a month after land has been seized by attachment so as to defeat the attachment. Daniel *v.* Frost, 62 Ga. 697.

The income of real estate of a testator received by his executors, under an arrangement with the devisee that they should carry it on and take the

be seized and sold under attachment, however, where the property was left in trust for the payment of the rents and profits to the devisee,[50] or where it is the duty of the trustees to sell the property and distribute the proceeds among the heirs,[51] but a fund devised in trust for the "comfort and support" of the *cestui que trust*, and not merely the interest, is liable to the debts of the beneficiary, and is liable to attachment in equity under the particular statute.[52]

By Creditors of Deceased Person. — It is generally held that an attachment is not available in behalf of a creditor of a deceased person in a suit against the estate,[53] as one creditor of a deceased person, by superior diligence or by any device or process after death, cannot obtain an advantage over others,[54] though it has been held under certain statutes, consistently with this rule, that property, both real and personal, belonging to the estate of a deceased person, may be attached on mesne process in any suit for a debt of the deceased, properly brought against the executor or administrator, since under the statutes providing for insolvency proceedings if the property is not sufficient to pay debts it is impossible for a creditor making such an attachment to obtain any improper preference over other creditors.[55]

proceeds and account for them as assets, is assets of the estate, and although the sole devisee is one of the executors, is not attachable as the property of the devisee. Brigham *v.* Elwell, 145 Mass. 520, 14 N. E. 780.

50. Easterly *v.* Keney, 36 Conn. 18, holding further that if the trustee has funds in his hands belonging to the *cestui que trust*, they are liable to foreign attachment, but rents and profits that may hereafter come into the hands of the trustees cannot be reached.

When the "proceeds" of property have been given in trust for the benefit of the husband and children of the testatrix, the property cannot be attached for a debt of the husband. Emerson *v* Hewins, 64 Me. 297.

51. Arlington State Bank *v.* Paulsen, 57 Neb. 717, 78 N. W. 303, holding that a court of equity may subject the interest of such heirs to the payment of the claims of their creditors.

52. Smith *v.* Moore, 37 Ala. 327, under Ala. Code §2956.

53. Cheatham *v.* Carrington, 14 La. Ann. 696; Barnes *v.* Stanley, 95 Mo. App. 688, 69 S. W. 682. See also *supra*, V, B.

Property is in Custody of the Law. Brewer *v.* Hutton, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804.

A chancery attachment will not lie against the effects of a deceased person. Redfern *v.* Rumney, 1 Cranch C. C. 300 20 Fed. Cas. No. 11,627; Henderson *v.* Henderson, 5 Cranch C. C. 469, 11 Fed. Cas. No. 6,353.

An administrator is not a "trustee" of the person to whom the estate of the deceased owed the debt. Conway *v.* Armington, 11 R. I. 116.

A non-resident cannot sue out an attachment against the property of a deceased non-resident found within the state. Hemingway *v.* Moore, 11 Ala. 645.

Property of Non-Resident Debtor Within the State.—Under a statute an attachment in the case of the death of any debtor residing out of the limits of the state, having lands or other property therein, the attachment must be levied on property which the deceased non-resident debtor left within the state, and which has not been reduced into possession by the foreign executor or administrator, so as to be assets in their hands. Loomis *v.* Allen, 7 Ala. 706.

Before the qualification of an executor, the effects of a testator's estate are in the custody of the law and cannot then be attached, and nothing can be done by the executor after his qualification waiving his right to have the attachment dissolved . Fay *v.* Reager, 2 Sneed (Tenn.) 200.

54. Levy *v.* Lehman, 38 La. Ann. 9; Trimble's Estate, 23 Pittsb. Leg. J. N. S. (Pa.) 89.

55. Herthel *v.* McKim, 190 Mass. 522, 77 N. E. 695, 5 Am. & Eng. Ann. Cas. 911.

13. Reversions, Remainders and Contingent Interests. — In some jurisdictions statutes provide for, or are construed to authorize, the attachment of a vested interest in remainder or reversion;[56] thus, a vested remainder in real and personal property has been held to be subject to attachment under statutes authorizing attachment of "any real, or personal property, of either a legal or equitable nature," "property, debts, or other effects."[57] But a contingent remainder or interest cannot be attached,[58] nor can an interest in remainder which is uncertain and incapable of just appraisal, and possibly of no value, when under the statutes no estate in land can be taken on execution unless at its "true value,"[59] though it has been held that if a contingent, executory or future interest in real estate may be disposed of by legal conveyance or will, as provided by statute, such an interest may be legally attached.[60]

D. Necessity for Ownership or Possession of Property by Debtor. — **1. In General.** — Before a writ of attachment can issue, it must be proved that the property attached belongs to the defendant,[61]

56. Ernest's Exrs. *v.* Northern Bank, 20 Ky. L. Rep. 1334, 49 S. W. 333; Moore *v.* Richardson, 37 Me. 438.

In Goode *v.* Longmire, 35 Ala. 668, 76 Am. Dec. 309, it was held that a remainder in slaves cannot be taken under attachment at law during the continuance of the life estate.

The residuary half interest in property in fee is subject to levy. Hewitt *v.* Durant, 78 Mich. 186, 44 N. W. 318.

57. Lockwood & Co. *v.* Nye, 2 Swan (Tenn.) 515, 58 Am. Dec. 73.

58. **Conn.**—Smith *v.* Gilbert, 71 Conn. 149, 41 Atl. 284, 71 Am. St. Rep. 163. **Tenn.**—Sturm *v.* White, 8 Baxt. 197. **Va.**—Young *v.* Young, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642, as an "estate or debts."

In Patterson *v.* Caldwell, 124 Pa. 455, 17 Atl. 18, 10 Am. St. Rep. 598, that an interest in the principal of an estate, which is contingent, is not attachable.

A contingent equitable interest in real estate, under a subsisting express trust, is not attachable. See Kendall & Co. *v.* Gibbs & Co., 5 R. I. 525.

Defeasible Interest of Heirs.—Where the remainder in the heirs consist only in the proceeds of a sale of such property, after the executor has exercised a power to sell conferred on them by the will, such interest is not subject to an attachment sued out against the heirs. McLeran *v.* McKethan, 42 N. C. 70.

59. Smith *v* Gilbert, 71 Conn. 149, 41 Atl. 284, 71 Am. St. Rep. 163, *citing* Gen. St. §1182.

60. Wood *v.* Watson, 20 R. I. 223, 37 Atl. 1030, holding that a statute recognizing the right of a plaintiff to attach "real estate, or the right, title and interest of any defendant therein," is broad enough to include a contingent interest in real estate.

61. **Ownership of Property by Defendant Necessary.**—Culbertson *v.* Stephens, 82 Va. 406, 4 S. E. 607.

"It is an established principal, which peculiarly affects attachments of real estate, that the attachment can only operate upon the right of the defendant existing when it is made." Johnston *v.* Field, 62 Ind. 377, 381, *citing* Drake on Attachment, §234.

The goods of another than the defendant cannot be taken. Grigsby Const. Co. *v.* Colly, 124 La. 1071, 50 So. 855; Rothermel *v.* Marr, 98 Pa. 285.

Property held in trust, mortgage or pledge, or upon equitable assignment, cannot be attached, either by direct attachment, or by attachment by garnishment. Pennebaker *v.* Tomlinson, 1 Tenn. Ch. 111, holding that bonds of an insurance company held by a state officer in his official capacity in trust "as security for risks taken by citizens of the state," are not attachable.

An instantaneous seizin is not the subject of attachment. Hazelton *v.*

for an attachment creditor can aequire no greater interests than his debtor had,[62] hence property, the title to whieh had not been acquired by the debtor at the time the writ issued cannot be attaehed.[63] But an attachment against a person may be levied on property which is in his

Lesure, 9 Allen (Mass.) 24; Chickering *v.* Lovejoy, 13 Mass. 51.

Where a deed was made to a middleman, in order that he might convey the property to a third person, and such further conveyance was made, the first grantee had no attachable interest when neither of the deeds was registered at the time the attachment was issued, as such grantee never had possession nor any title by record. Haynes *v.* Jones, 5 Met. (Mass.) 292.

62. Hannah *v.* Davis, 112 Mo. 599, 20 S. W. 686.

As to priority under a previous unrecorded deed, see Shirk *v* Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381.

An attachment of the interest of a grantee does not give the attaching creditors any interest in the land superior to their debtor, when the attachment was issued during the pendency of an action brought by others to set aside the deed. Kinnah *v.* Kinnah, 184 Ill. 285, 56 N. E. 376.

In Houston *v* McClune, 8 W. Va. 135, the court said: "In a number of cases decided in Virginia and other States, it has been held that the attaching creditor and purchaser at the sale of the property attached acquires no greater right than the debtor had in the property. But in none of these cases was there a conveyance, trust or lien, made or created by the debtor, that under the recordation law was void as to the creditor who attached. In such cases the debtor who made or created the conveyance or lien may be deemed, nevertheless, to hold the property for the benefit of the creditor to the extent of the debt for which he obtains a lien." See *infra*, XV.

63. **Cal.**—Howell *v.* Foster, 65 Cal. 169, 3 Pac. 647. **La.**—Hepp *v* Glover, 15 La. 461, 35 Am. Dec. 206. **Me.**—Crocker *v.* Pierce 31 Me. 177.

Interests subsequently acquired by the debtor are not affected by the levy. Seward & Co. *v.* Miller, 106 Va. 309, 55 S. E. 681.

Interest of Pre-emptor.—"By settling upon the public land of the United States, and filing a declaratory statement, a person acquires no interest in the land itself, but only an inchoate right, that, upon the compliance with the requirements of an act of congress, may ripen into a title. The right is personal to the pre-emptor, and may be forfeited by a failure to perform any of the condtitons imposed at any time before payment and final entry. It is not a subject of sale or transfer, as expressly provided in section 2263 of the Revised Statutes of the United States: 'All assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void.' It would seem manifest, therefore, that, if a voluntary transfer or assignment by the pre-emptor would be void, a third party could not, in contravention of the policy and against the express letter of the statute, procure a transfer of the right by an adverse legal proceeding against him, and any step towards the accomplishment of such a result would be wholly ineffective. The levy of the writ for this reason, was without any force." To such an interest Colo. Gen. St. §2676, 2677, have no application. "The rights of occupancy and possession that are therein mentioned are such as exist between occupants of the public domain, whose rights are dependent upon occupancy alone, and not upon any right derived from the general government. Such rights in no measure interfere with the paramount title of the United States, or its disposal of the land to one who acquires the right to purchase it under the act of congress, and are terminated whenever its title passes to such purchaser." McMillan *v.* Gerstle, 19 Colo. 98, 34 Pac. 681.

The property of an absconding debtor is subject to attachment, without regard to the possession being in another. Hutcheson *v.* Ross, 3 A. K. Marsh. (Ky.) 490, wherein the court said that instructions should not turn upon the possession but upon the right of property.

possession at the time of the levy, of which he has apparently the control, as this shows that he is *prima facie* the owner.[64]

Property in the possession of the plaintiff in the attachment suit may be levied on.[65]

2. Property and Rights of Individual Stockholders. — The creditors of a stockholder cannot seize his share in any part of the property of the corporation,[66] nor can the property of individuals composing a corporation be levied on in a suit by attachment against the corporation.[67]

3. Interests Under Contracts. — a. *In General.* —As a general rule where a person's interest in a contract may be sold and assigned, such interest may be the subject of attachment.[68]

64. **Apparent Possession is Sufficient.** Kelly *v.* Scannell, 12 Cal. 73. See Grover *v.* Buck, 34 Mich. 519; Hawley *v.* Lumberman's Bank, 10 Watts (Pa.) 230.

65. Boyd *v.* Bayless, 4 Hump. (Tenn.) 386; Gallun *v.* Weil, 116 Wis. 236, 92 N. W. 1091. But see Baker *v.* Doe (S. C.), 70 S. E. 431.

A writ of attachment issues generally against the property of the defendant, not exempt from execution, and may be executed by seizing any of such property within the county of the officer having the writ. Gallun *v.* Weil, 116 Wis. 236, 92 N. W. 1091.

The Interest of a pledger is a proper subject of attachment at the instance of the pledgee. Ottumwa Nat. Bank *v.* Totten, 114 Mo. App. 97, 89 S. W. 65, *citing* Richardson *v.* Ashby, 132 Mo. 238, 33 S. W. 806; Southworth & Co. *v.* Lamb, 82 Mo. 243.

66. **Right to Attach Interest of Stockholders.**—Williamson *v.* Smoot, 7 Mart. (La.) 31, 12 Am. Dec. 494.

67. Owen *v.* Marshall, 69 Miss. 486, 13 So. 668.

68. See generally cases cited *infra.*

A contract for payment by installments at certain times for a definite period creates an indebtedness for the whole amount, and this may be the subject of attachment. Goodman *v.* Meriden Britannia Co., 50 Conn. 139.

On a contract to build a house, until the materials are finally completed and attached to the house to remin as part of it, there is no delivery nor annexation to the house, and such materials may be attached as the property of the contractor. Manchester Mills *v.* Rundlett, 23 N. H. 271.

Interest of Contractor in Construction Plant.—Under a contract between a railroad company and a construction company, it was held that the construction company had an attachable interest in the working plant, and also in the material purchased by it, subject to the contract rights of the railroad to have the plant used for the execution of the contract, and the further right of the railroad to have the material put in the tunnel where it belongs, and thereby made a fixture and released from any lien of the writ. Knickerbocker Trust Co *v.* O'Rourke Engineering Const. Co., 74 N. J. L. 53, 70 Atl. 735, where the court said: "This attachable interest exists whether the present right of possession of the railroad be regarded as that of a chattel mortgage to secure payment of advances made to the contractor, as was the case in Long Dock Co. *v.* Mallery, 12 N. J. Eq. 93, 431, or in Fox *v.* Cronan. 47 N. J. Law, 493, 2 Atl. 444, 4 Atl. 314, 54 Am. Rep. 190, or whether the provisions of the contract are intended to prevent interference during the work by outside creditors, or are to be considered as an attempt to defeat creditors altogether."

On a sale of portable houses, if the contract was that the contractor "should construct the houses out of its own material, then the legal title to the material would remain in it, and would be liable to seizure," subject to equities in favor of others; but it would be different if the agreement was to sell the owner of the land material and also to construct the houses, intending that the property in the material should be in the owner of the

b. *Interest of Vendor and Vendee in Contract of Sale.* — (I.) **Contracts for Sale of Land.**— The interest of a vendor in a contract for the conveyance of land, while any of the purchaser's money remains unpaid, is one subject to levy by attachment,[69] but when the conditions of the contract have been complied with and the vendor has only the legal title, as trustee for the vendee, he has no attachable interest remaining.[70]

Interest of Vendee. — In the absence of statutory authority, the interest of a vendee under a contract for the purchase of land upon which he has made only partial payment, cannot be attached,[71] but under statutory authority his interest may be levied upon by such process.[72] And even then, the vendee has no attachable interest,

land and at his risk until the construction should be completed. Ellis *v.* Bonner, 80 Tex. 198, 15 S. W. 1045, 26 Am. St. Rep. 731.

Contract To Cut Lumber.—If one has erected a sawmill on land to carry out a contract to cut and manufacture the lumber, the owner of the land agreeing that after the lumber is cut and manufactured he will buy the mill or sell the land, the owner of the mill has no attachable interest in the land. Dodge *v.* Beattie, 61 N. H. 101.

Where, under a contract to cut and deliver cord wood, the right of the contractor was a mere lien, or right to retain the possession as security for the performance of the contract, wood cut and not delivered cannot be attached as the property of the contractor. Hilger *v.* Edwards, 5 Nev. 84.

A person occupying land upon which wood has been cut, under a contract to cut and sell wood and account to the owners after reimbursing himself for expenses, has no attachable interest in the wood. Provis *v.* Cheves, 9 R. I. 53, 98 Am. Dec. 367.

69. Coggshall *v.* Marine Bank Co. 63 Ohio St. 88, 57 N. E. 1086, the court saying that equitable interests in land are treated in the statutes as real estate.

70. Catlin *v.* Bennatt, 47 Tex. 165, **When Purchaser Is In Possession.**— When a purchaser under a parol contract to buy land has been let into possession and has paid the full price agreed upon, but a deed has not been delivered, the vendor has nothing but the naked title and has not an attachable interest. Hicks *v.* Riddick, 28 Gratt. (Va.) 418.

A contract for the sale of land provided that the cash payment should be applied to the satisfaction of certain liens on the property which were estimated at the time of the conveyance. "There is no evidence to show that they were overestimated, and therefore nothing to show the existence of any right to a refund in the defendant or of any cause of action on that ground. So far as the papers submitted throw any light upon this point, the inference is to the contrary. If the amount of the liens was not overestimated, the mere fact that some of them had not been discharged did not create an indebtedness of the vendee to the vendor to that extent. The contract provided for such stipulations in the deed with regard to incumbrances as might be agreed upon by the parties, and the vendor apparently took the promise of the grantee in his deed to discharge the liens as consideration pro tanto for the conveyance. It cannot be said, consequently, that either the vendee in the contract or the grantee in the deed is indebted to the vendor to the extent of that part of the purchase price which was deducted or retained for this purpose and has not yet been applied. Probably the vendee in the contract is under no further obligation in this regard; but at all events neither the vendee in the contract nor the grantee in the deed owes the vendor anything at all except the duty to discharge the liens. There is no indebtedness and nothing to attach." McFadden *v.* Innes, 60 Misc. 543, 112 N. Y. Supp. 912.

71. Murphy *v.* Marland, 8 Cush. (Mass.) 575.

72. **Me.**—Neil *v.* Tenney, 42 Me. 322; Houston *v.* Jordan, 35 Me. 520;

when his rights under the contract have ceased by a surrender[73] or by an assignment of them.[74]

(II.) Contracts for Sale of Personal Property. — Interest of Vendor or Transferror.— And so, as to personal property generally, when there has been a sale of goods and a change of possession by delivery, the property is not attachable as that of the vendor,[75] though a creditor in a suit against the vendor or transferror may disregard a sale or transfer and attach the property if it is still in the possession of the vendor or transferror after the vendee or transferree has had reason-

Whitmore *v.* Woodward, 28 Me. 392; Whittier *v.* Vaughn, 27 Me. 301; Wise *v.* Tripp, 13 Me. 9. **N. Y.**—Higgins *v.* McConnell, 130 N. Y. 482, 29 N. E. 978,*reversing* 18 Civ. Pro. 322, 56 Hun 277, 9 N. Y. Supp. 588, as "any interest" in real property. **Vt.**—Woods *v.* Scott, 14 Vt. 518.

Crops Held as Security for Vendor.— Where a contract for the sale of land reserved to the vendor the ownership and control of all crops thereafter raised or grown on the premises until the notes should be fully paid, and the notes are not paid, the vendee has not an attachable interest in the crops. Joslyn *v.* Taplin, 76 Vt. 422, 57 Atl. 995. The court distinguishing Whiting *v.* Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598, where a similar reservation was involved, and the vendor sought to foreclose the vendee's equity of redemption in the land and in the crops reserved, "thereby admitting in his pleadings, in effect, that the parties stood in the relation of mortgagor and mortgagee under the reservation."

Timber as Security for Vendor.—If timber on land sold is reserved as the property of the vendor to secure the purchase price, timber cut by the vendee is not liable to attachment as the latter's property. Diskerman *v.* Ray, 55 Vt. 65.

The right by contract to receive a conveyance of land may be attached under some statutes. And if the circumstances are such that specific performance of a parol contract will be decreed the right may be attached. Johnson *v.* Bell, 58 N. H. 395.

Where time is of the essence of an agreement to convey, and the condition of the contract has been broken, the promisee has no attachable interest. French *v.* Sturdivant, 8 Me. 246.

73. Wood *v.* Thomas, 2 Head (Tenn.) 160.

74. Lambard *v.* Pike, 33 Me. 141 (to a *boni fide* purchaser); Dumas *v.* Geer, 144 Mich. 377, 108 N. W. 84 (to one in possession).

75. **Ala.**—Mary Lee Coal, etc. Co. *v.* Knox, 110 Ala. 632, 19 So. 67, a case of a corporation. **Ky.**—New Roads Bank *v.* Kentucky Refining Co., 85 S. W. 1103. **N. Y.**—Bates *v.* New Orleans, etc. R. Co., 13 How. Pr. 516, 4 Abb. Pr. 72; Bennett *v.* Rosenthal, 11 Daly 91 (as to a lease of lands). **Vt.**—Chase *v.* Snow, 52 Vt. 525. See also, *infra*, XV.

A change of possession may be as well by the old owner going out and the new owner coming in while the property remains in the same place, as by the new owner taking it away to a a new place, and when title and possession have thus passed out of the debtor, the property cannot be levied on in a suit against the vendor. Post *v.* Berwind-White Coal Min. Co., 176 Pa. 297, 35 Atl. 111.

On an Executory Contract.—When property was actually delivered on an executory contract in payment for advances which had been made, an attachment cannot be levied thereon as the property of the vendor. Finding *v.* Hartman, 14 Colo. 596, 23 Pac. 1004.

Though the Contract of Sale Was Entered Into on Sunday.—Blass *v.* Anderson, 57 Ark. 483, 22 S. W. 94.

But where the evidence does not show that there was a sale to the vendee, for a price either fixed, or to be fixed, so as to put the goods at his risk, but they are still at the risk of the vendor and subject to his control, the property is liable to be attached by the creditors of the vendor. Price *v.* Smith, 5 Rob. (La.) 124.

Property Conveyed by Mortgagor.— Williams *v.* Whoples, 1 Head (Tenn.) 401.

Property Transfered in Payment of

able time and opportunity to take possession,[76] or when the creditor

Debt.—Mary Lee, etc. Co. *v.* Knox, 110 Ala. 632, 19 So. 67.

Where a debtor delivered property to a creditor to be sold, and if the proceeds amounted to more than the debt, the surplus should be paid to the debtor, and if for less the debtor should make up the deficiency. The ownership of the property remained in the debtor as it was neither a sale nor a gift in payment, nor was it a pledge, and consequently the property might be attached as that of the debtor. Rollins *v.* Watson, 8 La. Ann. 435.

After a valid assignment, the subject of the assignment cannot be attached as the property of the assignor (Md.—Wells *v.* Biscoe, 3 Gill 406. Pa. Noble *v.* Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66. Tex.—Euless *v.* Russell (Tex. Civ. App.), 34 S. W. 176). But it is otherwise if there was no valid assignment. People's Bank *v.* Barbour (Ky.), 19 S. W. 585.

Of Vessel at Sea.—The *bona fide* conveyance of a vessel and cargo, by deed, to secure the payment of money, the vessel being at sea at the time of the sale, is valid against creditors, who cannot attach the vessel if the vendee takes possession immediately on arrival at its destination. Thuret *v.* Jenkins, 7 Mart. (La.) 318, 12 Am. Dec. 508.

Sale of Undivided Interest in Steamboat.—Creditors of absent joint owners of a steamboat may attach their shares, and may have a privilege resulting from the attachment, entitling them to be paid by preference over the ordinary creditors of the commercial partnership engaged in running the boat. By transferring an undivided interest in the property, a debtor cannot deprive the creditor of this right against his remaining interest. Stevenson *v.* Prather, 32 La. Ann. 434.

When Vendor Re-takes Under a Lease.—Where the vendor of property has surrendered possession and then has leased the property, it is not subject to direct attachment at the suit of a creditor of the lessee, when there is nothing to sustain a doubt as to the *bona fides*. Redwitz *v.* Waggaman, 33 La. Ann. 26.

76. Lucas *v.* Birdsey, 41 Conn. 357; Franklin *v.* Gumersell, 11 Mo. App. 306.

Notwithstanding a Different Rule Prevails in Domicile of the Debtor.—Oliver *v.* Townes, 2 Mart. N. S. (La.) 93.

Under Statute of Frauds.—A sale of goods without immediate delivery, being void under the Statute of Frauds, is not valid as against the claims of attaching creditors of the seller. Lawrence *v.* Burnham, 4 Nev. 316, 97 Am. Dec. 540. See the title "Frauds, Statute of."

As Evidence of Fraud.—It is the settled law of this state, that if the vendor of personal property be permitted after the sale, to retain the actual and visible possession, it is unexplained conclusive evidence of fraud. Talcott *v.* Wilcox, 9 Conn. 134.

As a Question of Fact.—Whether the vendor retained the actual and visible possession, in fraud of his creditors, is a question of fact. Talcott *v.* Wilcox, 9 Conn. 134.

A finding by the court that the goods attached were the property and in the sole and exclusive possession of another than the defendant in the attachment, is conclusive when supported by any evidence. Bird *v.* Andrews, 40 Conn. 542.

The sale or cession of credits is strictly analogous to that of other property, and is not complete and effectual to transfer absolutely the rights of the creditor, till the debtor receives notice from the person to whom they are ceded. Badnal *v.* Moore, 9 Mart. (La.) 403.

On Vendor Becoming Lessee.—Where chattels were sold and the purchaser remained in possession, under a lease for twelve months, in the absence of actual fraud the goods cannot be attached as the property of the lessee. Wheeler *v.* Train, 3 Pick, (Mass.) 255.

When written permits to cut and haul timber from lands have been assigned, logs cut therefrom and lumber sawed cannot be attached as the property of the assignor, and this though the assignor was employed by the assignee and had possession of the logs for the assignee after they were severed from the soil. Fiske *v.* Small, 25 Me. 453.

"The purchaser, to protect himself against an attachment of the property bought on the debt of the vendor, if

has had no notice of the sale or of the transfer of the property.[77]

Interest of Vendee. — In order to subject the interest of a vendee of personal property to attachment, the sale must be so far perfected as to pass title to the defendant.[78] For example, property purchased but not paid for cannot be attached as the property of the vendee.[79]

Interests Under Conditional Sales. — Under a statute authorizing a creditor, by attachment of property held by a vendee under a contract of conditional sale, to extinguish the right of the vendor to it by making payment, or tender of payment, within the time provided by the statute, a creditor of the vendee may attach such property on

he place the property in the apparent possession of a third person, must leave it there, under such circumstances that the attaching officer can by inquiry learn whose possession his apparent possession is. . . . From the nature of the duty of the officer, and from the duty of the purchaser to affect a change in the possession of the property purchased from the vendor to himself, the third person having the control of the property purchased, must understand that he holds the control for, and that his possession thereof is the possession of, the purchaser. Otherwise there is no apparent, open change of possession available to the creditor, or the officer making the attachment." Hildreth *v.* Fitte, 53 Vt. 684. See also Marshall *v.* Towne, 28 Vt. 14.

A Lousiana statute declares that if personal property be transferred by contract, but not delivered, it is liable, in the hands of the obligor, to seizure and attachment in behalf of his creditors. See Lee *v.* Bullard, 3 La. Ann. 462; Fisk *v.* Chandler, 7 Mart. (La.) 24; Durnford *v.* Brook's Syndics, 3 Mart (La.) 222.

Nothing short of actual delivery will defeat the right. Oliver *v.* Townes, 2 Mart. N. S. (La.) 93.

An order for the delivery of the thing sold is not a delivery of it. Norris *v.* Mumford, 4 Mart. (La.) 20.

The rule extends to the sale of a promissory note not transferred by endorsement and delivery in the usual mercantile mode but by a collateral agreement. Hill *v.* Hanney, 15 La. Ann. 654.

If a debtor assigns all his estate to trustees, for the benefit of his creditors, any part of it may be attached before they obtain possession of it. Ramsey *v.* Stevenson, 5 Mart. (La.) 23, 12 Am. Dec. 468.

77. **In Absence of Notice to Debtor of Assignment.**—Vanbuskirk *v.* Hartford F. Ins. Co., 14 Conn. 141, 36 Am. Dec. 473.

If the interest in a county warrant is assigned before its issuance, notice thereof being given to the proper officer, no attachable interest remains in the assignor. Stephenson *v.* Walden, 24 Iowa 84.

Where the property sold was of a cumbersome character, and the vendor exercised no further control over it, an attachment could not be levied upon it as the property of the vendor though it was not actually removed, especially if the creditor had personal notice of the sale. Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

78. Berz *v.* Mecartney, 115 Ill. App. 66; Riddle *v.* Varnum, 20 Pick. (Mass.) 280.

79. In Parker *v.* Rodes, 79 Mo. 88, it was said that, under statute, where the purchase price of personal property was unpaid, the statute would authorize the vendor, under circumstances justifying a suit by attachment against the vendee, to seize such property in the hands of a third person purchasing with notice that the property had not been paid for. And see State *v.* Mason, 96 Mo. 127, 9 S. W. 19.

In Boltz *v.* Eagon, 34 Fed. 521, it was held that the statute does not create a lien in favor of the vendor of personal property for the purchase price, and a vendor cannot attach property for the purchase price which is in the possession of an assignee for the benefit of all the assignor's creditors.

complying with the provisions of the statute;[80] but in the absence of such statutory authority, property sold under a contract reserving title in the seller until the conditions of the contract of sale have been complied with, cannot be attached as the property of the purchaser,[81] though the creditor is without notice of the conditional character of the sale,[82] unless a statute requires such a contract to be recorded, and then when such record has not been made, the sale is to be treated as absolute so far as the rights of a creditor are concerned, and the property may be attached.[83]

4. Dower and Curtesy Interests. — A husband has no interest in the real estate of the wife during her life that can be legally attached.[84]

An unassigned dower interest in land is generally held not to be subject to attachment in an action at law.[85]

80. Rowan *v.* State Bank, 45 Vt. 160; Duncan *v.* Stone, 45 Vt. 118.

Upon Exchanging the Property.— In Hunt *v.* Douglass, 22 Vt. 128, Bennett, J., writing the opinion, said: "I for one should not be disposed to extend the doctrine, which protects the vendor in his property, while in the possession of the vendee, so far as to permit the vendee to exchange that property to an unlimited extent, and thereby invest the vendor with the title to the newly acquired property, even though the vendee may have a general authority so to do from the vendor."

81. **Conn.**—Lucas *v.* Birdsey, 41 Conn. 357; Hughes *v.* Kelly, 40 Conn. 148. **La.**—Stevens *v.* Older, 26 La. Ann. 634. **Mass.**—Hill *v.* Freeman, 3 Cush. 257. **Okla.**—McIver *v.* Williamson-Halsell-Frasier Co., 19 Okla. 454. 92 Pac. 170, 13 L. R. A. (N. S.) 696. **R. I.**—Goodell *v.* Fairbrother, 12 R. I. 233, 34 Am. Rep. 631. **Vt.**—Duncan *v.* Stone, 45 Vt. 118; Buckmaster *v.* Smith, 22 Vt. 203; Smith *v.* Foster, 18 Vt. 182.

Rights of Bargainee Surrendered.— If one who has bought under a conditional sale rescinds the sale and surrenders and assigns to his vendor, in due form, all claims to the property and incidents attaching to a conditional sale, are divested, and no title passes to one who purchases at a sheriff's sale under attachment thereafter levied against the buyer. Milner, etc., Co. *v.* Deloach Mill Mfg. Co., 139 Ala. 645, 36 So. 765, 101 Am. St. Rep. 63.

82. Thornton *v.* Cook, 97 Ala. 630, 12 So. 403.

83. Steen *v.* Harris, 81 Ga. 681, 8 S. E. 206, holding further, that though on a conditional sale of property not being recorded, a creditor of the purchaser may obtain an attachment, the parties to the sale may rescind the contract, and if a rescission is complete before an attachment is levied the property is not subject to such process at the suit of a creditor of the conditional purchaser.

When the Contract Was Made Out of the State.—The statute requiring such contracts to be recorded has no application to contracts between parties residing out of the state, and the purchaser has no attachable interest though the contract was not recorded. Cleveland Mach. Wks. *v.* Lang, 67 N. H. 348, 31 Atl. 20.

84. Greenwich Nat. Bank *v.* Hall, 11 R. I. 124. See Lancaster County Bank *v.* Stauffer, 10 Pa. 398, wherein the court said, as to the effect of birth of issue: "He is then said to be tenant by the curtesy initiate, though the new character of his interest is not consummated by anything less than the wife's death. As then the defendant had an independent estate in his wife's land, which might have been aliened by his separate act, it was bound as an inchoate one, by the judgment against him, for his separate debt."

85. McMahon *v.* Gray, 150 Mass. 289, 22 N. E. 923, 5 L. R. A. 748.

Compare Latourette *v.* Latourette, 52 App. Div. 192, 65 N. Y. Supp. 8, wherein the court said: "It is probably true that before the amendment of the Code

5. Property Pledged. — Though it has been held in several cases that property while held as a pledge is not liable to attachment for debts of the pledgor, in the absence of statutory authorization,[86] the attachment statutes in many jurisdictions authorize an attachment of property pledged as security,[87] but even then the levy may be made only upon whatever rights the pledgor may have subject to

of Civil Procedure there was no way in which the widow's dower could be reached by creditors until it had been admeasured, but the practical result was accomplished through equitable actions, in which the widow was compelled to assign her interest, permitting the assignee to bring an action in her name to reduce the dower interest to possession, when it was available for the purposes of her creditors. . . . And as it is the policy of the Code of Civil Procedure to simplify the practice and to promote justice, we can see no reason why a creditor should not have as good a right to attach a consummate dower interest before it has been reduced to possession as afterward."

Under a statute providing that "the real property which may be levied upon by virtue of a warrant of attachment includes any interest in real property, either vested or not vested, which is capable of being aliened by the defendant," a dower right is liable to attachment. Cowenhoven *v.* Lewis, 52 App. Div. 192, 65 N. Y. Supp. 8.

Statute Creating a Fee-Simple Estate.—A statute providing that one-third in value of all the real estate in which the husband had an interest shall be set apart in fee simple, does not abolish or take away the estate of dower, but merely enlarges it from an estate for life to a fee simple, and such estate is not subject to execution or attachment in a suit at law, before assignment. Rausch *v.* Moore, 48 Iowa 611, 30 Am. Rep. 412.

86. La.—Deloach *v,* Jones, 18 La. 447. **Me.**—Sargent *v.* Carr, 12 Me. 396; Thompson *v.* Stevens, 10 Me. 27. **N. Y.**—Brownell *v.* Carnley, 3 Duer 9.

Commercial Paper.—Sabel *v.* Planters' Nat. Bank, 110 Ky. 299, 61 S. W. 367 (*citing* with approval, Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858); Neill *v.* Produce Co., 41 W. Va. 37, 23 S. E. 702), it was held that a bank which has discounted a draft with a bill of lading attached is in constructive possession of the property covered by the bill of lading, and such property is not attachable in a suit against the original owners. And see *infra,* XV, and the title "Pledges."

Where cotton is pledged to secure the payment of a loan of money, and delivered to the agent of the creditor, making the advance, who ships it to be sold for the purpose of paying this loan, it is not liable to an attaching creditor in the hands of the consignee who is made garnishee. Deloach *v.* Jones, 18 La. 447.

Waiver of Right of Pledgee.—The one in possession has a right to retain the property until discharged of the lien, but he may waive his right, and if he does, it is no objection in the mouth of the debtor himself. Meeker *v.* Wilson, 1 Gall. 419, 16 Fed. Cas. No. 9,392. To the same effect, see Mower *v.* Stickney, 5 Minn. 397, as to a promissory note pledged as collateral security.

87. Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860.

A surplus resulting to a debtor from the sale of property pledged may be secured by attachment by such creditors as were not provided for. New England Marine Ins. Co. *v.* Chandler, 16 Mass. 275.

As Under a Writ of Execution.—An attachment may be levied upon property pledged by the debtor under statutes which provide that property pledged may be sold under execution, and that an attachment may be levied upon such property as is subject to levy under a writ of execution. Osborn *v.* Koenigheim, 57 Tex. 91.

In Mower *v.* Stickney, 5 Minn. 397, the court said that "the pledgor of personal property has an interest in the pledge equal to its value after discharging the sum for which it is pledged, and we cannot see why that interest is subject to levy and sale upon execution, if the pledgee is willing to surrender the possession;" the decisions showing a contrary doctrine

the lien,[88] upon paying the pledgee the amount of the debt for which the property was pledged,[89] or upon complying with the statutory requirements, if any are prescribed as a condition precedent to the exercise of the right.[90]

6. Property Held on Bailment. — Property held on a bailment may generally be attached as the property of the bailor,[91] but not as the

are generally cases where the pledgee was a party asserting his right to the possession, and were predicated to a great extent upon the old doctrine that the pledgor had but an equitable interest in the pledge.

A statute making the right and interest of a pledgor liable to be sold under an execution against him, even while the goods are still in the possession of the pledgee, does not give a right to a sale of the goods themselves but merely of the interest of the pledgor, and the statute does not authorize an attachment. Brownell *v.* Carnley, 3 Duer (N. Y.) 9.

County Warrants.—The right of the pledgor of county warrants to receive what is left of the proceeds of the warrants after the debt is paid for which the pledge is made, is "a demand, a chose in action, a debt, and the warrants are evidences of such debt," and under New York Code Civ. Proc., §648, is attachable. Thum *v.* Pingree, 21 Utah 348, 61 Pac. 18.

"Property incapable of manual delivery to the sheriff," applies to property which is physically thus incapable of delivery and to that which is under pledge or consignment, with advances made upon the property. Clarke *v.* Goodridge, 41 N. Y. 210.

88. **La.**—Skillman *v.* Bethany, 2 Mart. (N. S.) 104. **Me.**—Sargent *v.* Carr, 12 Me. 396. **Mo.**—Ottumwa Nat. Bank *v.* Totten, 114 Mo. App. 97, 89 S. W. 65; Early & Lane's Appeal, 89 Pa. 411; Fithian *v.* New York, etc., R. Co., 31 Pa. 114; Rhoads *v.* Megonigal, 2 Pa. 39.

After Assignment of Interest by Pledgor.—Where property has been pledged, and the pledgor has duly assigned his interest in the property and the pledgee has waived his lien, the property cannot be attached as the property of the original pledgor. Whitaker *v.* Sumner, 20 Pick. (Mass.) 399.

89. Clark *v.* Dearborn, 103 Mass. 335; National Bank *v.* Winston, 5 Baxt. (Tenn.) 685; Memphis First Nat. Bank *v.* Pettit, 9 Heisk. (Tenn.), 447.

90. When a statute prescribes two modes of attaching property pledged or mortgaged, one, by the summoning the pledgee as the trustee of the debtor, and the other, by first tendering the amount for which the goods stand subject, an attachment is of no avail when neither of these modes is pursued. Pomeroy *v.* Smith, 17 Pick. (Mass.) 85. See also Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

91. United States *v.* Graff, 67 Barb. (N. Y.) 304, holding further as to securities in the possession of a trust company, that the sheriff may properly be directed to open the safe and a tin box in which the property was kept, such receptacles not being within the protection which the law affords to defendants' dwelling.

Money deposited on a bet and in the hands of a stakeholder, betting on elections being prohibited by statute, must be deemed a mere naked deposit, liable to be reclaimed and recovered by each depositor, on demand, and the share of each is subject to attachment for his debts at any time before it is actually paid over. Reynolds *v.* McKinney, 4 Kan. 94, 89 Am. Dec. 602; Jennings *v.* Reynolds, 4 Kan. 110. See further the title "Garnishment."

Without Process of Garnishment.— Under a statute declaring that "an attachment *in the hands of third persons* is a mandate which a creditor obtains from a competent judge, or from the clerk of his court, commanding the seizure of any *property*, credit or right belonging to his debtor, *in whatever hands they may be found*, to satisfy the demands which he intends to bring" it was held that property in the warehouse of third persons can be attached without the process of garnishment, as the process of garnishment is an additional means given the creditor to attach the property, rights

property of the bailee, he having no attachable interest therein.[92]

7. Property Held on Consignment. — As property of consignor. — Until the title to property consigned has become vested in the consignee, it remains that of the consignor and may be attached by his creditor,[93] but the goods cannot be attached as the property of the consignor when the title has become vested in the consignee,[94] or when

or credits of his debtor, by serving interrogatories. Trounstein *v.* Rosenham, 22 La. Ann. 525. See also the title "Garnishment."

92. Strong *v.* Adams, 30 Vt. 221, 73 Am. Dec. 305. See also Anderson *v.* Heile, 23 Ky. L. Rep. 1115, 64 S. W. 849, holding that where the defendant was in possession of race horses as a trainer, and raced them in his name, this did not constitute an estoppel against the owners.

If a bailee has confused the bailor's goods with his own so that those of each cannot be distinguished, the bailor may claim them as against an attaching creditor of the bailee, but if the bailee has not actually confused, but only disposed of, the bailor's goods, even though the bailee had at the time goods of like character of his own, which he intended to put in their place, the bailor could not be regarded as having any title to the goods remaining on hand. Wood *v.* Fales, 24 Pa. 246, 64 Am. Dec. 655.

Indemnity for Surety.—Money deposited by a third person as indemnity in favor of the surety on an appeal bond, is a bailment for a specific purpose, and cannot be attached as the property of the appellant. And the fact that the money was transferred by check to the order of the appellant gave him no title. Guthrie *v.* Waite, 129 Mo. App. 587, 107 S. W. 1110.

93. Dolsen *v.* Brown, 13 La. Ann. 551; Hill *v.* Simpson, 8 La. Ann. 45; Stock *v.* Reynolds, 121 Mich. 356, 80 N. W. 289. See the title "Garnishment." See also *infra*, XV.

As to right of stoppage in transit, see the title "Stoppage in Transitu."

Before Bill of Lading Comes to and Accepted by Consignee.—Lee *v.* Davis, 3 La. 561; Woolsey *v.* Cenas, 1 Mart. (La.) 26; Delop *v.* Windsor, 26 La. Ann. 185; Magown *v.* Davis, 8 La. Ann. 315.

The rights of a consignee, on the goods shipped to him, who has refused to accept the consignment, and who attaches the goods as an ordinary creditor, are subordinate to the rights of an intervenor who has advanced on the goods, and holds as the transferree of the consignor, the bill of lading of the goods. Chopin *v.* Clark, 31 La. Ann. 846.

Shipped to Creditor Without Lien.— Where goods are shipped to a consignee who is a creditor, without privilege, the property in the goods still remains in the consignor, until delivery to the consignee. Wilson *v.* Smith, 12 La. 375.

Distinguishing attachment from garnishment, the court in Santa Fe Pac. R. Co. *v.* Bossut, 10 N. M. 322, 62 Pac. 977, said: "The attorney for plaintiff in error cites a number of cases to the effect that property in the hands of a common carrier is not liable to garnishment when in transit. They do not, however, cite a single case which holds that such property is not liable to attachment. The difference between an attachment of personal property and a garnishment is very great. In the former the property attached is actually taken into the possession of the officer holding the writ and is under his custody and control, while in garnishment proceedings the property is left in the hands of the garnishee. In the case at bar the box of merchandise was attached by the officer, and removed by him." See also the title "Garnishment."

94. Babcock *v.* Malbie, 7 Mart. N. S. (La.) 137; Armour *v.* Cockburn, 4 Mart. N. S. (La.) 667; McNeill *v.* Glass, 1 Mart, N. S. (La.) 261; Urie *v.* Stevens, 2 Rob. (La.) 251.

Goods in the possession of a consignee, who has made advances thereon to the consignor, and in whom the legal title was vested at the time of their arrival, cannot be seized under an attachment as the property of the consignor. Brownell *v.* Carnley, 3 Duer (N. Y.) 9.

A consignee, called in as a gar-

another has credited the shipper with the amount of a bill of lading attached, and the goods are in possession of the carrier.[95]

As Property of Consignee. — In like manner before the title to property consigned has passed to the consignee, he has no interest therein that is the subject of attachment by his creditor.[96]

nishee, has a right to retain the money which he has paid for freight, insurance, etc. Russell *v.* Gale, 4 La. 183.

Without Paying Claim of Consignees. Powell *v.* Aiken, 18 La. 321; Lambeth *v.* Turnbull, 5 Rob. (La.) 264, 39 Am. Dec. 536.

95. Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

In Bank of New Roads *v.* Kentucky Ref. Co., 27 Ky. L. Rep. 645, 85 S. W. 1103, the law of Louisiana was pleaded and proved, "according to which, under the undisputed evidence, the title to the oil vested in the bank. The delivery of the bill of lading was a symbolical delivery of the property which it represented. By the terms of the contract the oil was sold and transferred to the bank, to be disposed of by it at current market prices, the proceeds to be applied to the credit of the overdraft of the oil mill and manufacturing company to the bank. The bank had possession of the oil from the time of the delivery of the bill of lading, and had authority to sell it, and apply the proceeds in a given way. The oil mill and manufacturing company could not take the oil from its possession, or interfere with its sale by it for the purposes set out in the contract. The Kentucky Refining Company, as the attaching creditor of the oil mill and manufacturing company simply acquired by its attachment such rights as the debtor had at the time of the levy of the attachment. The property being in the possession of the bank under the contract, was not subject to be levied on under the attachment. This question was fully considered in Sabel *v.* Planter's National Bank, 110 Ky. 299, 61 S. W. 367, and this case was followed in Temple National Bank *v.* Louisville Cotton Oil Company, 82 S. W. 253, 26 Ky. Law Rep. 518. See also, Monroe *v.* Mattox (Ky.), 85 S. W. 748."

96. Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206.

An attaching creditor of a vendee, acquires no right against a vendor of property in possession of a carrier on a shipment made for cash on delivery and subject to stoppage in transit. Kelly *v.* Deming, 5 Fed. 677.

Consignees who are only agents to receive the goods for a creditor of the consignor, for and on whose account the goods were shipped, have no attachable interest in the goods; the goods were delivered to the carrier as the property of the creditor, and such creditor's right is to be preferred over that of an attaching creditor of the consignor and the intermediate consignee. Grove *v.* Brien, 8 How. (U. S.) 429, 12 L. ed. 1142.

Sale Within Statute of Frauds.— Property was improperly attached while in possession of the railroad company by a creditor of the consignee, because the sale was within the statute of frauds, the value of the goods being over $50, the contract not being in writing and there being no delivery, the goods being charged to the agent who sold them. Winner *v.* Williams, 62 Mich. 363, 28 N. W. 904.

A purchaser of property in transitu, by his omission to take possession or to pay the purchase money, defeats the right of his creditor's attachment as against the vendor's right of stoppage *in transitu* and reclamation of the goods. Clark *v.* Lynch, 4 Daly (N. Y.) 83, the court further saying that the creditor could only make his process available by payment of the purchase money.

Where an insolvent consignee has refused to receive goods, they are in transit, and may be seized by the consignor while they continue *in transitu*; but where an insolvent consignee undertakes to assign the goods, and authorizes a sale thereof for the use of the consignor, they may be attached by a creditor of the consignee. Lane *v.* Jackson, 5 Mass. 157.

8. Property in Possession of Agent or Factors. — As Property of Owner. — Property in the possession of a factor or agent can be attached as the property of the owner,[97] subject, however, to any lien such factor or agent may have for claims or advances.[98]

As Property of Factor or Agent. — The property cannot be reached, however, by such process at the suit of a creditor of the factor or agent,[99] though the property is in possession of the agent for the pur-

97. Wilson *v.* Lizardi, 15 La. 255; Naser *v.* New York First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077.

When property is consigned to the consignee as agent of the consignor it may be attached in the possession of the consignee by a creditor of the consignor. McGregor *v.* Barker, 12 La. Ann. 289; Goodhue *v.* McClarty, 3 La. Ann. 56.

Bonds of Corporation Issued for a Specific Purpose.—Such bonds, secured by mortgage, and delivered to trustees to be turned over to cancel indebtedness cannot be attached by the creditor as the property of the corporation ofter he declines to receive them on the condition on which they were issued and tendered. Alabama Marble, etc., Co. *v.* Chattanooga Marble, etc., Co. (Tenn. Ch.) 37 S. W. 1004.

Bonds so Issued Are Not Property. Coddington *v.* Gilbert, 17 N. Y. 489, *affirming*, 5 Duer 72, where the bonds were deposited with an agent for sale.

98. **A factor who has accepted drafts for his principal,** has a lien on the goods in his hands, which an attaching creditor cannot defeat. Kirkman *v.* Hamilton, 9 Mart. (La.) 297. See also Turpin *v.* Reynolds, 14 La. 473.

The privilege of a consignee, who has made advances on the goods or property in his possession, is superior to that of an attaching creditor. Maxen *v.* Landrum, 21 La. Ann. 366.

Should an intervenor show that he made the advances which he pretends to have done, it will not defeat the attachment of the plaintiff, which will hold the surplus after discharging the prior advances and necessary expenses. Park *v.* Porter, 2 Rob. (La.) 342.

The claim must be for specific advances made on goods and not on a general balance. Gray *v.* Bledsoe, 13 La. 491.

99. **U. S.**—Merrill *v.* Rinker, Baldw. 528, 17 Fed. Cas. No. 9,471. **Mass.**—Holly *v.* Huggeford, 8 Pick. 73, 19 Am. Dec. 303. **Neb.**—National Cordage Co. *v.* Sims, 44 Neb. 148, 62 N. W. 514; Shaughnessey *v.* Lininger, etc., Co., 34 Neb. 747, 52 N. W. 717.

Where the owner of a horse delivered it to another person to trade, and such person traded the horse for another horse and paid a sum in difference, such amount would not constitute a lien upon the horse, and the property could not be attached by a creditor of the agent, as against the owner. Churchill *v.* Bailey, 13 Me. 64.

Special Deposits in Name of Agent. Money deposited by the principal with the agent, with specific directions as to its disposal, cannot be attached by a creditor of the agent, because an attaching creditor cannot acquire through his attachment any greater right than was possessed by the defendant. Anderson *v.* Taylor, 131 Iowa 485, 108 N. W. 1051.

If a debt due from a supposed trustee is due to the creditor as agent, or factor, it is not attachable as his property. Granite Nat. Bank *v.* Neal, 71 Me. 125.

Margins and balances in the hands of brokers, belonging, on an accounting and settlement, to customers in another state, are not attachable. Barry *v.* Fisher, 39 How. Pr. (N. S.) 521, 8 Abb. Pr. (N. Y.) 369.

Property purchased by an agent in his own name cannot be attached by his creditors unless they show that they were ignorant of the real state of affairs, or that they had been induced to contract with the agent on a false basis of credit. Reed *v.* McIlroy, 44 Ark. 346.

Where a father acted as agent for his son in carrying on a business in the son's name, and was to receive half the profits as his compensation, but in fact there were no profits, the property in the business was not attachable as that of the father. Blanchard *v.* Coolidge, 22 Pick. (Mass.) 151.

Conditional Vendee Retaining Pos-

pose of sale on commission,[1] or to manufacture for the use of the principal.[2]

9. **Property Conveyed or Assigned.** — **Interest of Grantor or Assignor.** — One who has disposed of his interest in the property by sale or assignment, and has parted with the possession, has no attachable interest,[3] but in the case of a mere sale and conveyance of land by the absolute owner, without notice, either actual or constructive, or any change of possession, the land is still subject to attachment, by the creditors of the vendor.[4]

session on Re-Sale.—Where a person has sold personal property, possession of which he held under a contract of conditional sale, and retains possession of the property, his possession is that of agent of the new purchaser, and as the conditional vendee has never had any attachable interest in the property, the principle of fraud in law will not apply to his retaining possession on reselling the property. Smith *v.* Foster, 18 Vt. 182.

1. Hampton & B. R. & L. Co. *v.* Sizer, 31 Misc. 499, 64 N. Y. Supp. 553.

The possession of property by one as a general agent, authorized to sell the property for the principal and required to account to him for the proceeds of the sale, does not invest the agent with any title to the property so as to render it liable to be seized on attachment against him and sold for the payment of his debts. Loomis *v.* Barker, 69 Ill. 360.

Interest on a Contingency.—The interest of agents in goods which they are offering for sale, and depending upon the chances of obtaining more than the inventory prices as their commission, is not liable to attachment. Vose *v.* Stickney, 8 Minn. 75.

2. Gallup *v.* Josselyn, 7 Vt. 334.

3. St. Mary's Bank *v.* Morton, 12 Rob. (La.) 409; Slocomb *v.* Real Estate Bank, 2 Rob. (La.) 92; Morrison *v.* New Haven & W. Min. Co., 143 N. C. 250, 55 S. E. 611.

Whether property conveyed was homestead or not at the time of the conveyance is immaterial, and it is not subject to attachment as the property of the grantors when it was conveyed by a husband and wife in good faith and without fraud. Parlin, etc., Co. *v.* Leggett (Tex.), 88 S. W. 408; Parlin, etc., Co. *v.* Vawter, 39 Tex. Civ. App. 520, 88 S. W. 407.

A chose in action, which has been equitably assigned, is not subject to attachment as the property of the assignor. United States *v.* Vaughan, 3 Binn. (Pa.) 394, 5 Am. Dec. 375.

Conveyance by Infant.—An attachment is not available against the property of a minor who on coming of age has not disaffirmed a deed made during minority for a valuable consideration. Kendall *v.* Lawrence, 22 Pick. (Mass.) 540. See also, *infra*, XV.

Failure to Record.—Where a deed has been executed, acknowledged and delivered, and possession of the property taken, prior to the levying of the attachment, neglect to record the deed does not give a creditor of the grantor a right to attach the property, notwithstanding a statute provides that deeds shall take effect, etc., from receipt for record. United States *v.* Howgate, 2 Mackey (D. C.) 408.

Change of Possession Under Contract.—When there has been a change of possession, under a contract to secure the just claims of the transferree upon the property, an attachment cannot be levied upon the property in a suit against the transferror. Howe *v.* Keeler, 27 Conn. 538, in which case mill property had been transferred by a corporation to sales agents to give them an opportunity to run the mill as a going concern.

But a debtor whose property is attached cannot divest himself of it, so as to defeat the rights of the attaching creditor. Bach *v.* Goodrich, 9 Rob. (La.) 391.

4. Adams *v.* Day, 14 La. 503; Shultz *v.* Morgan, 27 La. Ann. 616; Hart *v.* Farmers', etc., Bank, 33 Vt. 252.

Conveyance by husband to wife of an undivided two-thirds of land and goods, without any change of posses-

Property Assigned for the Benefit of Creditors. — The right to attach property conveyed to an assignee for the benefit of the creditors of the assignor, will be found treated in another part of this work.[5]

10. Property Mortgaged. — a. *Mortgage of Real Property.* — **(I.) Interest of Mortgagor.** — As a general rule the interest of the mortgagor under a mortgage of real estate may be attached,[6] and as has been said in one case this is so although such an interest is not subject to a *fieri facias* on ordinary or common law judgments because not tangible.[7] It follows, of course, that the interest of the mortgagor may be attached after the mortgage has ceased to exist.[8]

(II.) Interest of Mortgagee. — But it is generally held that the in-

sion of any of the property or in the management thereof, will not prevent attachment by his creditor. Hammond *v.* Borgewardt, 126 Cal. 611, 59 Pac. 121.

Where property was conveyed to a wife through a third person, by deeds from the husband to such third person and from him to the wife simultaneously filed for record, but the deed to the wife is temporarily withdrawn for correction, a creditor of such third person has not in the meantime an attachable interest, when the wife went into possession on the execution of the deed, and such third person never had possession, and the creditor has knowledge of all the facts and circumstances. Jorgenson *v.* Minneapolis Thresh. Mach. Co., 64 Minn. 489, 67 N. W. 364.

Land purchased by husband and conveyed to wife cannot be saved from attachment at suit of husband's creditor by the fact that many years before she had advanced him money, and that she had given him her earnings to use in his business. Leathwhite *v.* Bennet (N. J. Eq.), 11 Atl 29.

Where title to land has been taken in the name of the wife of the purchaser, a creditor of the purchaser who has relied upon his financial integrity, cannot be defeated in his right to attach the land as the property of the husband by the consideration that his wife advanced him money many years before. Leathwhite *v.* Bennet (N. J. Eq.), 11 Atl. 29.

5. See the title "Assignment for the Benefit of Creditors."

6. When mortgaged real estate is attached, and the attaching creditor demands an account, on oath, of the mortgagee, of the amount due upon his mortgage, and no acount is rendered within fifteen days, or a false one is rendered, the effect of such failure to render a true account is to discharge the mortgage, as against the attachment of that creditor who made the demand for an account; but when there are several attaching creditors of the same mortgaged real estate, the mortgage remains in full force against all other attaching creditors except such as have thus made a demand for an account. Kimball *v.* Morrison, 40 N. H. 117.

Attachment by Mortgagee Lien. — The levy of an attachment by the mortgagee on the mortgaged property is a waiver of the mortgage lien. Cox *v.* Harris, 64 Ark. 213, 41 S. W. 426.

The interest of a mortgagor under a deed absolute in form, though in reality a mortgage, may be attached. Smith *v.* Kennedy, 18 Ky. L. Rep. 272, 36 S. W. 18.

A deed absolute in form, made to secure an indebtedness, does not convey the legal title of the land, and the interest of the grantor is subject to attachment as that of a mortgagor. Security Sav., etc., Co. *v.* Lowenberg, 38 Ore. 159, 62 Pac. 647. See also Macauley *v.* Smith, 132 N. Y. 524, 30 N. E. 997, *reversing* 57 Hun 585, 10 N. Y. Supp. 578.

7. Ford *v.* Philpot, 5 Har. & J. (Md.) 312.

8. **After a mortgage has ceased to exist** by a release by the mortgagee an attachment becomes a lien upon the property. Quinebaug Bank *v.* French, 17 Conn. 129.

terest of a mortgagee of land, cannot be attached,[9] even after entry and before foreclosure.[10]

Interest of Purchaser at Foreclosure Proceedings. — It has been held that where the mortgage has been foreclosed in the attachment proceedings, and the land has been purchased under these proceedings, the purchaser holds it discharged of the mortgage.[11]

b. *Chattel Mortgages.* — **(I.) Interest of Mortgagor.** — By reason of the common law rule that equitable interests are not attachable,[12] it is held that the interest of the mortgagor of personal property is not subject to attachment;[13] the interest of a mortgagor in mortgaged personal property may be attached only when authorized by statute,[14] and even then only under the conditions, if any, prescribed by stat-

9. **Conn.**—Pettus *v.* Gault, 81 Conn. 415, 71 Atl. 509. **Me.**—Fletcher *v.* Tuttle, 97 Me. 491, 54 Atl. 1110; Brown *v.* Bates, 55 Me. 520, 92 Am. Dec. 613; Thornton *v.* Wood, 42 Me. 282; McLaughlin *v.* Shepherd, 32 Me. 143, 52 Am. Dec. 646; Lincoln *v.* White, 30 Me. 291; Bullard *v.* Hinckley, 5 Me. 272. **Mass.**—Jones *v.* Mitchell, 158 Mass. 385, 33 N. E. 609; Clark *v.* Watson, 141 Mass. 248, 5 N. E. 298; Marsh *v.* Austin, 1 Allen 235; Portland Bank *v.* Hall, 13 Mass. 207. **Mich.**—Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792. **Vt.**—Barrett *v.* Sargeant, 18 Vt. 365.

A mortgage being a mere security, the mortgagee has no attachable interest in the premises. McGurren *v.* Garrity, 68 Cal. 566, 9 Pac. 839.

10. Smith *v.* People's Bank, 24 Me. 185; Eaton *v.* Whiting, 3 Pick. (Mass.) 484. But *compare* Hooton *v.* Grout, Quincy (Mass.) 343; Symes *v.* Hill, Quincy (Mass.) 318.

In Courtney *v* Carr, 6 Iowa 238, the court said "and we are not aware that it has been held in any state, that such lien, as an interest or right in the land, was subject to attachment, until, at least, there was, as practiced in some states, an entry to foreclose."

11. Sharts *v.* Awalt, 73 Ind. 304.

12. See *supra*, VI, C, 9.

13. In Jennings *v.* McIlroy, 42 Ark. 236, 48 Am. Rep. 61, the court said that at common law equitable interests in personalty were not liable to be taken in execution at law. By a mortgage of personal property the title passes, and the mortgagor has only the equitable right to reclaim it on payment, and that "even in those states which have adopted the equitable idea of property in the mortgagor, and held equities of redemption in chattels subject to execution, the doctrine does not seem to have been carried further than to hold that, where the mortgagor himself has the right of possession *for a definite time*, as, for instance, till default, that the right of possession, to that extent, is the subject of levy and sale."

14. **In the absence of statutes,** a mortgagor's interest cannot be attached. Lamb *v.* Johnson, 10 Cush. (Mass.) 126; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202. *Compare* Gale *v.* Ward, 14 Mass. 352, 7 Am. Dec. 223.

In Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202, the court, doubting whether a creditor may first remove the incumbrance, and then lay an attachment on the property, said: "But until payment, or tender of payment, of the money due to the mortgagee, or pawnee of goods and chattels, it is very clear that the creditor of the mortgagor or pawner has no remedy against them by attachment and execution."

Personal property covered by a chattel mortgage is subject to be taken on attachment against the mortgagor, under a statute which subjects such property to execution, a further statute providing that a writ of attachment shall command the sheriff to attach certain property not exempt from execution. King *v.* Hubbell, 42 Mich. 597, 4 N. W. 440.

But if the mortgagee does not complain, an attachment of mortgaged personal property as against the mortgagor is not invalid. Clement *v.* Little, 42

ute.[15] In such case the attachment will be subject to the prior lien

N. H. 563; Hill *v.* Wiggin, 31 N. H. 292.

If the mortgage is not recorded but has been left with the clerk, to be recorded at some future period the mortgagee not having taken possession, it has been held that an attachment may be levied. Town *v.* Griffith, 17 N. H. 165.

In South Carolina the mortgagee of a chattel is the legal owner, and attachment cannot be levied upon it for a debt of the mortgagor. Simonds *v.* Pearce, 31 Fed. 137, *citing* Levi *v.* Legg, 23 S. C. 282.

When Interest Merely Nominal.— A mortgagor whose interest in the property mortgaged is merely nominal, has no attachable interest. Spring *v.* Baker, 8 Allen (Mass.) 267.

15. **On first paying or tendering payment** of the debt secured by the mortgage. Welch *v.* Whittemore, 25 Me. 86.

Under the Iowa statutes, when a creditor of a mortgagor seeks to subject his interest in the mortgaged property to the payment of his debts, he may proceed by garnishment, or under the statute authorizing an attachment upon tendering the debt or making deposit to pay the mortgage; but if the validity of the mortgage is questioned, he may make his levy or garnishment, and then proceed, by the mode recognized in the practice, to cancel the mortgage, and have his levy established as a lien upon the property, without complying with the requirements of that statute. Clark *v.* Patton, 92 Iowa 247, 60 N. W. 533, *citing* Citizens' State Bank *v.* Council Bluffs Fuel Co., 89 Iowa 618, 57 N. W. 444; Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20.

In Massachusetts, statutes prescribe different methods of attaching the mortgagor's interest in the property, and unless such statutory methods are pursued, that interest cannot be reached on mesne process. Jenness *v.* Shrieves, 188 Mass. 70, 74 N. E. 312; Allen *v.* Wright, 134 Mass. 347.

When the mortgagee makes a proper demand, the mortgagor must pay or tender the money due, and failure to pay vacates the attachment. Woodward *v.* Ham, 140 Mass. 154, 2 N. E. 702. See also Degnan *v.* Farr, 126 Mass. 297; Robinson *v.* Sprague, 125 Mass. 582; Bicknell *v.* Cleverly, 125 Mass. 164; Folsom *v.* Clemence, 111 Mass. 273; Bradford *v.* French, 110 Mass. 365; Crosby *v.* Baker, 6 Allen (Mass.) 295; Hills *v.* Farrington, 6 Allen (Mass.) 80; Hills *v.* Farrington, 3 Allen (Mass.) 427; Macomber *v.* Baker, 3 Allen (Mass.) 241; Howe *v.* Bartlett, 1 Allen (Mass.) 29; Rhode Island Cent. Bank *v.* Danforth, 14 Gray (Mass.) 123; Brewster *v.* Bailey, 10 Gray (Mass.) 37; Gassett *v.* Sanborn, 8 Gray (Mass.) 218; Molineux *v.* Coburn, 6 Gray (Mass.) 124; Averill *v.* Irish, 1 Gray (Mass.) 254; Pettis *v.* Kellogg, 7 Cush. (Mass.) 456; Witham *v.* Butterfield, 6 Cush. (Mass.) 217; Jones *v.* Richardson, 10 Met. (Mass.) 481; Rowley *v.* Rice, 10 Met. (Mass.) 7; Simonds *v.* Parker, 3 Met. (Mass.) 144; Tapley *v.* Butterfield, 1 Met. (Mass.) 515, 35 Am. Dec. 374; Legate *v.* Potter, 1 Met. (Mass.) 325; Housatonic Bank *v.* Martin 1 Met. (Mass.) 294; Moriarty *v.* Lovejoy, 23 Pick. (Mass.) 321.

On attachment by trustee process, a demand by the mortgagee is not required. Putnam *v.* Cushing, 10 Gray (Mass.) 334.

When mortgaged personal property is attached, and the officer who makes the attachment makes a demand of the mortgagee for an account, in his own name and in his official capacity, and no account is rendered within fifteen days, or a false one is rendered, then he may hold such property discharged from such mortgage, and it may again be attached and held as against such mortgage by such officer, at any time before or after the expiration of the fifteen days, so long as such officer holds the property in his actual custody by virtue of the attachment under which said demand was made; and no other or further demand for an account need be made by such officer while thus holding the property, in case of such subsequent attachment. Kimball *v.* Morrison, 40 N. H. 117.

Under a Vermont statute, providing that if the mortgagee resides in the state, he shall render an account within fifteen days after demand, and that in default thereof the property may be held and sold by the attaching creditor discharged from the mortgage,

of the mortgagee in and to the property which has been attached.[16]

When in Possession of Mortgagor.— But if the mortgagor has the right to remain in possession until default, he has an attachable interest in the mortgaged property,[17] or, as the rule has been also stated, when there is a definite and determined right of possession, such interest may be attached, but the possession of the mortgagor during the pleasure of the mortgagee will not suffice.[18]

After default, though the mortgagor may remain in possession of the chattels, he has not such an interest as is subject to be levied on

a demand for an account forthwith is not a demand under the statute, and a noncompliance by the mortagee works him no legal harm. Green *v.* Kelley, 64 Vt. 309, 24 Atl. 133.

16. **Kan.**—Myers *v.* Cole, 32 Kan. 138, 4 Pac. 169. **Me.**—Sawyer *v.* Mason, 19 Me. 49. **Tex.**—Lapowski *v.* Taylor, 13 Tex. Civ. App. 624, 35 S. W. 934.

A purchaser at the attachment sale must satisfy the mortgage. Hixon v. Hubbell, 4 Okla. 224, 44 Pac. 222.

17. **Mo.**—Pollock *v.* Douglas, 56 Mo. App. 487. **N. Y.**—Hall v. Sampson, 23 How. Pr. 84, under a statute as to "all other property." **R. I.**—Good v. Rogers, 19 R. I. 1, 31 Atl. 264.

Not as Against Rights of Mortgagee. Fahy v. Gordon, 133 Mo. 414, 34 S. W. 881. See also *infra,* XV.

If nothing is done to place the property beyond reach of the mortgagee to prevent him from taking possession of it when his right of possession accrues, he is not injured and has no just ground of complaint. Locke *v.* Schreck, 54 Neb. 472, 74 N. W. 970.

Against Non-Resident Mortagee.— Under a statute providing that "personal property of a debtor subject to a mortgage, and being in possession of the mortgagor, may be attached in the same manner as if it was unencumbered; and the mortgagee or his assigns may be summoned in the same action in which the property is attached, as the trustee of the mortgagor," an attachment cannot be levied upon mortgaged property when the mortgagee is a non-resident and has no place of business in the state, as such a mortgagee is not subject to the rules of law which regulates the trustee process. Allen *v.* Wright, 134 Mass. 347.

As against the mortgagee of a vessel, whose mortgage has been recorded under the registration laws of the United States, an attachment under state laws is invalid and this though a state statute authorizes attachment of personal property in the possession of the mortgagor. Howe *v.* Tefft, 15 R. I. 477, 8 Atl. 707, *citing* Aldrich *v.* Aetna Co., 8 Wall. (U. S.) 691, 19 L. ed. 473.

18. Merchants' Nat. Bank *v.* Abernathy, 32 Mo. App. 211; Sams *v.* Armstrong, 8 Mo. App. 573. To the same effect, see Eggleston *v.* Mundy, 4 Mich. 295; Tannahill *v.* Tuttle, 3 Mich. 104, 61 Am. Dec. 480; Blauvelt *v.* Fechtman, 48 N. J. L. 430, 8 Atl. 728 (under a mortgage providing that until default the mortgagor was to remain in quiet and peaceable possession, and full and free enjoyment of the same).

The same rule had been followed in Peckinbaugh *v.* Quillin, 12 Neb. 586, 12 N. W. 104, but this was subsequently overruled in Burnham *v.* Doolittle, 14 Neb. 214, 15 N. M. 606, under a statute construed as authorizing an attachment to issue at any time while the property is in possession of the mortgagor.

If the mortgagor retains possession by an understanding with the mortgagee that he may use the property by sale to pay other debts as well as that to the mortgagee, it is a conveyance to his own use and fraudulent, and attachment will lie. Liberal Bank *v.* Anderson, 100 Mo. App. 567, 75 S. W. 189.

And the fact that the mortgagee permitted the mortgagor to retain possession of the mortgaged property, to sell the same in the usual course of business, and to apply the proceeds to his own use, renders the mortgage void as to creditors and purchasers. Bagley *v.* Harmon, 91 Mo. App. 22.

by attachment[19] unless a statute specifically authorizes, or can be construed so to authorize, the use of the process at any time while the property is in his possession.[20]

When in Possession of Mortgagee. — Though it has been held that mortgaged personal property in possession of the mortgagee may be levied on by attachment against the mortgagor subject to the right of the mortgagee to have the mortgaged property subjected to the amount due him,[21] it is a general rule that such property is not subject to attachment by creditors of the mortgagor when the property is in possession of the mortgagee[22] or even when the mortgagee has the right

19. Norris *v.* Sowles, 57 Vt. 360, wherein the court said that if the creditors of the mortgagor attach the chattel mortgaged, such creditors take only the interest of the mortgagor in the chattel, and hold it exposed to forfeiture for breach of condition by the mortgagor.

Under a statute which provides that "Personal estate when mortgaged and in the possession of the mortgagor, and while the same is redeemable, may be attached on mesne process or execution against the mortgagor in the same manner as his other personal estate," and further providing that the mortgagor may redeem within sixty days after condition broken, an attachment will not lie after sixty days have expired, though the property remain in possession of the mortgagor. Earle *v.* Anthony, 1 R. I. 307.

Although only a portion of the demand secured is due and unpaid at the time of the levy of the attachment, and the property conveyed greatly exceeds in value the sum due, there is no right to attach. Thompson *v.* Thornton, 21 Ala. 808.

20. Burnham *v.* Doolittle, 14 Neb. 214, 15 N. M. 606 (under a statute requiring the officer to levy upon "the goods, chattels, rights, and credits of the said judgment debtor in his, its, or their possession or control"), *overruling* Peckinbaugh *v.* Quillin, 12 Neb. 586, 12 N. W. 104, which held that where by violating a condition the mortgagor had forfeited his right to possession and given the mortgagee right to immediate possession, the former had no attachable interest. See also Carty *v.* Fenstemaker, 14 Ohio St. 457; Curd *v.* Wunder, 5 Ohio St. 92, where it was also so held under a similar Ohio statute.

21. Hyde *v.* Shank, 77 Mich. 517, 43 N. W. 890; Walker *v.* White, 60 Mich. 427, 27 N. W. 554; Barber *v.* Smith, 41 Mich. 138, 1 N. M. 992; Bacon *v.* Kimmel, 14 Mich. 201.

A levy on property held by the sheriff as trustee under a chattel mortgage executed to him by the defendant in the attachment suit to secure certain creditors is not void, and cannot be collaterally attacked. Deware *v.* Wichita Valley Mill, etc., Co., 17 Tex. Civ. App. 394, 43 S. W. 1047.

22. Giffert *v.* Wilson, 18 Ill. App. 214.

Property in the hands of a trustee is not subject to the levy of a writ of attachment by seizure. Pittman *v.* Rotan Grocery Co., 15 Tex. Civ. App. 676, 39 S. W. 1108.

The property cannot be taken out of the possession of the mortgagee. Moore *v.* Murdock, 26 Cal. 514; Quiriaque *v.* Dennis, 24 Cal. 154; Poundstone *v.* Holt, 5 Colo. App. 66, 37 Pac. 35.

Right to Discharge of Attachment.— A mortgagee in possession of the goods at the time of the levy may move for a discharge of the property. Symns Grocer Co. *v.* Lee, 9 Kan. App. 574, 58 Pac. 237.

Remedy by Garnishment.—In Blue Valley Bank *v.* Clement (Neb.), 26 N. W. 583, the court said that a chattel mortgage, if valid, which authorizes the mortgagee, upon default, to take possession of the property, and retain possession of the same until the lien is satisfied, certainly gives the mortgagee a right to retain the possession as against a lien subsequently acquired. In other words, if the property when attached is subject to a lien *bona fide* placed upon it by the debtor, the lien must be respected and the attachment postponed to it, and that the remedy of the creditor of the mortgagor

of possession,[23] and it follows *a fortiori,* that such property is not subject to attachment after the mortgagor has defaulted in payment.[24]

(II.) Interest of Mortgagee. — In the absence of statutory provision, the interest of a mortgagee in personal property while the mortgagor remains in possession, having also an interest therein, is not the subject of levy by direct seizure, under attachment,[25] even after breach of condition, but before foreclosure.[26]

11. Leasehold Interest. — a. *In General.* — It is held in some cases that a leasehold interest in land, or a chattel real, may be attached.[27]

is by garnishment, the statute providing for such process when "the officer is unable to come at such property."

The remedy is by garnishment to reach any surplus that may remain in hands of mortgagee after satisfaction of his interest. Moore *v.* Calvert, 8 Okla. 358, 58 Pac. 627. See the title "Garnishment."

23. Wells *v.* Sabelowitz, 68 Iowa 238, 26 N. W. 127, wherein the court said that statutes have made no provision under which the interest of the mortgagor can be appropriated in satisfaction of his debts by judicial sale.

Increase of Property Mortgaged.— As against the mortgagee, suckling colts which have been foaled since the mortgage was executed, cannot be attached in a suit against the mortgagor, when the mortgage gave the mortgagee the right to take the mortgaged property whenever he should choose to do so. Rogers *v.* Highland, 69 Iowa 504, 29 N. W. 429, 58 Am. Rep. 230.

24. Woodson *v.* Carson, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197.

25. **Me.**—Morton's Admr. *v.* Hodgdon, 32 Me. 127. **Mass.**—Murphy *v.* Galloupe, 143 Mass. 123, 8 N. E. 894. **N. C.**—Bowen *v.* King, 146 N. C. 385, 59 S. E. 1044, in which the court said that the right of the mortgagee in the property, on the facts presented, was simply that of a creditor, and his interest as creditor could only be levied on as directed by provisions of Revisal §767, to be collected and applied under the direction and supervision of the court. **Tex.**—Adoue *v.* Jemison & Co., 65 Tex. 680.

The mortgagee of a tenant in common of a vessel has a beneficial and available interest, and when all the parties concerned are before the court, the creditors of the mortgagee might be substituted in his place and be entitled to a foreclosure and sale of the interest of the mortgagor as far as the mortgagee might have had that right. Lyon *v.* Johnson, 3 Dana (Ky.) 544.

The fact that a mortgagee is in possession after the maturity of his debt, does not amount to a forfeiture so that the legal title to the property vests in him, and an attachment cannot be levied on his interest. Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931, wherein the court said, as to the vesting of the legal title, that the contrary is perhaps the general rule, but it does not prevail in that state.

26. Meadow *v.* Wise, 41 Ark. 285; Prout *v.* Root, 116 Mass. 410.

But in Connersville Buggy Co. *v.* Lowry, 104 Mo. App. 186, 77 S. W. 771, it was held that on an attachment against a mortgagee, when the debt is due and unpaid, the mortgagor has not the right to the immediate and exclusive possession as against the attaching creditor.

27. Shelton *v.* Codman, 3 Cush. (Mass.) 318. See the title "Landlord and Tenant."

When Capable of Being Taken on Execution at Law.—Any interest in a leasehold estate, which can be taken by a creditor in satisfaction of his debt, is a legal estate which can be attached in an action at law against him, and, if judgment is obtained, execution may be levied upon it. Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860.

A lease for 999 years is to be considered as fee simple for purposes of execution, and an attachment may be

b. *Interest of Lessor.* — A landlord's interest in a lease may be attached,[28] especially when this is expressly authorized by statute.[29]

c. *Interest of Lessee.* — Interest of a lessee of land is not attachable under a statute authorizing the attachment of the "effects" of a debtor,[30] nor under a statute providing that a tenant cannot sublet the leased premises without the landlord's consent,[31] unless the landlord waives the prohibition against subletting.[32] Nor can the interest of the lessee under a void lease be attached.[33]

Of Chattels. — It has been held that the interest of a lessee of chat-

levied thereon. Mun *v.* Carrington, 2 Root (Conn.) 15.

All estates in lands and tenements of a longer duration than one year, are real estate, and should be attached as such, under a statute requiring public notice to be given to create a valid lien on real estate. Mayhew *v.* Hathaway, 5 R. I. 283.

28. **Growing crops are personal property,** and where land has been rented for a share in the crops, the interest of the landlord in the growing crops is liable to attachment. Sims *v.* Jones, 54 Neb. 769, 75 N. W. 150, 69 Am. St. Rep. 749.

The landlord ordinarily has an interest in the crop, and not a mere lien thereon, and such interest is attachable. Rentfrow *v.* Lancaster, 10 Tex. Civ. App. 321, 31 S. W. 229.

By Garnishment of Tenant.—When land is rented on shares, the tenant is the exclusive owner of the crop while growing, and the landlord has no control over it, nor title to the part of the crops reserved as rent, until it is set apart to him. The landlord's interest is not subject to an actual levy by attachment, and the only way it can be attached is by the garnishment of the tenants. Howard County *v.* Kyte, 69 Iowa 307, 28 N. W. 609. See the titles "Landlord and Tenant," and "Garnishment."

No lien upon rents is acquired by the filing of a lis pendens against the real estate; all that could be sold under an execution issued upon a judgment in an action where real estate had been attached, would be the right, title and interest of the judgment debtor in the real estate at the time of filing the *lis pendens.* Columbia Bank *v.* Ingersoll, 21 Abb. N. C. 241, 1 N. Y. Supp. 54.

A landlord's lien for rent and advances is not such a title or interest as can be levied upon under attachment. Starnes *v.* Allen, 58 Ala. 316.

29. And where a statute authorizes the reversionary interest of a lessor in personal property in possession of the lessee, this can be done only in the manner authorized by statute, and the property cannot be taken from the possession of the lessee. Brigham *v.* Avery, 48 Vt. 602; Stanley *v.* Robbins, 36 Vt. 422; Smith *v.* Niles, 20 Vt. 315, 49 Am. Dec. 782.

30. Birmingham First Nat. Bank *v.* Consolidated Elec. L. Co., 97 Ala. 465, 12 So. 71, wherein the court said: "The term 'effects' must be construed to mean property of the same general nature as 'goods' and 'furniture' which precede. A chattel real, such as a leasehold interest in lands, though personal property, has different attributes from those of other chattels."

31. Mexican Nat. Coal etc. Co. *v.* Frank, 154 Fed. 217 (a Texas statute); Boone *v.* First Nat. Bank, 17 Tex. Civ. App. 365, 43 S. W. 594.

32. **Where a landlord has executed a written waiver** of a stipulation prohibiting subrenting, a creditor of the lessee may attach the leasehold estate as his property, though the lessee had no knowledge of the existence of the waiver until after the attachment was levied. Copeland *v.* Cooper Groc. Co. (Tex. Civ. App.), 63 S. W. 886. *Compare* Boone *v.* First Nat. Bank, 17 Tex. Civ. App. 365, 43 S. W. 594.

33. **Void Lease From Widow.**— Where a widow leased land of the intestate before the appointment of an administrator, the lease was void, and creditors of the lessee cannot attach the increase in the stock and produce of the land as against the rights of the administrator and the heirs. Foster *v.* Gorton, 5 Pick. (Mass.) 185.

tels is liable to attachment,[34] unless the title is retained by the lessor,[35] or the leasing is for a specified purpose.[36]

The interest of the tenant in the crops grown upon the premises is subject to attachment, to the extent of such interest.[37]

12. Joint and Several Interests. — a. *Interests of Joint Debtors.* By statute in some jurisdictions, the estate of joint debtors is made subject to attachment.[38]

34. Wheeler *v.* Train, 3 Pick. (Mass.) 255.

35. **Stock Leased on Shares or for Increase.** — Where personal property, (sheep) was leased on an agreement to share the proceeds, and it was stipulated that the property with the proceeds and increase should be the property of the lessor, the interest of the lessee cannot be attached. Tuohy *v.* Wingfield, 52 Cal. 319.

36. Where cattle were delivered to graze and prepare for market under an agreement that the feeder should have the profit over their then value and interest, a creditor might have levied an attachment on the interest of the grazer while the cattle were in his possession, but after possession had been surrendered to the owner, the grazer ceased to have rights of property in specie and the cattle could not be attached as his property. Megee *v.* Beirne, 39 Pa. 50.

Property Hired for Limited Time and Purpose.—The interest of a person in property hired for a definite time at a rental of a certain sum per month, the contract of hiring providing that it was to be used only for a certain purpose and prohibiting a sale or loan, is not subject to attachment. Reinmiller *v.* Skidmore, 7 Lans. (N. Y.) 161.

37. Where an agreement was that the future crops should be subject to be taken by the lessor for the payment of rent that might be in arrear, the crops are subject to attachment against the lessee when the lessor has not entered upon the premises and taken possession of the produce. Butterfield *v.* Baker, 5 Pick. (Mass.) 522.

But a creditor of the tenant cannot seize the whole crop by attachment, and dispose of the same regardless of the landlord's claims for rent. Atkins *v.* Womeldorf, 53 Iowa 150, 4 N. W. 905.

The crops cannot be levied on at the suit of a creditor of the lessee when under the lease the title to the crops is vested in the lessor. Whitcomb *v.* Tower, 12 Met. (Mass.) 487; Lewis *v.* Lyman, 22 Pick. (Mass.) 437; Smith *v.* Meech, 26 Vt. 233; Paris *v.* Vail, 18 Vt. 277.

Until Settlement of Accounts Between Landlord and Tenant.—Where the landlord and tenant expressly contract that the crops raised are to be and remain the property of the landlord until rent and advances are paid, the tenant has no attachable interest until there has been a settlement of the accounts between them. Howell *v.* Foster, 65 Cal. 169, 3 Pac. 647.

Attachable Subject to Lien.—Though a landlord may have a lien on the crop raised by a tenant, a creditor of the tenant may attach the crop subject to the lien of the landlord. Upham *v.* Dodd, 24 Ark. 545.

When a lease stipulates that a certain part of the crop should be used on the farm, such property cannot be attached as the property of the tenant. Coe *v.* Wilson, 46 Me. 314. To the same effect, see Potter *v.* Cunningham, 34 Me. 192.

Lease for Part of Crop.—Where a lease provided for the taking by the lessee of a part of the crop as his compensation, the crop is not subject to attachment in a suit against the lessee. Chandler *v.* Thurston, 10 Pick. (Mass.) 205.

38. **Under Sec. 3 of the Attachment Act of New Jersey** (P. L. 1901, p. 159), which permits attachments to issue against the separate and joint estates of joint debtors, or any of them, and which further provides that the estate so attached, whether separate or joint, may be sold or assigned for the payment of a joint debt, it has been held that an attachment may be issued against one of several joint debtors, but only in a case where all such joint debtors are

b. *Interests of Tenants in Common.* — In Personalty. — It is generally held that the undivided interest of a tenant in common of goods may be attached,[39] though the goods are in possession of another co-tenant,[40] without making the co-tenants parties.[41] But while the officer may take the entire property into his possession,[42] he cannot sell the interest of one tenant in common for the debt of another.[43] And so, as to land owned by tenants in common, the interest of one co-tenant may be attached,[44] even while the property is involved in

non-residents. Bray *v.* General Engineering Co., 75 N. J. Eq. 443, 78 Atl. 563, *following* Corbet *v.* Corbet, 50 N. J. L. 363, 13 Atl. 178; Thayer *v.* Treat, 39 N. J. L. 150.

It has been held under statutory authority that where in an action against joint debtors, the court has acquired jurisdiction by the service of the summons upon one of the defendants, the property of any other defendant, who is a non-resident, may be attached. ———*v.*———, 1 Duer (N. Y.) 662, but the separate estate of a joint debtor cannot be attached under a writ issued against the joint estate only. Feidler *v.* Blow, 1 Ohio Dec. (Reprint) 245, 5 West. L. J. 405; Winchester, Irvin & Co. *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 132.

39. **Conn.**—Remmington *v.* Cary, 10 Conn. 44. **Mass.**—Reed *v.* Howard, 2 Met. 36. **Mo.**—Wigley *v.* Beauchamp, 51 Mo. 544. **Ore.**—Beezley *v.* Crossen, 14 Ore. 473, 13 Pac. 306. **Vt.**—Frost *v.* Kellogg, 23 Vt. 308; Ladd *v.* Hill, 4 Vt. 164.

In Boylston *v.* Davis, 68 N. C. 17, 12 Am. Rep. 624, it was held that where property was saved from a wreck under a contract that the salvor should receive a certain part as compensation, the interest of the parties became that of tenants in common as soon as the property was brought to the beach, and was attachable in a suit against the salvor.

Joint Tenants of Timber.—Schamagel *v.* Whitehurst, 103 Ala. 260, 15 So. 611.

The interest of a person in a ship owned by him, as tenant in common with others, is liable to attachment. Buddington *v.* Stewart, 14 Conn. 404, wherein the court said: "If the interest of one joint owner of a ship is attached, and the other owners are desirous of sending her upon a voyage, we see no difficulty in compelling them to give security for the lien acquired by the attachment, as well as for any other interest."

40. Mersereau *v.* Norton, 15 Johns. (N. Y.) 179.

41. Curry *v.* Haley, 15 W. Va. 867.

42. When the interest of a defendant in attachment of personal property is that of a tenant in common, the sheriff is not guilty of a conversion of the share of the other by taking the entire property into his possession. Veach *v.* Adams, 51 Cal. 609.

But where personal property is in its nature severable, in common bulk, and of the same quality, the interest of one tenant in common cannot, it has been held, be seized on an attachment against his co-tenant. Tripp *v.* Riley, 15 Barb. (N. Y.) 333.

When a person is the owner of an individual portion of lands, holden in common, which portion is severed and set out, to be holden in severalty by a legal process and proceedings, his title adhers to and follows the estate and becomes limited by it, and an attachment of such person's estate cannot be levied upon the other undivided portion. Argyle *v.* Dwinel, 29 Me. 29; Newton *v.* Howe, 29 Wis. 531, 9 Am. Rep. 616.

43. **Sharing in Crops.**—If tenants in common work a farm on shares, one living on the farm and the other furnishing a hired man, the part of the crops to which the latter is entitled cannot be attached in a suit against the other. Hawkins *v.* Hewitt, 56 Vt. 430.

44. Shipp *v.* Gibbs, 88 Ga. 184, 14 S. E. 196; Curry *v.* Hale, 15 W. Va. 867.

Previous Unregistered Deeds of Release.—There may be a valid attachment of the undivided interest of a tenant in common, notwithstanding a previous division among the tenants by deeds of release, when the deeds had not been recorded previous to the attachment. McMechan *v.* Griffing, 9 Pick. (Mass.) 537.

a partition suit and the consent of the court not first obtained.[45]

c. *Interests of Coparceners.* — By reason of the doctrine of survivorship incident to such estates, estates in coparcenary cannot be taken under an attachment.[46]

d. *Partnership Property.* — The right to attach partnership property and the property owned by partners individually, will be found fully treated in another part of this work.[47]

VII. CAUSES OF ACTION IN WHICH ATTACHMENTS MAY BE HAD. — A. In General. — As the remedy by attachment is strictly statutory, an attachment can be had and issued only in a cause provided for by statute,[48] and in a pending suit.[49]

Attachment cannot issue after a judgment has been rendered.[50]

B. On Consolidation of Causes. — Separate and distinct claims held by several creditors cannot be united in one suit.[51] But it has been held that an attachment on a debt not due may be joined with one on a debt that is due.[52] If, however, the plaintiff procures one attachment

45. Price *v.* Taylor, 110 Ky. 589, 62 S. W. 270.

A partition, made after an attachment has been issued, without notice to the attachment plaintiff, is not binding upon him, and he has the right to treat the estate as an estate in common at the time of the levy. Munroe *v.* Luke, 19 Pick. (Mass.) 39. See also McMechan *v.* Griffing, 9 Pick. (Mass.) 537.

The levy of an attachment by metes and bounds, upon the interest of a tenant in common, instead of upon the undivided share, can be objected to only by the co-tenants before partition, and when it has not been avoided by them, the lien of such an attachment supersedes all subsequent conveyances and attachments. Brown *v.* Bailey, 1 Met. (Mass.) 254.

46. Where a husband and wife hold under a deed executed to them jointly, and an attachment has been levied upon the property by a creditor of the husband, on the death of the husband the wife is entitled to the whole tract by right of survivorship, and the attachment is dissolved. Brownson *v.* Hull, 16 Vt. 309, 42 Am. Dec. 517.

47. See the title "Partnership."

48. **Money Demands.**—Le Baron *v.* James, 4 Ala. 687, holding that the ancillary process is warranted only in the actions which could be commenced by original attachment. See *infra*, VII, K.

On a Common Law Right.—West *v.* People, 3 Ill. App. 377. See United States *v.* Stevenson, 1 Abb. N. S. 495, 21 Fed. Cas. No. 16,395.

Subject to collateral attack as being void for having been issued on a cause of action not provided for by statute. Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

To Collect Costs.—See the title "Costs."

49. Steele *v.* Harkness, 9 W. Va. 13, holding that it cannot issue after the cause has abated.

50. **The judgment creditor's remedy** is by writ of *fieri facias* for the collection of his judgment. Frellson *v.* Stewart, 14 La. Ann. 832.

51. Carrothers *v.* Sargent, 20 W. Va. 351. See the title "Consolidation of Actions."

52. Kahn *v.* Kuhn, 44 Ark. 404, as to an attachment on a debt due consolidated with another on a debt not due. And see Levy *v.* Millman, 7 Ga. 167.

By including a demand not due with others due, they did not debar themselves from priority as to all of their demand, when there is nothing to indicate any fraudulent intent on the part of the plaintiffs in averring the amount of their claims, and there was no collusion between them and the debtor. The attachment may be vacated as to the amount not due. Emerson *v.* Detroit Steel, etc. Co., 100 Mich. 127, 58 N. W. 659.

When the plaintiff sued on several

for several causes of action, the attachment is an entirety, and if improperly issued as to some of them, the presence of a cause or causes for which an attachment might issue if they had been sued for separately, will not support the attachment.[53]

C. Secured and Unsecured Debts and Demands. — **1. Rule in California and Idaho.** — In California and Idaho, statutes authorize an attachment when the creditor is not secured by mortgage or pledge, or, if originally so secured, such security has without any act of the plaintiff, or the person to whom the security was given, become valueless.[54]

causes of action, promissory notes and a check, some of which were not due, an averment in the affidavit used to support the attachment, that the total amount of such notes and check is due, could be fatal to the attachment. Johnson *v.* Buckel, 65 Hun 601, 20 N. Y. Supp. 566.

53. **Cal.**—Baldwin *v.* Napa, etc. Wine Co., 137 Cal. 646, 70 Pac. 732. **Idaho.**—Vollmer *v.* Spencer, 5 Idaho 557, 51 Pac. 609. **N. Y.**—Wilson *v.* Harvey, 52 How. Pr. 126.

In Union Consol. Min. Co. *v.* Raht, 9 Hun (N. Y.) 208, the court said: "There is no provision for the trial of a separate cause of action where several torts are united in the same complaint, for one of which an attachment might have been issued if sued for by a separate action. And hence the defendant's property is not subjected to provisional seizure, unless the plaintiff brings his action exclusively for the cause, or several causes, to which the right of attachment is specifically given."

Part of Claims Only Unsecured.— Willman *v.* Friedman, 3 Idaho 734, 35 Pac. 37.

54. Jensen *v.* Dorr, 157 Cal. 437, 108 Pac. 320; Sparks *v.* Bell, 137 Cal. 415, 70 Pac. 281; Fisk *v.* French, 114 Cal. 400, 46 Pac. 161; Barbieri *v.* Ramelli, 84 Cal. 174, 24 Pac. 113; Kinsey *v.* Wallace, 36 Cal. 462; Payne *v.* Bensley, 8 Cal. 260, 68 Am. Dec. 318; Simmons Hdw. Co. *v.* Alturas Commercial Co., 4 Idaho 334, 39 Pac. 550, 95 Am. St. Rep. 66.

It must be a lien of a fixed, determinate character, capable of being enforced with certainty, and depending on no conditions. Porter *v.* Brooks, 35 Cal. 199.

A lien upon property outside the state is under the statute. Hill *v.* Grigsby, 32 Cal. 55.

A condition in a note reserving title in the vendor until the goods are paid for is such security as precludes attachment until the security is exhausted or has become valueless. Mark Means Transfer Co. *v.* Mackinzie, 9 Idaho 165, 73 Pac. 135.

A Lien Upon Shares of Stock.— Beaudry *v.* Vache, 45 Cal. 3.

The payee of a note having died leaving property to be devoted to the payment of his debts, the indorsee of the note has no such lien under the statute as will prevent him from proceeding by attachment. Bank of California *v.* Boyd, 86 Cal. 386, 25 Pac. 20.

A bond executed by the debtor with two sureties is not such security as is meant by the statute. Slosson *v.* Glosser, 114 Cal. xvii, (mem). 46 Pac. 276.

A vendor's lien on a sale of land in which the title of the plaintiff was conveyed to the defendant, is not such a lien as will prevent the issue of an attachment. Porter *v.* Brooks, 35 Cal. 199, *distinguishing* Hill *v.* Grigsby, 32 Cal. 55, in which the court held that a person entitled to a vendor's lien as security for the debt could not maintain an attachment for the purchase money, when the vendor had made no conveyance, and had withheld the title as his security.

See also Willman *v.* Friedman, 3 Idaho 734, 35 Pac. 37, holding that a vendor of real estate upon an executory contract, the title remaining in the vendor until the purchase price is paid, has such a lien as bars him from resorting to attachment for the recovery of the unpaid portion of the purchase price.

An order or draft drawn and accepted is a chose in action, an evidence of debt, and was, therefore, personal property under the statutes of Idaho, and was a pledge of personal property to secure the debt of Murphy. This pledge being placed in the hands of

The provision that an attachment shall not issue unless the security has become valueless without fault of the creditor means that the property pledged has ceased to have any value as security.[55] Lapse of time is not sufficient to show that a mortgage has become valueless, as the plaintiff does not know, nor can he know until demurrer or answer, whether or not the plea of the statute of limitations will be interposed,[56] but if property is valueless when pledged, there is no contract of security, and the creditor stands in precisely the position as would one whose debtor had made no pretense of securing the debt.[57]

2. Majority Rule. — But in most jurisdictions, collateral security for the debt or demand or a part of it, which the defendant had given to the plaintiff, constitutes no obstacle to an attachment.[58]

Murphy the presumption is that it remained in his hands as such security, and the presumption should have been overcome by the appropriate statement in the affidavit. Murphy *v.* Montandon, 3 Idaho 325, 29 Pac. 851, 35 Am. St. Rep. 279.

Security Inuring to Benefit of Assignee.—The lien of a vendor who holds the legal title under an unexecuted contract for the conveyance of the land upon payment of the purchase money, inures to the benefit of an assignee of the purchase money note, and under California Code, C. C. P. §538, such assignee cannot attach property in an action on the note without stating in his affidavit that the security has become valueless. Gessner *v.* Palmateer, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187.

If security is delivered up before suit the plaintiff is entitled to his attachment, under a statute requiring the affidavit to state that "the payment of the debt was not secured by any mortgage, lien, or pledge upon real or personal property." Wooddy *v.* Jamieson, 4 Idaho 448, 40 Pac. 61.

See, however, Payne *v.* Bensley, 8 Cal. 260, 68 Am. Dec. 318, wherein the court said: "It may admit of great doubt whether he could surrender the security and attach without the consent of his debtor. The latter has acquired some rights, by giving the collateral security, as well as the former. This freedom from the oppressive remedy by attachment, may have constituted the principal motive on the part of the debtor, for giving collateral security for a pre-existing debt."

A bill of sale on a stock of goods signed but not delivered, and no possession of goods taken thereunder, is not security for the debt; and plaintiff's affidavit that the affidavit had not been secured by a lien or mortgage upon real or personal property, or pledge of personal property, was sustained. Rodley *v.* Lyons, 129 Cal. 681, 62 Pac. 313.

55. Williams *v.* Hahn, 113 Cal. 475, 45 Pac. 815, holding that when, by the terms of the agreement under which the security was given, the defendant had authorized the plaintiff to sell the goods pledged upon his default in making payment, a sale made by the plaintiff must be regarded as made by the direction of the defendant, and for any deficiency in the amount due on the claim, the plaintiff was entitled to an attachment.

56. Page *v.* Latham, 63 Cal. 75, wherein the court further said: "Besides, if a person permits the statutory time to pass, is it not his act? He could have brought his action for foreclosure within the time; if he omitted to do so it was his own act by which the security became valueless."

57. McPhee *v.* Townsend, 139 Cal. 638, 73 Pac. 584, as to mortgage bonds valueless at the time of their delivery. *Compare* Barbieri *v.* Ramelli, 84 Cal. 154, 23 Pac. 1086, holding that the plaintiff cannot be heard to urge that property on which he took a mortgage to secure his debt has become valueless when no change in value has since occurred, but he must pursue his remedy under the mortgage before being allowed to resort to the remedy of attachment.

58. **Written Lien on Personalty.**— Stapleton *v.* Ewell, 21 Ky. L. Rep. 1534, 55 S. W. 917.

See also, *supra*, III.

The same and other property may be

3. Effect of Real Estate Mortgage.—It seems to be the general rule, however, that when the creditor has taken a mortgage on land to secure the debt, he cannot proceed by attachment upon the same land.[59]

attached. State Bank *v.* Mottin, 47 Kan. 455, 28 Pac. 200; Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109; Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

To the effect, that the creditor may waive his claim or lien under the chattel mortgage, see: **Me.**—Whitney *v.* Farrar, 51 Me. 418; Libby *v.* Cushman, 29 Me. 429. **Mass.**—Buck *v.* Ingersoll, 11 Met. 226. **Tex.**—Branshaw *v.* Tinsley, 4 Tex. Civ. App. 131, 23 S. W. 184. **Mo.**—Ottumwa Nat. Bank *v.* Totten, 94 Mo. App. 596, 68 S. W. 386, holding that an attachment of the mortgaged property is a waiver of the creditor's lien under the mortgage.

The fact that stipulations in a mortgage gave the plaintiff the right to take possession of the property and sell it cannot have the effect to confine him to an action of replevin and debar him from the remedy of foreign attachment. Coble *v.* Nonemaker, 78 Pa. 501.

Stipulation To Pay Debt in Certain Land.—Where a creditor and a debtor stipulated that the debt due should be paid in certain parcels of land, at a value to be determined by appraisers, and that if either of the parties should not abide by the appraisement, such party should pay the appraisers, there was nothing obligatory until the appraisement was made, and an attachment obtained by the creditor was not fraudulent. Hammatt *v.* Bassett, 2 Pick. (Mass.) 564.

A statute providing that a plaintiff in foreclosure shall not "prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure," prevents a mortgagee from securing by writ of attachment, though it is an ancillary remedy, an additional remedy in anticipation of a deficiency judgment, while looking to the mortgage security and before exhausting the same by foreclosure and sale. Advance Thresher Co. *v.* Schimke, 47 Wash. 162, 91 Pac. 645.

Property Secured by Pledge.—**Mass.** Taylor *v.* Cheever, 6 Gray 146; Whitwell *v.* Brigham, 19 Pick. 117 (note of third persons). **Mont.**—Parberry *v.* Woodson Sheep Co., 18 Mont. 317, 45 Pac. 278, as to a pledge of corporate stock. **N. H.**—Homer *v.* Falconer, 60 N. H. 203.

Stockholder's Liability. — Foreign Mines Develop. Co. *v.* Boyes, 180 Fed. 594, was a suit against a stockholder to recover on notes of his corporation to secure which the corporation had given to the plaintiff a mortgage. Default was made and at the time of this action a foreclosure suit was pending. It was held that though this action was to enforce a statutory liability it was so far based upon the notes as to bring it within the statute forbidding attachment, the corporation being the stockholder's agent.

59. Atkins *v.* Sawyer, 1 Pick. (Mass.) 351, 11 Am. Dec. 188.

Attachment Induced by Debtor.—Sureties who are secured by mortgage have no cause of attachment; but when the mortgagor has induced them to take out attachments, he cannot be heard to object and defeat them for this cause, though other creditors might perhaps defeat them by showing that this was a fraudulent arrangement to secure the debtor's property from his other creditor. Jarboe *v.* Colvin, 4 Bush (Ky.) 70.

A creditor who is substantially secured by mortgage should not have attachment. Arcadia Cotton Oil Mill, etc. Co. *v.* Fisher, 120 La. 1076, 46 So. 28.

Averment of Deficiency in Value.—"In a proceeding to foreclose a mortgage the petition prays judgment for the debt and a foreclosure of the mortgagor's equity of redemption. The law provides for an order *cutting off* this equity and a general judgment for the debt, with directions for a general execution, after the disposition of the mortgaged premises. Now, if from a depreciation in value of the land given in security, if from a failure in title as to a part, or all, of the premises, or from any circumstances, the security given is insufficient, and the mortgagors or debtors are non-residents, or are 'about to dispose of their property, without leaving,' etc., we can see neither logical or legal in-

D. Debts and Demands Not Capable of Definite Ascertainment.

1. In General. — In order to give a right of attachment, it is generally held, under the statutory provisions, that the debt or demand arising out of the contract must be susceptible of ascertainment by a definite standard.[60] But in accordance with the maxim that that is certain which can be made certain,[61] it is not necessary that the amount in which the defendant may be liable should appear upon the face of the contract or instrument by or from which the liability is to be determined if there exists a basis upon which the damages can be determined by proof,[62] or, as it has sometimes been stated, when the amount due

consistency in permitting the mortgagee to resort to the process of attachment in aid of his 'ordinary proceeding.' This is a proceeding for the *recovery* of money most clearly, and the Code gives an attachment in all such actions. The language is, '*in an action for the recovery of money*, the plaintiff may cause any property to be attached,' etc. This language is general and no good reason is perceived why it does not apply to one action to recover money as well as another." Baldwin *v.* Buchanan, 10 Iowa 277.

In all cases where the defendant resides out of the state, the plaintiff is entitled to an attachment. This covers a case where the plaintiff had a special mortgage on the land to secure notes. Sandel *v.* George, 18 La. Ann. 526.

60. Guillou *v.* Fontain, 11 Fed. Cas. No. 5,861.

"Before an attachment can issue, there must be some facts set up upon which the court can exercise its judgment as to value and the amount for which the attachment should issue." Dudley *v.* Armenia Ins. Co., 115 App. Div. 380, 100 N. Y. Supp. 818.

Contracts to Guarantee the Inspection of Flour to be Delivered.—Wilson *v.* Wilson, 8 Gill (Md.) 192, 50 Am. Dec. 685.

If the contract itself fixes the amount due, or affords by its terms a certain measure for ascertaining that amount, an attachment will lie if the necessary jurisdictional facts appear; and the test is whether the contract furnishes a standard by which the amount of the indebtedness may be determined with sufficient certainty to permit the plaintiff to verify his claim by affidavit. Dirickson *v.* Showell, 79 Md. 49, 28 Atl. 896; Orient Mut. Ins. Co. *v.* Andrews, 66 Md. 371, 7 Atl. 693; Williams *v.* Jones, 38 Md. 555; McAllister *v.* Eichengreen, 34 Md. 54; State *v.* Steibel, 31 Md. 34; Warwick *v.* Chase, 23 Md. 154.

"**Direct Payment of Money.**"—Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821, wherein the court said: "The words 'direct payment,' as applied to payments, and as used in the statute, clearly mean absolute, unconditional, free from intervening agencies or conditions."

61. Stuyvesant *v.* Western Mortg. etc., Co., 22 Colo. 28, 43 Pac. 144.

The term "indebted" in a statute is general in meaning and is synonymous with owing, and is not confined to a debt or demand certain, but includes damages arising from a breach of contract that may be rendered certain. Jones *v.* Buzzard, 2 Ark. 415. See also Guy *v.* Lee, 81 Ala. 163, 2 So. 273, holding that such an action is "a moneyed demand, the amount of which can be certainly ascertained."

"It is sometimes said that unliquidated damages arising *ex contractu* are not recoverable in an action commenced by a writ of foreign attachment, but this is too broad a statement. Such damages are so recoverable if they are capable of being reduced to a certainty by any fixed standard, as where the damages depend on the value or amount of goods produced or sold and a share of the proceeds or commissions for selling the same are claimed; but damages for the loss of the advantages of the arrangement cannot be so recovered." Snowden & Co. *v.* Fulford Planing Mill Co., 19 Pa. Co. Ct. 65, 5 Pa. Dist. 720.

62. **Cal.**—De Leonis *v.* Etchepare, 120 Cal. 407, 52 Pac. 718; Dunn *v.* Mackey, 80 Cal. 107, 22 Pac. 64. **Mich.**—Showen *v.* J. L. Owens Co., 122 N. W. 640. **N. Y.**—Farquhar *v.* Wisconsin Condensed Milk Co., 30 Misc. 270, 62 N. Y. Supp. 305. **Pa.**—Carland *v.* Cunning-

can properly be verified by affidavit,[63] and is capable of definite ascertainment by a court or jury as a trier of the facts.[64]

ham, 37 Pa. 228. **Tex.**—Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210.

63. **U. S.**—Fisher *v.* Consequa, 2 Wash. 382, 9 Fed. Cas. No. 4,816. **La.** Christie & Lowe *v.* Pennsylvania Wks., 54 So. 742; Hyde *v.* Higgins, 15 La. Ann. 1. **Pa.**—Strock *v.* Little, 45 Pa. 416.

In E. Sondheimer Co. *v.* Richard Lumb. Co., 121 La. 786, 46 So. 806, the damages were prospective, depending on the delivery of a balance of a specified quantity of lumber within a certain time yet to run, and the court held that "any amount that may be fixed upon must be conjectural, and hence ought not to serve as the basis of a positive oath."

Other Statements.—Under a statute allowing attachments to be issued for "debts and demands" upon plaintiff's making affidavit "that the defendant is justly indebted to the plaintiff and the amount of the demand," "when the suit is for damages for breach of contract dependent upon existing and uncontingent facts and the damages claimed are actual and capable of estimation by the usual means of evidence, and not resting wholly or in part in the discretion of the jury, the affidavit required by our statute may properly be made and the attachment sued out." Hochstadler *v.* Sam, 73 Tex. 315, 11 S. W. 408. See also Roelofson *v.* Hatch, 3 Mich. 277; Coats *v.* Arthur, 5 S. D. 274, 58 N. W. 675.

Affidavit Sufficient To Sustain Charge of Perjury.—When the statute authorizes an attachment in an action to recover "damages," such a remedy may be pursued when the plaintiff can fix the sum due by his oath. All that is necessary is, that the affidavit should be sufficiently clear, positive, and certain, to sustain, if false, an indictment for perjury. Cross *v.* Richardson, 2 Mart. N. S. (La.) 323.

Amount Fixed by Affidavit.—In an action for the breach of a contract for the sale of plaintiff's land, wherein the defendant agreed to sell the plaintiff's land and to realize to the plaintiff a certain amount therefrom, an attachment will lie on an affidavit stating the market value of the property, and alleging the damages as the difference between such value and the amount which the defendant had agreed to return to plaintiff. Dunn *v.* Mackey, 80 Cal. 104, 22 Pac. 64.

Dealing with jurisdiction only in an action on a breach of warranty in the sale of goods, if the affidavit tends to show a cause of action on contract, and a liability of the defendant to the amount stated, this is enough to sustain the attachment. Haebler *v.* Bernharth, 115 N. Y. 459, 22 N. E. 167.

64. Moore v. Richardson, 65 N. J. L. 531, 47 Atl. 424; Heckscher *v.* Trotter, 48 N. J. L. 419, 5 Atl. 581; Cheddick's Exr. *v.* Marsh, 21 N. J. L. 463.

Damages for Breach of Contract of Purchase.—Lawton *v.* Reil, 34 How. Pr. (N. Y.) 465, 51 Barb. 30. But *compare* E. Sondheimer *v.* Richland Lumber Co., 121 La. 786, 46 So. 806, when the question was as to the difference between the contract price and the probable market price at a future time.

Breach of a Contract for the Delivery of Cattle.—McKay *v.* Elder (Tex. Civ. App.), 92 S. W. 268.

"The price which forms the basis of the plaintiff's claim is a precise sum, fixed by contract. The deductions to be made therefrom are for cash paid, and for materials to be furnished and labor to be performed at the expense of the defendants, the cost of which appears on the face of the account to be certain, and presumably can be ascertained by some definite standard." The balance can be definitely ascertained and will support an attachment. Sullivan *v.* Moffat, 68 N. J. L. 211, 52 Atl. 291.

A Claim for the Price of Goods Sold, at an Agreed Price.—Loeb *v.* Crow, 15 Tex. Civ. App. 537, 40 S. W. 506.

When, in an action for the conversion of goods, the value can be fairly approximated, and is definitely stated in the petition, "there is an implied promise to pay the value of the property when taken, and the demand is of such certainty as to form a basis for the issuance of the writ." Felker *v.* Douglass (Tex. Civ. App.), 57 S. W. 323.

Action for Services Rendered.—Evans *v.* Breneman (Tex. Civ. App.), 46 S. W. 80.

2. **Debts or Demands Unliquidated or Uncertain.** —In General. — The general rule is well settled that a writ of attachment will not issue in an action where the claim is unliquidated and uncertain.[65] Such a rule excludes all cases when from the nature of the claim asserted it is evident that any amount that may be fixed upon must be conjectural, and hence ought not to serve as the basis of a positive affidavit,[66] and where the amount of the claim can be determined by no fixed rule of law, but is to be determined entirely by the opinion of a court or jury.[67]

While various tests have been employed by which to determine whether or not a claim is uncertain or unliquidated,[68] the one most usually ap-

A commission contract with a traveling salesman based upon sales made by him, will not support an attachment. Hockstadler *v.* Sam, 73 Tex. 315, 11 S. W. 408.

Damages for Delay in Construction of Building.—Hale *v.* Milliken, 142 Cal. 134, 75 Pac. 653.

Damages Commensurate With Legal Interest.—Woldert *v.* Nedderhut Packing Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378.

Reasonable Attorney's Fees.—If a contract provides for the payment of "reasonable attorney's fees" for collection and the creditor sets out the whole sum including a specific amount which he alleges he was compelled to pay as a reasonable attorney's fee, the demand is liquidated. Waples-Platter Grocer Co. *v.* Basham, 9 Tex. Civ. App. 638, 29 S. W. 1118.

Matured Certificates of a Beneficial Association.—Failey *v.* Fee, 83 Md. 83, 34 Atl. 839, 55 Am. St. Rep. 326, 32 L. R. A. 311.

65. **U. S.**—Clark *v.* Wilson, 3 Wash. C. C. 560, 5 Fed. Cas. No. 2,841. **Ga.**—Mills *v.* Findlay, 14 Ga. 230. **N. C.**—Winfree *v.* Bagley, 102 N. C. 515, 9 S. E. 198. **Tex.**—Felker *v.* Douglass (Tex. Civ. App.), 57 S. W. 323.

A penalty in a covenant is usually only to cover such damages as the party may be entitled to, and an action thereon will not support an attachment. Hoy *v.* Brown, 16 N. J. L. 157.

This point was explained in the recent case of Bray *v.* General Engineering Co., 75 N. J. Eq. 443, 78 Atl. 563, 565, as follows: "As a matter of fact, the claim which the General Engineering Company prefers against Mr. Bray is a claim based on a covenant that sounds in damages, and not only is his affidavit, therefore, untrue, but the fact places the claim beyond the reach of the ordinary attachment suit. In Barber *v.* Robeson [15 N. J. L. 17], the attachment was in covenant, but in that case the covenant was that the defendant would pay a certain amount of cash in a certain contingency. The difference between an attachment of that character and an attachment for unliquidated damages is shown by the case of Cheddick *v.* Marsh, 21 N. J. Law, 463, where it was held that a writ of attachment would not issue for a penalty intended to secure unliquidated damages. See, also, Heckscher *v.* Trotter, 48 N. J. Law 419, 5 Atl. 581, and Wynant *v.* Nautical Preparatory School, 27 N. J. Law J. 202."

66. **Other Statements of the Rule.**—**Colo.**—Hyman *v.* Newell, 7 Colo. App. 78, 42 Pac. 1016. **D. C.**—Hoover *v.* Hathaway, 9 Mackey 591. **Md.** Hough *v.* Kugler, 36 Md. 186; Warwick *v.* Chase, 23 Md. 154. **N. Y.**—Story *v.* Arthur, 35 Misc. 244, 71 N. Y. Supp. 776.

Stipulated Sum for Breach of Contract Construed as Penalty.—In such a case an attachment will not lie. Hough *v.* Kugler, 36 Md. 186.

67. **Md.**—Steuart *v.* Chappell, 98 Md. 527, 57 Atl. 17, as to a claim of an attorney for professional services sought to be recovered under a *quantum meruit*. **N. J.**—Heckscher *v.* Trotter, 48 N. J. L. 419, 5 Atl. 581. **N. Y.**—Story *v.* Arthur, 35 Misc. 244, 71 N. Y. Supp. 776. **R. I.**—Mainz *v.* Lederer, 24 R. I. 23, 51 Atl. 1044, 96 Am. St. Rep. 702, 59 L. R. A. 702. **S. D.**—Coats *v.* Arthur, 5 S. D. 274, 58 N. W. 675.

Commissions, where the amount was not agreed upon, the amount alleged being based upon the customary charge. White *v.* Goodson Type Casting, etc. Mach. Co., 24 Civ. Proc. 411, 34 N. Y. Supp. 797.

68. When bail cannot be required without the order of a court or judge,

plied is that if the claim cannot be sworn to, it is not capable of sustaining an attachment.[69] But in some of the jurisdictions, an attachment is now allowed by express statutory provision in an action to recover unliquidated damages,[70] and in others the statutes have been construed to cover unliquidated demands, though not authorized by express terms in the statute.[71]

resort cannot be had to the remedy of attachment. Jeffery *v.* Wooley, 10 N. J. L. 123. See also Redwood *v.* Consequa, 2 Browne (Pa.) 62.

Whether debt or assumpsit would lie. Mills *v.* Findlay, 14 Ga. 230.

Action for Breach of Warrant.—But it has been said that a claim for damages for the breach of a warranty is not embraced by an attachment law which requires that the debt or demand must be such as could be recovered by an action of debt, or upon *indebitatus assumpsit,* and not a demand for unliquidated damages for breach of contract. Webb *v.* Bowler, 50 N. C. 362, holding also that the word "property" in the term "an injury to the property of another," means a thing tangible and not a mere right.

69. Goldsborough *v.* Orr, 8 Wheat. (U. S.) 217, 5 L. ed. 600; Zerega *v.* McDonald, 1 Woods 496, 30 Fed. Cas. No. 18,212; Hochstadler *v.* Sam, 73 Tex. 315, 11 S. W. 408. See also many of the cases cited *supra* throughout this subdivision.

Suit for Liquidation and Settlement of Partnership.—No attachment will lie in an action for the settlement of a partnership before any liquidation of accounts if from the nature of the business, it is impossible for the plaintiff to swear with certainty to the amount which will be found due to him on a final settlement. Barrow *v.* McDonald, 12 La. Ann. 110; Johnson *v.* Short, 2 La. Ann. 277. See Brinegar *v.* Griffin, 2 La. Ann. 154, where the court said: "Suits may occur in which the business of the adventure may be so limited and simple in its features, as to exhibit a case where the party might be considered as able to swear to a positive and precise balance."

In Ackroyd *v.* Ackroyd, 20 How. Pr. (N. Y.) 93, a suit for a dissolution of partnership and an accounting, the complaint alleged inability to state the amount due from the defendant, though alleging that there was a large sum of money due, and it was held that an attachment would not lie notwithstanding the affidavit stated an amount due, as this was inconsistent with the complaint.

70. **Md.**—Steuart *v.* Chappell, 98 Md. 527, 57 Atl. 17. **N. J.**—Hotel Registry Realty Corp. *v.* Stafford, 70 N. J. L. 528, 57 Atl. 145, the practice act of 1903. **S. C.**—Chitty *v.* Pennsylvania R. Co., 62 S. C. 526, 40 S. E. 944, Code, §248.

71. In Morrison *v.* Lovejoy, 6 Minn. 183, the court said that all that is necessary is that the action be for the "recovery of money," and that it is sufficient to state in the affidavit that a cause of action exists against the defendants, the amount of the claim, and the grounds thereof.

Under an Arkansas statute, providing that an attachment shall not be granted against a foreign corporation on non-resident "for any claim other than a debt or demand arising upon contract," it has been held that an attachment may issue in such an action though the damages claimed are unliquidated. Messinger *v.* Dunham, 62 Ark. 326, 35 S. W. 435. "Demand" is broader than "debt," and an attachment will lie although damages for the breach of the contract are unliquidated, when the measure of damages depends upon and is controlled by, the contract. Messinger *v.* Dunham, 62 Ark. 326, 35 S. W. 435.

Under a Connecticut statute, which gives the process to creditors against their debtors, to enable them to attach the effects of such debtors, in the hands of their agents, attorneys, trustees, etc., an attachment in an action for unliquidated damages on the breach of a contract will lie. New Haven Steam Saw Mill Co. *v.* Fowler, 28 Conn. 103, in which case the rule for the assessment of damages was certain.

Under a Mississippi statute, providing that "the remedy by attachment shall apply to all actions or demands, founded upon any indebtedness, or for

E. On Debts Not Due. — **1. In General.** — In the absence of statute, an attachment cannot issue in a cause of action on a debt or demand not due.[72] But this rule has been changed by valid statute in many juris-

the recovery of damages for the breach of any contract, express or implied, and to actions founded on any penal statutes," an attachment will lie for an unliquidated demand arising out of a contract, as well as for a liquidated demand. John E. Hall Com. Co. *v.* Crook, 87 Miss. 445, 40 So. 20; Nethery *v.* Belden, 66 Miss. 490, 6 So. 464.

North Carolina.—Foushee *v.* Owen, 122 N. C. 360, 29 S. E. 770; Judd *v.* Crawford Gold Min. Co., 120 N. C. 397, 27 S. E. 81.

It had previously been held under N. C. Code, §197, that the amount of the demand must be ascertained or susceptible of being ascertained by some standard referable to the contract itself, sufficiently certain to enable the plaintiff to aver it, or a jury to find it; but not if the contract furnishes no rule for ascertaining the damages, but leaves the amount to remain uncertain until fixed by a jury, without any definite rule of law to direct them. Wilson *v.* Louis Cook Mfg. Co., 88 N. C. 5. To the same effect, see Minga *v.* Zollicoffer, 23 N. C. 278.

In New York under a statute authorizing an attachment in case of a debt, an attachment may issue in any case arising out of contract, though the amount be unliquidated. The demand need not fall within the technical definition of a debt. Lenox *v.* Howland, 3 Caines (N. Y.) 323. To the same effect see Dudley *v.* Armenian Ins. Co., 115 App. Div. 380, 100 N. Y. Supp. 818; Delafield *v.* Armsby Co., 62 App. Div. 262, 71 N. Y. Supp. 14; *In re* Marty, 3 Barb. (N. Y.) 229, *affirming* 2 Barb. 436.

In United States *v.* Graff, 67 Barb. (N. Y.) 304, the court said that "to promote the efficiency of that remedy," the statute "has been held to include actions on contracts for the recovery of even unliquidated damages, where a proper disclosure of the grounds of the claim supplies practicable means for determining its amount."

A statute authorizing an attachment "in actions to recover a sum of money only," whether "for breach of contract, express or implied, other than a contract to marry," or for the wrongful conversion or other injury to personal property, does not confine the remedy to actions to recover liquidated damages. Seeley *v.* Missouri, etc., R. Co., 39 Fed. 252, as to a New York statute.

72. **U. S.**—Black *v.* Zacharie, 3 How. 483, 11 L. ed. 690. **Ga.**—Monroe *v.* Bishop, 29 Ga. 159. **Ill.**—Schilling *v.* Deane, 36 Ill. App. 513. **Ia.**—Anderson *v.* Thero, 139 Iowa 632, 118 N. W. 47. **Mass.**—Swift *v.* Crocker, 21 Pick. 241. **Mich.**—Hale *v.* Chandler, 3 Mich. 531; Galloway *v.* Holmes, 1 Dougl. 330. **Miss.**—John Hall Com. Co. *v.* Crook, 87 Miss. 445, 40 So. 20; Lum *v.* The Steamboat Buckeye, 24 Miss. 564. **Neb.**—Dayton Spice-Mills Co. *v.* Sloan, 49 Neb. 622, 68 N. W. 1040. **Pa.**—Jones *v.* Brown, 3 Pa. Dist. 294, *affirmed*, 167 Pa. 395, 31 Atl. 647; Pratt *v.* Styer, 1 Browne 282; Coaks *v.* White, 11 W. N. C. 271, 15 Phila. 295, 39 Leg. Int. 60. **Va.**—Batchelder *v.* White, 80 Va. 103.

Wrongful Attachment.—If issued when no indebtedness exists, it is wrongful. Young *v.* Broadbent, 23 Iowa 539; Porter *v.* Wilson, 4 Greene (Iowa) 314. See, *infra*, XV.

The mere liability of one as surety for another on a note not yet due, will not of itself give a cause of action against the principal in favor of the surety. Swift *v.* Crocker, 21 Pick. (Mass.) 241.

In case of insolvency, the seller may rescind, but he must repudiate the sale and bring trover, and when the action is brought for the contract price, the party cannot rid himself of a term of the contract giving extended credit. E. S. Higgins Carpet Co. *v.* Hamilton (N. J.), 28 Atl. 716.

Void as Against Other Creditors.—In the absence of statutory authority to issue a writ of attachment upon a debt not due, such an attachment is void as against creditors whose rights would be injuriously affected by it. Davis *v.* Eppinger, 18 Cal. 378, 79 Am. Dec. 184.

Such an attachment is, at least, prima facie void (Patrick *v.* Montader, 13 Cal. 434), and is a fraud upon other

dictions.[73] Even when allowed by statute the writ can issue only in the class of cases prescribed by the statute.[74] The remedy on claims

creditors (Pierce *v.* Jackson, 6 Mass. 242).

Part of Demand Not Due.—A levy may not be made for any greater sum than the amount due at the time of issuing the attachment. Hinchman *v.* Town, 10 Mich. 508, holding further that where the undue part of the demand was included in good faith and not with a design to defraud others, the complainant is entitled to a lien to the amount of his debt actually due at the time of the levy.

73. **Colo.**—Lustig *v.* McCulloch, 11 Colo. App. 41, 50 Pac. 48. **Ga.**—Selleck *v.* Twesdall, Dud. 196. **La.**—Millandon *v.* Foucher, 8 La. 582. **Mich.** Mosher *v.* Bay Circuit Judge, 108 Mich. 503, 66 N. W. 384; Ripon Knitting Wks. *v.* Johnson, 93 Mich. 129, 53 N. W. 17; Pierce *v.* Johnson, 93 Mich. 125, 53 N. W. 16, 18 L. R. A. 486. **Neb.** Reed *v.* Maben, 21 Neb. 696, 33 N. W. 252. **Tex.**—Cox *v* Reinhardt, 41 Tex. 591.

Attachments in equity are allowed in some states, on debts not due. Devries *v.* Johnston, 27 Gratt. (Va.) 803; Williamson *v.* Bowie, 6 Munf. (Va.) 176.

"**Purely equitable rights may be secured and enforced** through the medium of a foreign attachment, . . . that the claim of a party standing in the condition of a guarantor or surety, to protect himself against loss by reason of the failure of the principal debtor, is such an equitable right as may be enforced through the medium of a foreign attachment." Moore *v.* Holt, 10 Gratt. (Va.) 284, wherein the court said: "If the debt be due, and the principal debtor can be served with process, the right of the surety to maintain a bill *quia timet* proper, is undeniable. If the principal debtor, however, be out of the commonwealth, then the attachment comes in place of the service of process upon him. And if the debt be not due, a court of equity, upon familiar principles analogous to those of the bill *quia timet* proper, can have no difficulty in protecting a surety against loss by reason of the absence of the debtor from the commonwealth."

Constitutionality of Statute.—A statute authorizing the attachment upon a claim not due, does not violate a constitutional provision forbidding *ex post facto* laws and laws impairing the obligation of contracts. Mosher *v.* Bay Circuit Judge, 108 Mich. 503, 66 N. W. 384.

74. **Ala.**—Moore *v.* Dickerson, 44 Ala. 485 (contract to deliver cotton in the future); Pearsoll *v.* Middlebrook, 2 Stew. & P. 406. **Ind.**—Ross *v.* Stockwell, 19 Ind. App. 86, 49 N. E. 50 (§925, Burn's Rev. St. 1894). **Ia.**—See Brown *v.* Cairns, 107 Iowa 727, 77 N. W. 478; Allerton *v.* Eldridge, 56 Iowa 709, 10 N. W. 252 (under a statute providing for a specific attachment of personal property where the plaintiff has a lien upon the property); Bacon *v.* Marshall, 37 Iowa 581; Brace *v.* Grady, 36 Iowa 352; Churchill *v.* Fulliam, 8 Iowa 45. **Ky.**—Schnabel *v.* Jacobs, 105 Ky. 774, 49 S. W. 774 (Code, §249). **Miss.**—Yale *v.* McDaniel, 69 Miss. 337, 12 So. 556. **Mo.**—Aultman & Co. *v.* Daggs, 50 Mo. App. 280. **Neb.**—Caulfield *v.* Bittenger, 37 Neb. 542, 56 N. W. 302. **Ohio.**—Harrison *v.* King, 9 Ohio St. 388. **S. D.**—Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

An action upon the indebtedness of defendant for the purchase money of lands under a contract which matured at a subsequent day, was within the statute. Young *v.* Broadbent, 23 Iowa 539.

Debtor Removing or About To Remove Property From the State.—**Ga.** Levy *v.* Millman, 7 Ga. 167. **Ia.**—Stacy & Thomas *v.* Stichton & Co., 9 Iowa 399, no attachment on this ground if property has been disposed of. **Miss.** Thomason *v.* Wadlington, 53 Miss. 560. **S. D.**—Foley-Wadsworth Imp. Co. *v.* Porteous, 8 S. D. 74, 65 N. W. 429.

For Fraudulent Disposition of Property.—Cox *v.* Dawson, 2 Wash. 381, 26 Pac. 973.

Fraudulently Contracting Debt.—Jaffray *v.* Wolf, 1 Okla. 312, 33 Pac. 945.

In Johnson *v.* Buckel, 65 Hun 601, 20 N. Y. Supp. 566, there were nine causes of action set forth. One note and one check had matured. "With respect to the other seven causes of

action, the notes were not due. For the purpose, however, of immediately suing upon all the causes of action, the complaint contained a number of allegations, showing that the plaintiff was induced to discount the notes by reason of the false and fraudulent representations of the defendant as to his solvency. There can be no doubt, upon a showing that fraud existed in procuring the money, that plaintiff had an election to sue either upon the express contracts,—which would be the notes themselves and the check,—or upon the debt, or he could sue to recover damages for fraud; in other words, he had an election to either sue upon the express contract or sue for the fraud. In the latter case the debt would become immediately due, while in the former the debt would become due according to the terms of the contract. The plaintiff, however, elected to sue upon the express contract; and, as already stated, as to seven of the causes of action, embracing the greater portion of the amount for which recovery was sought, the amounts, according to the terms of the express contracts, were not due. The plaintiff, in the affidavit used to support the attachment, reiterates these several causes of action, and states that the $14,972, with interest, is due over and above all offsets and counterclaims, and yet by the very statement it is shown that there was then due but the sum of $2,500. This would necessarily be fatal to the attachment.''

Obtaining Property Under False Pretenses.—Finch *v.* Armstrong, 9 S. D. 255, 68 N. W. 740.

Rent of Agricultural Land.—In Kansas it is provided that ''whether the rent be due or not (if it be due in one year thereafter), if the person liable to pay rent intends to remove, or is removing, or has within thirty days removed his property, or the crops, or any part thereof, from the leased premises, the person to whom the rent is owing may commence an action, and may have an attachment issue therefor.'' Neifert *v.* Ames, 26 Kan. 515. Here the action was against one who had purchased the crops with notice of rent due for which notes had been given, and the judgment was not rendered until after the notes had become due and payable. See also Kinear *v.* Shands, 36 Mo. 379.

Statutory Construction.—A Colorado statute provides: ''Actions may be commenced and writs of attachment issued, as prescribed in this chapter, upon debts and liabilities not yet due, if the affidavit states any of the causes mentioned, except the first, second, third and thirteenth subdivisions.'' It has been held that proper construction demands that an exception should be made also of two other sections which provide respectively for attachment, when ''under the promise to pay simultaneously with the delivery, and a retention of the goods after demand of the payment. . . . where 'the defendant has failed or refused to pay the price or value of any work or labor done, . . . which should have been paid at the completion of such work.' '' Miller *v.* Godfrey, 1 Colo. App. 177, 27 Pac. 1016.

Statutory Discrimination Between Residents and Non-Residents.—Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874; Swan *v.* Roberts, 2 Coldw. (Tenn.) 153. See also Merchants' Nat. Bank *v.* McCarger, 9 Heisk. (Tenn.) 401.

Pennsylvania.—A foreign attachment is a process to enforce an appearance to a personal action, and can be legally sued out only for a debt presently demandable. But a domestic attachment, being a process of distribution among creditors, may be issued on a debt not yet due, under a statute containing the only condition that ''no such writ shall be issued except on oath or affirmation, previously made by a creditor of such person, of the truth of his debt.'' McCullough *v.* Grishobber, 4 Watts & S. (Pa.) 201. See also Schack *v.* Loucheim (Pa.), 1 Atl. 429, as to rescinding for fraud a contract giving credit.

Louisiana.—Under a statute authorizing attachments to issue to secure and enforce the payment of debts, not actually due, whenever the court shall be satisfied of the existence of the debt, ''and that the debtor is about permanently to depart from this state, or intends to remove his property out of the same,'' an attachment will not lie where the debt is not due and the debtor resides out of the state. McClintock *v.* Cairnes, 5 Mart. N. S. (La.) 450, 452.

not due, authorized by statute in certain cases, is a right and not simply a matter of grace springing from the discretion of the court or judge.[75]

2. Unmatured Negotiable Paper. — And so, an attachment cannot issue against the drawer of a bill of exchange before it is due.[76]

Against an Endorser. — Neither can an attachment be resorted to against an endorser previous to the maturity of the obligation,[77] unless a statute may be construed to authorize the proceeding.[78]

3. Procedure in Case of Attachment Before Maturity of Demand. It has been held that when an attachment has been issued under statutory authority "before maturity of the demand, on which the attachment was founded, the proper course is to stay proceedings until the period when the debt becomes due," after which, the suit may be prosecuted and a judgment rendered as in other cases.[79]

F. CONDITIONAL AND CONTINGENT DEMANDS. — **1. In General.** —

75. Nelson *v.* Stull, 65 Kan. 585, 68 Pac. 617, affirmed on rehearing, 65 Kan. 592, 70 Pac. 590.

76. Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404.

Although the Drawer May Have Suspended Payment.—Denegre *v.* Milne & Co., 10 La. Ann. 324.

Contingent Liability of a Surety on a Draft.—Benson *v.* Campbell, 6 Port. (Ala.) 455.

The acceptor of a bill of exchange, as surety of the maker, cannot obtain an attachment because of his contingent liability thereon, before it is due, to the prejudice of creditors of the debtor whose claims were already due. Henderson, Terry & Co. *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70. And an accommodation acceptor of a draft cannot proceed by attachment against the drawer, before the maturity of the draft and before paying and taking it up. Natchez First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25; Todd *v.* Shouse, 14 La. Ann. 426; Read *v.* Ware, 2 La. Ann. 498; Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198.

77. Harrod *v.* Burgess, 5 Rob. (La.) 449.

An attachment may issue against the payee and indorser of notes as well as the makers, before maturity, when all might be sued together after maturity, and the affidavit alleges that the notes were made and negotiated upon a joint venture, and it appears that the indorser himself negotiated them fraudulently. Mosher *v.* Bay Circuit Judge, 108 Mich. 503, 66 N. W. 384.

78. **As a Debt.**—Smead *v.* Chrisfield, 1 Handy (Ohio) 442.

Against Prior Accommodation Endorser.—A statute giving the right of attachment to an accommodation endorser, "' whether the debt for which he is security be due or not,' " does not authorize an attachment by an accommodation endorser against a prior accommodation endorser for the same principal. Turner *v.* Newman, 4 Humph. (Tenn.) 329.

79. Jones *v.* Holland, 47 Ala. 732 (referring to the statute, Rev. Code, §§2927, 2999, under which the complaint is not required to be filed until the maturity of the debt); Allen *v.* Claunch, 7 Ala. 788 (holding that the cause was continued at the intervening term by operation of law); Ware *v.* Todd, 1 Ala. 199; Rice *v.* Jernson, 54 Wis. 248, 11 N. W. 549.

A New Mexico statute authorizes an attachment to issue on a demand not yet due, but is silent as to the mode of procedure in such a case. The proceedings are to be treated "as separate and distinct from any action at law to recover judgment thereon, and as going no further than to create an attachment lien in advance of the commencement of such action;" if the issues raised in the attachment proceedings, are sustained, the attachment will remain a subsisting lien on the property of the debtor, until upon maturity of the demand and on proper pleadinggs filed, the issues on the claim may be tried and a judgment rendered thereon. Staab *v.* Hersch, 3 N. M. 209, 3 Pac. 248.

A Texas statute provides "that no attachment shall issue until a suit has been instituted; and that an attachment may issue although the debt be

On a contingent liability, an attachment cannot be issued,[80] and though an attachment to secure the payment of a debt not yet due may be authorized by statute, the right to invoke the remedy is confined to cases where, in addition to other requisites, there is an absolute liability to pay at a future time as distinguished from a prospective conditional and contingent liability.[81]

2. Liability of Surety. — A surety has no right of action against his principal in respect to the debt for which he is surety until he has paid such debt for his principal, and until then he cannot attach the property of his principal,[82] unless under statutory authorization.[83]

not due, and the same proceedings shall be had thereon as in other cases, except that no final judgment shall be rendered until the debt shall become due.'' Rabb *v.* White (Tex. Civ. App.), 45 S. W. 850. See also Mack *v.* James, 1 White & Wills. Civ. Cas. §547.

80. Brown *v.* Wyatt, 72 Tex. 60, 10 S. W. 321.

''When neither the writ, affidavit or bond allege that the defendant's estate was attached to satisfy a contingent liability,'' an attachment cannot be discharged on the ground that it was issued in an action on a contingent liability. Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404.

81. **U. S.**—Black *v.* Zacharie & Co., 3 How. 483, 11 L. ed. 690, as to the Louisiana statute. **La.**—Sondheimer Co. *v.* Richland Lumb. Co. 121 La. 786, 46 So. 806 (under a statute, art. 242, Code Prac., authorizing an attachment to issue ''in order to secure the payment of a debt, whatever may be its nature''); H. B. Claflin Co. *v.* Feibelman, 44 La. Ann. 518, 10 So. 862; Natchez First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25; Tyson *v.* Lansing, 10 La. 444; Denegre *v.* Milne & Co., 10 La. Ann. 324; Read *v.* Ware, 2 La. Ann. 478 **Tex.**—Kildare Lumb. Co. *v.* Atlanta Bank, 91 Tex. 95, 41 S. W. 64, under a statute authorizing an attachment ''although the plaintiff's debt or demand is not due.''

''The essential condition is that the defendant must be the unconditional debtor of the seizing party under a certain definite indebtedness, although the period of its payment has not yet arrived.'' Natchez First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25.

The purpose of requiring the statement ''that the debt or demand is actually an existing debt or demand, is to exclude from such remedy contracts upon which the liability of the defendant is still contingent.'' Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

If attorney's fees are to accrue on notes only in the event that they become due and are not paid and suit is brought on the same, the liability is contingent and attachment will issue only for the amount of the notes irrespective of such fees. Aultman, Miller & Co. *v.* Smyth (Tex. Civ. App.), 43 S. W. 932.

82. **Ia.**—Dennison *v.* Soper, 33 Iowa 183, holding also that the payment of the note by plaintiff ten months after suit was commenced did not entitle him to judgment. **La.**—Bannon *v.* Barnett, 7 La. Ann. 105, as to the curator of a surety on a bond to release property which has been attached. **Mo.**—Hearne *v.* Keath, 63 Mo. 84. **Ohio.**—Brannin *v.* Smith, 2 Disney 436.

An indorser cannot attach property of the maker of a note not yet due. Taylor *v.* Drane, 13 La. 62.

When the debtor made out and signed a note to his surety, the consideration for which was the liability of the surety on a note then payable, and caused an attachment to issue on the note made to the surety, the attachment must be vacated when the surety had not assented to the note, and the debt was thus not due, before the attachment was issued. Baird *v.* Williams, 19 Pick. (Mass.) 381, wherein the court said: ''If it be urged, that the subsequent assent of the creditors relates back to the making of the note, and makes the transaction valid *ab initio* the plaintiffs are met by the well known rule, that this principle of relation, equitable in itself as between the parties, is not to be so construed as overreaching mesne liens, and rights accrued to others before the consent and ratification.''

When a Surety Is Given Ample Remedy.—Patterson *v.* Caldwell, 1 Met. (Ky.) 489.

83. Shockley *v.* Bulloch, 18 Ga. 283,

G. Causes of Action Arising Ex Contractu. — **1. In General.** — Statutes in many of the jurisdictions allow an attachment when the cause of action sought to be enforced is for a debt due from the defendant on contract. In order to obtain an attachment on this ground, however, the applicant must bring himself closely within the requirements of the statute.[84] The use of such terms as "debtor," "creditor," "debt," in regard to the relation of the parties to the action, imports that the remedy is to be confined exclusively to actions on contract.[85] Though the word "debt" is not, it has been held, limited to an action for a precise sum due on an express contract, but includes a case in which the damages are such as the plaintiff can aver by affidavit to be due.[86]

2. What Are Actions Ex Contractu. — a. *In General.* — Not only are actions for damages for breach of contract (as illustrated in the notes) classed as actions upon contract,[87] but also actions on stated

upon an allegation that the principal is about to remove without the limits of the state. See also Selleck *v.* Twesdall, Dud. (Ga.) 196, holding that a statute giving the right to the remedy to securities should be liberally construed, so as to cover an indorser.

84. **Colo.**—Herfort *v.* Cramer, 7 Colo. 483, 4 Pac. 896; Kellerman *v.* Crescent Mill, etc., Co., 7 Colo. 295, 3 Pac. 426; Simmons *v.* California Powder Wks., 7 Colo. 285, 3 Pac. 420. **Pa.**—Batroff *v.* Pioneer Tobacco Co., 17 W. N. C. 255. **Wis.**—Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934.

85. **Ark.**—Hynson *v.* Taylor, 3 Ark. 552. **Del.**—Smith *v.* Armour, 1 Penne. 361, 40 Atl. 720, as to a statute authorizing an attachment when the defendant "is justly indebted" to the plaintiff. **Ia.**—Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96. **Mo.**—Finlay *v.* Bryson, 84 Mo. 664; McDonald *v.* Forsyth, 13 Mo. 549. **Neb.**—Handy *v.* Brong, 4 Neb. 60. **N. J.**—Jeffery *v.* Wooley, 10 N. J. L. 123. **N. C.**—Minga *v.* Zollicoffer, 23 N. C. 278. **Pa.**—Jacoby *v.* Gogell, 5 Serg. & R. 450. **Tex.** El Paso Nat. Bank *v.* Fuchs, 89 Tex. 197, 34 S. W. 206, *reversing* (Tex. Civ. App.), 34 S. W. 203; Gould *v.* Baker, 12 Tex. Civ. App. 669, 35 S. W. 708.

See *infra*, VII, H.

86. Fisher *v.* Consequa, 2 Wash. C. C. 382, 9 Fed. Cas. No. 4,816; Stiff *v.* Fisher, 2 Tex. Civ. App. 346, 21 S. W. 291.

87. **Damages for Non-performance of Contract.**—Runyan *v.* Morgan, 7 Humph. (Tenn.) 210.

An action for damages for breach of a contract of employment will support an attachment against a nonresident. Cohen *v.* Walker, 38 Misc. 114, 11 N. Y. Ann. Cas. 135, 77 N. Y. Supp. 105.

For Purchase and Sale of Goods.—In an action to recover damages for breach of a contract in which the defendant promised to buy and pay for certain goods, but refused to receive and pay for them it has been held that an attachment may issue. Flagg *v.* Dare, 107 Cal. 482, 40 Pac. 804; Donnelly *v.* Strueven, 63 Cal. 182; Hill *v.* Fruita Merc. Co., 42 Colo. 491, 94 Pac. 354, 126 Am. St. Rep. 172.

Damages for Breach of Contract To Deliver Goods.—Fisher *v.* Consequa, 2 Wash. C. C. 382, 9 Fed. Cas. No. 4,816. See also Clews *v.* Rockford, etc., R. Co., 4 Thomp. & C. (N. Y.) 669, as to an action for damages for a breach of contract to deliver bonds. But see Rouss *v.* Wright, 14 Neb. 457, 16 N. W. 765, 18 Neb. 234, 25 N. W. 80.

Part of Claim Not Yet Due.—Where the consideration has passed, a failure to deliver property on and after a certain day according to contract may be made the basis of an attachment. "This claim may well be the estimated value of the property—its worth in money at the time appointed for delivery." Ward & Co. *v.* Howard, 12 Ohio St. 158.

Damages Laid on Failure To Complete Buildings in Time.—Coats *v.* Arthur, 5 S. D. 274, 58 N. W. 675.

Damages for Breach of a Contract of Lease.—Doblinger *v.* Dickson, 71 Fed. 635 (in Ohio).

accounts,[88] on attachment bonds,[89] to enforce the statutory liability of stockholders,[90] on recognizances,[91] actions with reference to the purchase and sale of land,[92] actions for damage for breach of a covenant[93]

Action by the assignee of a lease from the defendant to recover the amount of a lien filed against the defendant on the property and paid off by the plaintiff, is for breach of contract. Alford *v.* Cobb, 28 Hun (N. Y.) 22.

Contract Need Not Show Amount.—"Nor is it necessary in order to give a right of attachment that the amount in which the defendant may be liable should appear upon the face of the contract or instrument by or from which the liability is to be determined. It often happens that the amount due under a contract does not appear from the contract itself. Attachment may issue in an action for damages for the breach of a contract. Donnelly *v.* Strueven, 63 Cal. 182. And this where proof is necessary at the trial to show the amount of damages. Drake, Attachm. §§13, 23. But there must exist a basis upon which the damages can be determined by proof. Dunn *v.* Mackey, 80 Cal. 107, 22 Pac. 64." DeLeonis v. Etchepare, 120 Cal. 407, 52 Pac. 718.

In an action upon a promissory note a party may have an attachment if any of the statutory grounds upon which it may be issued exists. Orlopp *v.* Schueller, 26 Ohio C. C. 127.

Contracts To Give Security.—In New York an attachment will lie for the breach of a contract to furnish security, thus—

A failure to give security for the price of goods, as agreed upon, renders the purchaser liable for breach of the contract, and attachment may issue. Ward *v.* Begg, 18 Barb. (N. Y.) 139.

Though debt fraudulently contracted it is still an action *ex contractu.* Whitney *v.* Hirsch, 39 Hun (N. Y.) 325.

Claims for Nominal Damages.—An attachment will not lie in an action upon a claim of nominal damages only. Walts *v.* Nichols, 32 Hun (N. Y.) 276.

88. **An action on an account stated** will support an attachment as one upon a contract. **Mo.**—Deering & Co. *v.* Collins, 38 Mo. App. 80. **N. Y.**—Johnston *v.* Ferris, 14 Daly 302, 12 N. Y. St. 666. **Pa.**—Strock *v.* Little, 45 Pa. 416.

But the contrary was held in Arizona. The court said an account stated is a mere admission of indebtedness. Ordenstein *v.* Bones, 2 Ariz. 229, 12 Pac. 614.

89. Withers *v.* Brittain, 35 Neb. 436, 53 N. W. 375, pointing out that the contract limits the liability to the amount stated in the undertaking.

90. An action against a stockholder for his proportion of the debt of a corporation of which he is a member, is upon contract. Kennedy *v.* State Sav. Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163; Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642, 10 Ann. Cas. 774. See also *infra,* VII, J. And see the title "**Stockholders' Suits,**" as to an action to enforce a stockholder's liability for unpaid subscriptions or calls.

91. **An attachment has been allowed in an action of debt on a recognizance** to appear as a witness. Com. *v.* Green, 12 Mass. 1.

92. Dunn *v.* Mackey, 80 Cal. 104, 22 Pac. 64.

An attachment will lie in an action on a contract for the purchase of property which the vendor afterwards took possession of and wrongfully refused to surrender when the amount sued for includes the purchase price of the property, expenses incurred in attempting to recover it, and damages for its detention; the breach of the contract is not diminished or merged in the tort or crime being superadded to it. Crane *v.* Lewis, 4 La. Ann. 320.

On Tender of Warranty Deed.—Barber *v.* Robeson, 15 N. J. L. 17.

Oral Contract Partly Performed.—Steadham *v.* Parrish, 93 Ala. 465, 9 So. 358.

Suit To Recover Commission on Sale of Land.—Ammen *v.* Morris, 7 Ohio Dec. (Reprint) 304, 2 Cinc. L. Bul. 94.

93. **U. S.**—Pollard *v.* Dwight, 4 Cranch 421, 2 L. ed. 666. **Ala.**—Weaver *v.* Puryear, 11 Ala. 941, the statute also requiring the plaintiff as his agent "to swear to the amount of the sum due." **Ky.**—Stewart *v.* Blue Grass Canning Co., 133 Ky. 118, 117 S. W. 401. **La.**—Butchert *v.* Ricker, 11 La. Ann. 489. **Miss.**—Woolfolk *v.* Cage,

or warranty, and, by statute in some jurisdictions, contracts for necessaries.[94] But an action to enforce the liability of an heir for the debts of his ancestor is not upon contract,[95] nor is an action to recover money embezzled.[96]

b. *Contracts for "Direct Payment of Money."* — In some jurisdictions, the contract must be for the "direct payment of money."[97]

c. *Actions for Breach of Marriage Contract.* — An action for a breach of promise of marriage, it has been held, is an action by itself and is not such an action on contract as will support an attach-

Walk. 300, under a statute providing for an attachment if any creditor shall make complaint, etc., and if such creditor shall make oath, etc., to the amount of his or her debt or demand, etc. **Neb.**—Cheney *v.* Straube, 35 Neb. 521, 53 N. W. 479.

The presence of features of tort in the case will not defeat the attachment. Stewart v. Blue Grass Canning Co., *supra.*

94. In Hare *v.* Cook, 27 Ohio C. C. 289, the court said: "If it be urged that because the statute allows an attachment under certain circumstances for necessaries, and that this affidavit states that this claim is for rent, that therefore it is to be assumed that it is for necessaries, it is sufficient to say that the fact that one is indebted for rent falls far short of showing that one is indebted for necessaries. Rent may be for a saloon, for a store, for a hotel, and for so many other things that would not be held to be necessaries that we cannot assume that one is indebted for necessaries simply because he is indebted for rent."

95. **An action against heirs** to enforce their statutory liability for the debts of their decedent is not an action on contract. Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934.

96. An action to recover money entrusted to a clerk of the plaintiff and which has been gambled away to the defendant is not an action upon a contract. Babcock *v.* Briggs, 52 Cal. 502.

97. So it has been held that in an action for failure to sell mining stock under a contract by which defendants agreed to procure for plaintiff a stipulated price, an attachment is authorized, such contract being for the direct payment of money. Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821, where it was said that the words *"direct payment,"* as used in the statute, clearly mean absolute, unconditional, free from intervening agencies or conditions.

The contract of an indorser of a promissory note or guarantor of a bill of exchange is a contract "for the direct payment of money," and an attachment may issue against the property of such indorser or guarantor when action is brought to enforce payment of the debt the same as against the acceptor or maker, under the provisions of §4302, Rev. St. 1887. Armstrong *v.* Slick, 14 Idaho 208, 93 Pac. 775, *citing* Elbring *v.* Miller, 4 Idaho 199, 38 Pac. 404.

Actions Upon Bonds.—Under a statute authorizing an attachment in an action on a "contract for the direct payment of money," it has been held in *California,* that an attachment may issue in an action upon an appeal bond (San Francisco *v.* Breeder, 50 Cal. 506; Hathaway *v.* Davis, 33 Cal. 161, 165); and on the official bond of a county treasurer (Monterey County *v.* McKee, 51 Cal. 255). Other courts, however, dissent from this construction. **U. S.**—People *v.* Boylan, 25 Fed. 594, an administration bond—in which case the court discredited Hathaway *v.* Davis, 33 Cal. 161, above cited. **Colo.**—Hurd *v.* McClellan, 14 Colo. 213, 23 Pac. 792, an appeal bond. **Md.**—State *v.* Beall, 3 Har. & M. 347, an administration bond.

See also Ancient Order of Hibernians *v.* Sparrow, 29 Mont. 132, 74 Pac. 197, 101 Am. St. Rep. 563, 1 Ann. Cas. 144, 64 L. R. A. 128, holding that an action against sureties on a bond providing that they became liable only on condition that their principal defaulted in the performance of his contract, and then only for such sum as the indemnified party might recover as damages for the breach, not ex-

ment.[98] In some jurisdictions, however, the statutes have been held to cover such a cause of action.[99]

d. *Actions on Implied Contracts.* — An attachment may be sued out in an action on an implied contract,[1] whether such contract is implied in law or implied in fact.[2]

ceeding the sum mentioned in the bond, will not support an attachment. The court, criticising the California decisions, said: "One of the definitions given in Webster's Dictionary for the word 'direct' is 'immediate; express; unambiguous; confessed; absolute; and it does seem that, if the term is to be given any meaning, as used in our attachment statute, it must distinguish a particular class of contracts for the payment of money from all other contracts for the payment of money. In other words, that class of contracts which provide for the direct payment of money must differ somewhat from all other contracts for the payment of money, or the term 'direct' has no meaning whatever."

98. The court in Mainz *v.* Lederer, 24 R. I. 23, 51 Atl. 1044, 96 Am. St. Rep. 702, 59 L. R. A. 954, said that such an action, though based on contract, "is wholly unlike any other in that the damages for a breach thereof are not measured by any commercial or business standard, but are governed almost exclusively by those rules which are applicable to tort actions, and rest almost absolutely in the judgment of the jury." To the same effect, see Roelofson *v.* Hatch, 3 Mich. 277.

Excepted by Statute.—See Alford v. Cobb, 28 Hun (N. Y.) 22.

Contract for Recovery of Money Only.—Barnes *v.* Buck, 1 Lans. (N. Y.) 268; Price *v.* Cox, 83 N. C. 261.

Not an Action for a Debt.—Maxwell *v.* McBrayer, 61 N. C. 527.

99. Hanson *v.* Watson, 13 W. N. C. (Pa.) 534.

In Ohio, such a suit has been sustained under a statute authorizing an attachment upon a debt or demand arising upon contract. Halbert *v.* Armstrong, 7 Ohio Cir. Dec. 712, 14 Ohio C. C. 296 Conley *v.* Creighton, 5 Ohio Dec. (Reprint) 402, 5 Am. L. Rec. 421, *affirmed* in 7 Ohio Dec. (Reprint) 241, 2 Cin. L. Bul. 4, *affirming* 7 Ohio Dec. (Reprint) 233, 1 Cin. L. Bul. 364; Caldwell *v.* Spillman, 1 Ohio Dec. (Reprint) 308, 7 West L. J. 149.

Under a West Virginia statute, which provides that the action or suit may be "for the recovery of any claim or debt arising out of contract or to recover damages for any wrong," and that "such attachment may be sued out in a court of equity for a debt or claim legal or equitable," an action for breach of promise of marriage will support an attachment. McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55, holding that the suit is not one at common law but a suit in equity.

1. **Goods Not of the Class Ordered.** When goods were paid for C. O. D. from a non-resident, but were found to be a different class of goods from that ordered, and the purchaser notified the shipper by letter and the express company that the goods were tendered back, there is a right of action on an implied contract which will support an attachment. Cohen *v.* Lasky, 102 Ga. 846, 30 S. E. 531.

Actions To Recover Money Paid.— As upon implied contracts, it has been held that an attachment may issue in an action to recover back money paid by plaintiff on a contract which the defendant has wrongfully refused to perform. Santa Clara Val. Peat Fuel Co. *v.* Tuck, 53 Cal. 304; William Hanley Co. *v.* Combs, 48 Ore. 409, 87 Pac. 143.

An action to recover the cost of laying sidewalks in front of property owned in fee by a non-resident defendant, is an action upon an implied contract. Anspach *v.* Spring Lake, 58 N. J. L. 136, 32 Atl. 77.

2. Nevada Co. *v.* Farnsworth, 89 Fed. 164; Garrott *v.* Jaffray, 10 Bush (Ky.) 413.

Action to recover a sum of money claimed to be due and owing to the United States for unpaid duties, is one upon an implied contract. United States *v.* Graff, 67 Barb. (N. Y.) 304.

Action against an agent to recover money of the principal which the agent had failed to pay over on demand, is on a contract implied in law. Nevada Co. *v.* Farnsworth, 89 Fed. 164.

Action to recover money which has

On Waiver of Tort.—Where the plaintiff exercises his right to waive the tort and sue in assumpsit, an attachment may lie as upon an implied contract.[3]

been wrongfully obtained, without the consent or knowledge of the plaintiff, is on a contract implied in law. Garrott *v.* Jaffray, 10 Bush (Ky.) 413.

Money Embezzled or Wrongfully Appropriated.—An action as for money had and received to recover money embezzled or wrongfully appropriated is *ex contractu,* and an attachment is authorized in an action on an implied contract. **Kan.**—Lipscomb *v.* Citizens' Bank, 66 Kan. 243, 71 Pac. 583. **Minn.** Cole *v.* Aune, 40 Minn. 80, 41 N. W. 934. **N. Y.**—Kelsey *v.* Mansfield Bank, 85 App. Div. 334, 83 N. Y. Supp. 281; Arming *v.* Monteverde, 44 Hun 627, 8 N. Y. St. 812. **Tex.**—Gould *v.* Baker, 12 Tex. Civ. App. 669, 35 S. W. 708.

That the cause of the action has in some cases been made criminal does not destroy its contractual character. Farmers' Nat. Bank *v.* Fonda, 65 Mich. 533, 32 N. W. 664.

3. Morgan's Louisiana & T. R. & S. S. Co. *v.* Stewart, 119 La. 392, 44 So. 138; Pennsylvania R. Co. *v.* Peoples, 31 Ohio St. 537.

When Assumpsit Will Also Lie.—Ill.—May *v.* Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001, *affirming* 113 Ill. App. 415. **Mich.**—Farmers' Nat. Bank *v.* Fonda, 65 Mich. 533, 32 N. W. 664. **Miss.**—Nethery *v.* Belden, 66 Miss. 490, 6 So. 464.

If a bailor elects to sue the bailee for damages in assumpsit rather than in case, an attachment will lie. Nethery *v.* Belden, 66 Miss. 490, 6 So. 464.

Property Stolen.—An action brought against a saloon keeper and his bartender to recover money stolen while plaintiff slept in a room rented over the saloon, is equivalent to a declaration in assumpsit for money had and received, whereby the tort was waived, and the action one of the class in which the law authorizes attachment to run. Gould *v.* Baker, 12 Tex. Civ. App. 669, 35 S. W. 708.

Action as for Fraudulently Obtaining Money.—Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100.

When the statute uses the words "debt," "debtor," and "creditor," the word "debt" should not be limited in its scope to the obligation of a person to pay a certain sum of money due on an express agreement, and when the foundation of the action is the fraudulently obtaining money, the tort may be waived, and a suit, as upon an implied contract, will support an attachment. Morgan's Louisiana, etc., S. S. Co. *v.* Stewart, 119 La. 392, 44 So. 138, where it was said that previous cases declaring that a writ of attachment could not propertly be made to issue in an action *ex delicto* stated the doctrine too broadly.

Action of Deceit.—In an action to recover the difference between the price paid for land upon false representations of defendant and the actual value, the plaintiff may waive the right of proceeding as for a tort, and sue as for a debt arising on an implied promise that the defendant will pay the loss suffered by plaintiff, and an attachment may be issued. Stanhope *v.* Swafford, 77 Iowa 594, 42 N. W. 450.

Harboring Slave.—Crane *v.* Lewis, 4 La. Ann. 320.

Action for Conversion.—Ark.—Judge *v.* Curtis, 72 Ark. 132, 78 S. W. 746. **Ohio.**—Martin *v.* Gunnison, 27 Ohio C. C. 113. **Tex.**—Hitson *v.* Hurt, 45 Tex. Civ. App. 360, 101 S. W. 292.

In Hitson *v.* Hurt, 45 Tex. Civ. App. 360, 101 S. W. 292, the court said: "Conceding that the averments amount to a declaration of an express promise to pay as a distinct cause of action, it was by no means necessary to the court's jurisdiction, or even to appellee's right of recovery. There was an implied promise to pay arising from the conversion charged, and, if appellee chose to waive the tort and sue for the conversion and upon the implied promise, he could do so."

But *compare* Tabor *v.* Big Pittsburg Consol. Silver Min. Co., 14 Fed. 636, holding that an attachment cannot be issued in an action for property tortiously taken, as upon a waiver of the tort and assuming to sue upon an implied contract.

It does not lie in an action for a chattel illegally detained, and in which there was no element of conversion. Boyer *v.* Bullard, 102 Pa. 555.

H. Actions Ex Delicto. — **1. In General.** —In the absence of a statutory provision allowing it, an attachment cannot issue in an action growing out of tort,[4] especially where the remedy is specifically authorized only in actions on contract.[5]

Felony.—An attachment will not lie in a case where the tort may not be waived as in a case of felony. Union Bank *v.* Baker, 8 Humph. (Tenn.) 477.

4. **U. S.**—Fisher *v.* Consequa, 2 Wash. C. C. 382, 9 Fed. Cas. No. 4,816. **La.**—Baune *v.* Thomassin, 6 Mart. (N. S.) 564 (action of slander); Young *v.* The Princess Royal, 22 La. Ann. 388, 2 Am. Rep. 731; West *v.* Chew, 18 La. Ann. 630; Childs *v.* Wilson, 15 La. Ann. 512; Barrow *v.* McDonald, 12 La. Ann. 110; Hill *v.* Chatfield, 4 La. Ann. 562; Holmes *v.* Barclay, 4 La. Ann. 63 (for damages caused by steamer running into a brick warehouse); Swagar *v.* Pierce, 3 La. Ann. 435 (on collision of steamer with steamer); Greiner *v.* Prendergast, 3 La. Ann, 376 (for sale of property seized under a *fieri facias* alleged to have been wrongfully issued pending an appeal); Prewitt *v.* Carmichael, 2 La. Ann. 943. **Mass.**—Wight *v.* Barnstable Bank, 123 Mass. 183, action for damages under a mill act for flowing of land. **N. J.**—Heckscher *v.* Trotter, 48 N. J. L. 419, 5 Atl. 581. **Tex.**—El Paso Nat. Bank *v.* Fuchs, 89 Tex. 197, 34 S. W. 206, *reversing* (Tex. Civ. App.), 34 S. W. 203; Hochstadler *v.* Sam, 73 Tex. 315, 11 S. W. 408.

In Sonnesyn *v.* Akin, 12 N. D. 227, 97 N. W. 557, it was held that a statute authorizing the issuance of a writ "when the debt upon which the action is commenced was incurred for property obtained under false pretenses," restricts it to actions brought to recover upon debts, and has no application to actions to recover damages for torts.

Codes do not obliterate the distinction between the causes or nature of actions. Goss *v.* Boulder County, 4 Colo. 468.

"In an Action for the Recovery of Money."—Under an old New York statute authorizing an attachment "in an action for the recovery of money," it was held in some cases that an attachment would not lie in an action on tort (Saddlesvene *v.* Arms, 32 How. Pr. [N. Y.] 280; Guilhon *v.* Lindo, 9 Bosw. 601 [for the infringement of a trade mark]; Knox *v.* Mason, 18 Abb. Pr. 290 [note]; Gordon *v.* Gaffey, 11 Abb. Pr. 1); while in others it held the contrary (Floyd *v.* Blake, 19 How. Pr. 542, 11 Abb. Pr. 349; Hernstein *v.* Matthewson, 5 How. Pr. 196; Shaffer *v.* Mason, 43 Barb. 521, 20 How. Pr. 55, 18 Abb. Pr. 455).

Distinction as to Original Aattachment and Ancillary Remedy.—A distinction has been made in some statutes in the use of the remedy in an action of tort, between an attachment sued out as an original process and one resorted to as an ancillary remedy. Thus, it has been held that when a statute authorized the use of a writ of attachment in actions in tort, it could not be issued as an original process. Swan *v.* Roberts, 2 Coldw. (Tenn.) 153 (the statute was afterwards amended to give a right to attachment on original process). And that a statute, providing that attachment may be sued out in aid of a certain class of actions in tort, cannot be extended to allow an original attachment to be sued out for the purpose of recovering damages in actions in tort generally. Firebaugh *v.* Hall, 63 Ill. 81, as where by a provision of the statute, an attachment may be sued out in aid of an action of trespass.

5. **U. S.**—McCracken *v.* Covington City Nat. Bank, 4 Fed. 602. **Cal.**—Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17 (an action founded upon the fraud and wrongful acts of the defendant); Griswold *v.* Sharpe, 2 Cal. 17 (as to an action for damages for collision in harbor). **Miss.**—Fellows & Co. *v.* Brown, 38 Miss. 541. **Ore.**—Sheppard *v.* Yocum, 11 Ore. 234, 3 Pac. 824. **Pa.**—Boyer *v.* Bullard, 102 Pa. 555; Coleman's Appeal, 75 Pa. 441; Porter *v.* Hildebrand, 14 Pa. 129; Piscataqua Bank *v.* Turnley, 1 Miles 312.

"Arising on Contract for the Recovery of Money Only."—Atlantic Mut. Ins. Co. *v.* McLoon, 48 Barb. (N. Y.) 27.

Action To Rescind Contract of Sale on the Ground of Fraud.—Crossman *v.* Lindsley, 42 How. Pr. (N. Y.) 107.

"Debt Fraudulently Contracted."—Baxter *v.* Nash, 70 Minn. 20, 72 N. W. 799.

Statute as to Joint Liability.—A

But by statute in some jurisdictions attachments may issue in actions sounding in tort.[6] And if certain classes of torts are designated, the right to the remedy is restricted to the class or classes named.[7]

statute declaring that "where two or more persons shall be jointly but not severally liable to the suit of another if one or more of such persons shall be liable to attachment as aforesaid, and another or others of them shall not be liable to such process, it shall be lawful for the person to whom such liability is due, to sue out and prosecute thereon a writ of attachment and summons," does not apply to actions in tort wherein the defendants are severally liable, but only to cases arising on contract where there is a joint liability exclusively. Boyer *v.* Bullard, 102 Pa. 555.

Claim Originally in Contract.—Under a statute providing that property may be attached in order to secure the payment of a debt, whatever may be its nature, whether the amount be liquidated or not, and when the creditor states expressly the amount which he claims, an attachment may issue if the amount sued for "is claimed by virtue of an obligation which originated *ex contractu*, and which the defendant became subsequently bound to discharge *ex delicto*," and if the amount is so certain "as to enable the plaintiff to swear expressly to its existence, and to claim it as a debt." Irish *v.* Wright, 12 Rob. (La.) 563.

6. **Ala.**—Hadley *v.* Bryars, 58 Ala. 139, assault and battery. **Ga.**—Graves *v.* Strozier, 37 Ga. 32. **Mo.**—Pearson *v.* Gillett, 55 Mo. App. 312; Houston *v.* Woolley, 37 Mo. App. 15. **N. J.**—Hotel Registry Realty Corp. *v.* Stafford, 70 N. J. L. 528, 57 Atl. 145.

A statute providing that "if the plaintiff's demand is founded on contract," a debt of more than five dollars must be stated in order to authorize an attachment, does not so limit the right in an action of tort. Weller *v.* Hawes, 49 Iowa 45.

Effect of Terms "Debtor," "Creditor," "Debt," or "Obligation."—The use of these terms, it is generally held, indicates an intention to authorize attachments only in actions founded on contracts. The phrase "debts or other demands," however, is broad enough to embrace a demand for damages for injury by a common carrier to goods while in transit. Bausman *v.* Smith, 2 Ind. 374. See also Stanley *v.* Ogden, 2 Root (Conn.) 259.

And a statute which allows attachment to secure "the payment of a debt, whatever be its nature," extends to obligations imposed by law as well as to those arising from contract. Morgan's Louisiana & T. R. & S. S. Co. *v.* Stewart, 119 La. 392, 44 So. 138.

And "Obligation" Has Been Held Equivalent to "Liability."—Sturdevant *v.* Tuttle, 22 Ohio St. 111. To the same effect, see Kirk *v.* Whitaker, 22 Ohio St. 115.

In Louisiana the term is synonymous with duty. Morgan's Louisiana & T. R. & S. S. Co. *v.* Stewart, *supra*.

In Merchant's Bank *v.* Ohio L. Ins. etc. Co., 1 Disney (Ohio) 469, it was held that while the word "obligation" is more general and indefinite than "debt," a provision authorizing an attachment when the defendant "fraudulently contracted the debt or incurred the obligation for which suit is about to be, or has been, brought," does not permit the use of the remedy in actions on torts.

A statute requiring the affidavit to specify that "the plaintiff's debt was fraudulently contracted," being remedial, must be liberally construed to advance the remedy, and "when the term 'debt' is interpreted in the enlarged sense, the strict signification of the word 'contracted' may also be modified, so as to extend to liabilities other than those directly growing out of the contract of parties." Cole *v.* Aune, 40 Minn. 80, 41 N. W. 934, as to embezzlement.

The term "right of action" includes claims *ex delicto*. Lum *v.* The Buckeye, 24 Miss. 564.

"All actions for the recovery of money," embrace tort actions. Davidson *v.* Owens, 5 Minn. 69.

Unlawful and Forceable Entry.—Collins *v.* Stanley, 15 Wyo. 282, 88 Pac. 620, 123 Am. St. Rep. 1022.

Assault and Battery.—Sturdevant *v.* Tuttle, 22 Ohio St. 111.

7. Foushee *v.* Owen, 122 N. C. 360, 29 S. E. 770; Newbern Gaslight Co.

2. Actions for Wrongful Conversion. — In New York the statutes provide that an attachment may issue in actions for the wrongful conversion of personal property.[8]

3. Causes of Action Arising Out of a Felony. — By statute in some states there may be attachment in an action for damages for injuries arising from the commission of some felony.[9]

I. ACTIONS ON JUDGMENTS.— It is generally held that after the recovery of a judgment, whether it was recovered upon contract or for a tort, the recovery becomes a debt which the defendant is under obligations to pay as upon an implied promise or contract, and that it is within a statute authorizing an attachment for the breach of a contract, express or implied, or in an action of debt.[10]

v. Lewis Mercer Contr. Co., 113 N. C. 549, 18 S. E. 693; Chitty *v.* Pennsylvania R. Co., 62 S. C. 526, 40 S. E. 944.

Especially when the code provides another provisional remedy, such as arrest and bail, for other cases. Addison *v.* Sujette, 50 S. C. 192, 28 E. E. 948.

"Injury to Personal Property, in Consequence of Negligence, Fraud, or Other Wrongful Act."—Weiller *v.* Schrieber, 63 How. Pr. (N. Y.) 491, 11 Abb. N. C. 175. To the same effect, see Campion Card Co. *v.* Searing, 47 Hun 237, 14 N. Y. St. 258; Roome *v.* Jennings, 61 N. Y. Super. 361, 19 N. Y. Supp. 825.

An Action for Wrongful Death.— James *v.* Signell, 60 App. Div. 75, 69 N. Y. Supp. 680.

An action to recover for goods sold and delivered, based on allegations of fraudulent representations inducing the sale, "constitute an actionable act for fraud whereby the estate of the plaintiffs was diminished or lessened, so far as they were induced to part with their goods in reliance upon the truth of the representations," and an attachment will lie, under the statutes as based upon an action for injury to property. Whitney *v.* Hirsch , 39 Hun (N. Y.) 325. *Contra,* Whittner *v.* Von Minden, 27 Hun (N. Y.) 234.

An Action To Recover Advances Made Upon the Faith of Forged Bills. Bogart *v.* Dart, 25 Hun (N. Y.) 395.

In an action for slander attachment may not issue. Addison *v.* Sujette, 50 S. C. 192, 28 S. E. 948. To the same effect, see Sargeant *v.* Hembold, Harp. L. (S. C.) 219.

8. Van Camp *v.* Searle, 147 N. Y. 150, 14 N. E. 427, *affirming* 79 Hun 134, 29 N. Y. Supp. 757; Dudley *v.* American Ins. Co., 115 App. Div. 380, 100 N. Y. Supp. 818; Scott *v.* Simmons, 34 How. Pr. (N. Y.) 66; Knapp *v.* Meigs, 11 Abb. Pr. N. S. (N. Y.) 405.

This includes an action for wrongful detention, as a wrongful detention of property is itself a conversion. Barry *v.* Fisher, 39 How. Pr. (N. Y.) 521, 8 Abb. Pr. N. S. 369.

9. And this includes injuries to person and property. Bradenstein *v.* Way, 17 Wash. 293, 49 Pac. 511.

A surety company which has made good, money embezzled by the defendant, may have an attachment, where the statute allows it for damages or injuries "arising from the commission of a felony." American Surety Co. *v.* Haynes, 91 Fed. 90 (a Missouri statute), the court saying that the statute does not by its terms require that the damages sued for shall be for the felony committed, but provides for an attachment in a case where the damages arise from the commission of a felony.

10. **Ill.**—Young *v.* Cooper, 59 Ill. 121. **Ia.**—Johnson *v.* Butler, 2 Iowa 535. **N. J.**—Cord *v.* Newlin, 71 N. J. L. 438, 59 Atl. 22 (as to costs taxed against the defendant on an appeal from a decree in chancery), *citing* Bullock *v.* Bullock, 57 N. J. L. 508, 31 Atl. 1024; Mutual L. Ins. Co. *v.* Newton, 50 N. J. L. 571, 14 Atl. 756, and *overruling* Van Buskirk *v.* Mulock, 18 N. J. L. 184.

A transcript of a judgment of a justice of the peace, filed in the court of common pleas, is such a judgment. Hitchcock *v.* Long, 2 Watts & S. (Pa.) 169.

Under an Illinois statute authorizing attachment in certain actions while the action is pending, and before judgment, in aid thereof,

J. Actions on Statutory Liabilities. — In some cases actions on a liability created by statute are held not to support attachments, as where there was no anterior contractual relation between the parties,[11] or when the action arises out of a contract entered into in violation of law.[12]

K. Money Demands. — **1. In General.** — By statute in some jurisdictions an attachment is specially provided for in cases of money demands.[13]

2. What Are Money Demands.— In General.—These statutes usually provide for an attachment in "actions for the recovery of money,"[14]

an attachment may issue on a *scire facias*, against part of several defendants not served with original process, to make them parties to the judgment. Ryder *v.* Glover, 4 Ill. 547. See also Firebaugh *v.* Hall, 63 Ill. 81, that an attachment in aid of a *scire facias* issues only in cases where such writ has been "sent out" or issued out of any court.

But where some of several defendants had not been served with process, and judgment was rendered against all under a joint debtor statute, a subsequent proceeding to charge all will not support an attachment, such proceeding not being upon the judgment. Oakley *v.* Aspinwall, 4 N. Y. 513, *reversing* 2 Sandf. 7. See Oakley *v.* Aspinwall, 1 Duer (N. Y.) 1.

When a judgment has been suspended by supersedeas, an action cannot be maintained thereon and attachment issued. Johnson *v.* Williams, 82 Ky. 45, the court saying that if the supersedeas is discharged the statutory remedy of execution to enforce the judgment must be considered as exclusive of all others.

In an action on a foreign judgment an attachment may issue. **Md.**—Cockey *v.* Milne's Lessee, 16 Md. 200, under a statute allowing attachment for a debt due by a non-resident upon "any instrument or instruments of writing by which the debtor is so indebted." **N. Y.**—Gutta Percha, etc. Mfg. Co. *v.* Houston, 108 N. Y. 276, 15 N. E. 402, 2 Am. St. Rep. 412, *reversing* 46 Hun 237, 12 Civ. Proc. 326, 11 N. Y. St. 302. **Ore.**—Meyer *v.* Brooks, 29 Ore. 203, 44 Pac. 281, 54 Am. St. Rep. 790. **S. C.**—Clark & Co. *v.* Conner, 2 Strobh. L. 346. **S. D.**—Nashua First Nat. Bank *v.* Van Vooris, 6 S. D. 548, 62 N. W. 378.

To the contrary, see Besley *v.* Palmer, 1 Hill (N. Y.) 482.

11. The liability of a tenant in possession to the purchaser, for rents or use and occupation from the day of sale to the expiration of the time for redemption is a statutory liability, merely, and is not a liability founded on a contract express or implied within the meaning of the attachment statute. Walker *v.* McCusker, 65 Cal. 360, 4 Pac. 206.

To Recover Costs of Former Action. Remington Paper Co. *v.* O'Dougherty, 32 Hun (N. Y.) 255, 6 Civ. Proc. 79.

12. A Claim for Excessive Interest. Reed *v.* Beach, 2 Pin. (Wis.) 26.

13. Not Money Merely.—"It is not necessary under the code that the plaintiffs should have a cause of action for the payment of money merely to have an attachment; it is enough that 'a cause of action exists against the defendant,' and that the amount of the claim, and the grounds thereof, are stated. (Code, §229)." Ward *v.* Begg, 18 Barb. (N. Y.) 139, which was an action for damages for breach of a contract, in which the amount of the claim was the debt payable and the amount of the guarantee.

Action on Contract for Direct Payment of Money.—In *Alaska*, under a statute providing that an attachment may issue in an action upon a contract for the direct payment of money, it is not necessary to allege that the debtor has absconded or is about to do so. Seattle First Nat. Bank *v.* Fisk, 2 Alaska 344.

14. An action to recover money lost at gambling will sustain an attachment as an "action for the recovery of money." Jenks *v.* Richardson, 71 Fed. 365.

A statutory proceeding to revive a dormant judgment is not a civil action

and it has been held that this phrase embraces not only equitable,[15] but unliquidated demands,[16] as in an action of detinue[17] or in trover.[18]

for the recovery of money. Forak *v.* Schuyler First Nat. Bank, 67 Neb. 463, 93 N. W. 682.

An action against a child for maintenance and care of parent is not an action on contract for the recovery of money only, and will not support an attachment. Wilson *v.* Harvey, 52 How. Pr. (N. Y.) 126.

One partner in an action against his copartner, to recover a general balance claimed upon an unsettled partnership account between them, may have an order of attachment, under a statute allowing an attachment "in a civil action for the recovery of money." Goble *v.* Howard, 12 Ohio St. 165.

An Action To Charge the Real Estate of a Decedent.—Avery *v.* Avery, 119 App. Div. 698, 104 N. Y. Supp. 290, *reversing* 52 Misc. 297, 102 N. Y. Supp. 955, and *distinguishing* Hamilton *v.* Penney, 29 Hun (N. Y.) 265, in which the plaintiff sought to recover a personal judgment on a promissory note, and it was held that an attachment could be granted in an action for the recovery of money only notwithstanding the plaintiff asked, in addition to the demand for judgment, that mining stock given to secure the note be sold and the proceeds applied upon the judgment.

15. Under statutes authorizing attachments in actions "for the recovery of money," the remedy may be had in equitable actions, seeking also incidental relief. **Ind.**—Martin *v.* Holland, 87 Ind. 105, action to foreclose a mortgage and for a personal judgment. **Kan.**—Gillespie *v.* Lovell, 7 Kan. 419, where the court said: "If this was purely a suit in equity to foreclose a mechanic's lien, a suit in which no personal judgment could be rendered, probably an attachment would not lie." **N. Y.**—Corson *v.* Ball, 47 Barb. 452, enforcement of contract of sale and recovery of purchase price. **Ohio.**—Hoover *v.* Gibson, 24 Ohio St. 389. **Okla.**—Hendrickson *v.* Brown, 11 Okla. 41, 65 Pac. 935. **S. C.**—National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028, to set aside a fraudulent conveyance and recover money.

South Carolina.—In Carolina Agency Co. *v.* Garlington, 85 S. C. 114, 67 S. E. 225, an action for an accounting, wherein the case was said to be one of first impression, it was held that under the wording of the statute ("any action for the recovery of money"), the legislative intent was clear to extend the remedy to all kinds of actions for the recovery of money, whether legal or equitable.

"Money Only."—If the statute authorizes attachment where "money only" is sought it will not lie in a suit of an equitable nature. Shiel *v* Patrick, 59 Fed. 992, 20 U. S. App. 407, 8 C. C. A. 440 (New York statute); Thorington *v.* Merrick, 101 N. Y. 5, 3 N. E. 794; Van Wyck *v.* Bauer, 9 Abb. Pr. N. S. (N. Y.) 142 (for the foreclosure of a mortgage); Ebner *v.* Bradford, 3 Abb. Pr. N. S. (N. Y.) 248 (to set aside deeds, for an accounting, and for an injunction and receiver).

16. **In Georgia** the statute provides that attachments may issue "in all cases of money demands, whether arising *ex contractu* or *ex delicto.*" Morton *v.* Pearman, 28 Ga. 323, wherein it was said that the fact that demand was unliquidated, did not prevent it from being a money demand.

Actions To Recover Specific Property. But under a statute limiting attachment to money demands, an attachment will not lie in an action for the recovery of specific property under such statutes. **Ark.**—Gates *v.* Bennett, 33 Ark. 475. **La.**—Hanna *v.* Loring, 11 Mart. 276. **Me.**—Holmes *v.* Fernald, 7 Me. 232, holding that on a writ of entry by a tenant, no lien can be created by attachment. **Mich.**—Mendelsohn *v.* Smith, 27 Mich. 2.

See the title "Replevin."

A person cannot have an attachment to recover possession of his own property from the custody of a person who has a lien thereon and whose lien is gone when the defendant does not give bail. Terril *v.* Rogers, 3 Hayw. (Tenn.) 203.

A Virginia statute authorizes an attachment for the recovery of specific personal property. See Breeden *v.* Peale, 106 Va. 39, 55 S. E. 2.

17. Massey *v.* Walker, 8 Ala. 167; LeBaron *v.* James, 4 Ala. 687.

18. Marshall *v.* White, 8 Port. (Ala.) 551.

L. Actions To Recover Statutory Penalties. — Statutory penalties are, in some instances, in terms within the scope of an attachment law,[19] and it has been held that "any money demand" includes all rightful claims whether founded upon contract, tort, or statutory penalty.[20]

M. Causes of Action Against Non-Residents and Foreign Corporations. — To maintain attachment on the ground of non-residence,[21] or on the ground that the debtor is a foreign corporation,[22] it must appear that the cause of action arose wholly within the limits of the state.

Under such a statute, it has been held that if the contract was not made in the state, there must have been an express stipulation that it shall be paid in the state to entitle a party to a writ of attachment in an action upon it.[23] But it may be shown that the contract was made within the state, or that the creditors reside therein.[24] On the other

19. Adams *v.* Johnson, 72 Miss. 896, 17 So. 632; Nethery *v.* Belden, 66 Miss. 490, 6 So. 464 (Code, § 2414). See Anspach *v.* Spring Lake, 58 N. J. L. 136, 32 Atl. 77.

20. George F. Dittman Boot, etc., Co. *v.* Mixon, 120 Ala. 206, 24 So. 847.

21. Stone *v.* Boone, 24 Kan. 337.

When the defendant is a non-resident and there is property of defendant in the county in which suit is brought, an attachment may be issued in a suit on a promissory note, notwithstanding the note was executed in another state and all the parties reside in such other state. Payne *v.* First Nat. Bank, 16 Kan. 147.

A loan by a non-resident to a non-resident, secured by a bill of exchange drawn upon a resident of the state, does not create a cause of action which arose within the state. Western Bank *v.* Columbus City Bank, 7 How. Pr. (N. Y.) 238.

In Action Sounding in Tort.—Under the statute, if attachment is asked because defendant is a non-resident, no attachment can be had in an action sounding in tort unless the cause of action arose wholly within the territory. Kidd *v.* Seifert, 11 Okla. 32, 65 Pac. 931, *following* Stone *v.* Boone, 24 Kan. 337; Gillispie *v.* Lovell, 7 Kan. 419; Treadway *v.* Ryan, 3 Kan. 437.

A foreign creditor cannot attach the property of a foreign debtor, when the debt was not contracted in the state in which the attempt to attach was made. *Ex parte* Schroeder, 6 Cow. (N. Y.) 603.

A subsequent promise to pay within the state cannot effect the question when the suit is brought upon the original contract. Dulton *v.* Shelton, 3 Cal. 206.

22. **In an action for a penalty against a foreign corporation** for refusing on demand to release a mortgage on real estate that has been paid when it then had its general office and place of business outside of the state, and the demand and refusal or neglect to release the mortgage occurred outside of the state, the cause of action cannot be said to have arisen wholly within the limits of the state. Travelers' Ins. Co. *v.* Stucki, 4 Kan. App. 424, 46 Pac. 42.

23. Eck *v.* Hoffman, 55 Cal. 501; Trabant *v.* Rummell, 14 Ore. 17, 12 Pac. 56. See also Drake *v.* DeWitt, 1 Cal. App. 617, 82 Pac. 982, following the principal of Dulton *v.* Shelton, 3 Cal. 206, and holding that a contract made with plaintiff's assignor, a resident of Minnesota, for the sale of California lands in the former state on commission was not a contract for the payment of money within the state.

But it has been held that a debt due for merchandise sold in another state to residents of the state in which the action is commenced and forwarded to the latter, they stipulating to pay by remitting funds to the other state, is not a subject of an attachment under such a statute. Dulton *v.* Shelton, 3 Cal. 206.

24. *In re* Fitch, 2 Wend. (N. Y.) 298; Matter of Marty, 3 Barb. (N.Y.) 229, *reversing* on this point 2 Barb. 436, 3 How. Pr. 208.

See also *supra*, V.

hand, where there is no such limit in the attachment law, the writ may be issued without regard to the place where the cause of action arose.[25]

N. Suits To Enforce Liens. — Various statutes authorize the use of the remedy by a writ of attachment in aid of suits for the enforcement of liens, and these will be found treated under the appropriate titles throughout this work, as in the cases of liens generally, to recover rent,[26] of mechanics' liens,[27] of vendor's lien,[28] of liens against vessels, etc.[29]

O. Attachment in Equity. — 1. In General. — Generally, under the statutory provisions, an attachment can issue only in an action at law and on a legal demand.[30]

Consequently, it is only by express statutory authority that a court sitting in equity has jurisdiction of an attachment proceeding, and such

25. Goldmark *v.* Magnolia Metal Co. 65 N. J. L. 341, 47 Atl. 720; Sheldon *v.* Blauvelt, 29 S. C. 453, 7 S. E. 593, 13 Am. St. Rep. 749, 1 L. R. A. 685.

In Fisher *v.* Consequa, 2 Wash. C. C. 382, 9 Fed. Cas. No. 4,816, the court said that the attachment law authorizing attachments for debt "has received in practice a liberal construction, so as to embrace debts contracted in foreign countries," by persons who never resided in the state, and cannot properly be said to absent themselves.

26. See the title "Landlord and Tenant."

27. See the title "Mechanic's Liens."

28. See the title "Sales."

29. See the title "Admiralty."

30. Ala.—Henderson *v.* Alabama, Gold L. Ins. Co., 72 Ala. 32. Ill.—May *v.* Baker, 15 Ill. 89. Mo.—Beyer *v.* Continental Trust Co., 63 Mo. App. 521. N. J.—Phoenix Iron Co. *v.* New York Wrought Iron R. Chair Co., 27 N. J. L. 484.

Equitable Attachment Not Favored. This was pointed out in Ayres *v.* The Graham Steamship C. & L. Co., 150 Ill. App. 137, *citing* Dewey *v.* Eckert, 62 Ill. 218; Manchester *v.* McKee, 9 Ill. 511), where Holdom, P. J., said that the theory on which the orders reversed were sought to be sustained was "that by reason of the non-residence of appellant and the fact that aside from the Queen securities it has no property subject to execution in this jurisdiction, therefore appellee has the right to the remedy granted by the injunctional and receivership orders, which in their essence, operate as an equitable attachment preserving the assets ordered into the hands of the receiver appointed so that the same may be subjected to the payment of any money decree which shall be thereafter adjudged against appellant."

Equitable debts are not sufficient to ground an attachment upon. Bachman *v.* Lewis, 27 Mo. App. 81.

When the property of an absconding debtor is liable to seizure by foreign attachment, the remedy is at law only. Latham *v.* Barlow, 6 Blackf. (Ind.) 97.

A bill in equity to charge the separate estate of a married woman will not support a writ of attachment. Brumback *v.* Weinstein, 37 Mo. App. 520. To the same effect, see Gage *v.* Bates, 62 Mo. 412; Bachman *v.* Lewis, 27 Mo. App. 81, *overruling* Frank *v.* Siegel, 9 Mo. App. 467. See *infra*, under VII, K.

"The statutory proceeding known in Louisiana as 'provisional seizure' is not authorized by the equity rules of the supreme court, nor by the practice of the high court of chancery in England, and has not been adopted nor authorized as an equity proceeding by the rules of this court. That in equity a similar remedy to the Louisiana 'provisional seizure' may, in certain cases, be granted, is admitted, but such similar remedy, which is by receiver and injunction in aid, should only be granted on bill filed, notice, hearing, and proof. The claim by council that the writ of provisional seizure, obtained in this present case, is incidental to and really forms part of the 'executory process' as authorized by the Louisiana Code of Practice, and therefore is authorized under our thirty-ninth rule, cannot be admitted." Marchand *v* Sobral, 24 Fed. 316.

remedy may be pursued only in the particular cases designated by the statute.[31] But such a statute is remedial and should be construed liberally,[32] and when a statute authorizes an attachment on an original bill in equity where a proper case for an attachment in equity is made, it has been held that it is not necessary for a creditor first to obtain a judgment at law and an execution with a return of no property.[33]

Effect of the Code — The code having abolished the distinction between legal and equitable actions, one form of action being substituted, an attachment may be issued in all civil actions without regard to whether they were formerly suits in equity or actions at law.[34]

31. **Ala.**—Smith *v.* Moore, 35 Ala. 76; McKenzie *v.* Bentley, 30 Ala. 139. **Ia.**—Baldwin *v* Buchanan, 10 Iowa 277; Crouch *v.* Crouch, 9 Iowa 269. **Ky.**—Huffman *v.* Thomas, 2 Duv. 105; Lewis *v.* Quinker, 2 Met. 284; Robertson *v.* Stewart, 2 B. Mon. 321; Moore *v.* Simpson, 5 Litt. 49. **Tenn.**—Isaacks *v.* Edwards, 7 Humph. 465, 46 Am. Dec. 86; Terril *v.* Rogers, 3 Hayw. 203. **W. Va.** Bowlby *v.* DeWitt, 47 W. Va. 323, 34 S. E. 919; McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55; Peyton & Co. *v.* Cabell, 25 W. Va. 540; Sims *v.* Charleston Bank, 3 W. Va. 415.

"**The object of the legislature** was to give courts of law power to enforce the remedy by attachment, as to all property of a legal nature, and to give to courts of equity the power to enforce the remedy by attachment as to all property, real and personal, either of a legal or equitable nature, debts or choses in action, whether due or not due, in which the defendant has an interest." Lane *v.* Marshall, 1 Heisk. (Tenn.) 30.

An administrator not having been appointed, that the courts in equity have jurisdiction against the heir of a non-resident debtor in a suit against the heirs to subject personal estate found in the state to the payment of debts, see Hefferman *v.* Forward, 6 B. Mon. (Ky.) 567; Peterson *v.* Poignard, 6 B. Mon. (Ky.) 570.

A bill in equity to enforce the execution of a trust may be inserted in a writ of attachment, and served on the defendant by an attachment of his property, as a mode of commencing a suit in equity, under statute of 1856, c. 38, §2. Crane *v.* Adams, 16 Gray (Mass.) 542.

Interest in Good-Will of a Business. Crossman *v.* Griggs, 186 Mass. 275, 71 N. E. 560.

A bill to compel the marshaling of assets will not support a domestic attachment, as the statute makes no provision for such an attachment. Buck *v.* Bransford, 58 Ark. 289, 24 S. W. 103.

32. St. Mary's Bank *v.* St. John, 25 Ala. 566. See also Flake *v.* Day, 22 Ala. 132.

The statute intended that whatever could be attached at law could likewise, in a proper case, be attached in chancery. Flake *v.* Day, 22 Ala. 132.

33. **Ala.**—Flake *v.* Day, 22 Ala. 132. **Ky.**—Meyer *v.* Ruff, 13 Ky. L. Rep. 254, 16 S. W. 84. **Tenn.**—Wilson *v.* Beadle, 2 Head 510.

34. **Colo.**—Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642, 10 Am. & Eng. Ann. Cas. 774. **Ia.**—Curry *v.* Allen, 55 Iowa 318, 7 N. W. 635. **N. Y.**—Corson *v.* Ball, 47 Barb. 452. **Ohio.**—Goble *v.* Howard, 12 Ohio St. 165. **Okla.**—Hendrickson *v.* Brown, 11 Okla. 41, 65 Pac. 935. *Contra,* Bachman *v.* Lewis, 27 Mo. App. 81.

"As for the attachment, our code provisions are broad enough to authorize such a proceeding in an equitable suit. It is the prevailing practice in Kentucky and other states having laws similar to ours. It has been adopted and used here by members of the bar, and has heretofore passed *sub silentio* under the notice of the court. Although it does not belong to the traditionary system of equity practice, as adopted here under our territorial government and transmitted to the state, it commends itself to the court as proper under the statutory provisions embracing all civil actions." American Land Co. *v.* Grady, 33 Ark. 550.

Attachment against a non-resident lies in equity as well as at law. Bonner *v.* Little, 38 Ark. 397.

By Mississippi Code, 1906, § 536, a chancery court has jurisdiction of at-

2. Suits for an Accounting. — It has been held that there can be no attachment in an equitable action requiring an accounting,[35] unless, as has been held in some cases, the plaintiff can show by the affidavit for the attachment the specific amount claimed to be due.[36]

VIII. GROUNDS FOR ATTACHMENT. — A. In General. — The attachment statutes in the different jurisdictions prescribe the grounds upon which a creditor may pursue the remedy by attachment in a suit against his debtor, and an attachment can be issued only for one of the causes mentioned in the statutes,[37] and must stand or fall according to the state of facts existing at the date of its issuance, and cannot be cured by a subsequent event.[38]

tachment suits for indebtedness arising *ex delicto*. Wallace *v.* Lucas (Miss.), 42 So. 607.

In Alaska.—So, under the the statute, an attachment will lie in an action to recover upon a contract, express or implied, for the direct payment of money, whether it is called an action at law or a suit in equity. School Board *v.* Common Council, 2 Alaska 344, 350. And see, Seattle First Nat. Bank *v.* Fish, 2 Alaska 344.

Constitutionality of Statute. — McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55.

35. Thorington *v.* Merrick, 101 N. Y. 5, 3 N. E. 794; Guilhon *v.* Lindo, 9 Bosw. (N. Y.) 601 (an action to perpetually enjoin the use of a trademark; the statute also requiring the affidavit to specify the amount of the claim and the grounds thereof); William *v.* Freeman, 12 N. Y. Civ. Proc. 334; Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934. *Contra*, see **Ill.**—Humphreys *v.* Matthews, 11 Ill. 471. . **Ia.**—Hansen *v.* Morris, 87 Iowa 303, 54 N. W. 223, holding that when the plaintiff shows that upon an accounting there will be a balance due, an attachment will lie. **S. C.**—Carolina Agency Co. *v.* Garlington, 85 S. C. 114, 67 S. E. 225.

See the title "**Account and Accounting.**"

A claim by a partner for a balance found due on an accounting will not support an attachment as a "debt or demand arising upon contract, judgment or decree." Stone *v.* Boone, 24 Kan. 337. See also Treadway *v.* Ryan, 3 Kan. 437.

36. Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741 (in an action by the assignee of an insolvent corporation to recover the balance due on a subscription to the capital stock, though the prayer of the complaint is for an accounting); Bingham *v.* Keylor, 19 Wash. 555, 53 Pac. 729. See also DeLeonis *v.* Etchepare, 120 Cal. 407, 52 Pac. 718, holding that the fact that equitable relief is sought to compel an accounting for moneys received by the defendant as agent of the plaintiff does not affect the plaintiff's right to an attachment for money specifically alleged to have been received by the agent, and for which judgment is demanded, unless the prayer that she may have judgment for such other sum or sums as the trial may disclose to have been received by the defendant precludes an attachment for the sum specifically demanded."

37. **Ga.**—Forbes Piano Co. *v.* Owens, 120 Ga. 449, 47 S. E. 938, holding that there was no law authorizing the issuance of an attachment on the ground that the defendant "has left the county." **Neb.**—Walker *v.* Hagerty, 20 Neb. 482, 30 N. W. 556. **N. Y.**—Bogart *v.* Dart, 25 Hun 395. **Tenn.**—Craigmiles *v.* Hays, 7 Lea 720. **Va.**—Starke *v.* Scott, 78 Va. 180.

Some Special Grounds.—Unlawfully Selling or Giving Away Liquors.—Adams *v.* Johnson, 72 Miss. 896, 17 So. 682.

Unlawfully Withholding Property.—Durr *v.* Jackson, 59 Ala. 203.

Dealing in Fixtures.—Dillard *v.* Brenner, 73 Miss. 130, 18 So. 933.

The right to resort to attachment cannot be acquired by contract between parties, much less can they in that manner add a new ground to the statute for suing out such process. Dogan *v.* Cole, 63 Miss. 153.

38. **Ga.**—Hobbs *v.* Greenfield, 103 Ga. 1, 30 S. E. 257. **Ia.**—Dennison *v.* Soper, 33 Iowa 183. **La.**—Boyd *v.* Labranche,

But when several statutory grounds for an attachment are assigned, the attachment will be sustained if any one or more of the grounds cover the entire debt, though the other grounds stated be untrue or not supported by the evidence.[39]

B. Insolvency and Indebtedness. — In most jurisdictions, insolvency, reputed or real, coupled with indebtedness, is not alone a ground for an attachment.[40]

But by statute in Kentucky insolvency is ground for an attachment, where it appears that the defendant has not sufficient property in the state subject to execution to satisfy the plaintiff's demand, and that its collection would be endangered by delay,[41] although there is fraudulent intent on the part of the debtor.[42] But the fact of insolvency makes only a *prima facie* case and may be rebutted like other such presumptions.[43]

35 La. Ann. 285; Todd *v.* Shouse, 14 La. Ann. 426; Thompson *v.* Watson, 1 Man. Unrep. Cas. 220. **Wis.**—Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100.

39. **U. S.**—Strauss *v.* Abrahams, 32 Fed. 310. **Neb.**—Askwith *v.* Allen, 33 Neb 418, 50 N. W. 267, in which case the court referring to Mayer *v.* Zingre, 15 Neb. 458, 25 N. W. 727, pointed out that in that case the petition contained two causes of action, one for debt fraudulently contracted, and the other was not so contracted, and that it was held that the attachment must be discharged for want of grounds covering the whole debt. **N. J.**—Garbett *v.* Mountford, 54 Atl. 872. **Wis.**—Stevens Point First Nat. Bank *v.* Rosenfeld, 66 Wis. 292, 28 N. W. 370.

40. **Ala.**—Durr *v* Jackson, 59 Ala. 203. **La.**—Arcadia Cotton Oil, etc., Co. *v.* Fisher, 120 La. 1076, 46 So. 28. **Neb.** Walker *v.* Hagerty, 20 Neb. 482, 30 N. W. 556. **Tex.**—Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048.

While inability to pay debts is no just cause for an attachment, it may be a material circumstance as tending to prove that the debtor is converting his property into money or concealing it for the purpose of placing it beyond the reach of his creditors. Parmer *v.* Keith, 16 Neb. 91, 20 N. W. 103.

41. Goepper & Co. *v.* Phoenix Brewing Co., 115 Ky. 708, 25 Ky. L. Rep. 84, 74 S. W. 726; Robinson *v.* McInteer, 15 Ky. L. Rep. 128; Reisert *v.* Vancleve, 9 Ky. L. Rep. 401; Simpson *v.* Starnes, 8 Ky. L. Rep. 357.

For early rule, see Clarke *v* Seaton, 18 B. Mon. (Ky.) 226.

Concurrence of Facts.—Under this statute, the two things must concur in order to authorize the issue of an attachment, though proof of the first is *prima facie* sufficient to sustain the latter. Goepper & Co. *v.* Phoenix Brew. Co., 115 Ky. 708, 25 Ky. L. Rep. 84, 74 S. W. 726; Dunn *v.* McAlpine, 90 Ky. 78, 13 S. W. 363.

Where two or more co-obligors are sued on the same debt, the allegation and proof as to one of them not having a sufficiency of property in the state subject to execution, and that the demand will be endangered by delay, does not authorize an attachment as to him, as it does not allege and show that the other co-obligors have not ample property, subject to execution, with which to pay the demand. Dunn *v.* McAlpine, 90 Ky. 78, 13 S. W. 363, holding further that an allegation that the other debtor had made an assignment for the benefit of creditors does not authorize the issue of the attachment.

And it is held that neither solvency nor insolvency are regarded in determining whether the defendant has enough property subject to execution to pay plaintiff's debt. Goepper & Co. *v.* Phoenix Brew. Co., 115 Ky. 708, 74 S. W. 726; Deposit Bank *v.* Smith, 109 Ky. 311, 58 S. W. 792; Downs *v.* Ringgold, 101 Ky. 392, 41 S. W. 317; Burdett *v.* Phillips, 78 Ky. 246; Johnson *v.* Louisville City Nat. Bank, 22 Ky. L. Rep. 118, 56 S. W. 710.

42. Burdett *v.* Phillips, 78 Ky. 246.

43. Deposit Bank *v.* Smith, 109 Ky. 311, 22 Ky. L. Rep. 808, 58 S. W. 792; Downs *v.* Ringgold, 101 Ky. 392, 19 Ky. L. Rep. 639, 41 S. W. 317; Dunn *v.*

C. Non-Residence. — **1. In General.** — Though in the absence of statute non-residence furnishes no ground for an attachment,[44] statutes now exist in most jurisdictions expressly providing for an attachment on this ground.[45] But this ground for attachment must not be confused with that one treated further on in this article, namely, absence or absconding.[46]

2. What Constitutes Residence or Non-Residence. — a. *In General.* A general definition of residence cannot well be given, as the word is used with different meanings in statutes having relation to different subject-matter.[47] It may be said that it has not the same meaning in attachment laws as the word has in statutes relating to citizenship, suffrage, homestead, and such relations.[48] As used in attachment statutes, residence is an actual as contradistinguished from a construc-

McAlpine, 90 Ky. 78, 13 S. W. 363; Johnson *v.* Louisville City Nat. Bank, 22 Ky. L. Rep. 118, 56 S. W. 710; Robinson *v.* McInteer, 15 Ky. L. Rep. 128.

"From the fact of insolvency the presumption arises that the collection of the debt will be endangered by delay. Dunn's Trustee *v.* McAlpine, 90 Ky. 78, 13 S. W. 363; Downs *v.* Ringgold, 101 Ky. 392, 41 S. W. 317." Johnson's Assignee *v.* Louisville City Nat. Bank, 22 Ky. L. Rep. 118, 56 S. W. 710.

44. Hugh *v.* Dayton Mfg. Co., 66 Ohio St. 427, 64 N. E. 521.

Provision as to Non-Residence Omitted by Inadvertance.—Where it is clear from a reading of collateral sections of an amended statute that non-residence as a ground for attachment was omitted by inadvertance from a section giving the right to a foreign attachment against a non-resident, a foreign attachment issued on the ground of non-residence will not be dissolved. Auerbach *v.* Swadner, 18 Ohio C. C. 389, 10 Ohio Cir. Dec. 435.

In Judicial Attachment.—In all cases it should appear as a prerequisite to the issuance of a judicial attachment, that the defendant is a resident of the state. Blair *v.* Cleveland, 1 Stew. (Ala.) 421; Evans *v.* Saltmarsh, 1 Stew. (Ala.) 43; Wyatt *v.* Campbell, Minor (Ala.) 390.

A judicial attachment against a non-resident is not authorized by the statute upon a return of not found. Deaver *v.* Keith, 61 N. C. 428.

45. See the various state statutes, and Willis *v.* Pearce, 6 Har. & J. (Md.) 191 note; Redwood *v.* Consequa, 2 Browne (Pa.) 62.

A non-resident, who owns property in the state, can be sued and forced to come into the state to defend a suit. Hornbeck *v.* Gilmer, 110 La. 500, 34 So. 651.

Grounds Additional to Those Against Residence.—As against a foreign corporation of a non-resident, the fact of non-residence alone authorizes an attachment, if the action be on a contract, or on a judgment or award. If the action against a non-resident or foreign corporation be not upon a contract, judgment, or award, there must be some ground stated that would justify an attachment against a resident defendant, or else it will not issue. Bates Mach. Co. *v.* Norton Iron Works, 113 Ky. 372, 68 S. W. 423.

Bond Required of Non-Resident.—A statute providing that "in all cases, when an attachment is prayed for against a debtor, absent from the territory, the plaintiff shall, previous to his obtaining the attachment, give bond, etc.," does not enlarge the privilege granted to the creditor to attach the property of a non-resident debtor. Watson *v.* Pierpoint, 7 Mart. (La.) 414.

46. **When the law provides one remedy by foreign and another by domestic attachment,** a foreign attachment issued against one who is a resident and absconding debtor will be discharged. Fuller *v* Bryan, 20 Pa. 144.

47. Krone *v.* Cooper, 43 Ark. 547.

48. **Time To Acquire Right To Vote.** A resident of a year is not required to protect a defendant's property from attachment, as the length of time required to acquire a political domicile is not required. State *v.* Judge, 2 Rob. (La.) 449, *overruling* Boone *v.* Savage, 14 La. 169; Lurty *v.* Skilton, 19 La. Ann. 136; Wesson *v.* Marshall, 13 La.

tive or legal residence or domicile.[49] It implies a settled or established abode, fixed permanently or for a time, for business or other purposes, as contradistinguished from a mere temporary or casual sojourn of a person in the state,[50] although there may be an intent, at some in-

Ann. 436; Thomas *v.* Ogden, 23 Ohio C. C. 185.

One may be a non-resident without losing his domicile or rights of citizenship in the state of his origin and without gaining a domicile in another. Blair *v.* Winston, 84 Md. 356, 35 Atl. 1101; Wheeler *v.* Cobb, 75 N. C. 21.

That a person's residence, to make him an inhabitant, should be so long as to give him the rights of citizenship, see Taylor *v.* Knox, 1 Dall. (U. S.) 158, 1 L. ed. 80.

The fact that the defendant voted in the foreign state, while absent from the state indefinitely, on business, was considered decisive on the question of non-residence. Wolf *v.* McGavock, 23 Wis. 516.

Statutes relating to elections and homestead relate rather to domicile than to a residence, and rules with reference thereto are not strictly applicable in the construction of an attachment statute. Witbeck *v.* Marshall-Wells Hdw. Co., 88 Ill. App. 101, *affirmed*, 188 Ill. 154, 58 N. E. 929. See Chitty *v.* Chitty, 118 N. C. 647, 24 S. E. 517, 32 L. R. A. 394.

49. **Ga.**—Stickney *v.* Chapman, 115 Ga. 759, 42 S. E. 68. **Ia.**—Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683. **Neb.**—Webb *v.* Wheeler, 79 Neb. 172, 112 N. W. 369. **N. Y.**—Hanover Nat. Bank *v.* Stebbins, 69 Hun 308, 23 N. Y. Supp. 529. **Tenn.**—Southern R. Co. *v.* McDonald, 59 S. W. 370. **Va.** Long *v.* Ryan, 30 Gratt. 718.

Where a residence is once established, it requires two conditions or things to destroy it; first, a removal; second, an intention not to return. Carlinghouse *v.* Mulvane, 40 Kan. 428, 19 Pac. 798.

The Act of Abiding for Some Continuance of Time.—Lawson *v.* Adlard, 46 Minn. 243, 48 N. W. 1019.

When applied to attachment laws, "domicile" and "residence" are not convertible terms, for domicile may be in one place and residence, for the time being, in another. Thomson *v.* Odgen, 23 Ohio C. C. 185.

Whether of Temporary or Permanent Character.—By "residence," as used in the statutes authorizing attachment, is meant not legal domicile, but actual place of abode or living, either of a temporary or permanent character, at which a service of process might be lawfully made. Irwin *v.* Raymond, 58 Misc. 319, 110 N. Y. Supp. 1100; Rosenzweig *v.* Wood, 30 Misc. 297, 63 N. Y. Supp. 447. To the same effect, see New York City Bank *v.* Merrit, 13 N. J. L. 131.

"Debtors who reside out of this state," means debtors who have no abode in the state. Evans *v.* Perrine, 35 N. J. L. 221.

General Intention To Return to Place of Domicil.—There may be such an actual residence, notwithstanding a general intention to return to the place of legal residence or domicil. Hanson *v.* Graham, 82 Cal. 631, 23 Pac. 56, 7 L. R. A. 127.

When a person has uniformly declared that his residence was not within the state, and his conduct and facts testified to by others support his declared intention, he must be treated as a non-resident for the purposes of attachment process. Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397.

A non-resident, who is the lessee of a railroad and liable therefore to be sued, is still a non-resident for the purposes of foreign attachment. Breed *v.* Mitchell, 48 Ga. 533.

50. **U. S.**—Knapp *v.* Gerson, 25 Fed. 197. **Cal.**—Hanson *v.* Graham, 82 Cal. 631, 23 Pac. 56, 7 L. R. A. 127. **Ill.**—Witbeck *v.* Marshall-Wells Hdw. Co., 88 Ill. App. 101, *affirmed*, 188 Ill. 154, 58 N. E. 929; Jenks *v.* Rounds, 87 Ill. App. 284; Barron *v.* Burke, 82 Ill. App. 116. **Minn.**—Keller *v.* Carr, 40 Minn. 428, 42 N. W. 292. **Miss.**—Morgan *v.* Nunes, 54 Miss. 308; Alston *v.* Newcomer, 42 Miss. 186. **Mo.**—Greene *v.* Beckwith, 38 Mo. 384. **N. J.**—Leonard *v.* Stout, 36 N. J. L. 370. **Va.**—Long *v.* Ryan, 30 Gratt. 718.

Member of Theatrical Troupe.—Under a rule that "the residence referred to by the attachment law is an actual, as contradistinguished from a constructive, or legal residence or domicile," a

definite time in the future, to return to the original domicile.[51] The at-

person who is a member of a theatrical troupe, traveling about from place to place giving performances cannot be proceeded against by attachment "as a non-resident." Egener *v.* Juch, 101 Cal. 105, 35 Pac. 432, 873.

One who has stopped at a place within the state with the settled purpose to remain there, and has made efforts to procure a residence for his family and a place for business, is a resident. Brown *v.* Ashbough, 40 How. Pr. (N. Y.) 260.

One who has no known place of abode and has not had one for thirteen years, is not a resident. Munger *v.* Doolan, 75 Conn. 656, 55 Atl. 169.

One who is in the state engaged in a business under a contract, and expects to engage in business and remain permanently upon completion of the contract, is a resident of the state. Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533.

And a contractor or other business man who goes into another state for an indefinite stay for business purposes is a resident of such state, and cannot be proceeded against as a "non-resident" under the attachment laws of such state. Didier *v.* Patterson, 93 Va. 534, 25 S. E. 661; Long *v.* Ryan, 30 Gratt. (Va.) 718; Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414.

A debtor who has left the state intending to engage in business in another state, may be proceeded against as a non-resident. Henderson *v.* Travis, 6 La. Ann. 174.

So also may one who has gone to another state with his family for three months, and has opened offices for the transaction of business not of a temporary character. Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683. To the same effect, see Union Square Bank *v.* Reichmann, 69 Hun 617, 23 N. Y. Supp. 531; Hanover Nat. Bank *v.* Stebbins, 69 Hun 308, 23 N. Y. Supp. 529; Canda *v.* Robbins, 55 Hun 605, 7 N. Y. Supp. 896; Chaine *v.* Wilson, 1 Bosw. (N. Y.) 673, 8 Abb. Pr. 78.

One who departed for a foreign country, carrying four-fifths of his property with him, and there engaged in a new business, cannot be considered an inhabitant of the state from which he departed when he had remained in the foreign country for about nine months and has been silent about his return. Hanson *v.* Graham, 82 Cal. 631, 23 Pac. 56, 7 L. R. A. 127; Nailor *v.* French, 4 Yeates (Pa.) 241.

An unmarried man, who took lodgings and rented a store in a city, where he carried on trade, and frequently declared his intention of taking up a permanent residence in the city, is an inhabitant, and a foreign attachment, issued upon his absconding, will be dissolved. Kennedy *v.* Baillie, 3 Yeates (Pa.) 55.

Foreigners who have come as absconding debtors, become residents of the state in which they purchased property and settled, though they have announced their purpose to sell their property and leave the United States. Eck *v.* Hoffman, 55 Cal. 501.

Upon a voluntary absence of ten years, a person becomes non-resident. Walker *v.* Barrelli, 32 La. Ann. 467.

51. **Ark.**—Krone *v.* Cooper, 43 Ark. 547. **Ill.**—Wells *v.* Parrott, 43 Ill. App. 656. **Miss.**—Morgan *v.* Nunes, 54 Miss. 308. **N. Y.**—Weitkamp *v.* Loehr, 21 Jones & S. 79. See *infra*, VIII, C, 2, e.

In Imperial Cotton Oil Co. *v.* Allen, 83 Miss. 27, 35 So. 216, it was held that a plaintiff was entitled to a charge that, if there was absence of defendant with intent to remain out of the state for an indefinite period, there was non-residence within the meaning of the attachment law, "although the jury may believe from the evidence that he occasionally visited the State of Mississippi, or intended at some uncertain time to return to Mississippi, and to live there permanently."

One who has been keeping house in the state and engaged in business must be deemed a resident though he may have a home in another state and intend some time to return to it. Southwood *v.* Myers, 3 Bush (Ky.) 681.

Appointment to Position or Office in Another State.—Where one voluntarily removes to another state, for the purpose of discharging the duties of an office of indefinite duration, which require his continued presence there for an unlimited time, such a one is a non-resident of the state for the purposes of an attachment, and that notwithstanding he may occasionally visit the state, and may have the intent to return at some uncertain future time.

tachment statutes usually refer to non-residents in the state and not in the county.[52]

b. *Number of Residences a Debtor May Have.* — Within the meaning of the attachment laws a man may have two places of residence at different times of the year,[53] or he may maintain two places of residence in different states, one where his family resides and the other where he has an abode.[54]

c. *Intention.* — On the question of residence or non-residence, intention alone is insufficient to establish a change of residence, there must be both an intention to change and the fact of removal. In other words, fact and intention must concur;[55] therefore, a mere intention to move to the state, not yet carried into effect, does not make a person a resident.[56] A declaration of intention to change a residence does not make

Lawson *v.* Adlard, 46 Minn. 243, 48 N. W. 1019 (as to employment in another state by the government for an indefinite period); Carden *v.* Carden, 107 N. C. 214, 12 S. E. 197, 22 Am. St. Rep. 876 (as to a Methodist preacher transferred to a conference in another state); Wheeler *v.* Cobb, 75 N. C. 21 (as to a supervisor of internal revenue, assigned to duty in other states).

52. **Non-residence in the county** does not warrant an attachment, but only non-residence in the state (Dickenson *v.* Cowley, 15 Kan. 269), unless a special statute authorizes attachments against non-residents of the county. People *v.* Justices, 11 Hun (N. Y.) 443.

53. Chariton County v. Moberly, 59 Mo. 238.

54. **Ill.**—Barron *v.* Burke, 82 Ill. App. 116. **Mo.**—Exchange Bank *v.* Cooper, 40 Mo. 169. **N. J.**—Stafford *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023. *Compare* Stout *v.* Leonard, 37 N. J. L. 492.

One who dwells in the state with no intention of leaving, being engaged as a public contractor under contracts that would occupy him for an indefinite period, and who has registered as a voter, is not a non-resident of the state, though his family live in Washington city in order that his children can be educated at its schools. Long *v.* Ryan, 30 Gratt. (Va.) 718. See Didier *v.* Patterson, 93 Va. 534, 25 S. E. 661.

But in Loder *v.* Littlefield, 39 Mich. 512, it was held that one who has a home in another state where his wife resides, and which he visits from time to time, is a non-resident.

Removal Unaccompanied by Family. One who has moved from one state to another with the intention of abandoning the former state and taking up his permanent abode in the latter, is a resident, and the fact that his family did not immediately accompany him is of no consequence. Swaney *v.* Hutchins, 13 Neb. 266, 13 N. W. 282. And see Wells *v.* People, 44 Ill. 40.

55. **Kan.**—Adams *v.* Evans, 19 Kan. 174. **Minn.**—Lawson *v.* Adlard, 46 Minn. 243, 48 N. W. 1019. **N. J.**—Baldwin *v.* Flagg, 43 N. J. L. 495; Stout *v.* Leonard, 37 N. J. L. 492, *reversing* 36 N. J. L. 370. **Pa.**—Reed's Appeal, 71 Pa. 378. **Tenn.**—Whitly *v.* Steakly, 3 Baxt. 393.

Intention Deducible From Facts and Circumstances.—Wells *v.* People, 44 Ill. 40; Wells *v.* Parrott, 43 Ill. App. 656.

Actual dwelling for a sufficient space of time. Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105, 129.

In order to effect a change of domicile there must be not alone a change of residence, but an intention permanently to abandon the former home, and the mere residing at a different place, although evidence of the required intention, does not amount *per se* to such a change. Johnson *v.* May, 49 Neb. 601, 68 N. W. 1032.

56. Adams *v.* Evans, 19 Kan. 174.

One who has no abode within the state, nor any place which he could call his home, and who is living in another state is a non-resident, though his domicile may have been within the state. Wood *v.* Hamilton, 14 Daly 41, 1 N. Y. St. 779, holding that the person's intentions as to the future do not affect the question.

a person a non-resident, when the residence and domicile are not in fact changed.[57] On the other hand, when there has been in fact a change of abode, a general intention at some future time to return to the state from which the person has removed, does not maintain his residence there so as to defeat an attachment against him as a non-resident.[58]

d. *As Dependent on Opportunity for Service of Process.* — In many cases, a prominent idea is recognized in determining the question of residence or non-residence, namely whether it is practicable to serve the debtor with ordinary process in any of the modes recognized by law for the serving of process upon residents of the state, and reach his property according to the course of the common law.[59] And so, it is held

57. **U. S.**—Lyle *v.* Foreman, 1 Dall. 480, 1 L. ed. 232. **Ia.**—Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220. **Kan.**—Ballinger *v.* Lantier, 15 Kan. 608. **Mo.** Holliday *v.* Mansker, 44 Mo. App. 465. **N. J.**—Stafford *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023; Kugler *v.* Shreve, 28 N. J. L. 129. **Pa.**—Matter of Dillon, 2 Pearson 182; Malone *v.* Lindley, 1 Phila. 192, 8 Leg. Int. 82. **Tenn.**—Smith *v.* Story, 1 Humph. 420.

In Croft *v.* Apel, 8 Houst. (Del.) 162, 32 Atl. 172, it was held that no foreign attachment will issue against a person who has been living and doing business in the state for a number of years, and whose family still resides at the place, notwithstanding the fact that he has been absent from his home for some time and has been heard to say that he was out of the town where he had been living and never expected to see it again.

Where it is evident by unequivocal acts that the intention is to remove, it is immaterial that the family remains temporarily. Reed *v.* Ketch, 1 Phila. (Pa.) 105, 7 Leg. Int. 182.

58. Hanson *v.* Graham, 82 Cal. 631, 23 Pac. 56, 7 L. R. A. 127. See, *supra*, VIII, C.

A person who removes to another state, with the intention of returning, but also with the intention of remaining on a certain contingency, which had not happened when foreign attachments are issued, is not a non-resident. Smith *v.* Dalton, 1 Cinc., Super. Ct. (Ohio) 150.

One who has remained abroad for three years, and has had all the time the purpose of returning when it might suit his convenience, is a non-resident. Haggart *v.* Morgan, 4 Sandf. (N. Y.) 198.

Loose expressions at the time of departure, of an intention to return at some indefinite time are countervailed by acts and conduct. Nailor *v.* French, 4 Yeates (Pa.) 241.

59. **Miss.**—Brown *v.* Crane, 69 Miss. 673, 13 So. 855. **N. Y.**—Union Square Bank *v.* Reichmann, 69 Hun 617, 23 N. Y. Supp. 531; Hanover Nat. Bank *v.* Stebbins, 69 Hun 308, 23 N. Y. Supp. 529. **N. C.**—Carden *v.* Carden, 107 N. C. 214, 12 S. E. 197, 22 Am. St. Rep. 876. **S. D.**—Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109. **Va.**—Long *v.* Ryan, 30 Gratt. 718.

In determining whether a debtor is a non-resident, the determinal fact is that he must be a non-resident of the state where the attachment is sued out, not that he must be a resident elsewhere; he must be so situated that he has no abode or home within the state where process can be served upon him. Thomson *v.* Ogden, 23 Ohio C. C. 185.

If a summons or capias could have been served, an attachment will not lie. Kugler *v.* Shreve, 28 N. J. L. 129.

In Blair *v.* Winston, 84 Md. 356, 35 Atl. 1101, the court said that the fact that the debtor can be or is summoned does not of itself defeat the attachment, if he be a non-resident, but when he is summoned in the capias case, it is a circumstance to be considered in connection with the other facts.

See also New York City Bank *v.* Merrit, 13 N. J. L. 131, wherein the court said that an attachment is an extraordinary writ, and to use it when the debtor is within the reach of ordinary process, is wholly inconsistent with the spirit and design of this mode of procedure.

Absence from the state with his family, so that neither personal nor substituted service can be commenced against a debtor, is a circumstance to

that a residence or place of abode in the state of a temporary or permanent character so that a summons might lawfully be served, is a condition on which process of foreign attachment cannot be issued,[60] as it is sometimes expressed, the absence must be so protracted as to amount to a prevention of legal remedy by ordinary process.[61] But a temporary, casual or transitory absence from the state is insufficient to warrant the issuance of a writ although there will be delay,[62] or inconvenience in the service of summons or other process.[63]

e. *Temporary Abode or Absence.* — A mere temporary abode in the state in which suit is brought does not make a person a resident,[64] nor does a mere temporary absence for business or pleasure make a person a non-resident,[65] especially where there is a clearly understood inten-

determine the issue of non-residence. Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683.

60. Bowers *v.* Ross, 55 Miss. 213; Ashton *v.* Newcomer, 42 Miss. 186. **N. J.**—C. B. Coles, etc. Co. *v.* Blythe, 69 N. J. L. 203, 54 Atl. 240; Baldwin *v.* Flagg, 43 N. J. L. 495; Stout *v.* Leonard, 37 N. J. L. 492, *reversing* 36 N. J. L. 370. **N. Y.**—Irwin *v.* Raymond, 58 Misc. 319, 110 N. Y. Supp. 1100.

Where the defendant's family are residing in the state, and ordinary process of summons can be served upon him, by leaving a copy with his family, at their residence or place of abode, he cannot be proceeded against by attachment as a non-resident, when his absence on business was intended to be for a definite time, but circumstances required it to be prolonged for a short time. Del Hoyo *v.* Brundred, 20 N. J. L. 328; Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

But the mere fact that the officer made a substituted service of the summons some days after the writ was issued, does not destroy the allegations of the affidavit as to the non-residence of the defendant. Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

61. **Ga.**—Stickney *v.* Chapman, 115 Ga. 759, 42 S. E. 68. **Ill.**—Jenks *v.* Rounds, 87 Ill. App. 284; Wells *v.* Parrott, 43 Ill. App. 656. **Minn.**—Lawson *v.* Adlard, 46 Minn. 243, 48 N. W. 1019; Keller *v.* Carr, 40 Minn. 428, 42 N. W. 292. **Miss.**—Morgan *v.* Nunes, 54 Miss. 308. **Neb.**—Webb *v.* Wheeler, 79 Neb. 172, 112 N. W. 369.

Nature, Purpose and Duration of Absence.—The fact that the defendant had, during his absence, no residence or place of abode in the state where summons could be served on him, is not conclusive of the question whether the defendant was or was not a non-resident, but the nature and purpose of the absence, as well as its duration, must be considered. Keller *v.* Carr, 40 Minn. 428, 42 N. W. 292.

62. Lawson *v.* Adlard, 46 Minn. 243, 48 N. W. 1019; Fuller *v.* Bryan, 20 Pa. 144.

63. Stafford *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023.

64. **Colo.**—Newlon-Hart Grocer Co. *v.* Peet, 18 Colo. App. 147, 70 Pac. 446. **Ia.**—Cawker City State Bank *v.* Jennings, 89 Iowa 230, 56 N. W. 494. **Mo.** Greene *v.* Beckwith, 38 Mo. 384.

One who has come into the state with his family, and whose decision as to location depends upon his business prospects, is a non-resident. Burrows *v.* Miller, 4 How. Pr. (N. Y.) 349.

An immigrant, who has left his native country forever, and is living in the state, without any determination to reside anywhere else, is a resident of the state. Heidenbach *v.* Schland, 10 How. Pr. (N. Y.) 477.

A member of congress, in the absence of a plain, unequivocal statement to the contrary by him, must be regarded as an inhabitant and resident of the state from which he comes, and as a non-resident in the District of Columbia. Howard *v.* Citizens' Bank, etc., Co., 12 App. Cas. (D. C.) 222.

65. **Ill.**—Wells *v.* Parrott, 43 Ill. App. 656. **La.**—Watson *v.* Pierpoint, 7 Mart. 414. **Minn.**—Keller *v.* Carr, 40 Minn. 428, 42 N. W. 292. **Mo.**—Charlton County *v.* Moberly, 59 Mo. 238. **Neb.**—Werner *v.* Linsenmeyer, 4 Neb. (Unof.) 372, 94 N. W. 105. **N. J.**—Stafford *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023; Clark *v.* Likens, 26 N. J. L. 207. **N. Y.**—Hurlbut *v.* Seeley, 11

tion to return, and no intent to establish a residence elsewhere.[66]

f. *Place of Business, Not of Residence.* — The location of the domestic residence, and not of the business residence determines the status of the debtor. Accordingly, a person doing business in one state and living in another is a non-resident of the former state, within the meaning of the attachment laws.[67]

How. Pr. 507, 2 Abb. Pr. 138; McKinley *v.* Fowler, 1 How. Pr. (N. S.) 282, *reversing* 67 How. Pr. 388. **Pa.**—Burch *v.* Taylor, 1 Phila. 224, 8 Leg. Int. 130; Shipman *v.* Woodbury, 2 Miles 67.

Absence in performing a job of work does not constitute non-residence. Fuller *v.* Bryan, 20 Pa. 144; Didier *v.* Patterson, 93 Va. 534, 25 S. E. 661; Long *v.* Ryan, 30 Gratt. (Va.) 718.

That a person leaves the state to seek work, for the purpose of prospecting with a view to change his residence, if desirable, does not sustain an attachment on the ground that the defendant was a non-resident. See Mahoney *v.* Tyler, 136 N. C. 40, 48 S. E. 549.

Absence caused by unlawful seizure of household goods does not constitute one a non-resident. Erickson *v.* Drazkowski, 94 Mich. 551, 54 N. W. 283.

Absence from one's domicile may be prolonged to such an extent as to justify his being subjected to attachment as a non-resident, but in such case there must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence within the meaning of that term. Miss. Alston *v.* Newcomer, 42 Miss. 186. **N. Y.** Burrill *v.* Jewett, 2 Robt. (N. Y.) 701, where a seaman was absent two and one-half years on a trading voyage. **Pa.**—Nailor *v.* French, 4 Yeates (Pa.) 241, where a trader had been absent nine months without any indication of returning.

One absent in the service of his country is not a non-resident. Lyon *v.* Vance, 46 W. Va. 781, 4 S. E. 761.

Absence from the state in each year, for temporary purposes, does not make a person "reside out of the state" who actually lives in the state with the intention of remaining, and an attachment will not lie against such person. Winter Iron Wks. *v.* Toy, 12 La. Ann. 200.

Prolongation of Absence by Series of Engagements.—A mere departure of one, though an unmarried man, from the state on an engagement which is not expected to last more than two weeks, when the intention is to return at its termination, would not make one a non-resident, nor would the prolongation of the absence thus commenced by a series of engagements, temporary in character and accompanied with the same intention have that effect. Wells *v.* Parrott, 43 Ill. App. 656.

66. **Md.**—Risewick *v.* Davis, 19 Md. 82. **Minn.**—Fitzgerald *v.* McMurran, 57 Minn. 312, 59 N. W. 199. **Tenn.**—People's Bank *v.* Williams (Tenn. Ch.), 36 S. W. 983. **Wis.**—Cooper *v.* Smith, 8 Wis. 358.

67. **D. C.**—Robinson *v.* Morrison, 2 App. Cas. 105, 129. **La.**—Rayne *v.* Taylor, 10 La. Ann. 726. **N. J.**—Perrine *v.* Evans, 35 N. J. L. 221. **N. Y.**—Fielding *v.* Lucas, 87 N. Y. 197; Wallace & Sons *v.* Castle, 68 N. Y. 370; Bowman *v.* Perine, 23 Abb. N. C. 236, 7 N. Y. Supp. 155; McKinley *v.* Fowler, 67 How. Pr. 388; Murphy *v.* Baldwin, 41 How. Pr. 270; Bache *v.* Lawrence, 17 How. Pr. 554; Houghton *v.* Ault, 16 How. Pr. 77, 8 Abb. Pr. 89 note; Lee *v.* Stanley, 9 How. Pr. 272; Barry *v.* Bockover, 6 Abb. Pr. 374; Potter *v.* Kitchen, 6 Abb. Pr. 374 note; Towner *v* Church, 2 Abb. Pr. 299; Chaine *v.* Wilson, 1 Bosw. 673, 8 Abb. Pr. 78; Coffin *v.* Stitt, 5 Civ. Proc. 261. **Ohio.** Byers *v.* Schlupe, 51 Ohio St. 300, 38 N. E. 117. **Pa.**—Chase *v.* New York Ninth Nat. Bank, 56 Pa. 355; Maule *v.* Cooper, 1 W. N. C. 109.

Though Family Temporarily Present. When a person carries on business in the state, and brings his family from their usual abode in another state to dwell at a hotel within the state during business embarrassments, he is still a non-resident. Chaine *v.* Wilson, 1 Bosw. (N. Y.) 673, 8 Abb. Pr. 78.

When Seldom Present.—A person having an ostensible place of business in the state, is a non-resident when he is seldom if ever there, and when he carries on business and has his abode

g. *Necessity for Acquisition of New Domicile or Residence.* — In some cases it is held that, to determine whether a debtor is a non-resident within the meaning of attachment laws, it is immaterial whether or not he has acquired a new domicile or residence in another state,[68] but he becomes a non-resident as soon as he commences to remove from the state with the intention of residing elsewhere,[69] even before he gets outside the state.[70] Other cases hold that a defendant must have acquired a residence out of the state when the attachment was issued.[71]

3. Computation of Time. — **In General.** — The non-residence of the defendant must have reference to the time when the attachment was begun, that is, when the affidavit was made,[72] or when the writ was issued and served.[73]

Presence in State When Attachment Issued. — Accordingly, if a defendant is a non-resident at the time a foreign attachment is issued, he is amenable to the process, notwithstanding he may have been temporarily

in another state. Greaton *v.* Morgan, 8 Abb. Pr. (N. Y.) 64.

Unmarried Man Temporarily Boarding in Adjoining State.—Where an unmarried man was engaged in business in the state, and, at the time an order of attachment was issued, was daily at his place of business but spent each night temporarily boarding in an adjoining state, he was a resident of the state, and this notwithstanding he had spent much of the previous five years in other states. Egan *v.* Lumsden, 2 Disney, (Ohio) 168.

68. **N. J.**—Weber *v.* Weitling, 18 N. J. Eq. 441. **N. Y.**—Burrows *v.* Miller, 4 How. Pr. 349, 2 Edm. Sel. Cas. 157. **N. C.**—Carden *v.* Carden, 107 N. C. 214, 12 S. E. 197, 22 Am. St. Rep. 876.

The fact that the defendant never acquired a residence in another place and that he had an intention to return, would be sufficient to constitute domicile, but the word "residence" means the abode or place where one actually lives. Hanover Nat. Bank *v.* Stebbins, 69 Hun 308, 23 N. Y. Supp. 529.

69. Spalding *v.* Simms, 4 Met. (Ky.) 285; Clark *v.* Ward, 12 Gratt. (Va.) 440.

70. State *v.* Allen, 48 W. Va. 154, 35 S. E. 990, 86 Am. St. Rep. 29, 50 L. R. A. 284.

A defendant who is beyond the state en route to his intended new home, although he has not reached the state of his destination, is a non-resident and subject to a foreign attachment. Whitehill *v.* Eicherly, 15 Pa. Co. Ct. 593.

Compare Ballinger *v.* Lantier, 15 Kan. 608, holding that the defendant must have left the state, and Kugler *v.* Shreve, 28 N. J. L. 129, holding that he must be beyond the reach of ordinary process.

71. **La.**—Clark *v.* Pratt, 19 La. Ann. 102. **N. J.**—Leonard *v.* Stout, 36 N. J. L. 370. **N. Y.**—Tibbitts *v.* Townsend, 15 Abb. Pr. 221. **Pa.**—Pfoutz *v.* Comford, 36 Pa. 420.

Domicil of Birth Easily Reverting.—To the rule that a debtor does not become a non-resident, so as to subject him to a foreign attachment, by leaving his place of abode in one state, and going to another state to seek a new residence, but continues a resident of the state until he has obtained another place of abode with the intention of remaining in it, the court, in Reed's Appeal, 71 Pa. 378, said that there is one recognized exception, which is that the domicile of birth easily reverts, and therefore if a man has acquired a new domicile different from that of his birth, and he removes from it with an intention to resume his native domicile, the latter is reacquired, even while he is on the way, for the native domicile reverts the moment the acquired domicile is given up with the intention of resuming the former.

72. Witbeck *v.* Marshall-Wells Hdw. Co. 188 Ill. 154, 58 N. E. 929, *affirming* 88 Ill. App. 101.

73. Stafford *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023; Baldwin *v.* Flagg, 43 N. J. L. 495.

in the state at, before, and after that time,[74] though the contrary has also been held.[75]

4. Evidence. — **Presumptions.** — The general rule that a domicile or residence once acquired, is *prima facie* presumed to continue unchanged,[76] applies also in determining the fact of residence in attachment proceedings.[77]

Weight If Fact That Debtor Is Absconding. — The remedy by foreign attachment, which may be issued on the ground that the defendant is a non-resident, cannot be pursued against one merely because he is an absconding debtor or one who is concealed or evading the service of process.[78]

Question of Law or Fact. — It is a question of fact whether a defendant's absence from the state has been of such a nature and duration

74. **Ark.**—Krone *v.* Cooper, 43 Ark. 547. **Del.**—Burcalow *v.* Trump, 1 Houst. 363. **La.**—Bryans *v.* Dunseth, 1 Mart. (N. S.) 412. **Minn.**—Lawson *v.* Adlard, 46 Minn. 243, 48 N. W. 1019. **N. J.**—Perrine *v.* Evans, 35 N. J. L. 221. **N. Y.**—Chaine *v.* Wilson, 1 Bosw. 673, 8 Abb. Pr. 78.

"At the Time of the Issuing" of the Writ.—The defendant being a person "not residing within the commonwealth" it cannot be inferred from the fact that he was within the county, on the day of the issuing of a foreign attachment, twice for very short periods, that he was within the county "at the time of the issuing" of the writ. King *v.* Cooper, 2 Miles (Pa.) 176.

Temporary sojourn at a hotel in the state by a public lecturer, does not constitute the hotel his usual place of residence at which ordinary process can be served. Garbett *v.* Mountford (N. J.), 54 Atl. 872.

Evidence showing a continuous residence for over eight years, and that on the day the writ was issued the defendant resided at a certain place, will justify the vacation of an attachment. Irwin *v.* Raymond, 58 Misc. 319, 110 N. Y. Supp. 1100.

75. Blake *v.* Hawkes, 2 Hill L. (S. C.) 631, holding that when the defendant was in the state when a writ of foreign attachment was levied, it will be set aside on motion.

76. See the title "Presumptions," 9 Encyclopedia of Evidence 914.

77. **Ia.**—Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220. **Kan.**—Garlinghouse *v.* Mulvane, 40 Kan. 428, 19 Pac. 798. **N. J.**—Stafford *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023; Clark *v.* Likens, 26 N. J. L. 207. **N. C.**—Fulton *v.* Roberts, 113 N. C. 421, 18 S. E. 510.

78. **Ky.**—Rich *v.* Catterson, 2 J. J. Marsh. 135. **Mo.**—Lindsey *v.* Dixon, 52 Mo. App. 291. **N. J.**—Stafford *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023. **Pa.**—Fuller *v.* Bryan, 20 Pa. 144; Scott *v.* Hilgert, 14 W. N. C. 305.

See, *infra*, VIII, H.

Where the absence is such that a summons issued upon the day the attachment is sued out, will be served upon the defendant in sufficient time before the return day to give the plaintiff all the rights which he can have, at the return term, the defendant has not so absented himself as that the ordinary process of law cannot be served upon him, and even in that case the process could not issue on the ground of non-residence, but only under the provision as to one who has absented himself from his usual place of abode, so that the ordinary process of law cannot be served upon him. Chariton County *v.* Moberly, 59 Mo. 238.

Residence Given Up in Former State. Where a person left the state for the purpose of avoiding the service of process upon him, residing in hotels and doing no particular business in another state, and giving up his residence in the former state for an indefinite time and without any intention of returning and there resuming his residence, he is a non-resident for the purposes of attachment. Witbeck *v.* Marshall-Wells Hardware Co., 88 Ill. App. 101, *affirmed*, 188 Ill. 154, 58 N. E. 929.

that he has become a non-resident for the purpose of foreign attachment.[79]

D. Foreign Corporations. — That foreign corporations may be proceeded against by attachment as non-residents, has been shown in a previous part of this article.[80]

E. Debts Fraudulently Contracted or Incurred. — **1. In General.** In some jurisdictions, an attachment is authorized, under varying statutory terminology, when a debt has been fraudulently contracted on the part of the defendant.[81]

An action against the insured on a fidelity bond which has been paid is essentially in assumpsit and not in tort, and cannot be treated as a debt fraudulently contracted.[82]

A cause of action upon a debt that is fraudulently contracted cannot be joined to one that is not, to sustain thereby an attachment as to the latter claim.[83]

79. Keller *v.* Carr, 40 Minn. 428, 42 N. W. 292; Johnson *v.* May, 49 Neb. 601, 68 N. W. 1032.

Mixed Question of Law and Fact.— Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665.

Upon Evidence on Motion To Dissolve.—The question whether the defendant, when he left, intended to abandon the state as his home, and so became a non-resident, is one of fact, depending for its solution upon the evidence introduced on the hearing of the motion to dissolve the attachment. Ritter *v.* Phoenix Mut. L. Ins. Co., 32 Kan. 504, 4 Pac. 1032.

80. See *supra*, V.

"Such debtor not a resident of the state," does not apply to a corporation. Stickney *v.* Missouri State Bank, 1 Ohio Dec. 80, 1 West. L. J. 563.

In order to obtain a warrant of attachment, it is necessary for plaintiff to show, not merely to allege, that defendant is a foreign corporation. American Trading Co. *v.* Bedouin Steam Nav. Co., 48 Misc. 624, 96 N. Y. Supp. 271.

81. Consult the statutes for the particular statutory provisions.

Neglect to provide for payment of a check, made payable on a future day, is not within this provision. Cluff *v.* Gunnis, 16 W. N. C. (Pa.) 65.

If one bank sends to another a "draft as a special collection, intending to have, and requested immediate remittance, if paid, and the defendant received the draft accompanied with such special request or instruction, and understood thereby that plaintiff intended to have, and expected immediate special remittance of the money collected on the draft, then there was a special contract, and defendant became the special agent of the plaintiff, and was bound to remit according to instruction, and a failure to do so, and the appropriation of the money and the new draft to its own use, we think made it liable to attachment under the Act. of 1869." Mechanics' Nat. Bank *v.* Miners' Bank, 13 W. N. C. (Pa.) 236, 15 W. N. C. 336.

Action for a Debt Due Upon an Express Contract and Fraudulently Contracted. Littlejohn *v.* Jacobs, 66 Wis. 600, 29 N. W. 545.

82. American Surety Co. *v.* Haynes, 91 Fed. 90, under the Missouri attachment law, adopting the construction of the statute by Finlay *v.* Bryson, 84 Mo. 664.

Negligence in the performance of a professional service does not create such a debt. Rawlings *v.* Powers, 25 Neb. 681, 41 N. W. 651, as to negligence of a physician.

An obligation under an action for malicious prosecution is not a fraudulent obligation. Glidden, etc. Varnish Co. *v.* Joy, 4 Ohio Cir. Dec. 323, 8 Ohio C. C. 157.

83. In Mayer *v.* Zingre, 18 Neb. 458, 25 N. W. 727, after referring to the statute providing that an order of attachment should only be issued in any case after an affidavit has been filed, showing the nature of the plaintiff's claim, that it is just, the amount which the affiant believes the plaintiff ought to recover, and the existence of some

Debts Contracted With No Intention to Pay. — Where a debtor contracts a debt without any intention of paying it, such debt is fraudulently contracted within the meaning of the law,[84] provided the fraudulent intent existed at the time the debt was contracted.[85] But an intent, at the time, not to pay the debt as promised is not essential to a fraudulent contracting. There can be no fraudulent contracting of a debt without a purpose to defraud, but, though the debtor may intend to pay and may be able to pay, he may fraudulently contract the debt by representations and devices whereby to obtain credit.[86]

General Attachments on Several Causes. — When several causes of action are sued on, some of which are without the statute, an attachment covering all the causes will not be upheld,[87] and when an action is brought on several bills of goods bought at different times, and one of the purchases was not fraudulently contracted, an attachment cannot be sued out.[88]

2. Nature and Elements of Fraud. — **In General.** —In order for an attachment to issue on the ground of the fraudulent contraction of a debt or the fraudulent procurement of the plaintiff's property, there

one of the grounds for an attachment enumerated in the statute, the court said: "These, with other provisions, clearly indicate the purpose of the legislature to secure the people against unauthorized and excessive attachments. These provisions would afford no protection if a party holding a small claim, upon which an attachment might lawfully issue, may attach to it another claim, upon which, under the law, no attachment could be issued, and obtain an attachment for the consolidated and increased amount."

84. Strauss *v.* Abrahams, 32 Fed. 310; Blackwell *v.* Fry, 49 Mo. App. 638.

A belief in ability to pay does not preclude a fraudulent intention not to pay. Marqueze *v.* Sontheimer, 59 Miss. 430, where defendant promised to send a sight draft to pay for the goods without any intention of doing so.

In West Virginia a purchase of property without any intention of paying for it, affords a ground for attachment, even though the debtor makes no fraudulent representations. Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

85. Hart *v.* Cooper, 129 Pa. 297, 18 Atl. 122.

A fraudulent act after the making of the contract is insufficient. Devinney *v.* Smith, 7 Ohio Dec. (Reprint) 31, 1 Cinc. L. Bul. 43, 5 Ohio Dec. (Reprint) 353, 5 Am. L. Rec. 6.

86. Macks *v.* Stoner (Miss.), 11 So. 186; Hughes *v.* Lake, 63 Miss. 552.

87. **Mich.**—Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812, an action based on several promissory notes. **Mo.** Sedalia Third Nat. Bank *v.* Cramer, 78 Mo. App. 476. **Neb.**—Mayer *v.* Zingre, 18 Neb. 458, 25 N. W. 727, an action on a note and an account. **Pa.**—Wright *v.* Ewen, 19 Phila. 312, 46 Leg. Int. 179, 24 W. N. C. 111; National Brew. Co. *v.* Bomgardner, 5 Pa. Dist. 365. **Tex.**—Stiff *v.* Fisher, 2 Tex. Civ. App. 346, 21 S. W. 291, affirmed on question certified in 85 Tex. 556, 22 S. W. 577.

Part of Debt Not Due.—Meyers *v.* Rauch, 4 Pa. Dist. 333.

88. **Neb.**—Meyer *v.* Evans, 27 Neb. 367, 43 N. W. 109. **Pa.**—Wilson *v.* Greenwood, 8 Kulp 210. **Wyo.**—C. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979.

An action on a running account for merchandise will support an attachment if only part of the items were fraudulently contracted. Mackey *v.* Hyatt, 42 Mo. App. 443, wherein the court distinguished Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812, and Mayer *v.* Zingre, 18 Neb. 458, 25 N. W. 727, cited above, as they were cases based upon separate and distinct debts, representing separate causes of action, and arising from separate and distinct contracts.

must be false representations[89] as to existing facts,[90] made with an intention to defraud,[91] and the plaintiff must have relied upon and been misled by such false representations.[92]

89. Bundrem *v.* Denn, 25 Kan. 430; Reynolds *v.* Horton, 67 Hun 122, 22 N. Y. Supp. 18, *affirmed*, 141 N. Y. 585, 36 N. E. 739.

Sufficient to rescind contract and demand a return of the goods. Biddle *v.* Black, 99 Pa. 380; Rodman *v.* Thalheimer, 75 Pa. 232; Meyers *v.* Rauch, 4 Pa. Dist. 333, 336.

Statute Requiring Statement to be in Writing.—An Illinois statute provides that "the statements of the debtor, his agent or attorney, which constitute the fraud, shall have been reduced to writing, and his signature attached thereto by himself, agent or attorney." The requirements of this statute are fulfilled by one who presents to a resigning guardian an instrument purporting to be an order of the court relieving the latter and appointing the former in his place, and a receipt designating the latter as "former guardian" and signed by the former as "succeeding guardian," and obtains securities on the faith of such representations, when, in fact, he never qualified. Yates *v.* Dodge, 123 Ill. 50, 13 N. E. 847, *affirming* 21 Ill. App. 547, 23 Ill. App. 338.

If the statement is made by an agent, the defendant's signature must be attached thereto. Fisher *v.* Secrist, 48 Fed. 264.

Failing To Notify Vendor of Decrease in Business.—Merely failing to advise the vendor that the defendant's business as a merchant was decreasing will not authorize an attachment on this ground, when there was also no preconceived design not to pay for the goods. Kelsey *v.* Harrison, 29 Kan. 145.

Fact That Capital Was Borrowed.—A merchant who informs one from whom he purchases goods that he has a certain sum in cash is not fraudulently concealing that the cash is borrowed, if no direct inquiry is made as to that point. Dieckerhoff *v.* Brown (Md.), 2 Atl. 723.

That the defendant's minor son made false statements, without the defendant's knowledge, in order to get credit for the defendant will not support an attachment on this ground. Hooven Mercantile Co. *v.* Backley, 7 Kulp (Pa.) 552.

90. **Mo.**—Rohan Bros. Boiler Mfg. Co. *v.* Latimore, 18 Mo. App. 16. **Neb.** Geneva Nat. Bank *v.* Bailor, 48 Neb. 866, 67 N. W. 865; Young *v.* Cooper, 12 Neb. 610, 12 N. W. 91. **Pa.**—Cox *v.* Buckly, 19 W. N. C. 291; Schwartz *v.* Lawrence, 1 W. N. C. 131.

When an abstract of title to land mortgaged to secure the debt was fair and perfect on its face and ran the title down to two days before the trade, and the borrower positively stated that "the abstract showed all that was there," this positive statement of a known falsehood, or a thing which he did not know to be true, was a sufficient basis for making the loan and excused the creditor from further examination of the record. Richards *v.* Harrison, 71 Mo. App. 224.

91. **Md.**—Johnson *v.* Stockham, 89 Md. 358, 43 Atl. 920. **Miss.**—Marqueze *v.* Southeimer, 59 Miss. 430. **Mo.**—Ring *v.* Charles Vogel Paint, etc. Co., 44 Mo. App. 111. **Neb.**—Young *v.* Cooper, 12 Neb. 610, 12 N. W. 91. **S. D.** Wyman *v.* Wilmarth, 1 S. D. 172, 46 N. W. 190. **Wis.**—Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. 581.

Evidence that one who is in failing circumstances makes various statements to different persons with respect to his financial ability, representing it as being better than it is in fact, but has no intention of defrauding any person, and does not make such statements to the one who gives him credit, does not necessarily prove that the debt to such person was fraudulently contracted. Long *v.* West, 31 Kan. 298, 1 Pac. 545.

92. **Colo.**—John V. Farwell Co. *v.* McGraw, 13 Colo. App. 467, 59 Pac. 231. **Miss.**—Marks *v.* Stover, 11 So. 186. **Mo.**—Finlay *v.* Bryson, 84 Mo. 664. **Neb.**—Young *v.* Cooper, 12 Neb. 610, 12 N. W. 91. **Tex.**—Gray *v.* Steedman, 63 Tex. 95.

In Penoyar *v.* Kelsey, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248, the court of appeals answered in the negative the question "whether an alleged false statement in writing by a debtor, which

Time Representations Made. — It must also be shown that the false and fraudulent representations were made at or before the time the debt or obligation was incurred.[93]

False Representations to Others Than Attaching Creditor.— False representations made to one who is the agent of the plaintiff, are in legal effect made to the principal,[94] but when the false statement is made to another creditor and before the agreement with the plaintiff, there is no right to an attachment on this ground.[95]

3. What Constitutes a Fraudulent Contracting. — As to renewal notes, it has been held that a debtor who, by fraudulently representing himself to be solvent, obtains a surrender of his overdue notes, and induces his creditors to accept new notes for the same amounts, payable at a future day, "fraudulently incurs an obligation."[96]

does not come to the knowledge or notice of a creditor until after credit has been given to the debtor, is sufficient to authorize the granting of a warrant of attachment," under N. Y. Code Civ. Proc. §636. See also May *v.* Newman, 95 Mich. 501, 55 N. W. 364.

As to Title to Property to be Traded for Goods.—One who had agreed to convey land in payment for goods, stated that the title was good and produced and exhibited a false and forged examination of title purporting to evidence a good title. It was held that the other was warranted in relying on such assertions and the debt was fraudulently contracted. Alexander *v.* Wade, 107 Mo. App. 321, 80 S. W. 917.

To the same effect, see Davis *v.* Jenkins, 46 Kan. 19, 26 Pac. 459.

As to Subsequent Transaction.— Where one induces another to deal with him and to give him credit by false representations as to his business condition, and when the credit is based entirely on such representations, and would not have been given without them, and shortly afterwards further credits are given, though without fresh representations, the question whether the false representations affected or influenced the further credits subsequently given will depend upon the facts and circumstances of the particular case, and the natural and usual consequences, from the remoteness of the time and other considerations, as business is ordinarily transacted. Lewis *v.* Pratt, 11 Minn. 57.

93. Marqueze *v.* Southeimer, 59 Miss. 430; Sedalia Third Nat. Bank *v.* Cramer, 78 Mo. App. 476.

Change From Open Account to Note. Though the principal debt had been contracted and obligation incurred before representations were made, and the only effect upon the principal debt that the representations had was to induce the plaintiff to change it from an open account to a note at ninety days, nevertheless it remained the same debt within the meaning of the attachment law. Mayer *v.* Zingre, 18 Neb. 458, 25 N. W. 727.

When made four years before the debt was contracted, an attachment will not be sustained. Meyers *v.* Rauch, 4 Pa. Dist. 333.

94. **Miss.**—Marks *v.* Stover, 11 So. 186. **Mo.**—Richards *v.* Harrison, 71 Mo. App. 224, holding that if a person to whom the representations were made was the agent of both parties, as by consent a broker may be, then whatever was said to him by one, was a communication to the other. **Pa.**—Lodge *v.* Rose Valley Mills, 11 Pa. Co. Ct. 667, 1 Pa. Dist. 811.

Identical Statement.—If one who has extended credit relied on a statement made by the debtor to the president of a bank and by him communicated to the creditor, he must show that the identical statement was communicated; facts and not a conclusion of the informant must be before the creditor to fulfil this requirement. Kilpatrick-Koch Dry Goods Co. *v.* McPheely, 37 Neb. 800, 56 N. W. 389.

95. Winter *v.* Davis, 48 La. Ann. 260, 19 So. 263.

96. First Nat. Bank *v.* Rosenfeld, 66 Wis. 292, 28 N. W. 370; Wachter *v.* Famachon, 62 Wis. 117, 22 N. W. 160. See Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

Reports to Commercial Agencies. — A report made to a commercial agency may be of such a character and made under such circumstances that a credit based thereon will be deemed to be a debt fraudulently contracted,[97] for it will be presumed that a person furnishing information did so to enable the agency to communicate the same to persons interested for their guidance in giving credit to him.[98]

Wrongful Conversion. — A wrongful conversion of money or property is not within the statute.[99]

4. Who Entitled to the Benefit of the Statute. — The right to an attachment under such a statute is personal to the contracting parties and does not follow the assignment of the debt.[1]

5. Evidence of Fraud. — The fraud may be proven by any competent evidence,[2] provided it is sufficient to sustain the issue.[3]

In Wachter *v.* Famachon, 62 Wis. 117, 22 N. W. 160, the court construed the phrase "incurred the obligation," and after referring to recognized meaning of the word "obligation," said: "The defendant, by giving the new notes, incurred new obligations commensurate with the changed terms of the old ones. By such new notes, the defendant gained an advantage by an increased term of credit, and the plaintiffs lost the advantage of an immediate recovery of their money. The suits are brought upon these notes now due, and not on the old notes, which were canceled."

But in Sedalia Third Nat. Bank *v.* Cramer, 78 Mo. App. 476, the court said that it matters nothing that notes evidencing part of the amount sued on were in fact executed after the alleged false and fraudulent statement was made, when they were only renewals of originals executed when the money was obtained, and this was prior to such representations.

97. Emerson *v.* Detroit Steel, etc. Co., 100 Mich. 127, 58 N. W. 659, holding that where credit was extended upon the strength of Dun's reports, which were based upon the company's sworn reports to the secretary of state, which could have been made with no other purpose than that of establishing a false credit, the indebtedness was fraudulently contracted.

But to make such a report the basis of a claim that a debt was fraudulently contracted, it must be clearly shown that the accused buyer made the statements to the agency with fraudulent intent to use such agency as an instrument in accomplishing a fraud upon his vendor or some other dealer, and that it was communicated to, and relied upon by, the person who gave the credit, or parted with the property. **Colo.**—John V. Farwell Co. *v.* McGraw, 13 Colo. App. 467, 59 Pac. 231. **Md.**—Dieckerhoff *v.* Brown, 2 Atl. 723. **Mo.** Holmes *v.* Harrington, 20 Mo. App. 661. **N. Y.**—Victor *v.* Henlien, 33 Hun 549. **Wis.**—Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. 581.

98. Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 17 N. W. 790, wherein the court said that so long as such intention exists, and the representations reach the persons for whom they were intended, it is immaterial whether they passed through a direct channel or otherwise, provided they were reported by the agency as made by the party.

99. **U. S.**—American Surety Co. *v.* Haynes, 91 Fed. 90. **Colo.**—Goss *v.* Boulder County, 4 Colo. 468. **Minn.**—Baxter *v.* Nash, 70 Minn. 20, 72 N. W. 799. **Mo.**—Finlay *v.* Bryson, 84 Mo. 664; Ryles *v.* Shelly Mfg. Co., 93 Mo. App. 178; Sunday Mirror Co. *v.* Galvin, 55 Mo. App. 412. **Ohio.**—Merchants' Bank *v.* Ohio L. Ins. Co., 1 Disney 469. **Wash.**—Blackinton *v.* Rumpf, 12 Wash. 279, 40 Pac. 1063.

1. Thwing *v.* Winkler, 13 Okla. 643, 75 Pac. 1126, holding that the right of an assignee of a chose in action to procure a writ of attachment exists only against his immediate assignor. To the same effect, see Thwing *v.* Humphrey, 13 Okla. 646, 75 Pac. 1127.

2. Johnson *v.* Stockham, 89 Md. 358, 43 Atl. 920; Blackwell *v.* Fry, 49 Mo. App. 638 (as to intent not to pay).

3. **Alaska.**—Whitehead *v.* New York,

A mere failure to pay as agreed is not sufficient to show that the debt was fraudulently contracted.[4]

Insolvency of Debtor. - But mere insolvency and inability to pay, known to the purchaser, does not raise a presumption of an intent not to pay, so as to make the contract fraudulent on his part,[5] though it has been held that a purchase of goods to a far greater extent than the usual course of business requires, by a man knowing himself to be insolvent, is sufficient evidence of fraud.[6]

etc. Min. Co., 1 Alaska 245. **Mo.**—Cole Mfg. Co. *v.* Jenkins, 47 Mo. App. 664. **Ohio.**—Goodyear Tire, etc. Co. *v.* Consolidated Rubber Tire Co., 26 Ohio C. C. 269. **Pa.**—Campbell *v.* Walls, 17 W. N. C. 524.

But *compare* Cole *v.* Aune, 40 Minn 80, 41 N. W. 934, wherein the court said that when the term "debt" is interpreted in the enlarged sense, the strict signification of the word "contracted" may also be modified, and held that an attachment would lie for the fraudulent conversion of the money sued for.

The failure of a partner to charge himself with or to account for moneys collected is not a fraud in contracting the debt or incurring the obligation. Bingham *v.* Keylor, 19 Wash. 555, 53 Pac. 729.

The question of fraud is for the court, and the evidence should be such, upon a trial of an issue framed for the purpose, that it would justify the court in submitting the question of fraud to a jury. Meyers *v.* Rauch, 4 Pa. Dist. 333.

An unauthorized credit statement, made by defendant's minor son, is not sufficient. Hooven Mercantile Co. *v.* Backley, 7 Kulp (Pa.) 552.

4. Johnson *v.* Stockham, 89 Md. 358, 43 Atl. 920.

A failure to pay at the expiration of a short or uncertain term of credit does not constitute a contemplated fraud. St. Louis Type Foundry *v.* Union Printing, etc., Co., 3 Mo. App. 142.

Representations as to Solvency.—False representations by a debtor as to his financial standing or condition (**U. S.**—Strauss *v.* Abrahams, 32 Fed. 310. **Mo.**—Cole Mfg. Co. *v.* Jenkins, 47 Mo. App. 664; Warner *v.* Kade, 15 Mo. App. 600. **N. Y.**—Strauss *v.* Seamon, 13 N. Y. St. 740. **Pa.**—Molony *v.* Atkinson, 2 Pa. Co. Ct. 441), as, for example, representations as to property owned (Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210), the nature and character of his property (Kahn *v.* Angus, 61 Wis. 264, 21 N. W. 81), the amount of his indebtedness (Rosenthal *v.* Wehe, 58 Wis. 621, 17 N. W. 318), that his property was not mortgaged (Wachter *v.* Famachon, 62 Wis. 117, 22 N. W. 160), that he has funds in the bank to meet a check given in payment for goods (Askwith *v.* Allen, 33 Neb. 418, 50 N. W. 267), or as to the character and quality of lands mortgaged to the creditor (Littlejohn *v.* Jacobs, 66 Wis. 600, 29 N. W. 545) are all competent on this issue.

Ability to pay in the usual course of trade is what representations of solvency usually mean. Ring *v.* Charles Vogel Paint, etc. Co., 44 Mo. App. 111.

A mere expression of opinion and not the representation of a fact is not sufficient. Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

5. Dunlap *v.* Fox (Miss.), 2 So. 169.

In Miller *v.* White, 46 W. Va. 67, 37 S. E. 332, 76 Am. St. Rep. 791, the court said: "True, the difference between buying without reasonable expectation or ground for expectation of paying, and buying with fixed intention of not paying, is not very plain. One who buys, with no present means, and with no reasonable ground to believe that he can raise a considerable sum to pay with, seems to contemplate, as a reasonable man, that he will not be able to pay. He would expect that, as a natural result. Still, there must be an intention not to pay, and whether there is a jury must say, under all the circumstances."

6. Claflin *v.* Einstein, 6 W. N. C. (Pa.) 398. See also McGlensey *v.* Landis, 3 W. N. C. (Pa.) 240; Miller *v.* Shapiro, 12 Pa. Co. Ct. 526, 2 Pa. Dist. 356.

6. Election of Remedies. — To pursue the remedy the creditor need not rescind the contract, but can sue for the enforcement of the contract fraudulently induced, and at the same time sue out and sustain an attachment on this ground.[7]

F. Failure To Pay on Performance of Contract. — In some jurisdictions an attachment may issue when the debtor has failed to pay the price of articles delivered which, under contract, he should have paid for upon delivery. It is held that under such a statute there must be the element of fraud to support an attachment.[8] But the right to an attachment on this ground may be lost by waiver, or a modification of the strict terms of the contract.[9]

G. Obligations Criminally Incurred. — In some jurisdictions an attachment may issue in aid of a suit brought for an obligation criminally incurred or for the commission of a felony.[10] Civil actions brought for embezzlement or conversion,[11] to recover damages for an assault and battery,[12] or for a rape committed upon the plaintiff's daughter,[13] are within the contemplation of such statute.

7. Kansas City Stained Glass Wks. etc. Co. *v.* Robertson, 73 Mo. App. 154. See the title "**Choice and Election of Remedies.**"

8. Miller *v.* Godfrey, 1 Colo. App. 127, 27 Pac. 1016; Young & Co. *v.* Lynch, 30 Kan. 205, 1 Pac. 503.

An express company, which has become liable to the vendor for the value of the goods, is not a party to whom the law has given this remedy by attachment. Richardson's Missouri Express Co. *v.* Cunningham, 25 Mo. 396.

It must also be stipulated by the contract that the price or value of the article or thing sold is to be paid for on delivery; if credit is given an attachment will not lie. Harlow *v.* Sass, 38 Mo. 34.

Monthly Payments Under Local Custom.—When the parties contemplate the continuous delivery of goods with periodical payments, some credit is given, however frequent or short may be the intervals at which payment is promised. St. Louis Type Foundry *v.* Union Printing, etc., Co., 3 Mo. App. 142.

An agreement to give notes and a mortgage amounts to an undertaking to pay on delivery within the meaning of the attachment law. Aultman & Co. *v.* Daggs, 50 Mo. App. 280.

A contract to pay "if demanded, on delivery," is not within the statute. St. Louis Type Foundry *v.* Union Printing, etc., Co., 3 Mo. App. 142.

On the ground of failure to pay for work and labor upon completion, there can be no attachment in the absence of an agreement to pay upon completion. Morris *v.* Everly, 19 Colo. 529, 36 Pac. 150.

"**Where by contract, one is employed by another to work by the day or month,** and nothing is said as to the time of payment for the services to be rendered, his wages are due and may be demanded at the close of each day or month, as the case may be. We think such services are comprehended within the meaning of the statute relied on, and that, after demand for the amount due, the laborer may maintain his attachment proceeding." De Lappe *v.* Sullivan, 7 Colo. 182, 2 Pac. 926.

9. Miller *v.* Godfrey, 1 Colo. App. 177, 27 Pac. 1016; Young *v.* Lynch, 30 Kan. 205, 1 Pac. 503.

10. Consult various statutes, and see Deering *v.* Collins, 38 Mo. App. 80.

"**Some felony**" means all felonies. Brandenstein *v.* Way, 17 Wash. 293, 49 Pac. 511.

11. **U. S.**—American Surety Co. *v.* Haynes, 91 Fed. 90 (to recover money paid on a bond for an embezzler); Nevada Co. *v.* Farnsworth, 89 Fed. 164. **Mo.**—R. C. Stone Milling Co. *v.* McWilliams, 121 Mo. App. 319, 98 S. W. 828. **Wis.**—Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100.

12. Creasser *v.* Young, 31 Ohio St. 57; Kirk *v.* Whitaker, 22 Ohio St. 115; Sturdevant *v.* Tuttle, 22 Ohio St. 111.

13. Kuehn *v.* Paroni, 20 Nev. 203, 19 Pac. 273.

II. Absconding, Absence or Concealment. — **1. In General.** — The statutes in most of the jurisdictions provide for the issuing of an attachment on the ground that the defendant is an absconding, absent or concealed debtor.[14]

Intended Departure. — Not only is actual absconding, absence or concealment a ground for attachment, but the statutes in most states further provide that if a debtor is about to abscond, etc., an attachment may issue.[15] But in other states, intended departure is no ground for attachment,[16] but such intention may be proven as in other cases,[17] by the declarations[18] or conduct[19] of the debtor.

2. Time of Absconding. — The statutes in some states contain pro-

14. Tiller *v.* Abernathy, 37 Mo. 196, And see the statutes of the different states.

15. Souberain *v.* Renaux, 6 La. Ann. 201; Isaacks *v.* Edwards, 7 Humph. (Tenn.) 465, 46 Am. Dec. 86.

Coupled With Other Conditions.— "The mere fact that one who is indebted is about to leave the state is not ground for an attachment. He must be about to remove his property from the state without leaving sufficient remaining for the payment of his debts; or he must be about to remove permanently from the state, and refuse to pay or secure the debt due the plaintiff. Code, section 3878." Tyler *v.* Bowen, 124 Iowa 452, 100 N. W. 505.

Time of Intended Removal.—In Myers *v.* Farrell, 47 Miss. 281, the court said: "If a purpose exists to remove, and the scheme may be carried out in one, two, three, or several weeks or months, and if this be contemplated with a view to evade or delay creditors, the writ may be taken out. . . And further, the word 'about' may be so satisfied in meaning, although the movements of the debtor may not be characterized by 'fright,' speed or 'haste;' thus leaving each case to be judged of by its peculiar circumstances." And the court held that there was error in an instruction that "the plaintiff must prove a design or purpose speedily to do so."

An instruction that before the jury could find that the defendant was about to remove out of the state they must believe that he was preparing for and intended to make an "immediate" removal, was erroneous. Elliott *v.* Keith, 32 Mo. App. 579.

Whether New Residence Acquired Immaterial.—If defendant was "about to remove out of the state," with no fixed intention of returning, it is not material whether he has determined upon a new residence or home for himself or not. Troy *v.* Rogers, 113 Ala. 131, 20 So. 999.

16. **Ala.**—Wallis *v.* Murphy, 2 Stew. 15. **Ky.**—Lewis *v.* Butler, Sneed 246; **N. C.**—Hale *v.* Richardson, 89 N. C. 62. **Tenn.**—Bennett *v.* Avant, 2 Sneed 152, under a statute providing for an attachment where the debtor "so absconds or conceals himself, that the ordinary process of law cannot be served on him." **Va.**—Mantz *v.* Hendley, 2 Hen. & M. 308.

The subject of the intended departure of a debtor from the state as a ground for an attachment is so nearly related to that of the actual absconding, absence, or concealment, that the previous discussion throughout this subdivision of the conditions governing the issue of an attachment on this ground may be considered as generally applicable to either the actual or intended departure or concealment, as the subject has been so treated. It may be here said, as particularly applicable to the ground of intended departure, that the intention of the debtor to leave the state must be made to appear. Schorten *v.* Davis, 21 La. Ann. 173; Gordon *v.* Baillio, 13 La. Ann. 473.

17. See the title "Intent," 1 Encyclopedia of Evidence, 580.

18. Troy *v.* Rogers, 113 Ala. 131, 20 So. 999.

19. Bamberger *v.* Merchants, etc., Bank, 73 Miss. 572, 19 So. 296; Myers *v.* Farrell, 47 Miss. 281.

visions prescribing a fixed period after the absconding, before an attachment may issue.[20]

3. Who Are Absconders or Absentees. — a. *In General.* — An absent and absconding debtor is one who, with intent to frustrate the just demands of his creditors, has departed from the state, or has intentionally concealed himself from his creditors, or has withdrawn himself from the reach of their suits.[21] But if a person depart from the state, or from his usual abode, with the intention of again returning, and without any fraudulent design, he has not absconded, nor absented himself within the intendment of the law.[22]

Departure from the limits of the state, however is not necessary; as a person may abscond and subject himself to the operation of the attachment laws against absconding debtors and still not leave the state,[23] unless a statute authorizes an attachment when it appears that the defendant, being an inhabitant of the state, has secretly departed

20. Oliver *v.* Wilson, 29 Ga. 642; Levy *v.* Millman, 7 Ga. 167; Webb *v.* Bowler, 50 N. C. 362 (under a statute allowing attachment if the defendant, doing an injury to the person or property of another, "shall within three months thereafter abscond."

Not a Statute of Limitations.—Blankinship *v.* McMahon, 63 N. C. 180.

Repeal by a later statute providing the ground but omitting the time limitation. Jewel *v.* Howe, 3 Watts (Pa.) 144.

Absence from home for the statutory period with the intention of going out of the state, is sufficient though the debtor was unexpectedly delayed for a short period in getting beyond the state boundary. Spalding *v.* Simms, 4 Met. (Ky.) 285.

21. **Conn.**—Fitch *v.* Waite, 5 Conn. 117. **Mich.**—McMorran *v.* Moore, 113 Mich. 101, 71 N. W. 505. **Mo.**—Ross *v.* Clark, 32 Mo. 296. **Neb.**—Gandy *v.* Jolly, 34 Neb. 536, 52 N. W. 376. **N. J.**—Stafford *v.* Mills, 57 N. J. L. 574, 32 Atl. 7. **Tenn.**—Bennett *v.* Avant, 2 Sneed 152.

The word "absent" means that the debtor should not only be absent, but that he must have absconded or else be a non-resident. Mandel *v.* Peet, 18 Ark. 236.

A debtor who is shut up from his creditors in his own house, is an absconding debtor. Ives *v.* Curtis, 2 Root (Conn.) 133.

22. Fitch *v.* Waite, 5 Conn. 117; **Branson** *v.* **Shinn, 13 N. J. L. 250.**

One serving in the army is not absconding. Abrams *v.* Pender, 44 N. C. 260.

23. Stouffer *v.* Niple, 40 Md. 477 (when a debtor is declared by statute to have absconded if he absconds or flies from justice, or secretly removes from his usual place of residence); Field *v.* Adreon, 7 Md. 209.

In Stafford *v.* Mills, 57 N. J. L. 574, 32 Atl. 7, the court, *per* Lippincott, J., said: "An absconding debtor is one who, with intent to defeat or delay the demands of his creditors, conceals or withdraws himself from his usual place of residence beyond the reach of process. It is not necessary that he depart from the limits of the state in which he has resided. . . . Each case must depend upon its own peculiar distinctive facts and circumstances, and the intent can be drawn from the acts of the defendant. . . . If one eludes his creditors he intends to defeat or delay them. . . . In one case it may be concealment in his own house. It may consist in going from place to place so quickly as to evade meeting with service of process anywhere."

So Under the Porto Rico Statute.—Perez *v.* Fernandez, 202 U. S. 80, 26 Sup. Ct. 561, 50 L. ed. 942.

Inability to serve, through the fault of the defendant, is a ground upon which the warrant may be granted. Penoyar *v.* Kelsey, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248.

therefrom, in which case an attachment cannot be issued on the ground that the debtor has absconded from the city of his residence.[24]

b. *Non-residents.* — But these statutes have reference to attachments against residents or inhabitants, and not against non-residents,[25] or persons who are within the state transiently or for a temporary purpose,[26] though such statutes have in a few instances been otherwise construed.[27] And in other jurisdictions, where a debtor absconds and takes his property with him beyond the confines of the state, an attachment may issue on this ground.[28]

c. *Corporations.* — A corporation cannot be proceeded against as an absconding debtor.[29]

d. *Persons "Not Found" After Service of Process.* — Some statutes provide for issuance of an attachment when process has been returned that the defendant is not to be found, and such an attachment is considered and referred to in some of the cases as a judicial attachment.[30] But to authorize an attachment, the return must be a proper one.[31]

24. Castellanos *v.* Jones, 5 N. Y. 164.

25. **Del.**—McCaulley *v.* Shute, 5 Harr. 26. **N. J.**—Brundred *v.* Del Hoyo, 20 N. J. L. 328. **Pa.**—Fuller *v.* Bryan, 20 Pa. 144; Kennedy *v.* Baillie, 3 Yeates 55. **Tenn.**—Shugart *v.* Orr, 5 Yerg. 192, as to one who has no fixed place of abode. **Eng.**—*Ex parte* Kettle, 10 N. Bruns. 81, so holding as to one who never had resided in the province.

Under a Statute as to a Return of Not Found.—A statute providing that when two summons have been returned *non est* against the defendant, the plaintiff upon proof of his claim shall be entitled to an attachment, enables a creditor to proceed against his resident debtor as if the latter were an absconding debtor, provided there have been two returns of *non est*, and contemplates a proceeding against a resident as contradistinguished from a proceeding against a non-resident. Steuart *v.* Chappell, 100 Md. 538, 60 Atl. 625. To the same effect, see James *v.* Hall, 1 Swan (Tenn.) 297; Slatton *v.* Johnson, 4 Hayw. (Tenn.) 197. *Compare* Steuart *v.* Chappell, 98 Md. 527, 57 Atl. 17.

The property of a non-resident who has but lately removed or absconded from the state, may be attached as that of an absconding debtor. Starke *v.* Scott, 78 Va. 180.

26. *In re* Fitzgerald, 2 Caines (N. Y.) 318; Baxter *v.* Vincent, 6 Vt. 614.

An inhabitant of the state is one **who has his home there.** Austin *v.* Grout, 2 Vt. 489. And see Barnet's Case, 1 Dall. (U. S.) 152, 1 L. ed. 77, holding that in such a case, foreign attachments will be dissolved and domestic attachments sustained.

A stranger in disguise, flying from a foreign land to avoid foreign creditors, temporarily concealing himself here is not the subject of a domestic attachment. Thurneyssen *v.* Vouthier, 1 Miles (Pa.) 422.

27. Middlebrook *v.* Ames, 5 Stew. & P. (Ala.) 158; Cochran *v.* Fitch, 1 Sandf. Ch. (N. Y.) 142.

28. Taylor *v.* Badoux, 92 Tenn. 249; Hills *v.* Lazelle, 5 Sneed (Tenn.) 363.

29. Stickney *v.* Missouri State Bank, 1 Ohio Dec. (Reprint) 80, 1 West. L. J. 563.

30. Welch *v.* Robinson, 10 Humph. (Tenn.) 264; Walker *v.* Birdwell, 21 Tex. 92.

The record must show the concurrence of the statutory conditions that the suit was properly commenced in the circuit court of the county and that the defendant cannot be found, or the attachment should be discharged. McNair *v.* Kaiser, 62 Miss. 783.

Only such absence as evinces a purpose to evade the service of process is contemplated by the statute. Robeson *v.* Hunter, 90 Tenn. 242, 16 S. W. 466.

31. **"The defendant not found in any county"** is not sufficient where the statute requires the return to be that "the defendant is not to be found within his county." Welch *v.* Robin-

A defective return of not found cannot be remedied by amendment.[32]

e. *As Dependent on Nature or Purpose of Departure.* — The purpose of the debtor in absconding must have been to defeat, hinder or delay creditors by avoiding the service of process;[33] accordingly, the mere casual or temporary absence of a debtor from the state or from his usual place of abode, on business or pleasure, does not *per se* authorize an attachment against him as an absent or absconding debtor,[34] and

son, 10 Humph. (Tenn.) 264, the court saying that the language of the statute clearly imports that, after diligent inquiry and search, by the sheriff, at the usual residence of the defendant and elsewhere, he is not to be found, being either actually absent from the county, or having concealed himself so as to evade the service of process. See Craig *v.* Saven, Hard. (Ky.) 46; Irons *v.* Allen, Hard. (Ky.) 44. See also Robeson *v.* Hunter, 90 Tenn. 242, 16 S. W. 466, where the officer kept the original summons only about two or three hours before making his return and made inquiry at several places and was told that the defendant would return in a day or two, and the defendant was in the county on the next day and continuously thereafter.

Defendant fraudulently enticed out of the state, by collusion between plaintiff and officer. Nason *v.* Esten, 2 R. I. 337.

32. Slatton *v.* Johnson, 4 Hayw. (Tenn.) 197.

33. Fitch *v.* Waite, 5 Conn. 117; Blackburn *v.* Hanlon, 30 Ky. L. Rep. 539, 99 S. W. 252; Stafford *v.* Mills, 57 N. J. L. 574, 32 Atl. 7; National Bank of Commerce *v.* Whitman Pulp, etc., Co., 67 Hun 648, mem., 21 N. Y. Supp. 748, *affirmed*, 138 N. Y. 636, 33 N. E. 1084.

Such purpose may be accomplished by secreting himself upon his own premises, or by departing secretly. Dunn *v.* Salter, 1 Duv. (Ky.) 342.

When there was nothing secret or clandestine about the departure, the debtor's goods were disposed of at public auction, and funds which the debtor had promised to apply to the payment of the claim had not been disposed of or appropriated, such purpose does not appear. F. A. Ringler Co. *v.* Newman, 33 Misc. 653, 68 N. Y. Supp. 871.

Departure Prior to Attempt or Threat To Commence Suit.—F. A. Ringler Co. *v.* Newman, 33 Misc. 653, 68 N. Y. Supp. 871.

"Has removed himself from the county" not sufficient. Meek *v.* Fox, 42 Miss. 513.

See also State *v.* Morris, 50 Iowa 203, as to an allegation merely that the defendant cannot be found.

One who had left the state on the day a citation was returnable calling upon him to account, instead of appearing and filing his accounts, and had been removed from his trust, may be proceeded against by attachment as having left with the intent to avoid the service of process or to defraud his creditors. Buell *v.* Van Camp, 55 Hun 604, 8 N. Y. Supp. 207.

Under Missouri statutes, regulating an allegation that the defendant had absconded or absented himself from his usual place of abode in the state, so that the ordinary process of law could not be served on him, and declaring that the place where the family, if any person shall permanently reside in the state, shall be deemed his place of abode, it was held that where a man makes provision for his family, and leaves them at his residence, although he may be personally absent an indefinite period of time, attending to his business, no attachment will lie, because the law has pointed out a mode by which service can be had; but where he leaves the country, and permits his family to sojourn with a relative, the presumption is that they are merely staying with the latter, and that he has no fixed or permanent place of abode. Tiller *v.* Abernathy, 37 Mo. 196.

34. **Ala.**—Vandiver *v.* Waller, 143 Ala. 411, 39 So. 136. **Ark.**—Mandel *v.* Peet, 18 Ark. 236. **Ia.**—State *v.* Morris, 50 Iowa 203. **N. Y.**—Rust *v.* Stuart, 2 City Ct. 295, where an actress was in Europe on a professional tour.

Absence During One Term of Court. Dudley *v.* Donaldson, 2 B. Mon. (Ky.) 151.

the notoriety or secrecy of the departure is merely a probative fact, and not of itself sufficient to warrant an attachment.[35] But if his original intention was to abscond, a subsequent return will not dissolve the attachment.[36]

If a debtor leaves the county of his residence to avoid the service of a summons by a certain creditor, it would avoid the service at the suit of another, and such other creditor may obtain an attachment,[37] though it has been held not to be necessary to couple an intent to defraud creditors with the attempt to avoid the service of a summons, in order to justify an attachment.[38]

To Avoid Criminal Process. — If the statute requires the absence or concealment to have for its object the desire to avoid process, an attachment will not lie when it appears that the defendant absconded to avoid a criminal prosecution and not to prevent civil suits from being commenced against him,[39] though it has been held that when the flight of the defendant for the purpose of avoiding arrest to answer a criminal

Business and residence in different counties or going to another state upon ordinary and legitimate business, does not make one an absconding debtor. Bogg *v.* Bindskoff, 23 Ill. 65.

Opportunity To Serve Process on Day Attachment Sued Out.—Ellington *v.* Moore, 17 Mo. 424; Kingsland *v.* Worsham, 15 Mo. 657.

35. **Ala.**—Pitts *v.* Burroughs, 6 Ala. 733. **Ind.**—Island Coal Co. *v.* Rehling, 22 Ind. App. 305, 53 N. E. 777. **N. Y.** Morgan *v.* Avery, 7 Barb. 656.

Concealment is established when it appears that the defendant left upon false pretexts, and departed, leaving his family ignorant of the cause of his flight. McCollem *v.* White, 23 Ind. 43, under a statute in the disjunctive —that the family could not give the cause of absence, or were unable to give the place of his destination.

In Dunn *v.* Myers, 3 Yerg. (Tenn.) 414, it was held that the statute does not authorize an attachment to be issued, where a party moves out of the county openly and with a full knowledge of all his neighbours that he is about to remove, and the place of his destination, nor can it be sued out where he may have so removed, and has taken up his residence in another county of the state, as all of this does not prevent the execution of the ordinary process of the law upon him.

36. Offutt *v.* Edwards, 9 Rob. (La.) 90.

37. Sherrill *v.* Bench, 37 Ark. 560; Finn *v.* Mehrbach, 30 Civ. Proc. 242, 65 N. Y. Supp. 250.

38. Finn *v.* Mehrbach, 30 Civ. Proc. 242, 65 N. Y. Supp. 250; Morgan *v.* Avery, 7 Barb. (N. Y.) 656.

Compare Tuller *v.* Howard, 17 Misc. 105, 40 N. Y. Supp. 739, wherein the court said that when there was no evidence to sustain the claim that defendant had departed from the state with intent to defraud his creditors, a motion to vacate the attachment should have been granted.

Either To Defend Creditors or To Avoid Service.—An attachment may issue when the defendant has left the state whether the intent was, as stated in the affidavit in the alternative, either a general one to defraud his creditors or to avoid the service of civil process. Van Alstyne *v.* Erwine, 11 N. Y. 331.

39. Evans *v.* Saul, 8 Mart. N. S. (La.) 247; Lynde *v.* Montgomery, 15 Wend. (N. Y.) 461.

A showing that the defendant had fled to avoid punishment, upon hearing that a judgment on conviction had been affirmed by the appellate court, does not support attachment on the ground that defendant had gone away to defraud his creditors. Thames, etc., Marine Ins. Co. *v.* Dimmick, 66 Hun 634, mem., 22 N. Y. Supp. 1096.

But where the intent to place himself beyond the reach of civil as well as criminal process appears, and the intent to defraud his creditors, an attachment may be issued. New York *v.* Genet, 63 N. Y. 646.

charge, has the effect to prevent the service of summons to answer in a civil action for the same wrong, an attachment may issue as in a case of absence to avoid the service of process.[40]

4. Concealment of Person. — In some states concealment of the debtor is a ground upon which an attachment may be issued. It is held that concealment is but a phase of absconding,[41] and it must appear that there was actual concealment coupled with the purpose of avoiding service of process.[42] And it has been held that an attachment need not be delayed until after a summons has been issued and an attempt made to serve it defeated by concealment.[43]

5. Concealment of Property. — In some jurisdictions an attachment may issue on the ground that the debtor is concealing his property and effects.[44] And not only must the concealment be with a fraudulent

40. Bank of Commerce *v.* Payne, 86 Ky. 446, 8 S. W. 856.

And under a statute which authorizes an attachment when the defendant absents or secretes himself "so that the ordinary process of law cannot be served on him," an attachment may be issued when the defendant absented himself to avoid the service of criminal process. Malone *v.* Handley, 81 Ala. 117, 8 So. 189, wherein the court said that there is a difference in the language of the statutes, and "many of them require not only the secretion or concealment, but the secretion must be with the intent to avoid the service of process in the particular case, or class of cases, Under such statutory requirements, to abscond or secrete one's self to escape criminal arrest, furnishes no ground for attachment in a civil suit; for the *intent* to evade service under civil process is wanting."

41. Stafford *v.* Mills, 57 N. J. L. 574, 32 Atl. 7.

Place of Concealment Immaterial.— Lewis *v.* Wright, 3 Bush (Ky.) 311.

A person can conceal himself within the state as effectually at a distance as near at home. North *v.* McDonald, 1 Biss. 57, 18 Fed. Cas. No. 10,312.

42. Winkler *v.* Bartel, 6 Ill. App. 111; Reynolds *v.* Horton, 67 Hun 122, 22 N. Y. Supp. 18, *affirmed*, 141 N. Y. 585, 36 N. E. 739; Thomas *v.* Dickerson, 58 Hun 603 (memo.), 11 N. Y. Supp. 436.

Intention is for the court to determine, and is not to be taken solely on the defendant's avowed object. Commann *v.* Tompkins, 2 Edm. Sel. Cas. (N. Y.) 227. It may be inferred when it appears that the concealed debtor is deeply embarrassed, that creditors are pressing their claims, that he has transferred his goods and has left town suddenly without informing the creditors of his destination, and that his employers have attempted to mislead inquirers as to his whereabouts. North *v.* McDonald, 1 Biss. 57, 18 Fed. Cas. No. 10,312, under an Illinois statute.

Refusing interview to creditor is insufficient. Wallach *v.* Sippell, 65 How. Pr. (N. Y.) 501.

Absence from place of business on each of two days does not show the requisite intent. Head *v.* Wollner, 53 Hun 615, 6 N. Y. Supp. 916.

Length of time of concealment is immaterial. Young *v.* Nelson, 25 Ill. 565.

43. Johnson *v.* Kaufman, 104 Ky. 494, 47 S. W. 324; Commann *v.* Tompkins, 2 Edm. Sel. Cas. (N. Y.) 227.

Attempt To Find Debtor Unnecessary.—North *v.* McDonald, 1 Biss. 57, 18 Fed. Cas. No. 10,312, under an Illinois statute. But see Thomas *v.* Dickerson, 58 Hun 603, 11 N. Y. Supp. 436, where it was held not enough to inquire at the debtor's place of business, which was in charge of the sheriff.

44. The phrase "absconding or concealing himself or his property and effects," contemplates two causes. Concealing "property and effects" is ground for an attachment. Boyd *v.* Buckingham, 10 Humph. (Tenn.) 434.

Fraudulent Concealment of Money. Terry *v.* Knoll, 3 Kulp (Pa.) 272, construing Pa. Act of 1869.

intent,[45] the proof of such intent must be clear and convincing.[46]

A joint owner of land who, on the sale of the land, conceals the money received and attempts to cheat his co-grantor out of his share, fraudulently conceals.[47] Moreover, a concealment of part of his property,[48] or property the title to which is imperfect or bad,[49] will justify an attachment on this ground against the debtor.

6. Removal of Person. — By statute in most jurisdictions an attachment will lie when the debtor is actually removing or about to remove without the state,[50] or county,[51] unless good cause is shown

45. **Mich.**—Powers *v.* O'Brien, 44 Mich. 317, 6 N. W. 679, where there was a finding negativing fraud. **Mo.** Powell *v.* Matthews, 10 Mo. 49. **Pa.** Stokes *v.* Schlecht, 14 W. N. C. 328.

46. **If the facts are consistent with honesty** fraudulent concealment will not be intended. Albuquerque First Nat. Bank *v.* Lesser, 10 N. M. 700, 65 Pac. 179.

When a mortgage has been paid, it is a fraudulent concealment to allow it to remain as though still in force in order to cover new stock. Bauer Grocery Co. *v.* Smith, 74 Mo. App. 419.

Withdrawing From Business and Concealing Money.—Mathews *v.* Loth, 45 Mo. App. 455.

Concealment of portion of property prior to an assignment for the benefit of creditors. Klein *v.* Nie, 88 Ky. 542, 11 S. W. 590.

The secreting of books by the defendant's employe is not fraudulent concealment if the defendant is not connected. Fitzgerald *v.* Belden, 49 How. Pr. (N. Y.) 225.

Absence of system in business, and want of business tact and ability, are not ground for attachment on the ground of fraudulent concealment. Winter *v.* Davis, 48 La. Ann. 260, 19 So. 263.

Failure to pay over money collected, and a denial of its receipt, do not constitute concealment, removal, nor disposal of it. Roach *v.* Brannon, 57 Miss. 490; Rohan Bros. Boiler Mfg. Co. *v.* Latimore, 18 Mo. App. 16.

47. Ziegler *v.* Ziegler, 68 Hun 177, 22 N. Y. Supp. 812.

Fact of Giving Preference to Creditor.—Keith *v.* McDonald, 31 Ill. App. 17. See also Kipling *v.* Corbin, 66 How. Pr. (N. Y.) 12.

In Dodson-Hills Mfg. Co. *v.* Payton, 65 Mo. App. 311, the court said that the law does not tolerate the preservation of property for the benefit of one creditor by concealing it from another, and that while the law will uphold an executed preference, it will not an executory preference with an intermediate concealment.

48. Taylor *v.* Myers, 34 Mo. 81.

49. Treadwell *v.* Lawlor, 15 How. Pr. (N. Y.) 8, wherein the court said: "The attachment lies, if the defendant has, or is about to secrete 'any' single piece of his property, and extends to all his property of every kind. . . . This design is as manifest in concealing embezzled property, as in concealing that which is lawfully his."

50. Ludlow *v.* Ramsey, 11 Wall. (U. S.) 581, 20 L. ed. 216, where one went into country held by the confederate army.

To the same effect, see Jenkins *v.* Hannan, 26 Fed. 657; Dorsey *v.* Dorsey, 30 Md. 522, 96 Am. Dec. 635; Dorsey *v.* Kyle, 30 Md. 512, 96 Am. Dec. 617.

Under a Louisiana Statute as to Absentees.—Leathers *v.* Cannon, 27 La. Ann. 522; Budd *v.* Stinson, 20 La. Ann. 573.

An attachment against a partnership when all were out of the state, the last one to leave having gone recently with the expressed intention of returning in a few days, the firm goods being in course of removal. Sloan *v.* Bangs, 10 Rich. L. (S. C.) 15.

Person Removing Refusing To Pay or Secure Demand Under Iowa Statute.—Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153. See Burrows *v.* Lehndorff, 8 Iowa 96; Bates *v.* Robinson, 8 Iowa 318.

A formal demand is not a prerequisite to an attachment on this ground Ruthven *v.* Beckwith, 84 Iowa 715 45 N. W. 1073, 51 N. W. 153.

When Defendant Absent From State. State *v.* Morris, 50 Iowa 203.

Either payment or security is sufficient. Drummond *v.* Stewart, 8 Ia. 341.

51. Brooks *v.* Hutchinson, 122 Ga. 838, 50 S. E. 926.

for such removal.[52] But in other jurisdictions, a removal of the person, unaccompanied by a removal of his property, is insufficient to sustain an attachment.[53]

7. Removal of Property. — a. *In General.* — Statutes in several of the states prescribe as a ground of attachment that the debtor has removed or is about to remove his property out of the jurisdiction.[54]

b. *Intended Removal.* — Some of these statutes couple, with the removal of property as a ground for an attachment, the requirement that such contemplated removal is to the prejudice of creditors.[55] When such is the case, to sustain an issue of "about to remove," it is not necessary to show an actual removal.[56]

c. *As Determined by Amount of Property Remaining.* — It is usually an inseparable part of these statutes that the debtor, in removing his property without the jurisdiction, has failed to leave enough therein to satisfy his debts;[57] accordingly if the debtor has more than sufficient

Present Tense in a Statute.—If a non-resident is passing through the county, from one state to another, he is "actually removing beyond the limits of said county." Johnson *v.* Lowry, 47 Ga. 560, 15 Am. Rep. 655.

Residence of Debtor in Latter County a Defense.—"The ground of attachment that the debtor is 'actually removing or about to remove' from the limits of the county refers to his person. If the debtor has left the county and established his residence in another before the attachment issues, it will not lie, although he has left property in the county in which the attachment issued." Brooks *v.* Hutchinson, 122 Ga. 838, 50 S. E. 926, *following* Thompson *v.* Wright, 22 Ga 607.

52. See Clark *v.* Pratt, 19 La. Ann. 102; Haynes *v.* Powell, 1 Lea (Tenn.) 347.

53. Clarke *v.* Seaton, 18 B. Mon. (Ky.) 226.

54. See the various statutes.

Removal of property not of person is required. Holloway *v.* Chiles, 40 Ga. 346.

55. See Patton *v.* Harris, 15 B. Mon. (Ky.) 607; Isaacks *v.* Edwards, 7 Humph. (Tenn.) 465, 46 Am. Dec. 86. And see also many of the cases referred to and cited above, throughout this subdivision.

Against Non-Resident or Foreign Corporation.—An attachment may issue against a non-resident or a foreign corporation upon the ground that the defendant is about to remove its property then in the state, without the state, not leaving sufficient to satisfy the plaintiff's claim. Bates Mach. Co. *v.* Norton Iron Works, 113 Ky. 372, 68 S. W. 423.

Issue and Proof.—Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490.

56. Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490.

The word "about" must be taken as usually understood and defined. Wrompelmeir *v.* Moses, 3 Baxt. (Tenn.) 467.

57. **U. S.**—Mack *v.* McDaniel, 4 Fed. 294, 2 McCrary 198. **Ark.**—Simon *v.* Sevier County Co-operative Assn., 54 Ark. 58, 14 S. W. 1101. **Ia.**—State *v.* Morris, 50 Iowa 203. **Miss.**—Stephenson *v* Sloan, 65 Miss. 407, 4 So. 342. **N. Y.**—McEntee *v.* Aris, 66 Hun 635, memo., 21 N. Y. Supp. 857. **Va.**—Weiss *v.* Hobbs, 84 Va. 489, 5 S. E. 367.

One expecting to return, and leaving property accessible to creditors amply sufficient to pay his debts, may take with him, for a business or pleasure trip, money without subjecting himself to attachment. But one whose sole property in this state consists of ten thousand dollars on deposit in various banks in the state, cannot remove himself and such ten thousand dollars out of the state without subjecting himself to attachment. Philadelphia Invest. Co. *v.* Bowling, 72 Miss. 565, 17 So. 231.

The packing of a large stock of goods preparatory to moving to another state does not justify the inference of removal with the intent to de-

unencumbered property remaining, subject to execution, with which to pay his debts, an attachment will not lie on this ground.[58] But the amount remaining must be sufficient to satisfy all his creditors and not merely the claim of the attaching creditor,[59] and its sufficiency for that purpose must be determined at its fair market value.[60]

d. *What Constitutes a Removal.*—For a Temporary Purpose. — These statutes have reference to a permanent removal, and not to removal for a transitory or temporary purpose.[61]

The removal must be of something tangible and capable of locality and removal,[62] and cannot be applied to such property as from its nature and use must necessarily be taken out of the state, such as vessels employed in navigation on their regular trips.[63]

e. *Necessity of Showing Fraudulent Intent.* — By statute in most jurisdictions, to justify an attachment on the ground of a removal of property from the jurisdiction, the removal must be made with a

fraud creditors, when the plaintiff's claim was for a small amount and the only one owing by the defendant, who owned other property. McEntee *v.* Aris, 66 Hun 635, memo., 21 N. Y. Supp. 857.

It is a contemplated fraud under the statute to remove property beyond the state, without leaving sufficient. Mingus *v.* McLeod, 25 Iowa 452.

"Nothing is to be presumed in favor of the creditor." Aekerman *v.* Bohm, 4 Ky. L. Rep. 895.

58. Ill.—White *v.* Wilson, 10 Ill. 21. Miss.—Pickard *v.* Samuels, 64 Miss. 822, 2 So. 250; Montague *v.* Gaddis, 37 Miss. 453. Tenn.—Wrompelmeir *v.* Moses, 3 Baxt. 467; Freidlander *v.* Pollock, 5 Coldw. 490.

An inconsiderable removal of property in the ordinary course of trade is not within the statute. Haber *v.* Nassitts, 12 Fla. 589.

59. Holliday *v.* Cohen, 34 Ark. 707, and see the cases cited above. But *compare* Ackerman *v.* Bohm, 4 Ky. L. Rep. 893.

Liens are to be considered. Ackerman *v.* Bohm, 4 Ky. L. Rep. 893.

60. Nesbit *v.* Schwab Clothing Co. 62 Ark. 22, 34 S. W. 79.

61. Ia.—Warder *v.* Thrilkeld, 52 Iowa 134, 2 N. W. 1073, under a statutory provision that the defendant "is about to remove his property out of the state without leaving sufficient remaining for the payment of his debts." Ky.—Montgomery *v.* Tilley, 1 B. Mon. 155. N. Y.—Nyack, etc., Gas Light Co. *v.* Tappan Zee Hotel Co., 53 Hun 633, 6 N. Y. Supp. 113, where there was no intent to defraud and the absence was temporary, while goods were in transit through the state of New Jersey back to New York for storage and safekeeping. Tenn. Friedlander *v.* Pollock, 5 Coldw. 490. Va.—Clinch River Mineral Co. *v.* Harrison, 91 Va. 122, 21 S. E. 660.

But as to a non-resident passing through the state with his goods. Johnson *v.* Lowry, 47 Ga. 560, 15 Am. Rep. 655.

62. Removal of Intangible Property. Logan *v.* Sibley, 61 Ill. App. 579, holding that property in a patent covers the whole territory of the United States wherever the owner may be, and an attachment will not lie on the ground of removal.

63. Russell *v.* Wilson, 18 La. 367; Lyons *v.* Mason, 4 Coldw. (Tenn.) 525.

In the absence of an allegation of fraud or insolvency, the employment of a steamer in navigating waters outside of the state is not such a removal as will justify an attachment. Hogan *v.* Carras, 12 La. Ann. 49.

fraudulent intent.[64] But since an intent to defraud will not be presumed, [65] a very high degree of proof will be required to establish a fraudulent intent in this,[66] as in all other cases where fraud is imputed to another.[67]

Rule That Fraudulent Intent Need Not Be Shown. — In other jurisdictions it is held that the law does not require that the removal shall be made with a fraudulent intent or for a fraudulent purpose.[68] When, however, such a person ships goods out of the state, the proceeds of which are not to be applied to the debts due the consignees but, upon the order of the shipper, are applied to the debts of other creditors and disposed of by him at his will, an attachment may be issued.[69]

64. **Intention To Defraud Creditors Must Exist.—U. S.**—Mack *v.* Jones, 31 Fed. 189. **Ga.**—Holloway *v.* Chiles, 40 Ga. 346. **Ill.**—Bryant *v.* Simoneau, 51 Ill. 324; White *v.* Wilson, 10 Ill. 21. **Ky.**—Schnabel *v.* Jacobs, 105 Ky. 774, 49 S. W. 774; Montgomery *v.* Tilley, 1 B. Mon. 155 ("with the intent of cheating, hindering, delaying or defrauding creditors"). **Miss.**—Lowenstein *v.* Bew, 68 Miss. 265, 8 So. 674, 24 Am. St. Rep. 269. **Neb.**—Steele *v.* Dodd, 14 Neb. 496, 16 N. W. 909. **N. J.** Liveright *v.* Greenhouse, 61 N. J. L. 156, 38 Atl. 697. **N. Y.**—Mott *v.* Lawrence, 17 How. Pr. 559, 9 Abb. Pr. 196 (that the defendant is "about to remove his property from the county with intent to defraud his creditors"); Ketchum *v.* Vidvard, 4 Thomp. & C 138. **Pa.**—Kline *v.* O'Donnell, 11 Pa. Co. Ct. 38, 1 Pa. Dist. 741. **Va.**—Weiss *v.* Hobbs, 84 Va. 489, 5 S. E. 367.

There may be a purpose in all honesty to change residence. Hunter *v.* Soward, 15 Neb. 215, 18 N. W. 58; Sowers *v.* Leiby, 4 Pa. Co. Ct. 223; Miller *v.* Paine, 2 Kulp (Pa.) 304.

Hence a removal of goods in the ordinary or regular course of business is not such a removal as is contemplated by the statutes. Clinch River Mineral Co. *v.* Harrison, 91 Va. 122, 21 S. E. 660. As, for example, sales of manufactured products in not unusual quantities and in the regular course of business to foreign customers. Herman *v.* Phoenix Brew. Co., 115 Ky. 708, 74 S. W. 726.

Where the removal is not permanent, and the proceeds are brought back. Clinch River Mineral Co. *v.* Harrison, 91 Va. 122, 21 S. E. 660.

Sufficient Means Remaining To Pay All Debts.—Stewart *v.* Cole, 46 Ala. 646.

65. Dunn *v.* Claunch, 13 Okla. 577, 76 Pac. 143.

66. Stow *v.* Stacey, 56 Hun 640, 9 N. Y. Supp. 1; Stevens *v.* Middleton, 26 Hun 470 (where the circumstances were held sufficient); Bernhard *v.* Cohen, 58 N. Y. Supp. 363, *affirming* 56 N. Y. Supp. 271; Mott *v.* Lawrence, 17 How. Pr. (N. Y.) 559, 9 Abb. Pr. 196.

67. See the title "**Weight and Effect of Evidence**," 14 ENCYCLOPEDIA OF EVIDENCE, 65.

68. **U. S.**—Mack *v.* McDaniel, 4 Fed. 294, 2 McCrary 198. **Ark.**—Durr *v.* Hervey, 44 Ark. 301, 51 Am. Rep. 594. **Ia.**—Sherrill *v.* Fay, 14 Iowa 292; State Bank *v.* White, 12 Iowa 141. **Miss.**—Stephenson *v.* Sloan, 65 Miss. 407, 4 So. 342. **Tenn.**—Freidlander *v.* Pollock, 5 Coldw. 490.

"**It is only the fraudulent conversion of property into money** in the state that subjects the debtor to attachment. On the other hand, the statute expressly declares that the removal of property from the state is ground of attachment. It is not necessary that the removal shall be with a fraudulent purpose." Lowenstein *v.* Bew, 68 Miss. 265, 8 So. 674, 24 Am. St. Rep. 269.

Under a statute which subjects one to attachment who "has removed or is about to remove himself or his property out of this state," it was held that the removal of personal property within the meaning of the law must be such as to impair or jeopardize the remedy of creditors for the collection of their debts. Lowenstein *v.* Bew, 68 Miss. 265, 8 So. 674, 24 Am. St. Rep. 269.

In an action commenced before maturity of debt attachment should not be allowed because the debtor is shipping cotton to another state to a bona fide creditor in payment of a debt, in good faith and without fraudulent intent. Rice *v.* Pertuis, 40 Ark. 157.

69. Goodbar *v.* Bailey, 57 Ark. 611,

I. DISPOSITION OF PROPERTY TO DELAY OR DEFRAUD CREDITORS. — 1. In General. — Another cause for attachment common to most of the jurisdictions arises when a debtor has disposed of or secreted his property with intent to hinder, delay or defraud his creditors.[70] But to support an attachment on the ground of hindering or delaying a creditor, the fraudulent act must in some manner

22 S. W. 568; Durr *v.* Hervey, 44 Ark. 301, 51 Am. Rep. 594; Wilkinson *v.* Dockery (Miss.), 12 So. 585; Crow *v.* Lemon, etc., Co., 69 Miss. 799, 11 So. 110.

The benefit of a course of business applicable to solvent merchants cannot be claimed by an insolvent. *Per* Caldwell, J., charging the jury in Mack *v.* McDaniel, 2 McCrary 198, 4 Fed. 294 (under an Arkansas statute). To the same effect, see Lowenstein *v.* Bew, 68 Miss. 265, 8 So. 674, 24 Am. St. Rep. 269.

"It is immaterial that the business cannot be successfully conducted unless the property may be sent to markets outside the state for sale. When the concern becomes insolvent, it must go into liquidation, or take the consequences of so acting as to subject itself to attachment." Queen City Mfg. Co. *v.* Blalack (Miss.), 18 So. 800.

70. Ky.—Pearson etc., Co. *v.* Plew, 32 Ky. L. Rep. 77, 105 S. W. 377. **N. Y.**—*Compare* Sturz *v.* Fischer, 15 Misc. 410, 36 N. Y. Supp. 893. **W. Va.** Lewis *v.* Bragg, 47 W. Va. 77, 35 S. E. 943.

Such a provision, of course, appears in varying language in various statutes.

Alternative Grounds.—Guile *v.* McNanny, 14 Minn. 520, 100 Am. Dec. 244.

In Sturz *v.* Fischer, 15 Misc. 410, 36 N. Y. Supp. 893, however, it was said that the three agencies of fraud, namely, assigning, disposing of, and secreting, are legally identical and equivalent, *citing* Van Alstyne *v.* Erwine, 11 N. Y. 331.

To transfer property is to place it in the hands of another. Culbertson *v.* Cabeen, 29 Tex. 247, pointing out that to secrete property is to hide it, to put it where the officer of the law will not be able to find it.

"Dispose of" is broader than "transfer" or "secrete" (Carpenter *v.* Pridgen, 40 Tex. 32), and signifies any actual removal or disposition in fact of property, other than "assigned" or "secreted" (Guile *v.* McNanny, 14 Minn. 520, 100 Am. Dec. 244). "Dispose" is not a generic term embracing all alienations, but is limited to dispositions not covered by the provision as to conveyances and assignments, and includes such as pledges, gifts, pawns, bailments and other transfers and alienations as may be effected by mere delivery, and without the use of any writing, assignment or conveyance. Bullene *v.* Smith, 73 Mo. 151.

"Assign" means to transfer the legal title to the property, and perhaps refers to any conveyance of any interest therein. Guile *v.* McNanny, 14 Minn. 520, 100 Am. Dec. 244.

To secrete property is to hide it, to put it where the officer of the law will not be able to find it (Culbertson *v.* Cabeen, 29 Tex. 247), to hide it in fact (Guile *v.* McNanny, 14 Minn. 520, 100 Am. Dec. 244); any making away with property which shall put it unlawfully out of the reach of the creditor (Sturz *v.* Fischer, 15 Misc. 410, 36 N. Y. Supp. 893).

Whether instructions should be limited to the words of the law itself depends upon the nature of the case, and the discretion of the judge. Beach *v.* Baldwin, 14 Mo. 597.

Deposit for Safe Keeping Not Fraudulent Disposition.—Couldren *v.* Caughey, 29 Wis. 317.

Failure To Redeem Promise To Pay on Sale of Property.—Shibley, etc., Grocery Co. *v.* Ferguson, 60 Ark. 160, 29 S. W. 275.

When, after giving an order to a creditor on a party to whom the debtor declared that certain property would be delivered for sale, the debtor secretly attempted to sell the property to others, an attachment will lie. Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

When the debtor refused to pay proceeds of insurance on property upon which the creditor had a lien, this fur-

be connected with the disposition of the debtor's property,[71] and must have resulted in an injury to the creditor.[72]

Declining to prefer a particular creditor is not ground for an attachment.[73]

2. Unexecuted Intention To Dispose of Property. — a. *In General.* The statutes in many of the jurisdictions, in addition to declaring the fraudulent disposition of property a ground for an attachment, prescribe the further ground that the defendant is about or intends to dispose of his property, with intent to hinder, delay or defraud his creditors,[74] and an attachment may be issued if this plaintiff has reasonable grounds for believing the facts stated, or if the allegations be true in point of fact.[75]

An attachment will not be sustained however, upon the ground that the defendant is about to dispose of his property fraudulently, when the disposition was consummated before the attachment.[76]

b. *Necessity for Fraud.* — But to support an attachment on this ground, as in case of an actual disposition of the property, there must

nished ground for an attachment. Brasher *v.* Tandy, 18 Ky. L. Rep. 701, 37 S. W. 1045.

Entering into a partnership by a merchant without the consent of creditors who had sold goods to him as an individual, is not itself a disposition which hindered and delayed the creditors. Mack *v.* Jones, 31 Fed. 189. *Compare* Curran *v.* Rothschild, 14 Colo App. 497, 60 Pac. 1111.

Property Which May Be Fraudulently Disposed of.—Money (Rohan Bros. Boiler Mfg. Co. *v.* Latimore, 18 Mo. App. 16); checks (Wildman *v.* Van Gelder, 60 Hun 443, 14 N. Y. Supp. 914); a chose in action (Wilson *v.* Beadle, 2 Head [Tenn.] 510); crops (Flower *v.* Skipwith, 45 La. Ann. 895, 13 So. 152); a policy of insurance (Conyne *v.* Jones, 51 Ill. App. 17).

A solvent merchant has the right to dispose daily of his goods, and to use the money for his own private purposes, and place it where it cannot be reached by his creditors except at his own pleasure. Though he does not appropriate their proceeds to the payment of his debts, he has not necessarily disposed of his property for the purpose of defrauding his cerditors, Willis *v.* Lowry, 66 Tex. 540, 2 S. W. 449. *Compare* Goodwell *v.* Min chew, 26 La. Ann. 621, where a creditor though he had cash enough paid only a part of his debts and then removed to another state.

71. Hosea *v.* McClure, 42 Kan. 403, 22 Pac. 417, 42 Kan. 408, 22 Pac. 319.

72. Zeigler *v.* Cox, 63 Ill. 48.

73. Lehman *v.* McFarland, 35 La. Ann. 624; Thompson *v.* Dater, 57 Hun 316, 10 N. Y. Supp. 613; Ellison *v.* Bernstein, 60 How. Pr. (N. Y.) 145.

74. Consult the various statutes, and see **U. S.**—Correy *v.* Lake, Deady 469, 6 Fed. Cas. No. 3,253, under the Oregon Code. **La.**—Abrams *v.* Teague, 24 La. Ann. 567. **Tex.**—Culbertson *v.* Cabeen, 29 Tex. 247.

When purpose abandoned attachment should not issue. Dogan *v.* Cole, 63 Miss. 153.

75. Lord *v.* Wood, 129 Iowa 303, 94 N. W. 842.

In McHaney *v.* Cawthorn, 4 Heisk. (Tenn.) 508, it was held that an allegation that a party "intends by future and fraudulent conveyances as complainant believes" does not authorize attachment, the court saying: "It is an impossibility to determine an issue upon the naked *belief* of a complainant alleged as an independent fact without more, and the trial of the question of what will be the *future* intention of a defendant would be equally empty in its attempt and result."

The issue upon a traverse of the allegation that plaintiff has reason to believe, etc., is whether the deponent had such reason. Meinhard *v.* Lilienthal, 17 Fla. 501.

76. Yarbrough *v.* Hudson, 19 Ala. 653.

be a fraudulent intent,[77] existing prior to the issuance of the attachment.[78]

e. *Evidence.* — Although the evidence must be clear and convincing before an attachment can issue on the ground that the debtor is about to dispose of his property to defraud,[79] on the other hand where the ap-

77. **La.**—Bridge *v.* Ennis, 28 La. Ann. 309; Hoy *v.* Weiss, 24 La. Ann. 269; Lefevre *v.* Landry, 24 La. Ann. 82. **Mo.**—Belcher, etc., Lumb. Co. *v.* Drane, 107 Mo. App. 56, 80 S. W. 307. **N. Y.**—Newitter *v.* Mansell, 60 Hun 578, 14 N. Y. Supp. 506 (where the allegation was that defendant was about to assign all his property); Talcott *v.* Rosenberg, 8 Abb. Pr. (N. S.) 287, 3 Daly 203.

Any Part of Property.—Kurtz *v.* Lewis Voight, etc., Co., 86 Mo. App. 649.

78. **Ala.**—Donnell *v.* Jones, 17 Ala. 689, 52 Am. Dec. 194, as to the fraudulent execution of an assignment made three days after the issuance of an attachment. **Ky.**—Warner *v.* Everett, 7 B. Mon. 262. **Mo.**—Taylor *v.* Myers, 34 Mo. 81; Scudder *v.* Payton, 65 Mo. App. 314, as to concealing part of the property immediately after suing out an attachment.

Previous Arrangement Subsequently Carried Out.—National Park Bank *v.* Whitmore, 40 Hun 499, 2 N. Y. St. 87, *affirmed,* 104 N. Y. 297, 10 N. E. 524.

A conveyance to the wife of the debtor on the day of the issuance of attachment is sufficient. Washburn *v.* McGuire, 19 Neb. 98, 26 N. W. 709.

79. Towle *v.* Lamphere, 8 Ill. App. 399.

The fact that the debtor wanted to include in a general assignment a certain debt which was considered as an invalid claim, is not sufficient. Parsons *v.* Stockbridge, 42 Ind. 121; Kemper, etc. Dry Goods Co. *v.* Fischel, 4 Okla. 250, 44 Pac. 205.

The mere fact that a debtor had not paid according to promise, or had offered to sell his property, or had suffered a judgment to go against him, will not justify, the charge that he is about fraudulently to conceal, remove or dispose of his property so as to hinder or delay his creditors. Nelson Distilling Co. *v.* Lock, 59 Mo. App. 637.

Attempting to dispose of goods at a sacrifice in expectation of leaving the state indicates a fraudulent purpose. Guckenheimer *v.* Libbey, 42 S. C. 162, 19 S. E. 999.

Endeavoring to raise money with which to speculate is not sufficient. Galligan *v.* Groten, 18 Misc. 428, 26 Civ. Proc. 78, 42 N. Y. Supp. 22.

Failure to pay an admitted debt though frequently dunned, and an offer to sell for cash personal property is not sufficient. Boyd *v.* Labranche, 35 La. Ann. 285; Meyers *v.* Boyd, 37 Mo. App. 532.

Mortgage to secure part of indebtedness. Armstrong *v.* Cook, 95 Mich. 257, 54 N. W. 873.

Sale To Secure or Pay Some Creditors.—Eaton *v.* Wells, 18 Minn. 410.

Transfer goods to different parties to liquidate their accounts, does not show requisite intent. Newwitter *v.* Mansell, 60 Hun 578, memo., 14 N. Y. Supp. 506.

But in Frank *v.* Minsterketter (Ky.), 99 S. W. 219, it was held that the placing by a debtor of his property in the hands of another with instructions to convert it into cash and pay the proceeds to certain persons to the exclusion of others amounts to a fraud, the court saying: "Though appellee acted with honesty of purpose, yet the results of his acts were the same to appellant as though he had not so acted. The legal intention of one in doing a particular act must be determined by the result of that act, and even though the doer may intend no wrong, yet if the result of the act would be to defraud and prevent, or hinder or delay, the creditor in the collection of his debt, then the act would, in law, be a fraudulent act as to the creditor affected."

False statements as to his financial condition made when requesting an extension of time for payment do not show an intention to assign, remove and dispose of property with intent to defraud creditors. Ellison *v.* Bernstein, 60 How. Pr. (N. Y.) 145. Kemper, etc., Dry Goods Co. *v.* Fischel, 4 Okla. 250, 44 Pac. 205. And see At-

plicant makes a sufficient showing the writ cannot be denied.[80]

Threats to dispose of property in such a manner that the plaintiff would not be able to recover, are sufficient to support an attachment when it appears that the purpose was fraudulent,[81] or where the threat could only be carried out by illegal means,[82] but a mere statement by a debtor that, if sued, he would do what the law permits, such as making an assignment and the giving of preferences, does not furnish ground for an attachment.[83] But mere declarations by a debtor of

las Furniture Co. *v.* Freeman, 70 Hun 13, 23 N. Y. Supp. 1131.

80. **U. S.**—Correy *v.* Lake, Deady 469, 6 Fed. Cas. No. 3,253. **Fla.**—Eckman *v.* Munnerlyn, 32 Fla. 367, 13 So. 922, 37 Am. St. Rep. 109. **N. Y.**—Boyd *v.* Miller, 88 Hun 617, memo., 34 N. Y. Supp. 1026.

Postponement of Payment With Other Disposition of Property.—Rice *v.* Tolbert, 20 Ky. L. Rep. 674, 47 S. W. 323.

Sufficient Showing.—**Fla.**—Meinhard *v.* Lillienthal, 17 Fla. 501, avoiding plaintiff, receiving assignments in name of clerk, etc. **Kan.**—Curtis *v.* Hoadley, 29 Kan. 566, proposal of immediate marriage and an offer to transfer property after marriage. **Ky.**—Clark *v.* Smith, 7 B. Mon. 273, intention to transfer property to son and turn over latter's notes to creditors. **Neb.**—Askwith *v.* Allen, 33 Neb. 418, 50 N. W. 267, intention to make bill of sale to mother though not indebted to her. **N. Y.**—Van Loon *v.* Lyons, 61 N. Y. 22 (representation of inability to pay and of intention to go to Canada); Union Distilling Co. *v.* Ruser, 60 Hun 583 (memo.), 14 N. Y. Supp. 908 (attempting to realize money quickly). **N. C.**—Brown *v.* Hawkins, 65 N. C. 645, secretly moving property in the night and contradictory statements.

81. **La.**—Newman *v.* Kraim, 34 La. Ann. 910. **N. Y.**—United States Net, etc., Co. v. Alexander, 18 N. Y. Supp. 147. **Pa.**—Quay *v.* Robbins, 1 W. N. C. 154. **S. C.**—Kerchner *v.* McCormac, 25 S. C. 461, a statement by the debtor that if plaintiff "would not sue, he would pay the note, . . . but if they did sue, he would throw them into the courts, and would defeat them in getting anything on the note."

In Hanks *v.* Andrews, 53 Ark. 327, 13 S. W. 1102, it was held that when a merchant who, in order to get an extension of time for the payment of a debt, threatens his creditor that, in case he declines to allow the extension, and puts the claim in the hands of a lawyer for collection, he will make such a disposition of his property as that the creditor will realize nothing, this justifies an inference of fraud. The case is to be distinguished from a threat merely to make an assignment, which being a lawful act and standing alone furnishes no evidence of an intended fraudulent disposition of property.

To Make a General Assignment.—Wingo *v.* Purdy, 87 Va. 472, 12 S. E. 970.

A threat to convert accounts into promissory notes indicates an intention to transfer the notes to third parties, and thus put the assets beyond the reach of process, and justifies attachment. Orr etc., Shoe Co. *v.* Harris, 82 Tex. 273, 18 S. W. 308.

Where the defendant had contracted to purchase, control and ship to the plaintiff cotton seed upon which his overdrafts had been made, and openly declared his intention to sell the seed if plaintiff refused to pay his overdrafts, was an attempt to deprive the plaintiff of property which was stored for his account, and was a security for the advances he had already made to defendant on the faith of it, and a violation of such contract with the accompanying declaration evidenced an intent to defraud. Standard Cotton Seed Oil Co. *v.* Matheson, 48 La. Ann. 1312, 20 So. 713.

Threats to assign, if sued, tend to sustain an allegation of intention fraudulently to convey his property. White *v.* Leszynsky, 14 Cal. 165. And see Anthony *v.* Stype, 19 Hun (N. Y.) 265.

82. Livermore *v.* Rhodes, 3 Robt. (N. Y.) 626, 27 How. Pr. 506.

83. Atlas Furniture Co. *v.* Freeman, 70 Hun 13, 23 N. Y. Supp. 1131; Stamp *v.* Herpich, 44 Hun 623 (memo.),

his intention to dispose of property, unaccompanied by anything indicating a fraudulent purpose, are not grounds for attachment.[84]

The burden of proof shifts to the plaintiff when the allegations of his affidavit are denied.[85]

3. Property Within Contemplation of Statute. — Money as well as other property may be fraudulently concealed, removed or disposed of.[86]

Mere denial of receipt of money or failure to pay according to contract is not a fraudulent concealment, removal or disposal of it.[87]

4. Requisites and Sufficiency of Conveyance. — No actual change of possession is necessary in order to constitute such a conveyance as is contemplated by the statutes.[88]

5. Amount of Property Disposed of or Retained as Affecting Right To Attach. — To entitle a creditor to an attachment on this ground, the law does not require the disposition of all the debtor's property, or any particular portion of it, to defraud his creditors.[89] It is sufficient if the debtor assigns any portion of his property for the purpose of defrauding his creditors.[90] Nor, under such provisions as we are considering, is it material what amount of property the grantor has retained.[91]

8 N. Y. St. 446; Evans *v.* Warner, 21 Hun (N. Y.) 574; Farwell *v.* Furniss, 67 How. Pr. (N. Y.) 188; Kipling *v.* Corbin, 66 How. Pr. (N. Y.) 12; Dickinson *v.* Benham, 19 How. Pr. (N. Y.) 410, 10 Abb. Pr. 390; Wilson *v.* Britton, 26 Barb. (N. Y.) 562, 6 Abb. Pr. 97, *reversing* 6 Abb. Pr. 33; Kemper etc. Dry Goods Co. *v.* Fischel, 4 Okla. 250, 44 Pac. 205.

84. **Of Intention to Sell Certain Property, and Not Pay.**—Donnelly Contracting Co. *v.* Stanton, 6 Misc. 168, 27 N. Y. Supp. 124.

The fact that one of the defendants said that the defendants thought they would have to turn over their business, that creditors might be left, and that they would have to protect themselves, does not prove that the defendants intended to transfer their property to cheat and defraud creditors. Hanlenbeck *v.* Coenen, 20 Civ. Proc. 6, 12 N. Y. Supp. 1.

85. Easterline *v.* Jones, 2 Kulp (Pa.) 121.

86. Rohan Bros. Boiler Mfg. Co. *v.* Latimore, 18 Mo. App. 16.

87. Rohan Bros. Boiler Mfg. Co. *v.* Latimore, 18 Mo. App. 16.

88. Schwabacker *v.* Rush, 81 Ill. 310.

In Allen *v.* Meyer, 7 Daly (N. Y.) 229, it was held that continuing to reside on property which had been conveyed and to assert rights of ownership, raise a presumption that the disposition was with intent to defraud creditors. And see Schumann *v.* Davis, 14 N. Y. Supp. 284, where the debtor remained in charge of business under his old sign after a sale under execution in favor of his wife.

If the vendee is in possession at time of sale, no further change of possession is necessary. Simmons Hardware Co. *v.* Pfeil, 35 Mo. App. 256.

89. Wildman *v.* VanGelder, 60 Hun 443, 14 N. Y. Supp. 914; Weiller *v.* Schreiber, 63 How. Pr. (N. Y.) 491, 11 Abb. N. C. 175. See Sedalis Third Nat. Bank *v.* Cramer, 78 Mo. App. 476, where there was no evidence to show the value of the property conveyed to the trustee, nor what amount he had realized from the sale thereof; and it therefore did not appear whether or not the trustee would have sufficient to pay off and satisfy every debt provided for, including that of the plaintiff.

90. Johnson *v.* Laughlin, 7 Kan. 359; Taylor *v.* Myers, 34 Mo. 81; Dixon Nat. Bank *v.* Western Lumb. Co., 68 Mo. App. 81.

91. **One conveyance with the fraudulent intent** to hinder or delay his creditors is sufficient. Barry County Bank *v.* Russey, 74 Mo. App. 651.

6. The Fraudulent Intent. — a. *Necessity for Fraudulent Intent.*— **Minority Rule.** — In some jurisdictions it is held that an actual fraudulent intent is not required to be shown in order to obtain an attachment on this ground, fraud in law being sufficient.[92]

Majority Rule. — But the general rule is, that to obtain an attachment on the ground of a fraudulent transfer or other disposition of property, there must have been an actual intent to hinder, delay or defraud creditors.[93]

Distinction as to Suits To Set Aside Fraudulent Conveyances.—Hoffman *v.* Henderson, 145 Ind. 613, 44 N. E. 629. See also Flannagan *v.* Donaldson, 85 Ind. 517.

It is a circumstance against inference of fraud in a conveyance of property, that the defendant's only indebtedness was that to the plaintiff, which was inconsiderable compared with the value of his property. Steele *v.* Dodd, 14 Neb. 496, 16 N. W. 909.

92. Kellog *v.* Richardson, 19 Fed. 70; Winter *v.* Kirby, 68 Ark. 471, 60 S. W. 34; Ryan Drug Co. *v.* Hvambsahl, 89 Wis. 61, 61 N. W. 299, holding intent immaterial if an instrument is *per se* fraudulent and void in law.

Rule in Georgia.—Carstarphen Warehouse Co. *v.* Fried, 124 Ga. 544, 52 S. E. 598; Gray *v.* Neill, 86 Ga. 188, 12 S. E. 362.

The execution of a certain deed of trust being fraudulent per se, it is ground for an attachment. Joseph *v.* Levi, 58 Miss. 843 (holding as fraudulent and void, mortgages and deeds of trusts on stocks of merchandise which provide for the retention of possession by the maker of the instrument, with power to sell and replenish the goods in the usual course of such business); Reed *v.* Pelletier, 28 Mo. 173.

In Missouri it is held that the question of intent or motive of the defendant is wholly immaterial, as it is enough if his conveyance is constructively fraudulent or fraudulent in law and tends to hinder or delay existing creditors in the enforcement of their demands, under a statute authorizing an attachment on the ground that the defendant "had fraudulently conveyed or assigned his property so as to hinder or delay his creditors." Glacier *v.* Walker, 69 Mo. App. 288; Cole Mfg. Co. *v.* Jenkins, 47 Mo. App. 664; Cooper *v.* Stanley, 40 Mo. App. 138; Eby *v.* Watkins, 39 Mo. App. 27; Douglass *v.* Cissna, 17 Mo. App. 14. See further the notes *infra*, VIII, I.

Burden of Proving Fraudulent Disposition is on the Plaintiff.—Noyes *v.* Cunningham, 51 Mo. App. 194; Forster *v.* Mullanphy Planing Mill Co., 16 Mo. App. 150.

93. **U. S.**—Farwell *v.* Brown, 1 Fed. 128, under a Wisconsin statute. **Ill.**—Weare Com. Co. *v.* Druley, 156 Ill. 25, 41 N. E. 48, 30 L. R. A. 465, *affirming* 54 Ill. App. 391; Rhode *v.* Matthai, 35 Ill. App. 147; Dempsey *v.* Bowen, 25 Ill. App. 192; Princeton First Nat. Bank *v.* Kurtz, 22 Ill. App. 213; Shove *v.* Farwell, 9 Ill. App. 256. **Kan.**—McPike *v.* Atwell, 34 Kan. 142, 8 Pac. 18. **La.**—Bloch *v.* Creditors, 46 La. Ann. 1334, 16 So. 267. **Miss.**—Roach *v.* Brannon, 57 Miss. 490. **N. Y.**—J. H. Mohlman Co. *v.* Landwehr, 87 App. Div. 83, 83 N. Y. Supp. 1073; Shuler *v.* Birdsall, etc. Mfg. Co., 17 App. Div. 228, 45 N. Y. Supp. 725; Wildman *v.* VanGelder, 60 Hun 443, 21 Civ. Proc. 143, 14 N. Y. Supp. 914; Greef *v.* Sickle, 48 Hun 614 (memo.), 15 N. Y. St. 248, 997; Fleitman *v.* Sickle, 47 Hun 633 (memo.), 13 N. Y. St. 399; Goldschmidt *v.* Hirschorn, 47 Hun 633, memo., 13 N. Y. St. 560; Seckendorf *v.* Ketcham, 67 How. Pr. 526; Belmont *v.* Lane, 22 How. Pr. 365; Johnston *v.* Ferris, 14 Daly 302, 12 N. Y. St. 666. **Ohio.**—American Engineering Specialty Co. *v.* O'Brien, 28 Ohio C. C. 64; Hoyman *v.* Beverstock, 4 Ohio Cir. Dec. 491; Union Rolling Mill Co. *v.* Packard, 1 Ohio Cir. Dec. 46. **S. D.**—German Bank *v.* Folds, 9 S. D. 295, 68 N. W. 747; Sturgis First Nat. Bank *v.* McMillan, 9 S. D. 227, 68 N. W. 537; Trebilcock *v.* Big Missouri Min. Co., 9 S. D. 206, 68 N. W. 330. **Tex.**—Blum *v.* Strong, 71 Tex. 321, 6 S. W. 167; Needham Piano, etc. Co. *v.* Hollingsworth (Tex. Civ. App.), 40 S. W. 750, *affirmed*, 91 Tex. 49, 40 S. W. 787. *Compare* Armstrong *v.* Ames, 17 Tex

b. *What Constitutes Fraud.* — It is not sufficient that the payment of one creditor may have the effect to delay the payment of others by exhausting the means of payment,[94] or that appearances indicate a fraudulent purpose,[95] or that the creditor has suspicions or a belief which are not sustained by sufficient affirmative evidence of intention to defraud.[96]

c. *Time of Forming Fraudulent Intent.* — But there must have been an actual fraudulent intent[97] at the time the attachment issued,[98] or at the time the disposition of the property was made.[99]

Civ. App. 46, 43 S. W. 302. **Va.**—Wingo *v.* Purdy, 87 Va. 472, 12 S. E. 970.

Statute Relates to Intent and Not to Manner.—Howland *v.* Marshall, 127 N. C. 427, 37 S. E. 462.

It is the intent to delay creditors which constitutes the act a fraud upon them (Curran *v.* Rothschild, 14 Colo. App. 497, 60 Pac. 1111); an intent to injure and reserve some supposed benefit to the debtor (Heidenheimer *v.* Ogborn, 1 Disney [Ohio] 351).

A design to sell or remove property, without any intent to defraud creditors, furnishes no ground for an attachment. Hunter *v.* Soward, 15 Neb. 215, 18 N. W. 58.

Omission of certain formalities in instrument, as where a mortgage made prior to the contracting of the debt was not filed until just before the action was commenced, and therefore may be fraudulent in law, or void as to creditors, will not sustain an attachment unless is was in fact intended to defraud. Park *v.* Armstrong, 9 S. D. 269, 68 N. W. 739.

The violation of the limited partnership act by the preferential payment of an honest debt does not show intent to defraud creditors within the attachment law. Casola *v.* Vasquez, 147 N. Y. 258, 41 N. E. 517, *reversing,* 85 Hun 314, 32 N. Y. Supp. 1140.

Though the conveyance is valid as between the parties and confers a perfect title, if made with fraudulent intent to cheat, hinder, or delay creditors it is ground for attachment. Farris *v.* Gross, 75 Ark. 391, 87 S. W. 633, or if it is made to force creditors to accept a compromise. Collier *v.* Hanna, 71 Md. 253, 17 Atl. 1017.

Where two defendants are jointly charged, fraudulent action must be shown, as to both. Kompass *v.* Light, 122 Mich. 86, 80 N. W. 1008.

94. Eaton *v.* Wells, 18 Minn. 410; Heidenheimer *v.* Ogborn, 1 Disney (Ohio) 351.

95. Ferguson *v.* Chastant, 35 La. Ann. 339.

96. Fidelity, etc. Co. *v.* Johnston, 117 La. 880, 42 So. 357; Auge *v.* Variole, Man. Unrep. Cas. (La.) 224; Ellison *v.* Bernstein, 60 How. Pr. (N. Y.) 145.

97. Nelson *v.* Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142, *affirming* 93 Ill. 167; Wadsworth *v.* Laurie, 164 Ill. 42, 45 N. E. 435, *affirming* 63 Ill. App. 507; McNeil, etc Co. *v.* Plows, 83 Ill. App. 186; Hagadine-McKittrick Dry Goods Co. *v.* Belt, 74 Ill. App. 581; Hanford *v.* Richart, 66 Ill. App. 443. **Mich.**—Ionia First Nat. Bank *v.* Steele, 81 Mich. 93, 45 N. W. 579. **N. Y.**—V. G. Pfluke Co. *v.* Papulias, 42 Misc. 15, 85 N. Y. Supp. 541.

98. Bickham *v.* Lake, 51 Fed. 892; Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. 369.

In Hegever *v.* Kiff, 31 Kan. 440, 2 Pac. 553, which was a case of a transfer of stock and fixtures made after the levy, the court said: "Even if it be true that the defendants in error, plaintiffs below, were induced by false promises to sign the notes sued on; that defendant below had failed before and cheated his creditors; that he is guilty of violating the criminal laws of the state; and that he had mortgaged his real estate for its full value before the execution of the note upon which the plaintiffs below were sureties; nevertheless, all of this would not establish the specific charges upon which the attachment was granted."

Statutory Limitation.—A fraudulent transfer made more than the statutory period before the filing of the affidavit is not a good ground, though the fraud be continuing in the sense that a direct attack would be successful. Strauss Bros. Co. *v.* White, 61 Ill. App. 171.

99. **Prior Mortgage Used as a Cover.** Though when a mortgage was executed

d. *Intent of Grantee or Purchaser.* — An attachment may issue if the intent of the debtor was fraudulent. A fraudulent intent on the part of the grantee or purchaser is not required,[1] nor will it alone afford any ground for an attachment.[2] In such a case, the grantee or purchaser is not a party to the action; his title to the property alleged to have been fraudulently conveyed as a ground for the attachment is not involved, and an adjudication upon the attachment issue cannot affect any right of property of such person.[3] But in some jurisdictions, in order to establish the fraudulent character of the conveyance it must be shown that the purchaser participated in the fraud.[4]

7. Transactions or Conveyances Inhibited by the Statute. — a. *In General.* — No general rule can be stated as to what is such a conveyance as will justify an attachment, that would embrace all such transactions.[5]

the mortgagor did not intend to hinder or delay his creditors by a fraudulent conveyance, there is abundant ground if such mortgage is subsequently used as a cover to fraudulent disposal of property. Semmes *v.* Underwood, 64 Ark. 415, 42 S. W. 1069.

The acceptance of new notes in settlement of an open account being the creation of a new debt, a wrongful disposition of property which occurred before the execution of the notes is not ground for attachment upon the notes. Hershfield *v.* Lowenthal, 35 Kan. 407, 11 Pac. 173.

1. Ryhiner *v.* Ruegger, 19 Ill. App. 156; Barry County Bank *v* Russey, 74 Mo. App. 651.

2. Thurber *v.* Sexauer, 15 Neb. 541, 19 N. W. 493.

3. **Ill.**—Spear *v.* Joyce, 27 Ill. App. 456; Pettingill *v.* Drake, 14 Ill. App. 424. **Mo.**—Enders *v.* Richards, 33 Mo. 598. **Wis.**—Miller *v.* McNair, 65 Wis. 452, 27 N. W. 333.

4. Johnston *v.* Field, 62 Ind. 377, where the court said: "It is not necessary to quote authorities to sustain so well recognized a principal of law."

5. **"Every assignment by a debtor of his property must, of necessity, work some delay** as to other creditors in the collection of their claims; but this is not such delay as is meant by a statute which gives the right of attachment when the debtor is about to convey, assign, conceal or dispose of his property to delay and defraud his creditors." Breeden *v.* Peale, 106 Va. 39, 55 S. E. 2, *citing* Waples on Attachment, §66.

A transfer of property to satisfy a pretended trust (Central Nat. Bank *v.* Ft. Ann Woolen Co., 24 N. Y. Supp. 640, *affirmed,* 76 Hun 610, 27 N. Y. Supp. 1114, 143 N. Y. 624, 37 N. E. 827), or a sale of property to irresponsible persons at grossly inadequate prices, will justify an attachment. Flanders *v.* McDonald, 39 Wis. 288.

Trading Goods Bought on Credit for Valueless Property.—J. T. Robinson Notion Co. *v.* Ormsby, 33 Nev. 665, 50 N. W. 952.

But that part of the purchase money was paid on a pre-existing indebtedness does not militate against the validity of the sale. Schwabacker *v.* Rush, 81 Ill. 310.

Deposit with surety on bail-bond to induce the surety to go on his bond to secure his release from jail is not a fraudulent disposition. Howland *v.* Marshall, 127 N. C. 427, 37 S. E. 462.

That a wife offers to pledge her property to provide bail for her husband is not cause of attachment when there is no fraudulent intent. Schloss *v.* Rovelsky, 107 Ala. 596, 18 So. 71.

The assignment to his father of insurance policies by a debtor, for the purpose of enabling the father to pay his own debt and the debts for which he had become bound as surety, is not ground for an attachment when there was no arrangement or understanding that any of it should be used except in discharge of legal indebtedness. Field *v.* Stout, 68 Ill. App. 360.

The payment by a mutual benefit association of death claims of its members out of a fund collected upon an assessment ordered for the plaintiff's

As Affected by Disposition of Proceeds of Sale. — Although the debtor may make a sale of his property, yet if he applies the proceeds of sale to the payment of his debts an attachment will not lie.[6] But it is only conveyances by a debtor of his own property that his creditors can complain of;[7] if the property was received by the defendant as agent for the plaintiff, an attachment cannot be issued.[8]

b. *Mortgages.* — **In General.** — Though the contrary has been held,[9] a mortgage is generally regarded as such a conveyance or disposition as is contemplated by the statute,[10] provided a fraudulent intent is

claim, is not a fraudulent disposition of property. Knorr *v.* New York State Mut. Ben. Assoc., 79 Hun 83, 29 N. Y. Supp. 508.

Violation of Promise to Secure Debt. A ground for an attachment, that the defendant had disposed of, or was about to dispose of, his estate, or some part thereof, with intent to hinder, delay or defraud his creditors, is not made out by the facts that the defendant owed a debt to the plaintiff; that he promised to secure it and violated his promise, that he appropriated the proceeds of property, sold at a fair price, to the satisfaction of claims of other creditors, where his purpose to make that sale was not only not concealed, but was discussed between the debtor and his creditor. Breeden *v.* Peale, 106 Va. 39, 55 S. E. 2.

6. **Ark.**—Blakemore *v.* Eagle, 73 Ark. 477, 84 S. W. 637. **Miss.**—Alexander *v.* Dulaney, 16 So. 203. **Neb.**—Tenney *v.* Diss, 32 Neb. 61, 48 N. W. 877.

A debtor may mortgage his property to obtain money to pay his debts without subjecting himself to attachment. Cuendet *v.* Lahmer, 16 Kan. 527; Gore *v.* Ray, 73 Mich. 385, 41 N. W. 329.

Collusive Judgment.—An assignment for the purpose of securing a fraudulent judgment and sheriff's sale to defeat creditors is within the Pennsylvania act of 1869. Terry *v.* Knoll, 3 Kulp (Pa.) 272.

Fraudulent Execution.—Field *v.* Liverman, 17 Mo. 218.

Mere neglect of the debtor to defend actions, there being no collusion, is not sufficient to sustain a charge of fraudulent transfers. Rigney *v.* Tallmadge, 17 How. Pr. (N. Y.) 556.

7. Campbell *v.* Jackson, 80 Wis. 48, 49 N. W. 121.

Property Purchased with Wife's Money.—Cooper *v.* Standley, 40 Mo. App. 138.

A fraudulent transfer of an officer's individual property cannot be attributed to the corporation. Central Nat. Bank *v.* Ft. Ann Woolen Co., 24 N. Y. Supp. 640, *affirmed* 76 Hun 610 (memo.), 27 N. Y. Supp. 1114, 143 N. Y. 624, 37 N. E. 827.

8. Empire Warehouse Co. *v.* Mallett, 84 Hun 561, 32 N. Y. Supp. 861.

But one who holds property for which he has given warehouse receipts, which property he has a right to sell and account for the proceeds thereof, has such a title to the property as that a fraudulent transfer thereof will enable a creditor to ask for a writ of attachment against his property. German Bank *v.* Meyer, 55 Hun 86, 8 N. Y. Supp. 205, *following* Bank *v.* Lang, 87 N. Y. 209, *disapproving* German Bank *v.* Dash, 60 How. Pr. (N. Y.) 124.

The disposal by a debtor for his own benefit, without consent of the creditor, of goods for which warehouse receipts have been issued and delivered as collateral security for money borrowed, is an act done with the fraudulent intent to cheat, hinder and delay such creditor within the meaning of the statute. Bank of Commerce *v.* Payne, 86 Ky. 446, 8 S. W. 856.

9. Bullene *v.* Smith, 73 Mo. 151, holding that the word "disposed" in the statute did not include a mortgage or other conveyance in writing.

10. **Kan.**—Bunford, etc. Imp. Co. *v.* McWhorter, 41 Kan. 262, 21 Pac. 86. **Mo.**—Bauer Grocery Co. *v.* Smith, 74 Mo. App. 419, holding that the party is not relieved by the fact that the mortgaged chattels have been released or no longer exist. **S. C.**—Tabb, etc. Hdw. Co. *v.* Gelzer, 43 S. C. 342, 21 S. E. 261. **Wis.**—Ryan Drug Co. *v.* Hvambsahl, 89 Wis. 61, 61 N. W. 299.

Mortgage for Future Services of Attorney.—Shellabarger *v.* Mottin, 47 Kan. 451, 28 Pac. 199, 27 Am. St. Rep. 306.

made to appear irresistibly,[11] by sufficient competent evidence.[12]

A mortgage fraudulent in part will be set aside in behalf of suing creditors.[13]

Retention of Possession by Mortgagor. — In those jurisdictions in which actual as distinguished from constructive fraud must exist, the rule is that in the absence of actual fraud[14] a chattel mortgage merely reserving the right to the mortgagor to sell the goods mortgaged in the usual course of business, is not ground for an attachment though the mortgage is voidable as to creditors;[15] but the rule is otherwise in those jurisdictions in which a constructive fraudulent intent is sufficient to justify an attachment.[16]

11. Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 396; Ryan Drug Co. *v.* Hvambsahl, 89 Wis. 61, 61 N. W. 299.

A mortgage to secure usury not ground for attachment. Adler, etc. Clothing Co. *v.* Carl, 155 Mo. 149, 55 S. W. 1017.

Excessive Mortgages.—When the mortgage was given for amounts greater than really due, this is evidence of fraud. Taylor *v.* Kuhuke, 26 Kan. 132; Tabb, etc. Hdw. Co. *v.* Gelzer, 43 S. C. 342, 21 S. E. 261.

Fraudulent Excess.—Void In Toto.—Marbourg *v.* Lewis Cook Mfg. Co., 32 Kan. 629, 5 Pac. 181.

Mortgage is open to explanation, as that it was to cover further loans expected. Allen *v.* Fuget, 42 Kan. 672, 22 Pac. 725.

Mortgage of All Property to Secure One Creditor.—A debtor in failing circumstances may prefer one or more of his creditors, but he cannot tie up all his property which greatly exceeds in value the amount to be secured. Smith *v.* Boyer, 29 Neb. 76, 45 N. W. 265, 26 Am. St. Rep. 373. See also State *v.* Crowder, 40 Mo. App. 536; Thurber *v.* Sexauer, 15 Neb. 541, 19 N. W. 493.

But an attachment will be discharged if the excess would probably be trifling on the sale. Grimes *v.* Farrington, 19 Neb. 44, 26 N. W. 618.

Constructive Fraud.—If a mortgage on a stock of goods is void, and the mortgagee who has taken possession cannot lawfully sell them, creditors are necessarily hindered and delayed. Kingman First Nat. Bank *v.* Gerson, 50 Kan. 589, 32 Pac. 908, holding that a mortgage given by a druggist on a stock of goods including intoxicating liquors, being void as to the liquors, is void *in toto.* And see Lukens Iron, etc. Co. *v.* Payne, 13 App. Div. 11, 43 N. Y. Supp. 376, under a statute declaring an unfiled mortgage not followed by an actual and continued change of possession, to be absolutely void. In such a case it was said there need be no evidence of actual intentional fraud, though generally in New York there must be actual fraud to justify an attachment.

If mortgage is void against such claims for goods bought between the time a chattel mortgage is given and the time of filing, the vendors are not defrauded. Lord *v.* Wirt, 96 Mich. 415, 56 N. W. 7.

12. A conveyance or mortgage made within sixty days prior to an assignment for the benefit of his creditors is not evidence in itself of any intent to defraud creditors. Wachter *v.* Famachon, 62 Wis. 117, 22 N. W. 160.

Failure to record a mortgage until after the debt was incurred does not alone show an intent to defraud. Park *v.* Armstrong, 9 S. D. 269, 68 N. W. 739; Burruss *v.* Trant, 88 Va. 980, 14 S. E. 845.

13. Marbourg *v.* Lewis Cook Mfg. Co., 32 Kan. 629, 5 Pac. 181; Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 396.

14. **Facts and Circumstances Showing Fraud.**—Leser *v.* Glaser, 32 Kan. 546, 4 Pac. 1026; Ranney-Alton Merc. Co. *v.* Watson, 100 Okla. 675, 65 Pac. 98.

15. **Ark.**—Wolf *v.* Erwin, etc. Co., 71 Ark. 438, 75 S. W. 722, where a mortgage was substituted for one void in part. **Ia.**—Meyer *v.* Gage, 65 Iowa 606, 22 N. W. 892. **N. Y.**—Pfluke Co. *v.* Papulias, 42 Misc. 15, 85 N. Y. Supp. 541.

Proceeds to be Used in Paying Debts and Expenses.—Gregory Grocer Co. *v.* Young, 53 Kan. 339, 36 Pac. 713.

16. Reed *v.* Pelletier, 28 Mo. 173; Sauer *v.* Behr, 49 Mo. App. 86; Cole

c. *Voluntary Conveyances.* — (I.) In General. — A mere voluntary transfer, or a disposition of property without adequate consideration, nothing else appearing, is not sufficient to justify an attachment on the ground of a fraudulent transfer of property; there must be additional circumstances tending to show actual fraud.[17] But the insolvency of the grantor has been regarded as such a circumstance.[18]

(II.) Conveyance to Relatives. —Conveyances by insolvent debtors to members of their family have been regarded as fraudulent conveyances within the attachment laws,[19] especially if the debtor was at the time insolvent.[20]

Mfg. Co. *v.* Jenkins, 47 Mo. App. 664. Anderson *v.* Patterson, 64 Wis. 557, 25 N. W. 541; Roy *v.* Union Mercantile Co., 3 Wyo. 417, 26 Pac. 996. But *compare* Hopkins *v.* Hastings, 21 Mo. App. 263, where the court said that it did not appear that the mortgagee consented to or had any knowledge of a misappropriation of the proceeds of sales by the mortgagor.

The effect of a provision that the mortgagee should sell the goods in the due course of trade and at customary prices is to hinder and delay creditors, as the mortgagees are not permitted to pay their own debt, and then to leave the surplus subject to sale for the payment of other claims against the mortgagors. Gallagher *v.* Goldfrank, 75 Tex. 562, 12 S. W. 964.

17. Dintruff *v.* Tuthill, 62 Hun 591, 17 N. Y. Supp. 556 (a bare allegation that property was sold at less than the fair market value); Vietor *v.* Kayton, 48 Hun 620, 2 N. Y. Supp. 42; Grosvenor *v.* Sickle, 47 Hun 634, 2 N. Y. Supp. 40.

In Glacier *v.* Walker, 69 Mo. App. 288, the court, holding an instruction that the voluntary transfer was not fraudulent in law, if he "in good faith believed that he had ample property left to pay his creditors" was erroneous, said: "It is not a question as to the belief on the part of the grantor, but as to fact, that he has retained ample property to pay his creditors, that relieves his voluntary conveyance from the fraudulent character which the law would otherwise impute to it. It is incumbent on him, in order to do away with the *prima facie* presumption of fraud in law, to show that he did retain ample property, liable to process, to pay all his existing debts."

Transfer by Corporation to New Company.—After a verdict against it, and pending a new trial, without consideration, to a new company, and has already removed a large part of its goods thither, and has made no offer to pay the claim, is not ground for an attachment. Dienelt *v.* Aronia Fabric Co., 2 Pa. Co. Ct. 206.

18. Conyne *v.* Jones, 51 Ill. App. 17.

19. Ala.—Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 818. Neb.—Askwith *v.* Allen, 33 Neb. 418, 50 N. W. 267 (where the defendant was about to make a bill of sale to his mother); Kirkendall *v.* Shorey, 28 Neb. 631, 44 N. W. 992. Wyo.—Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

20. Minck *v.* Levey, 17 Misc. 315, 40 N. Y. Supp. 348.

"In Danger of Losing the Debt."—Keigher *v.* McCormick, 11 Minn. 545, where attachment was allowed because defendant had deeded away all his real estate except his homestead in which he was expending the money derived from goods instead of paying for them.

Secretly shipping a large part of a stock of goods to a relative is ground for attachment. Talcott *v.* Rosenberg, 8 Abb. Pr. N. S. (N. Y.) 287, 3 Daly 203. But shipping goods to a brother doing business in a small way in another town, as he had done for several years, the same being entered upon the books as were other goods sold, does not show a fraudulent purpose. Singer *v.* Lidwinosky, 36 Ill. App. 343.

Husband Receiving Proceeds from Wife's Business.—Anderson *v.* O'Reilly, 54 Barb. (N. Y.) 620.

A confession of judgment by a partnership to a brother of the members of the firm. Jaffrey *v.* Nast, 57 Hun 585, 10 N. Y. Supp. 280.

Conveyance to wife by an insolvent debtor for an inadequate consideration is ground for an attachment. Cooper *v.* Standley, 40 Mo. App. 138; Islin *v.*

d. *Conversion of Property.* — The conversion of plaintiff's property and the refusal to pay over the proceeds is not a ground for an attachment as a fraudulent disposition.[21]

e. *Conveyance by Agents.* — Conveyances by an agent beyond the scope of his authority, will not justify an attachment against his principal.[22]

f. *Conveyances Giving Preferences to Some Creditors.* — In the absence of any unfairness or fraud,[23] and unless positively prohibited by

Goldberg, 6 Misc. 603, 26 N. Y. Supp. 79; Victor *v.* Goldberg, 6 Misc. 46, 25 N. Y. Supp. 1005.

Grantor at the Time Solvent.—The case is different where the grantor is solvent. Iosco County Sav. Bank *v.* Barnes, 100 Mich. 1, 58 N. W. 606. And a bona fide transfer to a wife by her husband, for a valuable consideration, cannot be touched. Loveland *v.* Kearney, 14 Colo. App. 463, 60 Pac. 584.

If the grantor was not indicted when he took property in his wife's name, there is no ground for attachment. Prunk *v.* Williams, 28 Ind. 523.

Departure to another state not evidence of fraud. Taylor *v.* Hull, 56 Hun 90, 9 N. Y. Supp. 140.

Reconveyance by Grantee to Grantor's Wife.—A conveyance back to the grantor's wife of property which was deeded as security, sufficiently establishes a fraudulent intent. Brady *v.* Fraley, 27 Ky. L. Rep. 163, 84 S. W. 750.

The release of dower in the homestead by a wife is a sufficient consideration to support a conveyance to her of a stock of goods, though the consideration is apparently inadequate. Novelty Mfg. Co. *v.* Pratt, 21 Mo. App. 171.

A settlement with a wife is not ground for attachment. Wilson *v.* Chalaron, 26 La. Ann. 641.

Leaving wife's savings and earnings to her disposition and control is not such a fraud as attachment laws contemplate, even where the husband has legal control of them. Beach *v.* Baldwin, 14 Mo. 597.

21. German Bank *v.* Dash, 60 How. Pr. (N. Y.) 124.

22. **Reckless Sales by an Agent.**—Myers *v.* Whiteheart, 24 S. C. 196.

23. **An attachment may be issued when** the purpose was fraudulent (Hobbs *v.* Greenfield, 103 Ga. 1, 30 S. E. 257; Kimball *v.* Thompson, 4 Cush. (Mass.) 441, 50 Am. Dec. 799), or was a shift or device to delay or defeat creditors. **Neb.**—Kingman *v.* Weiser, 48 Neb. 834, 67 N. W. 941. **Ohio.**—Sellew *v.* Chrisfield, 1 Handy 86. **Tenn.**—Wilson *v.* Eifler, 7 Coldw. 31), as where the mortgage or other transfer was made for more than the amount due from the debtor (McBryan *v.* Trowbridge, 125 Mich. 542, 84 N. W. 1084).

Control of Debtor Continued.—"When he knowingly prefers a creditor in his assignment for an amount far in excess of the debt he actually owes him, for the express purpose of creating a secret trust in the surplus above his debt, to the end that he may subsequently dispose of it according to his own secret intention, which he may change at any moment, he thereby presents conclusive evidence of his fraudulent intent in making the assignment upon every principle applicable to such instruments." Waples-Platter Co. *v.* Low, 54 Fed. 93, 10 U. S. App. 704, 4 C. C. A. 205, decided under an Arkansas statute; *citing* Haydock *v.* Cooper, 53 N. Y. 68.

Assignment Reserving Preference to Use of Assignor.—Winter *v.* Kirby, 68 Ark. 471, 60 S. W. 34.

Long Credit Note for Excess by Creditor.—Elser *v.* Graber, 69 Tex. 222, 6 S. W. 560.

Security for Debt and Advances.—If the creditor takes a mortgage to secure a debt and "at the same time, he advances his debtor a sum of money, and leaves it subject to the latter's control, and attempts to secure its repayment in the same transaction, we see no reason why the same rule should not apply which obtains when he purchases the property in satisfaction, and pays in cash an additional consideration." Gallagher *v.* Goldfrank, 75 Tex. 562, 12 S. W. 964.

An unfair preference to one creditor, and false statements calculated to de-

statute,[24] the mere giving of preferences by the debtor to some of his creditors over others,[25] as is often done, by mortgage or deed of

ceive and lull his creditors into a false sense of security, authorizes attachment. Stevens *v.* Helpman, 29 La. Ann. 635.

False Statements as to Financial Condition.—If one who has made a preferential assignment, stated within two months that his assets amounted to $30,000 and that he owed only $800, there may be an attachment for fraudulent disposition of property if no explanation is made. Tannenbaum *v.* Gottlieb, 14 App. Div. 105, 43 N. Y. Supp. 469.

Preferences to Members of Debtor's Family.—When a conveyance has been made to or for the benefit of members of the debtor's family or his relatives, proof is required as to the debt paid or secured, and when the existence of a bona fide debt is shown, for the payment or security of which the conveyance was made, an attachment cannot be maintained on the ground that such conveyance was fraudulent. **U. S.**—Farwell *v.* Brown, 1 Fed. 128, preferring a brother and a wife. **Mo.**—Sedalia Third Nat. Bank *v.* Cramer, 78 Mo. App. 476, deed of trust naming wife as a secured creditor. **Neb.**—Dayton Spice Mills Co. *v.* Sloan, 49 Neb. 622, 68 N. W. 1040 (mortgage to wife); Omaha Hdw. Co. *v.* Duncan, 31 Neb. 217, 47 N. W. 846.

Voluntary or Collusive Attachment.—If in the absence of fraud a debtor prefers creditors by taking out attachments against himself in their favor, which are ratified by them, the attachments are good against subsequent attachments (Bayley *v.* Bryant, 24 Pick. (Mass.) 198; Randall *v.* Williams, 19 Pick. (Mass.) 381; Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421), though it has been held that a writ of attachment, issued collusively between a creditor and an insolvent debtor, for the purpose of giving a preference, and with intent to effect a fraudulent transfer to the debtor's property to the plaintiff in attachment, through the machinery of the attachment process, is void, and the suffering of such an attachment by the debtor, with the fraudulent intent, is an "attempt" to fraudulently transfer the attached property (Comer *v.* Heidelbach, 109 Ala. 220, 19 So. 719, holding also that it is immaterial whether the alleged indebtedness of the defendant to the plaintiff in attachment was fictitious or simulated, or otherwise).

Necessity for proceeding in behalf of all creditors to set aside a prior attachment as collusive between the debtor and creditor. Deposit Bank *v.* Smith, 109 Ky. 311, 58 S. W. 792.

24. Breeden *v.* Peale, 106 Va. 39, 55 S. E. 2.

"The provisions of the act of 1887 (chapter 503) apply only to general assignments for the benefit of creditors, and have never been extended beyond the case of transfers of property so connected with a general assignment as manifestly to constitute a part of the same scheme for the disposition of the estate of the insolvent. Manning *v.* Beck, (Sup.) 7 N. Y. Supp 215." Dintruff *v.* Tuthill, 62 Hun 591, 17 N. Y. Supp. 556.

In Louisiana an intent to give "an unfair preference" is one of the statutory grounds for an attachment. Code Prac. art. 240, subd. 4; Patterson Bank *v.* Urban Co., 114 La. 788, 38 So. 561.

Collusive Judgment.—Patterson Bank *v.* Urban Co., 114 La. 788, 38 So. 561.

A confession of judgment in favor of certain creditors and refusal to put other creditors on the same footing is in effect a mortgage with intent to give an unfair preference. Joseph Bowling Co. *v.* Colvin, 49 La. Ann. 1340, 22 So. 374. *Compare* Wilson *v.* Chalaron, 26 La. Ann. 641.

25. Campbell *v.* Warner, 22 Kan. 604; Blackington *v.* Goldsmith, 3 How. Pr. N. S. (N. Y.) 77.

Payment of bona fide debts in whole or in part is not ground for an attachment. **U. S.**—Miami Powder Co. *v.* Hotchkiss, 29 Fed. 767. **Ala.**—Cox *v.* Birmingham Dry Goods Co., 125 Ala. 320, 28 So. 456, 82 Am. St. Rep. 238. **Colo.**—Loveland *v.* Kearney, 14 Colo. App. 463, 60 Pac. 584. **Kan.**—Hosea *v.* McClure, 42 Kan. 403, 22 Pac. 317; 42 Kan. 408, 22 Pac. 319; Burnham *v.* Patmor, 3 Kan. App. 257, 45 Pac. 115. **Mich.**—Iosco County Sav. Bank *v.* Barnes, 100 Mich. 1, 58 N. W. 606. **N. Y.**—Merriam *v.* Wood, etc. Lithographing Co., 19 App. Div. 329, 46 N.

trust,[26] or other conveyance,[27] will not alone justify an attachment, though the debtor be insolvent,[28] and though the act may delay or hinder the other creditors in the collection of their claims.[29] This a

Y. Supp. 484, appeal dismissed, 155 N. Y. 136, 49 N. E. 685; Horton *v.* Fancher, 14 Hun 172.

The Execution of a Bill of Sale.—Johnson *v.* Stockham, 89 Md. 358, 43 Atl. 920.

While a preference may defeat a voluntary assignment, a dishonest motive within the attachment law is not necessarily imputable. Cooper *v.* Clark, 44 Kan. 358, 24 Pac. 422 (as to an assignment executed in good faith, though it preferred a creditor and no schedule of liabilities was filed); McPike *v.* Atwell, 34 Kan. 142, 8 Pac. 118.

A sale to raise money is not necessarily fraudulent. Ladew *v.* Hudson River Boot, etc., Mfg. Co., 61 Hun 333, 15 N. Y. Supp. 900.

A debtor may honestly give up a business that does not pay.—Andrews *v.* Schwartz, 55 How. Pr. (N. Y.) 190.

The payment of a debt owing to a former partner, who had left his liquidated capital and profits in the business as a loan, subject to call, was held not to constitute a fraudulent disposition, in Victor *v.* Henlien, 33 Hun (N. Y.) 549.

Preference by Corporation to Corporate Officer.—Wolf *v.* Erwin, etc., Co., 71 Ark. 438, 75 S. W. 722; Trebilcock *v.* Big Missouri Min. Co., 9 S. D. 206, 68 N. W. 330.

And so, an attachment should not be issued on the ground that the debtor has transferred property to his creditor in payment of his debt. Chouteau *v.* Sherman, 11 Mo. 385; Loucheim *v.* Marks, 2 Pearson (Pa.) 268.

A transfer by an insolvent corporation of property to a creditor to enable such creditor to dispose of the property to satisfy his claims, is not a ground for an attachment. Holbrook *v.* Peters, etc., Co., 8 Wash. 344, 36 Pac. 256, wherein the court said that if the corporation "was an insolvent corporation at the time it transferred its property to the bank, its other creditors can have adequate relief upon alleging sufficient grounds therefor, by complaint in equity to subject its assets, in the hands of the bank, to an equal distribution, in which all its creditors can participate."

26. **U. S.**—La Belle Iron Wks. *v.* Hill, 22 Fed. 195. **Kan.**—Hosea *v.* McClure, 42 Kan. 403, 22 Pac. 317. **La.** Merchants', etc., Bank *v.* Kellar, 44 La. Ann. 940, 11 So. 592; Secligson *v.* Rigmaiden, 37 La. Ann. 722; Abney *v.* Whitted, 28 La. Ann. 818. **Mich.** Ripon Knitting Wks. *v.* Johnson, 93 Mich. 129, 53 N. W. 17; Pierce *v.* Johnson, 93 Mich. 125, 53 N. W. 16, 18 L. R. A. 486. **Mo.**—Sedalia Third Nat. Bank *v.* Cramer, 78 Mo. App. 476. **Neb.**—Britton *v.* Boyer, 27 Neb. 522, 43 N. W. 356. **N. Y.**—Johnson *v.* Buckel, 65 Hun 601, 20 N. Y. Supp. 566, notwithstanding fraudulent representations of other creditors. **Ohio.**—Stone *v.* Lorain Sav., etc., Co. 8 Ohio C. C. 636, 4 Ohio Cir. Dec. 354. **S. D.**—Wyman *v.* Wilmarth, 1 S. D. 172, 46 N. W. 190. **Tenn.**—Wyler *v.* McGrew, 35 S. W. 754. **Utah.** Godbe-Pitts Drug Co. *v.* Allen, 8 Utah 117, 29 Pac. 881. **W. Va.**—Capehart's Exr. *v.* Dowery, 10 W. Va. 130. **Wis.** Campbell *v.* Jackson, 80 Wis. 48, 49 N. W. 121.

The Promise to Make a Preferential Assignment in Case of Insolvency. National Park Bank *v.* Whitmore, 104 N. Y. 297, 10 N. E. 524.

Preferences in Excess of Statutory Limit.—Rose *v.* Renton, 13 N. Y. Supp. 592, *affirmed*, 16 N. Y. Supp. 384.

27. **Ill.**—Wadsworth *v.* Laurie, 164 Ill. 42, 45 N. E. 435, *affirming* 63 Ill. App. 507. **Kan.**—Swofford Bros. Dry-Goods Co. *v.* Zeigler, 2 Kan. App. 296, 42 Pac. 592. **Mich.**—McMorran v. Moore, 113 Mich. 101, 71 N. W. 505; Ionia First Nat. Bank *v.* Steele, 81 Mich. 93, 45 N. W. 579; Gore *v.* Ray, 73 Mich. 385, 41 N. W. 329. **N. Y.** Casola *v.* Vasquez, 147 N. Y. 258, 41 N. E. 517, *reversing* 85 Hun 314, memo., 32 N. Y. Supp. 1140; Horton *v.* Fancher, 14 Hun 172. **Okla.**—Jaffray *v.* Wolf, 1 Okla. 312, 33 Pac. 945. **Pa.** Easterline *v.* Jones, 2 Kulp 121. **Wyo.** Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

28. Palmer *v.* Hawes, 80 Wis. 474, 50 N. W. 341.

29. **Ill.**—Nelson *v.* Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142, *affirming* 93 Ill. App. 176. **Kan.**—Gregory Grocer Co. *v.* Young, 53 Kan. 339,

debtor may do so long as he retains control of his property,[30] and when there is no intent to secure any benefit or advantage to himself.[31] And even in case of a fraudulent preference, a creditor may lose the right to object by estoppel.[32]

g. *Transfers in Violation of Bankrupt Act.* — A tranfer in violation of the National Bankrupt Act will not justify an attachment.[33]

h. *Dealings by Debtor With Exempt Property.* — Nor will any disposal or concealment of property exempt by law to the debtor, justify an attachment on this ground.[34]

i. *Disposal of Property Mortgaged or Pledged.* — But the disposal of property mortgaged or pledged is ground for an attachment, when it was done with the intent to hinder and delay the creditor in the payment of his debt.[35]

j. *Transfers in Regular Course of Business.* — A fraudulent disposition of property, as ground for an attachment, cannot be predicated upon the selling of property in the ordinary course of trade,[36] nor

36 Pac. 713; Miller *v.* Wichita Overall, etc., Mfg. Co., 53 Kan. 75, 35 Pac. 799. **Mo.**—Heideman-Benoist Saddlery Co. *v.* Urner, 24 Mo. App. 534.

But see Frank *v.* Minsterketter, 30 Ky. L. Rep. 485, 99 S. W. 219, where a debtor placed all of his property in the hands of a trustee, with directions to pay certain creditors to the exclusion of another.

30. Hunter *v.* Ferguson, 3 Colo. App. 287, 33 Pac. 82; Douglas County Nat. Bank *v.* Sands, 47 Kan. 596, 28 Pac. 620; Watkins Nat. Bank *v.* Sands, 47 Kan. 591, 28 Pac. 618; DeWolf *v.* Armstrong, 46 Kan. 523, 26 Pac. 1038; Abernathy Furniture Co. *v.* Armstrong, 46 Kan. 270, 26 Pac. 693; Tootle *v.* Coldwell, 30 Kan. 125, 1 Pac. 329; Swofford Bros. Dry-Goods Co. *v.* Zeigler, 2 Kan. App. 296, 42 Pac. 592.

31. Fitzpatrick *v.* Flannagan, 106 U. S. 648, 1 Sup. Ct. 369, 27 L. ed. 211; Heideman-Benoist Saddlery Co. *v.* Urner, 24 Mo. App. 534.

32. Seeligson *v.* Rigmaiden, 37 La. Ann. 722.

33. Stanley *v.* Sutherland, 54 Ind. 339.

34. **Ala.**—Cox *v.* Birmingham Dry-Goods Co., 125 Ala. 320, 28 So. 456, 82 Am. St. Rep. 238. **Mich.**—Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879. **S. D.**—Wyman *v.* Wilmarth, 1 S. D. 172, 46 N. W. 190.

Pension Money.—Clark *v.* Ingraham, 15 Phila. (Pa.) 646, 38 Leg. Int. 393.

35. Senter & Co. *v.* Mitchell, 16 Fed. 206.

36. **Ala.**—Cox *v.* Birmingham Dry-Goods Co., 125 Ala. 320, 28 So. 456, 82 Am. St. Rep. 238. **Kan.**—Burnham *v.* Patmor, 3 Kan. App. 257, 45 Pac. 115. **Ky.**—Schnabel v. Jacobs, 105 Ky. 774, 49 S. W. 774. **La.**—State Bank *v.* Martin, 52 La. Ann. 1628, 28 So. 130; Hernsheim *v.* Levy, 32 La. Ann. 340. **Md.** Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355. **Miss.**—Weissinger *v.* Studebaker Bros. Mfg. Co., 73 Miss. 480, 18 So. 915. **N. Y.**—Stringfield *v.* Fields, 7 Civ. Proc. 356, 13 Daly 171.

Dissatisfaction of creditors with methods of business is no ground of attachment (Mack *v.* Jones, 31 Fed. 189); as, for example, where there has been a large shrinkage in a short time in the stock (Thompson *v.* Dater, 57 Hun 316, 10 N. Y. Supp. 613).

Sale of business after due advertisement. Wightman *v.* Henry, 1 W. N. C. (Pa.) 74.

Continuance in business after suspending payment does not authorize an attachment. Bloch *v.* Creditors, 46 La. Ann. 1334, 16 So. 267.

One who carries on business in the absence of another under an agreement that the former may become owner by paying the latter what he has invested is not fraudulent. Dunham *v.* Halberg, 69 Mo. App. 509.

That a merchant is agent of another, whether properly or improperly, does not warrant the inference that his sales are improper. Claussen *v.* Fultz, 13 S. C. 476.

should an attachment be issued merely because a merchant is selling at[37] or below cost[38] to attract business. But where it can be shown that sales were made out of the regular course of business and for the fraudulent purpose of converting the property into money, so as to place it beyond the reach of creditors by execution or other process, such course constitutes ground for attachment.[39]

k. *Assignment for Benefit of Creditors.* — An assignment for the benefit of creditors, if a fraudulent intent is shown, is a fraudulent disposition of property within the meaning of the attachment law, and this without regard to the validity or invalidity of the assignment itself.[40]

Under the rule that fraud in fact, or actual fraud, must be shown to support an attachment, if an assignment for the benefit of creditors is invalid because it does not comply with the directions of the statute or contains some invalid provision, such invalidity does not, standing alone, constitute any evidence of an actual intent to defraud, and therefore constitutes no ground for an attachment.[41]

But under the rule that fraud in law, or constructive fraud, is sufficient to support an attachment, it is held that if a deed of assignment was fraudulent in and of itself, as a matter of law, it is a fraudulent conveyance or assignment within the meaning of the attachment law.[42]

37. Mack *v.* Jones, 31 Fed. 189.

38. Wando Phosphate Co. *v.* Rosenberg, 31 S. C. 301, 9 S. E. 969.

Unauthorized Sales Below Cost of Manufacture.—Abel, etc., Co. *v.* Duffy, 106 La. 260, 30 So. 833; Myers *v.* Whiteheart, 24 S. C. 196.

39. Farris *v.* Gross, 75 Ark. 391, 87 S. W. 633, 5 Am. & Eng. Ann. Cas. 616; Hardie *v.* Colvin, 43 La. Ann. 851, 9 So. 745.

Stock Greatly Reduced and Rapidly Converted.—Reed Bros. Co. *v.* Weeping Water First Nat. Bank, 46 Neb. 168, 64 N. W. 701.

Selling Some Goods at Auction, in a Small Place.—Arcadia Cotton Oil Mill, etc., Co. *v.* Fisher, 120 La. 1076, 46 So. 28.

40. Skinner *v.* Oettinger, 14 Abb. Pr. (N. Y.) 109.

Where the Leading and Controlling Purpose Is to Bring About a Composition.—Bank of Commerce *v.* Payne, 86 Ky. 466, 8 S. W. 856.

To Prevent Undue Sacrifice.—McPike *v.* Atwell, 34 Kan. 142, 8 Pac. 118.

The expectation of a surplus after full payment of debts, is not fraudulent or a badge of fraud. Hunter *v.* Ferguson, 3 Colo. App. 287, 33 Pac. 82.

Prior fraudulent acts do not make an assignment fraudulent when no connection is shown. Archelis *v.* Kalman, 60 How. Pr. (N. Y.) 491.

41. **Kan.**—Watkins Nat. Bank *v.* Sands, 47 Kan. 591, 28 Pac. 618; Cooper *v.* Clark, 44 Kan. 358, 24 Pac. 422; Harris *v.* Capell, 28 Kan. 117. **N. M.**—C. J. L. Meyer, etc., Co. *v.* Black, 4 N. M. 352, 16 Pac. 620. **N. Y.**—Miliken *v.* Dart, 26 Hun 24; Friend *v.* Michaelis, 15 Abb. N. C. 354. **Pa.**—McCallum *v.* Hodder, 2 W. N. C. 185. **S. D.**—German Bank *v.* Folds, 9 S. D. 295, 68 N. W. 747; Trebilcock *v.* Big Missouri Min. Co., 9 S. D. 206, 68 N. W. 330. **Wis.** Stevens Point First Nat. Bank *v.* Rosenfeld, 66 Wis. 292, 28 N. W. 370, a bona fide attempt to make a voluntary assignment of all the debtor's property, under the statute, for the benefit of all his creditors.

An assignment to a receiver under a decree of a court of competent jurisdiction is not ground for an attachment. Wells *v.* Sanford, 85 Ill. 100, holding that the remedy was by appeal from that decree.

Slight incidental delay to creditors because of an honest conveyance to pay debts does not make such conveyance fraudulent in law. Torlina *v.* Trorlicht, 6 N. M. 54, 27 Pac. 794, *affirming* 5 N. M. 148, 21 Pac. 68.

42. **Md.**—Whedbee *v.* Stewart, 40 Md. 414; Douglass *v.* Cissna, 17 Mo. App. 44, wherein the court said: "The

l. *Fraudulent Judgment.* — Through the instrumentality of a fraudulent judgment, the property of a debtor may be fraudulently transferred or disposed, so as to sustain an attachment.[43]

m. *Use of Property for Support of Family.* — The sale or use of his property by a debtor for the necessary support of himself and family is not a fraudulent disposition.[44]

n. *Curing Fraudulent Conveyance.* — A fraudulent conveyance cannot be cured so as to avoid an attachment, by rescinding the sale,[45] or releasing the mortgage,[46] as the case may be.

intent, the motive which prompted the conveyance or assignment, in the absence of a secret trust or understanding *dehors* the instrument could have no effect, because the intent to defraud might have been entertained by the grantor and yet the legal effect of the deed make valid the conveyance, so that as matter of law it would and could not hinder or delay any creditor." **N. M.**—C. J. L. Meyer, etc., Co. *v.* Black, 4 N. M. 352, 16 Pac. 620. **Tenn.**—Powers v. Goins, 35 S. W. 902.

43. Marietta First Nat. Bank v. Bushwick Chemical Works, 119 N. Y. 645, 23 N. E. 1149, *affirming* 5 N. Y Supp. 824, 53 Hun 635, mem., 6 N. Y. Supp. 318.

The giving of a judgment note by an insolvent, where there is no consideration for one-half of the amount for which it is given, is sufficient ground for an attachment. Rubinsky *v.* Walenk, 16 Pa. Co. Ct. 401, 4 Pa. Dist. 611.

Collusive Default Judgment.—Rand *v.* Getchell, 24 Minn. 319.

Confession of Judgment To Defraud Creditors May Justify an Attachment. Burr *v.* Mathers, 51 Mo. App. 470; Grines *v.* Blackman, 30 Mo. App. 2; Galls *v.* Code, 60 Hun 132, 578, memo., 21 Civ. Pro. 147, 152, 14 N. Y., Supp. 531.

Confessions of judgment in favor of certain creditors, for just and honest debts, and merely to prefer them, do not show an intent to defraud creditors. (**Mo.**—Estes *v.* Fry, 22 Mo. App. 80. **Pa.**—Wright *v.* Ewen, 24 W. N. C. 111, 19 Phila. 312, 46 Leg. Int. 179; Lennig *v.* Senior, 21 W. N. C. 379. **S. D.** Wyman *v.* Wilmarth, 1 S. D. 172, 46 N. W. 190), though, owing to some informality therein, the judgment itself is invalid (Rainwater *v.* Faconesowich, 29 Mo. App. 26).

A Confession of Judgment to the Defendant's Wife.—Thomas *v.* Dickerson, 58 Hun 603, mem., 11 N. Y. Supp. 436. *Compare* Meyers *v.* Rauch, 4 Pa. Dist. Ct. 333, as to a confession of judgment without consideration.

"**Where one builds a dwelling-house on the land of another,** there is a prima facie presumption that he intended to dedicate it as a permanent accession to the freehold—to make a gift of it; but this presumption may be rebutted; and where the owner sees fit, in consideration of the benefit he has received, to make or secure" by a confession of judgment "repayment of the money expended by the other in the improvement of his real estate, we do not think it can be regarded as a fraudulent transaction." Kline *v.* O'Donnell, 11 Pa. Co. Ct. 38, 1 Pa. Dist. Ct. 741.

Confessions in favor of claims arising subsequently to representations as to the financial condition of the defendant do not justify attachment. Strasburger *v.* Bachrach, 59 Hun 624, memo., 13 N. Y. Supp. 538.

But a judgment confessed without consideration, followed by execution, is fraudulent. Meyers *v.* Rauch, 4 Pa. Dist. 333; Ross *v.* Roth, 13 Pa. Co. Ct. 14.

44. **Ala.**—Cox *v.* Birmingham Dry Goods Co., 125 Ala. 320, 28 So. 456. **Miss.**—Weissinger *v.* Studebaker Bros. Mfg. Co., 73 Miss. 480, 18 So. 915; Roach *v.* Brannon, 57 Miss. 490. **Mo.** Estes *v.* Fry, 22 Mo. App. 80.

45. Smith-McCord Dry Goods Co. *v.* Perry, 3 Ind. Ter. 258, 54 S. W. 812.

Deed made in good faith if withdrawn before registration is good reason for quashing attachment issued because of the execution thereof. McCrosky *v.* Leach, 63 Ill. 61.

46. "Where a debtor mortgages his personal property for the purpose of hindering and delaying his creditors, such act is sufficient to justify the is-

8. Creditors Entitled to Protection.— a. *In General.*— If a debtor makes a fraudulent disposition of his property to avoid the demand of one creditor, its effect may be to cheat, hinder or delay any other creditor, and any such other creditor may obtain an attachment.[47]

b. *Subsequent Creditors.* — But when the debt sued on was contracted after the transfer complained of, such a creditor is not entitled to an attachment.[48] Therefore one contracting a debt after property has been mortgaged, and the mortgage duly recorded, cannot be heard to say that such mortgage was made with intent to defraud creditors, as ground for an attachment.[49]

9. Evidence. — The fraudulent intent is a question of fact,[50] and may be proven by any relevant evidence,[51] which is usually by the facts and circumstances surrounding the transaction.[52]

suance of an attachment against the debtor; and it is no defense for him to show that a short time before the attachment he caused such fraudulent mortgage to be released, where it is further shown that immediately upon such release, and upon suspicious circumstances, the mortgaged property was remortgaged to other parties." Buford & George Implement Co. *v.* McWhorter, 41 Kan. 262, 21 Pac. 86.

47. Sherrill *v.* Bench, 37 Ark. 560; Clayton *v.* Clark, 76 Kan. 832, 92 Pac. 1117, 123 Am. St. Rep. 169.

It is not necessary that the disposition should have been fraudulent as against the plaintiff. Noyes v. Cunningham, 51 Mo. App. 194.

As Between Partnership and Individual Creditors.—Cases may arise where the acts of a surviving partner would be fraudulent as to firm creditors, though not so as to his individual creditors, and the former would have a right to the writ of attachment, where the latter would not. Roach *v.* Brannon, 57 Miss. 490.

48. **Ill.**—Keith *v.* McDonald, 31 Ill. App. 17. **Kan.**—Allen *v.* Fuget, 42 Kan. 672, 22 Pac. 725. **Miss.**—Roach *v.* Brannon, 57 Miss. 490.

49. Trebilcock *v.* Big Missouri Min. Co., 9 S. D. 206, 68 N. W. 330.

A voluntary mortgage (or a mortgage executed with intent to defraud existing creditors) cannot be attached by subsequent creditors, unless the grantor made the conveyance intending to engage in some hazardous business where debts would likely be incurred. Bauer Grocery Co. *v.* Smith, 74 Mo. App. 419.

An Arkansas statute in terms declares every conveyance made with intent to hinder, delay or defraud creditors, as against creditors and purchasers, "prior and subsequent," to be void. Semmes *v.* Underwood, 64 Ark. 415, 42 S. W. 1069.

50. Blake *v.* Sherman, 12 Minn. 420 See the title "**Fraud**," 9 ENCYCLOPEDIA OF EVIDENCE, 50.

On an issue, the jury must determine what was the motive of the debtor in making the conveyance or bill of sale. Strauss *v.* Abrahams, 32 Fed. 310.

51. Milwaukee Harvester Co. *v.* Tymich, 68 Ark. 225, 58 S. W. 252; McMorran *v.* Moore, 113 Mich. 101, 71 N. W. 505.

In cases where fraud is charged a wide latitude is allowed in the examination of witnesses and in the production of evidence. Field *v.* Liverman, 17 Mo. 218.

A defendant in an attachment suit may testify as to his intention in forming a corporation and conveying his property to it. Union Rolling Mill Co. *v.* Packard, 1 Ohio C. C. 76, 1 Ohio Cir. Dec. 46.

Evidence of Prior Unrecorded Mortgages.—Rabb *v.* White (Tex.), 45 S. W. 850.

52. **Colo.**—Loveland *v.* Kearney, 14 Colo. App. 463, 60 Pac. 584. **La.**—Abel, etc. Co. *v.* Duffy, 106 La. 260, 30 So. 833; State Bank *v.* Martin, 52 La. Ann. 1628, 28 So. 130; Joseph Bowling Co. *v.* Colvin, 49 La. Ann. 1340, 22 So. 374; Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. 369. **N. Y.**—Scott *v.* Simmons, 34 How. Pr. 66. **Ohio.**—Pierce *v.* White, 10 Ohio Dec. (Reprint) 552, 22 Cinc. L. Bul. 98.

Circumstantial Evidence.—In Stevens

Effect of Solvency or Insolvency of Debtor. — Insolvency alone will not justify the suing out of an attachment but the question sometimes becomes important in determining the *bona fides* of the disposition of property,[53] though the fact of the defendant's solvency will not defeat the right to attachment on the ground that the defendant has conveyed his property so as to hinder and delay creditors.[54]

But the burden of proving a fraudulent intent is upon the party applying for the writ, and circumstances which may create a strong suspicion, but yet fall short of *prima facie* proof, are not sufficient;[55] the evidence must be clear and convincing.[56]

v. Middleton, 26 Hun (N. Y.) 470, the court, observing that the case presented by the circumstances was a close one as to the intent of the defendant to dispose of his property fraudulently, said: "Direct proof of the fact can rarely be obtained, and when it is established it must ordinarily be inferred from circumstances. The facts as they are disclosed in this case, in the absence of any explanation on the part of the debtor, justify the inference, that his movements were prompted by the intent alleged in the attachment."

See the title "Circumstantial Evidence," 3 ENCYCLOPEDIA OF EVIDENCE 109; "Fraud," Vol. 6, pp. 18, 73; and Blackwell *v.* Fry, 49 Mo. App. 638; Chatham Nat. Bank *v.* Goldsoll, 14 Mo. App. 586.

With Presumption of Honesty.— Direct testimony is not required to establish a fraudulent intention, but it may be found or inferred from a variety of circumstances, such as the conduct, the actions, the financial situation, and the method of dealing adopted on a particular occasion; and the court stated further the qualification of the rule that fraud may be found on the strength of circumstantial evidence alone, "that, if the circumstances relied upon by a plaintiff to establish a fraudulent intent are just as consistent with honesty of purpose as with dishonesty of purpose, then the jury are not warranted by such circumstances in inferring that the person in question was actuated by a fraudulent intent." *Per* J. Thayer, in Strauss *v.* Abrahams, 32 Fed. 310, in a charge to the jury.

Inference of fraud from conflicting statements by the defendants and the person to whom they purported to have transferred property. Boyd *v.* Miller, 88 Hun 617 mem., 34 N. Y. Supp. 1026.

53. Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 818; Elkhart Bank *v.* Western Lumb. Co., 59 Mo. App. 317. *Compare* Martin *v.* Mayer, 112 Ala. 620, 20 So. 963, as to evidence on an issue of insolvency.

"From an attempt to sell property by an insolvent, there is no necessary presumption of an intent to defraud creditors, and we cannot therefore say that an admission of such an attempt required the court to sustain the attachment, without regard to the other evidence in the case." Pierce *v.* White, 10 Ohio Dec. (Reprint) 552, 22 Cinc. L. Bul. 98.

Stoppage of business and insolvency are not necessarily evidence of an intent to defraud, but the effect is strengthened by a removal of the business property, and of the machinery from defendant's factory. MacTaggart *v.* Putnam Corset Co., 55 Hun 610 mem., 8 N. Y. Supp. 800.

54. Arcadia Cotton Oil Mill, etc. Co. *v.* Fisher, 120 La. 1076, 46 So. 28; Rock Island Nat. Bank *v.* Powers, 134 Mo. 432, 34 S. W. 869, 35 S. W. 1132; Dixon Nat. Bank *v.* Western Lumb. Co., 68 Mo. App. 81; Elkhart Bank *v.* Western Lumb. Co., 59 Mo. App. 317.

Solvent and Without Evil Intent.— Robinson *v.* Melvin, 14 Kan. 484.

55. J. H. Mohlman Co. *v.* Landwehr, 87 App. Div. 83, 83 N. Y. Supp. 1073; Hill *v.* Atanasio, 127 N. Y. Supp. 344.

56. **Ark.**—Shibley, etc. Grocery Co. *v.* Ferguson, 60 Ark. 160, 29 S. W. 275. **N. Y.**—J. H. Mohlman Co. *v.* Landwehr, 87 App. Div. 83, 83 N. Y. Supp. 1073; Levy *v.* Goldstein, 18 Misc. 639, 43 N. Y. Supp. 774; Johnston *v.* Ferris, 14 Daly 302, 12 N. Y. St. 666. **Pa.**— Whildin *v.* Smith, 4 W. N. C. 88.

When none of the facts point with any degree of clearness to defendant's intention to dispose of his property

J. Estoppel, Laches and Ratification. — By his acts or conduct, a creditor may be estopped from setting up, or may lose the right to set up grounds upon which an attachment may be issued. Thus he cannot obtain an attachment on the ground that property has been fraudulently disposed of when he has received benefits under the alleged fraudulent conveyance,[57] or when he has been guilty of laches.[58] And a creditor cannot obtain an attachment on the ground that the debt was fraudulently contracted or incurred, if he has subsequently ratified the transaction with full knowledge of all the circumstances.[59]

IX. AFFIDAVIT FOR ATTACHMENT.—A. Necessity for Affidavit.—**1. In General.** — By statute in most jurisdictions a good and sufficient affidavit made in compliance with statutory requirement, is a condition precedent to the issuance of a writ of attachment.[60] It is

with intent to cheat or defraud his creditors, an attachment should be vacated. Durkin *v.* Paten, 97 App. Div. 139, 89 N. Y. Supp. 622.

57. Bull *v.* Harris, 18 B. Mon. (Ky.) 195; Richards *v.* White, 7 Minn. 345.

If a non-preferred creditor, who accepts a compromise, knew that the money to satisfy the compromised claims came from the preferred creditors, and the terms on which it was obtained, he would not be heard to complain that he was defrauded. City Nat. Bank *v.* Jeffries, 73 Ala. 183.

Where a person had obtained goods on credit under circumstances of fraud which gave the seller a right to vacate the sale, and a compromise was entered into whereby the seller agreed that another person might purchase the goods, and that he had no claim upon them but sold the same to the original buyer and expected to look to him for the pay for the same, the seller might still, upon the expiration of the original credit, attach the goods as the property of the first purchaser upon discovering fraud in the sale as between the other parties. Dingley *v.* Robinson, 5 Me. 127.

58. Allen *v.* Herschorn, 9 Abb. Pr. N. S. (N. Y.) 80, as to a fraudulent disposition of property alleged to have been made four years before the attachment issued.

Failure after judgment to pursue his remedy for several years, and suffering the judgment to become dormant, estops the judgment creditor from asserting that the defendant is transferring his property so as to hinder and delay him. Loveland *v.* Kearney, 14 Colo. App. 463, 60 Pac. 584.

59. Troup *v.* Appleman, 52 Md. 456.

Suing on contract is not a waiver of the alleged fraudulent incurring of the debt as a ground for an attachment. Blackington *v.* Rumpf, 12 Wash. 279, 40 Pac. 1063.

60. **Ala.**—Wigs Bros. *v.* Ringemann, 155 Ala. 189, 45 So. 153. **Cal.**—Fairbanks, Morse & Co. *v.* Getchell, 13 Cal. App. 458, 110 Pac. 331. **Colo.**—Skinner *v.* Beshoar, 2 Colo. 383, 388. **Fla.**—Lord *v.* F. M. Dowling Co., 52 Fla. 313, 42 So. 585. **Ill.**—Brandenburg *v.* Malcolm, 102 Ill. App. 302. **Ind.**—Bond *v.* Patterson, 1 Blackf. 34. **Mich.**—Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288; Burnside *v.* Davis, 65 Mich. 74, 31 N. W. 619; Greenvault *v.* Farmers', etc. Bank, 2 Dougl. 498; **Minn.**—Duxbury *v.* Dahle, 78 Minn. 427, 81 N. W. 198, 79 Am. St. Rep. 408. **Miss.**—Ford *v.* Woodward, 2 Smed. & M. 260. **Neb.**—Winchell *v.* McKinzie, 35 Neb. 813, 53 N. W. 975. **N. J.**—Weber *v.* Weitling, 18 N. J. Eq. 441. **N. Y.**—Taylor *v.* Heath, 4 Denio 592. **N. C.**—State Bank *v.* Hinton, 12 N. C. 397. **Ohio.**—Endel *v.* Leibrook, 33 Ohio St. 254. **Pa.**—Rowland *v.* Red Cross Pack. Co., 15 W. N. C. 468. **S. C.**—Wando Phosphate Co. *v.* Rosenberg, 31 S. C. 301, 9 S. E. 969. **S. D.**—William Deering & Co. *v.* Warren, 1 S. D. 35, 44 N. W. 1068. **Tex.**—Caldwell *v.* Haley, 3 Tex. 317. **Wash.**—Tacoma Grocery Co. *v.* Draham, 8 Wash. 263, 36 Pac. 31. **W. Va.**—Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791; Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409. **Wis.**—Gallun *v.* Weil, 116 Wis. 236, 92 N. W. 1091.

Where an affidavit is not directly sworn to but is referred to as con-

the jurisdictional paper which sets the court in motion, and its purpose is the greater security of the debtor.[61]

2. Failure To Make Affidavit. — If there is no affidavit, and the omission is not supplied by a petition or pleading,[62] the attachment is not merely voidable, but absolutely void.[63]

tained in another affidavit, and there is no statement that that affidavit is anywhere on file, and there is not a copy of the affidavit annexed on which the attachment is ordered, the attachment should be discharged on the ground that it was not warranted by the affidavit. Fitzgerald *v.* Belden, 49 How. Pr. (N. Y.) 225.

Attachment of a Boat.—Thompson *v.* Robinson, 34 Ark. 44.

Necessity of New Affidavit.—Substitution of Parties.—Where the original proceeding was against defendants as a corporation and by leave of court the plaintiff was allowed to amend by proceeding against the defendants as a partnership, and alias summons and writ of attachment were issued against the substituted defendants and summons was returned without service, the court was without jurisdiction when no new affidavit was filed showing the indebtedness and non-residence of the defendants. Inman *v.* Deport, 65 Ill. 540.

When Seizure of Property Required. Kerr *v.* Smith, 5 B. Mon. (Ky.) 552.

An equitable attachment must be brought under the statute and made conformable thereto, and therefore both an affidavit and a bond must be given preliminary to the issuance of the attachment. Smith *v.* Moore, 35 Ala. 76.

Special Affidavits Where Debt Not Due.—Lord *v.* F. M. Dowling Co., 52 Fla. 13, 42 So. 585. This is not provided as a prerequisite to the issuance of the writ, but as an addition to the *quantum* of proof.

Special Affidavit Where Damages Not Liquidated.—Bozeman *v.* Rose, 40 Ala. 212.

Where the plaintiff in attachment died before the issuance of the original writ it was necessary to issue an alias writ, but the affidavit was in no way affected by the death and there was no necessity for the executor to file a new affidavit. Rheubottom *v.* Sadler, 19 Ark. 491.

Not Required on Return of "No Property Found."—Maddox *v.* Fox, 8 Bush (Ky.) 402; Lewis *v.* Quinker, 2 Met. (Ky.) 284; Farmers' Nat. Bank *v.* National Bank, 4 Ky. L. Rep. 451.

No Act of Court Can Cure Want of Affidavit.—When the petition is not supported by affidavit it is fatal, nor will the fact that the judge issuing said attachment said that he had evidence before him which justified his issuing this attachment, for no record was ever made of the fact that it existed, and that or something equivalent to it is indispensable to authorize the issuing of the attachment. Gazan *v.* Royce, 78 Ga. 512, 3 S. E. 753.

No other application required in some jurisdictions. Winchell *v.* McKenzie, 35 Neb. 813, 53 N. W. 975.

Petition Supported by Affidavit or Testimony.—Price *v.* M. Cohen Son & Co., 118 Ga. 261, 45 S. E. 225.

61. **Miss.**—Smith *v.* Mulhern, 57 Miss. 591. **S. D.**—Finch *v.* Armstrong, 9 S. D. 255, 68 N. W. 740. **Tenn.**—Maples *v.* Tunis, 11 Humph. 108, 53 Am. Dec. 779.

62. Bond *v.* Patterson, 1 Blackf. (Ind.) 34; Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288; Burnside *v.* Davis, 65 Mich. 74, 31 N. W. 619.

Not supplied by consent of parties. Mobile Life Ins. Co. *v.* Teague, 78 Ala. 147.

But the state may be exempted from making affidavit. *Ex parte* Macdonald, 76 Ala. 603.

63. **Minn.**—Duxbury *v.* Dahle, 78 Minn. 427, 81 N. W. 198, 79 Am. St. Rep. 408. **Miss.**—Ford *v.* Woodward, 2 Smed. & M. 260; Tyson *v.* Hamer, 2 How. 669. **Ohio.**—Endel *v.* Leibrock, 33 Ohio St. 254.

Voidable if Not Void.—Farmers' Nat. Bank *v.* National Bank, 4 Ky. L. Rep. 451; Tyson *v.* Hamer, 2 How. (Miss.) 69.

A total absence of affidavit would render the suit one without jurisdiction, but an insufficient averment does not have that effect. Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

3. Objections for Want of Affidavit. — The want of an affidavit must be taken advantage of by plea in abatement,[64] or motion to quash.[65]

Waiver of Objection. — A party may waive his objections to the want of an affidavit by failing to object seasonably.[66]

B. Operation and Effect of Affidavit. — Upon making an affidavit in conformity to statutory requirements, the plaintiff is entitled to a writ of attachment.[67] It constitutes an estoppel of the facts alleged,[68] but is not conclusive upon the defendant as to the nature of the plaintiff's claim.[69] If the allegations of the affidavit are traversed by the other party, the burden of proof is shifted to the affiant to sustain his affidavit.[70]

C. Who May Make Affidavits. — **1. In General.** — Some of the statutes simply require an affidavit, without stating by whom it is to be made.[71] In other jurisdictions it is provided that the affidavit shall be made by the complainant or complainants, or some one of them,[72] by any credible person,[73] or by the plaintiff, when not absent from the county.[74] And where the statute requires the affidavit to be made by

64. Kirkman *v.* Patton, 19 Ala. 32; Jones *v.* Pope, 6 Ala. 154; Powell *v.* Hampton, 1 N. C. 218. See the title "**Abatement,**" 1 Encyclopedia of Evidence; and "**Abatement, Pleas of,**" in this work.

65. **Quashing Upon Motion.**—Skinner *v.* Beshoar, 2 Colo. 383; McReynolds *v.* Neal, 8 Humph. (Tenn.) 12.

66. **After an appearance and a plea to the merits** it is too late for the defendant to take advantage of the plaintiff's failure to submit an affidavit for that amounts to a waiver of such exception. Stoney *v.* McNeill, Harp. (S. C.) 156, 172.

67. Walker *v.* Anderson, 18 N. J. L. 217.

68. Edson *v.* Freret, 11 La. Ann. 710.

69. Heckscher *v.* Trotter, 48 N. J. L. 419, 5 Atl. 581.

70. Sowers *v.* Leiby, 4 Pa. Co. Ct. 223; Terry *v.* Knoll, 3 Kulp (Pa.) 272; Miller *v.* Paine, 2 Kulp (Pa.) 304.

71. **Ia.**—Pitkins *v.* Boyd, 4 Greene 255. **N. C.**—See Bruff *v.* Stern, 81 N. C. 183. **S. C.**—Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272. **S. D.**—Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068. **Va.**—Benn *v.* Hatcher, 81 Va. 25, 59 Am. Rep. 645.

Where the statute does not say who shall make the affidavit, anyone authorized by the plaintiff to collect may make the affidavit as one of the incidents of his authority. Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068, wherein the court held that an affidavit made by plaintiff's attorney, who swore of his own knowledge that the defendant was justly indebted in a certain sum; that no part of the sum had been paid; that he derived his knowledge of the facts by the admissions of the defendant; and that he had in his possession notes of the amount sworn to for collection, was sufficient.

Anyone who knows the facts and who would be a competent witness. **Ia.**—Pitkins *v.* Boyd, 4 Greene 255. **N. Y.**—Morgan *v.* Avery, 7 Barb. 656, 2 N. Y. Code Rep. 121. **S. D.**—Hardenberg *v.* Roberts, 6 S. D. 487, 61 N. W. 1128. **Va.**—Benn *v.* Hatcher, 81 Va. 25, 59 Am. Rep. 645.

Traveling Salesmen May Make.—Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

Not a mere collector without special authority. Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308.

72. Flake *v.* Day, 22 Ala. 132.

73. **The affidavit may be made by "any credible person,"** and the affidavit need not state that affiant is a "credible person," as that will be presumed until the contrary appears. Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. 798.

74. Pool *v.* Webster, 3 Met. (Ky.) 278.

Averment in Petition as an Aid to the Affidavit.—Under a statute requiring the affidavit to be made by the "plaintiff, his agent or attorney,"

the plaintiff, it cannot generally be made by any other person.[75] The vigor of such statutory language, however, is relieved by an application of the rule *in pari materia*,[76] especially when the codified law contains a general provision that the attachment law is not to be rigidly construed.[77]

2. Necessity for Affiant To State His Authority. — In the absence of a requirement in the statute, the person making the affidavit need not state his authority.[78] But in many jurisdictions, which place a strict construction upon the attachment statutes, though the statute does not expressly require that the affiant shall state that he is the person designated by the statute, it is required, by construction, that the affidavit shall show that the affiant is the person so designated.[79]

Form and Sufficiency of Statement. — In those jurisdictions, it is generally held that such authority, and the fact that it is made for the plaintiff, need not be stated in the part of the affidavit which is sworn to, but that a recital of the affiant's relation to the plaintiff, as agent or attorney, appearing before the words "being duly sworn, says," is a sufficient statement of affiant's authority;[80] some cases, however, hold

where the affidavit does not show that the affiant is a plaintiff, but the petition names the affiant as one of the plaintiffs, the affidavit is sufficient. Tessier *v.* Englehart, 18 Neb. 167, 24 N. W. 734.

Affidavit by Creditor Required.—Fellows *v.* Miller, 8 Blackf. (Ind.) 231.

Former Rule in Virginia.—Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308.

A person for whose benefit attachment proceedings are begun, may make the affidavit; for the beneficiary is considered the real plaintiff. Patton *v.* Harris, 15 B. Mon. (Ky.) 607; Grand Gulf R., etc. Co. *v.* Conger, 9 Smed. & M. (Miss.) 505.

75. **Ky.**—Pool *v.* Webster, 3 Met. 278. **La.**—Hawley *v.* Tarbe, 14 La. 92. **Va.**—Mantz *v.* Hendley, 2 Hen. & M. 308.

A statute allowing the plaintiff, or someone in his behalf, to make the affidavit, §2731, Rev. St., does not mean a mere interloper. Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241.

76. See Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186, where it is said the statutes are to be "read together," and Hardie *v.* Colvin, 43 La. Ann. 851, 9 So. 745.

77. Flake *v.* Day, 22 Ala. 132.

78. **Ark.**—Mandell *v.* Peet, 18 Ark. 236. **Cal.**—Simpson *v.* McCarthy, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37. **Ohio.**—Shawnee Commercial, etc. Co. *v.* Miller, 24 Ohio C. C. 198. See McDowell *v.* Nims, 9 Ohio Dec. (Reprint) 624, 15 Cinc. L. Bul. 359 (as to the sufficiency of an allegation that the affiant "has commenced an action in said court, as next friend for" a certain infant); Sutliff *v.* Chenango Bank, 2 Ohio Dec. (Reprint) 52, 1 West. L. Month. 214; Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 170, 3 West. L. J. 131; Delaplaine *v.* Rogers, 29 W. Va. 783, 2 S. E. 800; Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. 798.

So held also under a statute which does not designate a particular person to make the affidavit. Bruff *v.* Stern, 81 N. C. 193.

79. **Ind.**—Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 3 N. E. 135. **Ky.** Northern Lake Ice Co. *v.* Orr, 102 Ky. 586, 44 S. W. 216; Anderson *v.* Sutton, 2 Duv. 480. **La.**—Austin *v.* Latham, 19 La. 88; Fernandez *v.* Miller, 26 La. Ann. 120; Baker *v.* Hunt, 1 Mart. 194. **Mich.**—Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620. **Neb.**—Reed *v.* Bagley, 24 Neb. 332, 38 N. W. 827. **N. Y.** Biddle *v.* McLoughlin, 17 Misc. 748, 39 N. Y. Supp. 837. **Wis.**—Miller *v.* Chicago, etc. R. Co., 58 Wis. 310, 17 N. W. 130; Wiley *v.* Aultman, 53 Wis. 560, 11 N. W. 32.

80. **Ala.**—Murray *v.* Cone, 8 Port. 250. **Ind.**—Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 3 N. E. 135; Abbott *v.* Zeigler, 9 Ind. 512. **La.**—Schneider *v.* Vercker, 11 La. Ann. 274.

that the affiant must aver his authority in the body of the affidavit and make oath thereto.[81]

3. For a Partnership. — Where suit is brought by a partnership, one member of the firm may make the affidavit upon which to issue an attachment.[82] An attorney cannot make the affidavit if any member of the firm is present.[83]

4. For a Corporation. — An affidavit to support an attachment on behalf of a corporation must be made by some natural person, so that, in case of its falsity, the affiant may be held responsible both civilly and criminally.[84]

Md.—Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95. **Mich.**—Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679; Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886; Wetherwax *v.* Paine, 2 Mich. 555. **Minn.**—Smith *v.* Victorin, 54 Minn. 338, 56 N. W. 47. **Neb.**—Reed *v.* Bagley, 24 Neb. 332, 38 N. W. 827; Tessier *v.* Crowely, 16 Neb. 369, 20 N. W. 264. **N. M.**—Robinson *v.* Hesser, 4 N. M. 144, 13 Pac. 204. **S. D.**—Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068. **Tex.**—Evans *v.* Lawson, 64 Tex. 199.

Sufficiency of Statement of Agency. Where affiant swears that he is the agent for the plaintiffs for the purpose of making this affidavit and he makes the same on behalf of plaintiffs in the above entitled action "this is a sufficient statement that the person making the affidavit is such agent." Hardenberg *v.* Roberts, 6 S. D. 487, 61 N. W. 1128.

81. Manley *v.* Headley, 10 Kan. 88; Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241; Miller *v.* Chicago, etc. R. Co., 58 Wis. 310, 17 N. W. 130; Wiley *v.* Aultman, 53 Wis. 560, 11 N. W. 32.

82. **U. S.**—Drake *v.* Cleveland, 3 Cranch C. C. 3, 7 Fed. Cas. No. 4,059; Birch *v.* Butler, 1 Cranch C. C. 319, 3 Fed. Cas. No. 1,425. **Ind.**—Fellows *v.* Miller, 8 Blackf. 231. **La.**—Barriere *v.* McBean, 12 La. Ann. 493. **Miss.**—Bosbyshell *v.* Emanuel, 12 Smed. & M. 63, where the fact that affiant was one of the firm was shown by other parts of the record. **Va.**—Kyle *v.* Connelly, 3 Leigh 719.

83. Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

84. Clements *v.* Puckett, 1 Neb. (Unof.) 356, 95 N. W. 796.

The reason for this rule is that a corporation can only act through its officers and agents. **Kan.**—Manley *v.* Headley, 10 Kan. 88. **N. J.**—North Penn Iron Co. *v.* Boyce, 71 N. J. L. 434, 58 Atl. 1094; Trenton Bkg. Co. *v.* Haverstick, 11 N. J. L. 171. **Wis.**—Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241. **Wyo.** Blythe, etc. Co. *v.* Swenson, 7 Wyo. 303, 51 Pac. 873, an affidavit signed the "B. & F. Co. by S. F. managing agent," reciting that plaintiff "being duly sworn," etc.

By Officers and Agents.—One acting under the authority of the corporation and having knowledge of the facts. **N. J.**—North Penn Iron Co. *v.* Boyce, 71 N. J. L. 434, 58 Atl. 1094; Trenton Bkg. Co. *v.* Haverstick, 11 N. J. L. 171. **N. Y.**—National Park Bank *v.* Whitmore, 40 Hun 499, 2 N. Y. St. 87; Marine Nat. Bank *v.* Ward, 35 Hun 398. **Wis.**—Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241.

Must appear to be the authorized agent of the corporation at the time, and if by mistake the affidavit states that he is one of the plaintiffs, this is fatal. Manley *v.* Headley, 10 Kan. 88.

The affidavit of the vice-president of a corporation plaintiff is prima facie sufficient; there being no averment by the defendant that he was not at the time the chief officer of the corporation in the county. Kentucky Jeans Clothing Co. *v.* Bohn, 104 Ky. 387, 47 S. W. 250.

Secretary and Treasurer.—Taylor *v.* Sutherlin-Meade Tobacco Co., 107 Va. 787, 60 S. E. 132, 14 L. R. A. (N. S.) 1135, holding that the words "secretary and treasurer" do not necessarily import that such officer is the agent of the corporation.

As to Cause of Action.—By President of Corporation.—An affidavit made by the president of a corporate plaintiff, as to the cause of action, and

5. Agents or Attorneys. — In most jurisdictions the statutes further provide that the affidavit may be made in certain cases, and under certain restrictions, by the plaintiff's agent or attorney,[85] provided such

of facts stated by him to be based upon the books, papers and documents of the company, was held to be sufficient, in Lee *v.* La Compagnie, etc., 41 Hun 641 mem., 2 N. Y. St. 612.

Under Statutory Authority to Verify Pleadings.—In Kentucky when plaintiff is a corporation, and sues out on attachment, the affidavit must be verified by the officer upon whom a summons in the action might be lawfully served, if it were a defendant. If it have no such agent in the county then it may be verified by its attorney. Northern Lake Ice Co. *v.* Orr, 102 Ky. 586, 44 S. W. 216.

Though the statements in the petition purport to be those of the plaintiff, it is a sufficient verification of them for the attorney of plaintiff to state that they are true, for he thereby makes the statements of the client his own affidavit and it has frequently been held that if a verified petition contains a statement of all the grounds necessary to the issual of an attachment, it will be regarded as supplying the place of a separate affidavit. Clark *v.* Miller, 88 Ky. 108, 10 S. W. 277.

Attorney may make the affidavit in absence of chief officer. Northern Lake Ice Co. *v.* Orr, 102 Ky. 586, 44 S. W. 216.

Proof of Agency.—And notwithstanding that there is a general statutory provision allowing service of summons upon the chief officer or agent of a corporation, this is not a legislative recognition of the officer's agency. Taylor *v.* Sutherlin-Meade Tob. Co., 107 Va. 787, 60 S. E. 132, 14 L. R. A. (N. S.) 1135.

Court will not take judicial notice that an officer of a corporation is such. North Penn Iron Co. *v.* Boyce, 71 N. J. L. 434, 58 Atl. 1094.

Presumptions.—Where the officer, agent or attorney of a corporation specifically states his agency in the affidavit, by an averment to which oath is made, it will be presumed that affiant makes the affidavit on behalf of the plaintiff. Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 3 N. E. 135.

85. **U. S.**—Johnson *v.* Johnson, 31 Fed. 700, under a Kentucky statute. **Ala.**—Flake *v.* Day, 22 Ala. 133. **Ind.** Abbott *v.* Zeigler, 9 Ind. 511. **Ky.**—Clark *v.* Miller, 88 Ky. 108, 10 S. W. 277; Pool *v.* Webster, 3 Met. 278; Burgess *v.* Jacobs, 14 B. Mon. 520; Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186. **La.**—Clark *v.* Morse, 16 La. 575; Hardie *v.* Colvin, 43 La. Ann. 851, 9 So. 745; Fernandez *v.* Miller, 26 La. Ann. 120. **N. Y.**—James *v.* Richardson, 39 Hun 399; Morgan *v.* Avery, 7 Barb. 656. **N. C.**—Bruff *v.* Stern, 81 N. C. 183. **S. C.**—Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272. **S. D.** Hardenberg *v.* Roberts, 6 S. D. 487, 61 N. W. 1128. **Va.**—Benn *v.* Hatcher, 81 Va. 25, 59 Am. Rep. 645. **W. Va.**—Delaplaine *v.* Rogers, 29 W. Va. 783, 2 S. E. 800; Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. 798. **Wis.**—Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241.

Necessity for Statutory Provision.—Pool *v.* Webster, 3 Met. (Ky.) 278.

Under general statute authorizing affidavit by attorneys. Beer *v.* Hooper, 32 Miss. 246.

Agent or Attorney Having Requisite Knowledge.—Chillenden *v.* Hobbs, 9 Iowa 417; Trenton Bkg. Co. *v.* Haverstick, 11 N. J. L. 171.

On plaintiff's lack of knowledge see Gribbon *v.* Back, 35 Hun (N. Y.) 541; Lampkin *v.* Douglas, 63 How. Pr. (N. Y.) 47.

Absence of Plaintiff.—Clark *v.* Miller, 88 Ky. 108, 10 S. W. 277.

Sufficiency of allegation that agent's principal is absent. Morrel *v.* Fearing, 20 N. J. L. 670.

The plaintiff must, in fact, be absent. Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

Illness of Plaintiff.—Schneider *v.* Vercker, 11 La. Ann. 274.

Averment by agent as "plaintiff," held sufficient when from other averments it appears that agent makes the oath. Whipple *v.* Hill, 36 Neb. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313.

"Attorney," as used in attachment laws, is distinguished from agent and means attorney at law. Dwight *v.* Weir, 6 La. Ann. 706.

agent or attorney has the requisite authority.[86] But an affidavit for an attachment, made by an attorney or agent, need not show why it is not made by the plaintiff, as is required by some statutes in the case of the verification of pleadings,[87] unless the statute provides that the affidavit may be made by the plaintiff, or, in his absence from the county, by his agent or attorney, in which case the affidavit of such agent or attorney must state that the plaintiff is so absent,[88] though the failure to show the plaintiff's absence cannot be assailed collaterally and must be questioned by direct proceedings.[89]

86. **Where the Attorney Has Knowledge of the Facts.**—Chittenden *v.* Hobbs, 9 Iowa 417.

By Attorney in Fact.—Where the statute designates an attorney in fact, as the affiant who may be substituted in place of the plaintiff, an attorney at law, as such, has no authority to make the affidavit. Parham *v.* Murphee, 4 Mart. N. S. (La.) 355. And the fact that an attorney at law has always attended to the creditor's business is not sufficient in itself to authorize such agent or attorney to bring suit and make the affidavit. Johnson *v.* Johnson, 31 Fed. 700.

Authority to collect a debt in one state does not authorize an attorney to make the affidavit in another state. Wetmore *v.* Daffin, 5 La. Ann. 496.

Effect of Substitution of Attorneys. An affidavit signed by the attorney will sustain the attachment, notwithstanding another was afterwards engaged in his stead. Hardie *v.* Colvin, 43 La. Ann. 851, 9 So. 745; Fulton *v.* Brown, 10 La. Ann. 350.

Absence of Client.—Clark *v.* Miller, 88 Ky. 108, 10 S. W. 277; Clark *v.* Morse, 16 La. 575.

By different attorneys at different times to cover different facts. Lewis *v.* Stewart, 62 Tex. 352.

That the affiant need not affirm that he is the attorney, see Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 132.

Agent Must Be Clothed With Authority.—Johnson *v.* Johnson, 31 Fed. 700.

A subsequent ratification by the plaintiff of an unauthorized act of a pretended agent or attorney will not do. **U. S.**—Johnson *v.* Johnson, 31 Fed. 700. **La.**—Grove *v.* Harvey, 12 Rob. 221. **Md.**—Didier *v.* Kerr, 12 Gill & J. 499.

See Schneider *v.* Vercker, 11 La. Ann. 274, where it was held that the authority of the agent was sufficiently proved to have been given verbally when the suit was instituted.

Proof of agency or authority appearing on the face of the affidavit is conclusive. Baker *v.* Huddleston, 3 Baxt. (Tenn.) 1, holding that the authority of an agent or attorney will be presumed, in the absence of evidence that he was not authorized to swear to the bill; Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241. But see Johnson *v.* Johnson, 31 Fed. 701, as to a statute authorizing attachment only upon the oath of a designated person.

Instructions held to sufficiently warrant agent to make affidavit. Allen *v.* Champlin, 32 La. Ann. 511.

Where the petition shows upon its face that it is made by one who is the agent or attorney of the plaintiff, who also made the affidavit, the affidavit need not show this. **La.**—Chittenden *v.* Hobbs, 9 Iowa 417. **Ky.**—Clark *v.* Miller, 88 Ky. 108, 10 S. W. 277. **La.**—Austin *v.* Latham, 19 La. 88. **Mo.**—Gilkeson *v.* Knight, 71 Mo. 403.

Showing by Record.—Bauer Grocery Co. *v.* Smith, 61 Mo. App. 665.

87. **Kan.**—Johnson *v.* Laughlin, 7 Kan. 359. **N. C.**—Sheldon *v.* Kivett, 110 N. C. 408, 14 S. E. 970. **Ohio.**—White *v.* Stanley, 29 Ohio St. 423. **S. D.** Citizens' Bank *v.* Corkings, 10 S. D. 98, 72 N. W. 99, *overruling* 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891.

88. Northern Lake Ice Co. *v.* Orr, 102 Ky. 586, 44 S. W. 216; Pool *v.* Webster, 3 Met. (Ky.) 278; Burgess *v.* Jacobs, 14 B. Mon. (Ky.) 520.

Must Show Absence of Corporate Officers.—Northern Lake Ice Co. *v.* Orr, 102 Ky. 586, 44 S. W. 216; Pool *v.* Webster, 3 Met. (Ky.) 278.

89. **Voidable.**—Matthews *v.* Densmore, 109 U. S. 216, 6 Sup. Ct. 126, 27

D. Who May Take Affidavits. — **1. In General.** — As a general rule any officer that is competent to administer oaths may take an affidavit for an attachment.[90] But in some jurisdictions, the officer before whom an affidavit in attachment is made must be one of those designated by the attachment statute.[91]

2. Interested Persons. — The person before whom the affidavit is made should not be interested in the cause.[92]

3. Non-Resident Officers. — **In General.** —An affidavit is good and valid when taken before any officer of another state, who, according to the common law and the practice of the courts is authorized to administer oaths,[93] unless the statute laws of the forum require that the affidavit be made before a particular officer, in which case the requirement

L. ed. 912; Westcott *v.* Sharp, 50 N. J. L. 394, 13 Atl. 243; Russell *v.* Work, 35 N. J. L. 316.

90. Cassedy *v.* Mayer, 64 Miss. 356, 1 So. 510.

Clerks of Court.—Wright *v.* Smith, 66 Ala. 545; Singleton *v.* Wofford, 4 Ill. 576.

If clerk has no general authority to administer oaths, and specific authority is not given, an affidavit taken before him is invalid. Heard *v.* Illinois Nat. Bank, 114 Ga. 291, 40 S. E. 266; Greenvault *v.* Farmers', etc. Bank, 2 Dougl. (Mich.) 498.

Deputy clerks have the power of clerks. Kirkman *v.* Wyer, 10 Mart. (La.) 126; Dorr *v.* Clark, 7 Mich. 310.

A notary public may take the affidavit unless the attachment statutes limit the right to certain persons. Robinson *v.* Hesser, 4 N. M. 282, 13 Pac. 304.

Of Any Jurisdiction.—Howard *v.* Citizens' Bank, etc., Co., 12 App. Cas. (D. C.) 222.

That notary public is a woman is immaterial. Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

Not Necessary to State When Commission Expires.—Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

Justices of the Peace.—Generally an affidavit made before a justice of the peace is sufficient. Cassedy *v.* Mayer, 64 Miss. 356, 1 So. 510; Wagonhurst *v.* Dankel, 1 Woodw. (Pa.) 221.

It is not so if the statute designates a particular person, as the clerk of court. Campbell *v.* Whitstone, 4 Ill. 361.

91. **Ark.**—Edmondson *v.* Carnall, 17 Ark. 284. **Fla.**—Chattanooga First Nat. Bank *v.* Willingham, 36 Fla. 32, 18 So. 58. **Ga.**—Heard *v.* Illinois Nat. Bank, 114 Ga. 291, 40 S. E. 266, a judicial officer.

Same Officer Issuing Writ.—In Wright *v.* Smith, 66 Ala. 545, it was held that an affidavit need not be made before the same clerk who issues the writ.

92. Owens *v.* Johns, 59 Mo. 89, the clerk.

If the notary is attorney in the case the affidavit is irregular. **Ga.**—Wilkowski *v.* Holle, 37 Ga. 678, 95 Am. Dec. 378, by statute. **Kan.**—Tootle *v.* Smith, 34 Kan. 27, 7 Pac. 577. **Neb.**—Malcom Sav. Bank *v.* Cronin, 80 Neb. 228, 114 N. W. 158, *rehearing*, 80 Neb. 231, 116 N. W. 150; Dobry *v.* Western Mfg. Co., 57 Neb. 228, 77 N. W. 656; Horkey *v.* Kendall, 53 Neb. 522, 73 N. W. 953, 68 Am. St. Rep. 623. **Ohio.**—Ward *v.* Ward, 20 Ohio C. C. 136, 10 Ohio Cir. Dec. 656.

Being only irregular it cannot be collaterally attacked (Horkey *v.* Kendall, 53 Neb. 522, 73 N. W. 953, 68 Am. St. Rep. 623); and is amendable (Dobry *v.* Western Mfg. Co., 57 Neb. 228, 77 N. W. 656).

93. Hays *v.* Bouthalier, 1 Mo. 346.

Before a Judge or Judicial Officer.—Smith *v.* Greenleaf, 4 Har. & M. (Md.) 291.

Lord Mayor of London.—Taylor *v.* Knox, 1 Dall. (U. S.) 158, 1 L. ed. 80.

Justice of the Peace.—Posey *v.* Buckner, 3 Mo. 604.

Before a Commissioner.—Irving *v.* Edrington, 41 La. Ann. 671, 6 So. 177; Griffing *v.* Mills, 40 Miss. 611. See also Grider *v.* Williams, 25 Ark. 1.

Notary Public.—Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

of the statute must be complied with in order to validate the affidavit.[94]

Proof of Authority. — A statute of the forum requiring the certificate or official character of the person, before whom the affidavit is made in a foreign jurisdiction, to be authenticated by the certificate of the clerk, or otherwise, must be complied with,[95] at least in substance.[96]

Presumptions as to Regularity. — When the certificate does not show where the affidavit was taken, the presumption will be that the officer exercised his power within his jurisdiction,[97] and an officer appointed in another jurisdiction to take oaths will not be presumed to have exceeded his authority.[98]

94. Tallant *v.* Thompson, 4 Mart. N. S. (La.) 514.

A notary public in another state is without authority to take the affidavit in attachment when the statute says that it must be taken by a justice of the peace or by the clerk of the circuit court. Chattanooga First Nat. Bank *v.* Willingham, 36 Fla. 32, 18 So. 58.

95. **U. S.**—Bolton *v.* White, 2 Cranch C. C. 426, 3 Fed. Cas. No. 1,616. **Ind.**—Fellows *v.* Miller, 8 Blackf. 231, as to a justice of the peace. **Md.**—Coward *v.* Dillinger, 56 Md. 59; Washington *v.* Hodgskin, 12 Gill & J. 353. **Mo.**—Posey *v.* Buckner, 3 Mo. 604.

The official character of the judge who took the affidavit is sufficiently proved by a certificate of the clerk of the court, under the seal of the court. This is not a case within the law of congress which directs the mode of certifying and authenticating the records of judicial proceedings of one state into another. Hays *v.* Bouthalier, 1 Mo. 346.

In Posey *v.* Buckner, 3 Mo. 604, it was held enough that the clerk certified that the foreign justice was then an acting justice, duly commissioned, etc., and two commissioners of the same court certified to the clerk and that his acts were entitled to full faith and credit.

A certificate was held to be insufficient which simply certified that the oath was in due form of law and that the signature was genuine, but which did not certify that the person before whom the affidavit was taken, as a notary public, was authorized to take and certify the acknowledgement and proof of deeds to be recorded in the state. Williams *v.* Waddell, 5 Civ. Proc. (N. Y.) 191.

In Maryland the statute provides that if the affidavit is made out of the state, before a judge of a court of record, it shall be certified by the clerk of that court, under seal thereof, that the court, of which he is judge, is a court of record. Evesson *v.* Selby, 32 Md. 340.

96. Ross *v.* Wigg, 34 Hun (N. Y.) 192, 6 Civ. Proc. 263. In this case the clerk, instead of stating in the language of the statute that "he is well acquainted with the handwriting of such judge, and verily believes his signature genuine," certified that "the name of said Judge John Boyd, subscribed to the above jurat, is to me known to be the autograph signature of said Judge John Boyd."

Approved Form.—"Dominion of Canada, Province of Ontario, County of York, ss:

"I, Walter McKenzie, who am clerk of the County Court of the county of York, in said Province of Ontario, hereby certify that said County Court of the county of York is a court of record of said Province of Ontario, in the Dominion of Canada, and that said court has a seal; that John Boyd, Esq., is the judge of said court, and that the name of said Judge John Boyd subscribed to the above jurat is to me known to be the autograph signature of said Judge John Boyd.

"Witness my hand and the seal of said court, at the city of Toronto, in said Province of Ontario, this March 4, 1884.

(Signed) "Walter McKenzie,

(L. S.) "Clerk of the County Court of the County of York." See Ross *v.* Wigg, 34 Hun (N. Y.) 192.

97. **Ill.**—Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73. **Ia.**—Snell *v.* Eckerson, 8 Iowa 284. **W. Va.**—Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289.

98. Matthai *v.* Conway, 2 App. Cas. (D. C.) 45.

E. Service and Filing. — **1. Service.** —The affidavit need not be served on the defendant, if the statute does not require it.[99]

2. Filing. — a. *Necessity For.* — In some jurisdictions the affidavit must be duly filed with the clerk of the court.[1] But in other jurisdictions filing is unnecessary.[2]

b. *What Constitutes.* — An affidavit to be filed must be delivered to the proper officer and by him placed on file.[3]

In an action on a joint note, it has been held that the affidavit must be filed against both to entitle the plaintiff to a writ or some good cause shown why it cannot be so made.[4]

c. *Time of Filing.* — And an affidavit must be filed within the time prescribed by statute.[5]

F. Form, Sufficiency and Contents of Affidavit. — **1. In General. The form of the affidavit** is usually provided for in the various jurisdictions.[6]

99. Grellman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

1. Simpson *v.* Knight, 12 Fla. 144; Britton *v.* Gregg, 96 Ill. App. 29.

Excuse for Failure To File—When the bond and affidavit were destroyed by fire before they were returned and filed while in the possession of the justice of the peace who issued the writ and prior to the return term of the court, the court held it error to dismiss the action for the failure to return and file them as there was no default upon the part of the plaintiff and the remedy of the defendant, in case the attachment was illegally issued, had not been lost or impaired. Wheeler *v.* Slavens, 13 Smed. & M. (Miss.) 623.

But in Hughes *v.* Stinnett's Admr., 9 Ark. 211, it was held that when the affidavit was made when the writ was applied for and the clerk instead of filing it or marking it filed, wrote out the writ of attachment on the reverse side of the affidavit and handed it to the sheriff who kept it until he had executed it, the validity of the affidavit was not impaired by the clerk's omission to retain it in his office and mark it filed though it was his duty for the plaintiff had complied with all the provisions. See also Buckley *v.* Lowry, 2 Mich. 418.

Failure To Mark "Filed" Is Not Fatal.—Pinson *v.* Kirsh, 46 Tex. 26.

2. Brash *v.* Wielarsky, 36 How. Pr. (N. Y.) 253. Benn *v.* Hatcher, 81 Va. 25, 59 Am. Rep. 645.

3. Beebe *v.* Morrell, 76 Mich. 144, 42 N. W. 1119, 15 Am. St. Rep. 288.

Effect of Attaching to Writ.—Townsend *v.* Sparks, 50 S. C. 380, 27 S. E. 801.

4. Courrier *v.* Cleghorn, 3 Greene (Iowa) 523.

5. Eads *v.* Pitkin, 3 Greene (Iowa) 77; Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744; Doty *v.* Boyd, 46 S. C. 39, 24 S. E. 59.

Not before subpoena in foreign attachment. Moore *v.* Holt, 10 Gratt. (Va.) 284.

Filing in proper time presumed from presence on file of good affidavit properly marked. Morrel *v.* Buckley, 20 N. J. L. 667.

Harmless Error.—Augusta Bank *v.* Conrey, 28 Miss. 667.

It is within the court's discretion to refuse leave to file an affidavit after the expiration of the statutory limit. Savidge *v.* Ottawa Circuit Judge, 105 Mich. 257, 63 N. W. 295.

6. **In Georgia** a certain class of attachments may be issued on affidavits or "testimony." Price *v.* Cohen, 118 Ga. 261, 45 S. E. 225; Loeb *v.* Smith, 78 Ga. 504, 3 S. E. 458 (holding that such testimony must be in writing).

Examination Under Oath.—Jacobs *v.* Marks, 183 Ill. 533, 56 N. E. 154, *affirmed*, 182 U. S. 583, 21 Sup. Ct. 865, 45 L. ed. 1241.

A verified petition is, under some statutes, a sufficient affidavit when the petition contains, in substance and effect, all the requisite averments to authorize the writ. **Ga.**—Loeb *v.* Smith, 78 Ga. 504, 3 S. E. 458. **Ia.**—Van Winkle *v.* Stevens, 9 Iowa 264. **Ky.**—

Sufficiency of Affidavit Generally.—In General.— Unless an affidavit is made by the plaintiff in strict accordance and compliance with the statute authorizing an attachment, the attachment cannot legally issue and should be summarily quashed.[7]

2. Affidavits Used in Other Proceedings. — The plaintiff may present to the court affidavits used in other proceedings,[8] or may use the

Scott *v.* Doneghy, 17 B. Mon. 321; Burnam *v.* Romans, 2 Bush 191. **Tenn.** Peak *v.* Buck, 3 Baxt. 71. **Tex.**—Watts *v.* Harding, 5 Tex. 386.

Bill as Affidavit.—St. Mary's Bank *v.* St. John, 25 Ala. 566.

Formal requisites are title, venue, signature, jurat and authentication. Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288.

Name of affiant, though usually inserted at the commencement of the affidavit, may be omitted if the affidavit is duly signed. Rudolf *v.* McDonald, 6 Neb. 163.

Form of Affidavit.—"State of Tennessee, Madison county. Affidavit. Personally appeared before me, J. W. Blackman, clerk of the circuit court for said state and county, O. G. Gardner, with whom I am personally acquainted, who makes oath in due form of law that Swift & Company are indebted to him in the sum of fifteen hundred dollars, debt and damages by open account, and that his claim is just, due and unpaid; and that said Swift & Company are non-residents of the state of Tennessee, so that ordinary process of law cannot be served upon them, wherefore he prays that the writ of attachment issue. This November 9th, 1903. O. G. Gardner.

"Sworn to and subscribed to before me this November ——, 1903. T. C. Biggs, D. Clerk." Gardner *v.* Swift & Co., 113 Tenn. 1, 80 S. W. 764.

7. **Kan.**—Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292. **Mich.**—Burnside *v.* Davis, 65 Mich. 74, 31 N. W. 619. **Pa.** Woods *v.* Watkins, 40 Pa. 458. **Tex.**—Walker *v.* Birdwell, 21 Tex. 92; Schrimpf *v.* McArdle, 13 Tex. 368. **Va.** Brien *v.* Pittman, 12 Leigh 379. **W. Va.**—United States Baking Co. *v.* Bachman, 38 W. Va. 84, 18 S. E. 382; Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409.

An affidavit conforming to the statute is sufficient, for only the material traversable facts set forth in the petition need be embraced in the affidavit. Barbee *v.* Holder, 24 Tex. 225.

A paper purporting to be an affidavit for an attachment, which does not show on its face that the party seeking the attachment was sworn, and which contains no jurat, is not a sufficient paper on which to base an order of attachment. Cosner's Admr. *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

Scope of Affidavit.—In Scram *v.* Duggan, 1 White & Wills. Civ. Cas. §1268, 1271, it was held that the statute contemplates that the party making the affidavit shall swear to all such facts as are essential under the law to be sworn to, and not that the several different facts which constitute the plaintiff's grounds for attachment may be sworn to by different persons, piece-meal and at different times.

Use of Several Affidavits.—Each affidavit of several by different creditors must comply with the law in setting up some statutory cause for attachment. Ryan *v.* Burkam, 42 Ind. 507.

Exact and Literal Compliance With Statute.—Caldwell *v.* Haley, 3 Tex. 317.

The expressions and terms used in the affidavit, to render them intelligible, and to construe its meaning fairly, must be considered in their relations to the subject-matter concerning which they are employed. Whitemore & Co. *v.* Wilson, 1 Posey Unrep. Cas. (Tex.) 213.

The affidavit for attachment and garnishment may be combined in one upon the same paper. Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 3 N. E. 135.

The proceeding for an equitable attachment must conform to the statute which alone authorizes them. McGown *v.* Sprague, 23 Ala. 524; Crouch *v.* Crouch, 9 Iowa 269.

8. Hallock *v.* Van Camp, 55 Hun 1, 8 N. Y. Supp. 588; Levy *v.* Goldstein, 18 Misc. 639, 43 N. Y. Supp. 774; Colver *v.* Van Valen, 6 How. Pr. (N. Y.) 102.

same affidavit used on an application for one attachment as a basis for a second application.[9]

3. Execution of Affidavit. — a. *Time of Making.* — An affidavit must be made before or at the time of issuing the writ or warrant,[10] and as nearly contemporaneous therewith as possible,[11] inasmuch as the affidavit must show the ground of attachment when the writ issues; especially when the ground alleged is one that may not exist long subsequent to the making of the affidavit.[12] But a given time elapsing has been held not to be material when the ground alleged for the attachment is not of a transitory nature, as, for example, non-residence[13] for fraud in making a contract,[14] or for breach of contract.[15]

b. *By Persons in Representative Capacity.* — Although an affiant takes the oath, in a representative capacity, still if he made oath to the facts stated therein in his individual capacity, it is his individual oath, and if untrue he could be indicted therefor.[16]

c. *Entitling.* — The entitling of the affidavit is essential only for the purpose of identifying the suit in which the affidavit is designed to be used and if the purpose is accomplished in some other way the want of the formality of a title is of no consequence.[17]

9. Thompson *v.* Stetson, 15 Neb. 112, 17 N. W. 368; Mojarrieta *v.* Saenz, 80 N. Y. 547, 58 How. Pr. 505.

10. Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332.

11. **Idaho.**—Murphy *v.* Zaspel, 11 Idaho 145, 81 Pac. 301, holding that an affidavit made twenty-eight days before the action, would not support the writ. **Mich.**—Wilson *v.* Arnold, 5 Mich. 98. **Tex.**—Sydnor *v.* Chambers, Dall. 601.

After Institution of Suit Against Non-Resident.—Cirode *v.* Buchanan, 22 Gratt. (Va.) 205; Pulliam *v.* Aler, 15 Gratt. (Va.) 54; O'Brien *v.* Stephens, 11 Gratt. (Va.) 610.

Objection for First Time on Appeal. Hadden *v.* Linville, 86 Md. 210, 38 Atl. 37, 900.

12. Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289, holding two days not to be unreasonable.

13. Wright *v.* Ragland, 18 Tex. 289.

14. Adams *v.* Lockwood, 30 Kan. 373, 2 Pac. 626.

15. O'Neil *v.* New York, etc., Min. Co., 3 Nev. 141.

16. Wade *v.* Roberts, 53 Ga. 26, "as guardian."

17. **Mich.**—Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288. **Neb.**—Burnham *v.* Doolittle, 14 Neb. 214, 15 N. W. 606. **Tex.**—Munzenheimer *v.* Manhattan Cloak & Suit Co., 79 Tex. 318, 15 S. W. 389. **Wis.**—Quarles *v.* Robinson, 2 Pin. 97, 1 Chand. 29.

It is, therefore, not essential when there is an identification with the suit by filing the affidavit in the cause. **Fla.**—West *v.* Woolfolk, 21 Fla. 189. **Mich.**—Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119. **Tex.**—Whitemore *v.* Wilson, 1 Posey Unrep. Cas. 213.

When there can be no doubt by the record as to the case in which it was intended to use the affidavit (Burnham *v.* Doolittle, 14 Neb. 214, 15 N. W. 606), or when the affidavit is attached to the writ, which specifies the suit by the names of the parties and when and how it was commenced. (Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288).

Reference to another paper which is properly entitled. King *v.* Harrington, 14 Mich. 532.

When the affidavit refers to the caption thereof, the matter therein contained becomes a part of the affidavit. Rubinsky *v.* Ullman, 4 Pa. Dist. Ct. 126.

Entitling before writ issued not harmful. Wakefield *v.* Bruce, 5 Ont. Pr. 77.

Substantial Compliance With Statute. Kinney *v.* Heald, 17 Ark. 397; Cheadle *v.* Riddle, 6 Ark. 480.

Reference to the court (Woodfolk *v.* Whitworth, 5 Coldw. [Tenn.] 561), is sufficient if the court appears from the clerk's endorsement (West *v.* Wool-

d. *The Oath and Signature.* — **(I.) The Oath.** — Generally under the statutes, it is necessary that the affiant swear to facts as set forth in the affidavit in order to validate the affidavit in attachment.[18]

(II.) Signature. —The absence of the affiant's signature will not invalidate the affidavit,[19] except in those jurisdictions where the signature is specifically required by statute.[20]

(III.) Effect of Want of Signature and Oath. —An instrument in the form of an affidavit, neither sworn to nor signed, is no affidavit.[21]

e. *Stamping.* — If the statute requires a stamp, the absence of one may render the affidavit a nullity.[22]

f. *Attestation or Authentication of Affidavit.* — In many states it is not fatal that the officer, before whom the oath was taken, did not certify or attest the affidavit.[23] But in some jurisdictions, such

folk, 21 Fla. 189; Scott *v.* Mitchell, 8 Ont. Pr. 518).

An affidavit for an attachment which omits the title of the cause is entirely insufficient. Burgess *v.* Stitt, 12 How. Pr. (N. Y.) 401.

Number of case is sufficient if indorsed on back of affidavit. B. F. Bridges & Son *v.* First Nat. Bank, 47 Tex. Civ. App. 454, 105 S. W. 1018.

Names of parties need not be prefixed if their identity otherwise appears plainly. Fargo *v.* Cutshaw, 12 Ind. App. 392, 39 N. E. 532; Burnham *v.* Doolittle, 14 Neb. 214, 15 N. W. 606.

Approved Form.—"In the Superior Court of the County of San Diego, State of California. Andrew J. O'Conor, receiver of the Consolidated National Bank of San Diego, Plaintiff, vs. Ellen Roark, Defendant. State of California, County of San Diego—ss. Andrew J. O'Conor, being duly sworn, says," etc. O'Conor *v.* Roark, 108 Cal. 173, 41 Pac. 465.

18. **Ia.**—Sherrill *v.* Fay, 14 Ia. 292. **Ky.**—Anderson *v.* Sutton, 2 Duv. 480. **Miss.**—Carlisle *v.* Gunn, 68 Miss. 243, 8 So. 743. **Ohio.**—Endel *v.* Leibrock, 33 Ohio St. 254. **Tex.**—Schrimpf *v.* McArdle, 13 Tex. 368. **W. Va.**—Cosner's Admr. *v.* Smith, 36 W. Va. 788, 15 S. E. 977. **Wis.**—Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408.

Verification by Oath and Affirmation. Matthews *v.* Dare, 20 Md. 248.

The fact that the affiant swears to the affidavit as guardian will not authorize a dismissal of the proceedings, where he makes oath to the facts stated in his individual capacity. Wade *v.* Roberts, 53 Ga. 26.

Affidavit Must Be Sworn to After Amendment.—Atlantic Bank *v.* Frankford, 61 N. C. 199.

Affidavit made on behalf of a partnership must be sworn to. Norman *v.* Horn, 36 Mo. App. 419; Moody *v.* Alter, 12 Heisk. (Tenn.) 142.

19. **Idaho.**—Simmons Hardware Co. *v.* Alturas Commercial Co., 4 Idaho 386, 39 Pac. 550. **Ia.**—Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138. **Miss.**—Redus *v.* Wofford, 4 Smed. & M. 579.

Shown by Jurat of Clerk.—Bates *v.* Robinson, 8 Iowa 318.

The rule of idem sonans was applied, in Kahn *v.* Herman, 3 Ga. 266.

20. Cohen *v.* Manco, 28 Ga. 27; Sedalia Third Nat. Bank *v.* Garton, 40 Mo. App. 113.

Although as a matter of form it is usual for the draftsman to insert the name at the commencement. Rudolf *v.* McDonald, 6 Neb. 163.

Must be signed in Texas, and want of signature cannot be cured by amendment. Davis *v.* Sherrill, 52 Tex. Civ. App. 259, 113 S. W. 556. See also Cohen *v.* Manco, 28 Ga. 27 (where the statute naming amendable papers was silent as to affidavits); Third Nat. Bank *v.* Garton, 40 Mo. App. 113.

Failure of Signature Amendable.—**Ala.**—Savage *v.* Atkins, 124 Ala. 378, 27 So. 514. **Ia.**—Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138. **Tenn.**—West Tennessee Agricultural, etc., Assoc. *v.* Madison, 9 Lea 407.

21. Carlisle *v.* Gunn, 68 Miss. 243, 8 So. 743; Watt *v.* Carnes, 4 Heisk. (Tenn.) 532.

22. Hoyt *v.* Benner, 22 La. Ann. 353.

23. **Ala.**—McCartney *v.* Branch Bank, 3 Ala. 709. **Ark.**—Fortenheim *v.* Claflin, 47 Ark. 49, 14 S. W. 462. **Ill.**—

attestation is required.[24] In either event, however, the failure to certify cannot be availed of by motion to quash,[25] but is an amendable defect.[26] Nor is the attaching of his seal to such certificate considered a necessary requisite when taken before a notary public of the county in which the action was commenced.[27]

4. Clerical Errors and Formal Defects. — a. *Effect of.* — Mere clerical errors or formal defects will not vitiate the affidavit.[28]

b. *Aider by Reference to Other Papers. — In General.* — Defects in or omissions from the affidavit (an imperfection) may be cured or supplied by the sworn petition,[29] a declaration or complaint,[30] or bill in

Kruse *v.* Wilson, 79 Ill. 233. **Ia.**—Cook *v.* Jenkins, 30 Iowa 452. **La.**—English *v.* Wall, 12 Rob. 132. **Md.**—Matthews *v.* Dare, 20 Md. 248. **Tenn.**—Wiley *v.* Bennett, 9 Baxt. 581. **Va.**—Kyle *v.* Connelly, 3 Leigh 719.

24. **Ga.**—Loeb *v.* Smith, 78 Ga. 504, 3 S. E. 458. **Ky.**—Garriott *v.* Tiller, 13 Ky. L. Rep. 96. **Mich.**—Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288. **Mo.**—Sedalia Third Nat. Bank *v.* Garton, 40 Mo. App. 113. **S. C.**—Doty *v.* Boyd, 46 S. C. 39, 24 S. E. 59. **Tex.**—Steinam *v.* Gahwiler, (Tex. Civ.), 30 S. W. 42. **Wash.**—Tacoma Grocery Co. *v.* Draham, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907. **W. Va.**—Cosner's Admr. *v.* Smith, 36 W. Va. 788, 15 S. E. 977. **Wis.**—Mayhew *v.* Dudley, 1 Pinn. 95.

Satisfaction of officer must appear, under some statutes, by his statement to that effect. Mayhew *v.* Dudley, 1 Pin. (Wis.) 95.

25. Lowry *v.* Stowe, 7 Port. (Ala.) 483.

26. Hyde *v.* Adams, 80 Ala. 111.

Amendment of Jurat.—Ala.—Hyde *v.* Adams, 80 Ala. 111. **Ark.**—Fortenheim *v.* Claflin, 14 S. W. 462. **Colo.**—Skinner *v.* Beshoar, 2 Colo. 383. **Ia.**—Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138. **Kan.**—Arkansas City Lumb. Co. *v.* Scott, 5 Kan. App. 636, 47 Pac. 545. **Miss.**—Boisseau *v.* Kahn, 62 Miss. 757. **Pa.**—Hart *v.* Jones, 6 Kulp 326. **Tenn.**—Agricultural Assn. *v.* Madison, 9 Lea 407; Wiley *v.* Bennett, 9 Baxt. 581.

Signature after service and before return the oath having been administered before the issuance of the writ, is good. Farrow *v.* Hayes, 51 Md. 498.

Signature of clerk judicially noticed (Simon *v.* Slattar, 25 Kan. 155), or determined by referring to the record (Singleton *v.* Wofford, 4 Ill. 576).

27. Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73; Rowley *v.* Berrian, 12 Ill. 200.

28. De Bebian *v.* Gola, 64 Md. 262, 21 Atl. 275; Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288.

29. **Ia.**—Chittenden *v.* Hobbs, 9 Iowa 417. **Ky.**—Bell *v.* Mansfield's Assn., 12 Ky. L. Rep. 89, 13 S. W. 838. **La.**—Farley *v.* Farior, 6 La. Ann. 725. **Neb.**—Grotte *v.* Nagle, 50 Neb. 363, 69 N. W. 973. **Tex.**—Cleveland *v.* Boden, 63 Tex. 103; Shirley *v.* Byrnes, 34 Tex. 625.

Especially When Petition Referred to in Affidavit.—La.—Miller *v.* Chandler, 29 La. Ann. 88; Belden *v.* Read, 27 La. Ann. 103; Souberain *v.* Renaux, 6 La. Ann. 201; Boone *v.* Savage, 14 La. 169. **Ohio.**—Ward *v.* Howard, 12 Ohio St. 158; Stifel *v.* Cincinnati Nat. Bank, 9 Ohio Dec. (Reprint) 700, 16 Cinc. L. Bul. 398. **Tex.**—Morgan *v.* Johnson, 15 Tex. 568.

It is not necessary that the affidavit should show that no part of the debt is paid, if this is alleged in the petition. Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

In Wisconsin the plaintiffs' complaint and a bill of particulars delivered under it are *prima facie* evidence against the plaintiffs of the facts stated therein. They constitute a statement of the nature, character, and extent of their claim, and are in the nature of solemn judicial admissions by the plaintiffs, and may properly be regarded as *prima facie* competent evidence against them, when relevant upon a trial, or as a foundation for a motion. Lederer *v.* Rosenthal, 99 Wis. 235, 239, 74 N. W. 971.

It is only when the affidavit is imperfect that it can be aided by the petition, not when it contradicts the latter. Focke *v.* Hardeman, 67 Tex. 173, 2 S. W. 363.

30. **D. C.**—Matthai *v.* Conway, 2

equity[31] accompanying it. In some jurisdictions, however, the contrary is held.[32] But papers referred to in the affidavit and which have not been properly identified cannot be considered.[33] Perhaps the summons, too, may be referred to in a proper case to uphold the affidavit.[34]

5. Contents and Averment. — a. *In General.* — The general rule is that an affidavit for a writ of attachment must set forth all of the statutory requirements, either in the language of the statute or in language of substantially the same purport or meaning.[35] As a general rule the affidavit must state who the defendant is, the parties to the proceeding, the commencement of a suit or action and the tribunal in which it is commenced, the nature and amount of the demand, and the grounds for the attachment.[36] But mere omissions of the

App. Cas. 45. **N. Y.**—Crandall *v.* McKaye, 6 Hun 483. **S. D.**—Germantown Trust Co. *v.* Whitney, 19 S. D. 108, 102 N. W. 304.

Filed at Same Time.—U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832.

Words of discription in the form of a recital as to the residence of plaintiff, in affidavit or complaint cannot supply want of averment in the other instrument though there is a reference to it in the latter. Talcott *v.* American Credit Indemnity Co., 81 Hun 577, 30 N. Y. Supp. 1118.

Reference to complaint to be filed is of no avail for deponent might change his mind and conclude not to allege it, or to aver something else, and it is not the statement of any fact. Axford *v.* Seguine, 70 App. Div. 228, 75 N. Y. Supp. 35.

31. Sims *v.* Tyrer, 96 Va. 5, 26 S. E. 508. See also Foster *v.* Hall, 4 Humph. (Tenn.) 346.

32. **Affidavit Not Aided by Declaration.**—Webb *v.* Bowler, 50 N. C. 362.

33. Smith *v.* Arnold, 33 Hun (N. Y.) 484.

34. An affidavit for an attachment cannot be properly connected with a summons in the action so as to uphold it, especially where it appears that the affidavit was made and sworn to a day previous to the issuance of the summons. Burgess *v.* Stitt, 12 How. Pr. (N. Y.) 401.

35. Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821; Kerns *v.* McAulay, 8 Idaho 558, 69 Pac. 539.

In a suit in equity, the facts required to be stated in the affidavit need not be separate and apart from the bill, but it is sufficient if the bill sets them forth with clearness, and is verified by the oath of the creditor or some person for him. St. Mary's Bank *v.* St. John, 25 Ala. 566.

Under the North Carolina code it is only necessary that it shall appear by affidavit, without stating by whom to be made, on behalf of the plaintiff, that such facts exist as warrant the issuing of the attachment. Bruff *v.* Stern, 81 N. C. 183.

36. **Ind.**—Willets *v.* Ridgway, 9 Ind. 367. **N. Y.**—Burgess *v.* Stitt, 12 How. Pr. 401. **W. Va.**—Hudkins *v.* Haskins, 22 W. Va. 645.

In Britton *v.* Gregg, 96 Ill. App. 29, the affidavit was held defective in that it failed to state the place of residence of defendant, or that upon diligent inquiry the affiant had been unable to ascertain the same, and that it failed to state that the other defendant was indebted to the plaintiff in any sum whatever, for all the requirements of the statute must be fulfilled.

Where an affidavit had no title and did not refer to the summons or any other paper having the title; did not state who the deponent was or what he had to do with the suit, nor who was plaintiff or defendant, and might be used in an action brought by any plaintiff against any defendant, it was held that such an indefinite affidavit could not be the basis of any legal proceeding. Burgess *v.* Stitt, 12 How. Pr. (N. Y.) 401.

An affidavit which is not entitled, which nowhere shows who is the plaintiff or who the defendant, which does not name either individually, and does not state who the deponent is, is entirely insufficient. Burgess *v.* Stitt, 12 How. Pr. (N. Y.) 401.

Ancillary Attachment.—Woodfolk *v.*

draftsmen will not vitiate the affidavit.[37] But the exact words of the statute need not be used,—if substantially the same are used it is sufficient.[38]

b. *Requisites and Sufficiency of Averments.* — (I.) Upon Personal Knowledge. — Of course it is sufficient if the averments in the affidavit are made positively upon the affiant's own knowledge.[39] But it is not necessary that the affidavit affirm that it was made upon deponent's knowledge, if such clearly appear from the context of the affidavit, itself.[40]

Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 140; Morris *v.* Davis, 4 Sneed. (Tenn.) 453; Thompson *v.* Carper, 11 Humph. (Tenn.) 542.

37. Clark *v.* Miller, 88 Ky. 108, 10 S. W. 277, where the word "the" was omitted.

38. If the language of the affidavit necessarily implies the fact, it is sufficient. As when the affidavit states "that the claim is just" and "that the defendant is converting, etc.," while the language of the statute in the one instance is "that the claim is believed to be just," and in the other "that to the best of affiant's belief, defendant is converting, etc.," it is all that is required. Clinch River Mineral Co. *v.* Harrison, 91 Va. 122, 21 S. E. 660.

39. Ia.—Pitkins *v.* Boyd, 4 Greene 255. La.—Hicks *v.* Duncan, 4 Mont. N. S. 314. Mich.—McCrea *v.* Russell, 100 Mich. 375, 58 N. W. 1118. N. Y. Hill *v.* Bond, 22 How. Pr. 272, where the affidavit was insufficient for failure so to state any material fact. Va.—Clowser *v.* Hall, 80 Va. 864; Sublett *v.* Wood, 76 Va. 318.

Rulings as to Facts Sufficiently Stated Upon Personal Knowledge.—Patterson *v.* Dulaney, 59 Hun 628, 20 Civ. Proc. 427, 14 N. Y. Supp. 100; Hamilton *v.* Steck, 56 Hun 649, memo., 5 N. Y. Supp. 831, 10 N. Y. Supp. 177; Foster *v.* Rogers, 31 Misc. 14, 64 N. Y. Supp. 652.

Some averments made upon knowledge and others upon information and belief, the source of such information appearing from an affidavit attached, is sufficient. Bennett *v.* Edwards, 27 Hun (N. Y.) 352.

Rule Where Affidavit Is Made by Agent or Attorney.—D. C.—Matthai *v.* Conway, 2 App. Cas. 45. Ia.—Sioux Valley State Bank *v.* Kellog, 81 Iowa 124, 46 N. W. 859. Md.—Gunby *v.* Porter, 80 Md. 402, 31 Atl. 324. Mich. Burns *v.* Kinne, 2 Mich. N. P. 63. Miss. Jones *v.* Leake, 11 Smed. & M. 591. Ohio.—White *v.* Stanley, 29 Ohio St. 423; Phelps *v.* Wetherby, 3 Ohio Dec. (Reprint) 205, 4 Wkly. L. Gaz. 385.

40. What Constitutes Knowledge.—Information derived from others is nevertheless personal knowledge. Dinkelspiel *v.* New Albany Woolen Mills, 46 La. Ann. 576, 15 So. 282.

Having the means of knowledge, and deposing positively as to the facts, the inference is that affiant had knowledge of the fact. Simpson *v.* McCarty, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37; Cole *v.* Smith, 84 App. Div. 500, 82 N. Y. Supp. 982; Hayden *v.* Mullins, 76 App. Div. 69, 78 N. Y. Supp. 553; Hanson *v.* Marcus, 8 App. Div. 318, 40 N. Y. Supp. 951; Ladenburg *v.* Commercial Bank, 5 App. Div. 219, 39 N. Y. Supp. 119; Washburn *v.* Carthage Nat. Bank, 86 Hun 396, 33 N. Y. Supp. 505; Nason Mfg. Co. *v.* Craft Refrigerating Mach. Co., 81 Hun 578, 30 N. Y. Supp. 1031; Barstow Stove Co. *v.* Darling, 81 Hun 564, 30 N. Y. Supp. 1033; Butterworth *v.* Boutilier, 67 Hun 650, memo., 22 N. Y. Supp. 872; Raymond *v.* Ganss, 64 Hun 632, 18 N. Y. Supp. 609; Gribbon *v.* Ganss, 64 Hun 632, 18 N. Y. Supp. 608; Essex County Nat. Bank *v.* Johnson, 61 Hun 625, memo., 21 Civ. Proc. 321, 16 N. Y. Supp. 71; E. W. Bliss Co. *v.* Opera-Glass Supply Co., 60 Hun 438, 21 Civ. Proc. 136, 15 N. Y. Supp. 6; Hill *v.* Knickerbocker Electric Light, etc., Co., 60 Hun 578, 21 Civ. Proc. 141, 14 N. Y. Supp. 517; Marietta First Nat. Bank *v.* Bushwick Chemical Wks., 53 Hun 635, memo., 17 Civ. Proc. 229, 6 N. Y. Supp. 318, *affirming* 5 N. Y. Supp. 824, *affirmed*, 119 N. Y. 645, 23 N. E. 1149; American Exch. Nat. Bank *v.* Voisin, 44 Hun (N. Y.) 85; Gribbon *v.* Back, 35 Hun (N. Y.)

(II.) Upon Belief. — In some jurisdictions the demands of the statute are satisfied if the averments are made upon the belief of the affiant.[41] In other jurisdictions, an averment upon belief is insufficient,[42] unless the grounds of such belief are set out,[43]

541; Globe Yarn Mills *v.* Bilbrough, 2 Misc. 100, 21 N. Y. Supp. 2, *affirming* 28 Abb. N. C. 426, 22 Civ. Proc. 186, 19 N. Y. Supp. 176; Central Nat. Bank *v.* Ft. Ann Woolen Co., 24 N. Y. Supp. 640, *affirmed* in 76 Hun 610, 27 N. Y. Supp. 1114, 143 N. Y. 624, 37 N. E. 827.

Personal Knowledge When Not Presumed.—Crowns *v.* Vail, 2 N. Y. Supp. 218, *affirmed* in 51 Hun 204, 4 N. Y. Supp. 324.

When the affiant is the son of plaintiff, the inference of familiarity with his father's business does not arise, and therefore the inference of knowledge does not arise from his averments, and he must show facts upon which his knowledge is based. McVicker *v.* Campanini, 53 Hun 630, memo., 5 N. Y. Supp. 577, *affirming* 2 N. Y. Supp. 577.

No Showing of Means of Knowledge. Illustrative Cases.—In the following cases the affidavits were held to be insufficient because it did not appear that the affiant had means of knowledge of the facts alleged. James *v.* Signell, 60 App. Div. 75, 32 Civ. Proc. 38, 69 N. Y. Supp. 680; Shuler *v.* Birdsall, etc., Mfg. Co., 17 App. Div. 228, 45 N. Y. Supp. 725; Hart *v.* Bernan, 67 Hun 652, mem., 22 N. Y. Supp. 296; Manufacturers' Nat. Bank *v.* Hall, 69 Hun 466, 24 Civ. Proc. 131, 15 N. Y. Supp. 208, *affirmed* 129 N. Y. 663, 30 N. E. 65; Thomas *v.* Dickerson, 58 Hun 603, mem., 11 N. Y. Supp. 436; Lee *v.* Co-operative L., etc., Assn., 50 Hun 604, 2 N. Y. Supp. 864; Buhl *v.* Ball, 41 Hun 61, 2 N. Y. St. 270; Cribben *v.* Schillinger, 30 Hun (N. Y.) 244; Geneva Non-Magnetic Watch Co. *v.* Payne, 5 N. Y. Supp. 68; Trautmann *v.* Schwalm, 80 Wis. 275, 50 N. W. 99; Streissguth *v.* Reigelman, 15 Wis. 212, 43 N. W. 1116.

41. Voorheis *v.* Eiting, 15 Ky. L. Rep. 161, 22 S. W. 80; Franklin Sav. Inst. *v.* M. M. Bank, 1 Met. (Ky.) 156 (the affidavit of an agent).

"Best knowledge and belief" sufficient for agent or attorney. Horn *v.* Guiser Mfg. Co., 72 Ga. 897.

As to Non-Residence.—Reed *v.* Kentucky Bank, 5 Blackf. (Ind.) 227.

Allegation That "Affiant Thinks" Insufficient.—Rittenhouse *v.* Harman, 7 W. Va. 380.

Good Reason to Believe.—Bylis *v.* Rowe, 64 Mich. 522, 31 N. W. 463; Hunt *v.* Strew, 39 Mich. 368; Nicolls *v.* Lawrence, 30 Mich. 395.

"Knows or Has Good Reason to Believe."—Dean *v.* Oppenheimer, 25 Md. 368.

"Good Reason to Believe and Does Believe."—Stevenson *v.* Robbins, 5 Mo. 18.

Belief That He Ought To Recover. Sleet *v.* Williams, 21 Ohio St. 82.

Fraudulent Disposition of Property. Zinn *v.* Dzialynski, 13 Fla. 597.

"Verily Believes."—**Ind.**—McNamara *v.* Ellis, 14 Ind. 516. **La.**—Clements *v.* Cassily, 2 La. Ann. 567. **Md.**—Boarman *v.* Patterson, 1 Gill 372. **Mo.**—Chenault *v.* Chapron, 5 Mo. 438. **Wis.** Clark *v.* Gilbert, 1 Pin. 354.

In Simon *v.* Johnson, 7 Kulp (Pa.) 166, the court held that charging fraudulent acts not upon simple belief, but "as he verily expects and believes and expects to be able to prove" was sufficient to support the attachment.

This requirement is not met by a statement "to the best of his knowledge and belief." Stadler *v.* Parmlee, 10 Iowa 23.

Recitals of Belief.—Bowers *v.* Beck, 2 Nev. 139, holding that when the statute says that the clerk shall issue the attachment when the plaintiff makes oath to his belief and recites the facts on which his belief is founded, the recital of such belief based upon information derived from others is sufficient without introducing the affidavits of others to prove the facts on which he founded his belief.

42. Simons *v.* Hickman, 24 W. N. C. (Pa.) 92; Greene *v.* Tripp, 11 R. I. 424.

Affidavit "on Belief" Not Void, But Is Amendable.—Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458.

43. **N. J.**—Chumar *v.* Kennedy, 26 N. J. L. 305. **N. C.**—Judd *v.* Crawford Gold Min. Co., 120 N. C. 398, 27 S. E. 81; Penniman *v.* Daniel, 90 N. C. 154. **Ohio.**—Garner *v.* White, 23 Ohio St.

(III.) Upon Information and Belief. — The general rule is that an affidavit upon the information and belief of the affiant is sufficient,[44] in the absence of a statute requiring a more positive form of averment.[45] But in South Carolina[46] and New York[47] an affidavit made upon information and belief is insufficient unless the sources of the information are disclosed, or affidavit made by such sources.[48] In other words,

192; Dunlevy *v.* Schartz, 17 Ohio St. 640.

Amount of Damages.—White *v.* Goodson Type Casting, etc., Mach. Co., 24 Civ. Proc. 411, 34 N. Y. Supp. 797.

Objection Cannot Be Made for First Time on Appeal.—Landfair *v.* Lowman, 50 Ark. 446, 8 S. W. 188; Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458.

Sufficiency of Allowing Grounds for Belief.—N. C.—Gushine *v.* Baer, 64 N. C. 109. **S. C.**—Brown *v.* Morris, 10 S. C. 467. **Tex.**—Sydnor *v.* Totman, 6 Tex. 189.

44. **Ala.**—Mitchell *v.* Pitts, 61 Ala. 219. **N. Y.**—Morgan *v.* Avery, 7 Barb. 656, 2 N. Y. Code 91. **Tenn.**—Brown *v.* Crenshaw, 5 Baxt. 584.

"Knowledge" and Belief.—Distinguishing Nelson *v.* Fuld, 89 Tenn. 466, 14 S. W. 1079, holding that an affidavit merely on information and belief is not sufficient, it was held in Phipps *v.* Burnett, 96 Tenn. 175, 33 S. W. 925, that an allegation on "knowledge and belief" is entirely sufficient. See also *supra*, "Averment upon Personal Knowledge."

Stating unnecessary matter, which might have been omitted, on information and belief, is immaterial. Lawton *v.* Kiel, 51 Barb. (N. Y.) 30.

Evidential matter stated on information and belief does not vitiate. Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550.

45. Deupree *v.* Eisenach, 9 Ga. 598.

46. Roddey *v.* Erwin, 31 S. C. 36, 9 S. E. 729; Kerchner *v.* McCormac, 25 S. C. 461; Myers *v.* Whiteheart, 24 S. C. 196.

47. Steuben County Bank *v.* Alberger, 78 N. Y. 252; Sill Stove Works *v.* Scott, 62 App. Div. 566, 71 N. Y. Supp. 181; Hunt *v.* Robinson, 52 App. Div. 539, 65 N. Y. Supp. 386; Martin *v.* Aluminum Compound Plate Co., 44 App. Div. 412, 60 N. Y. Supp. 1010; Hawkins *v.* Pakas, 39 App. Div. 506, 57 N. Y. Supp. 317; Wallace *v.* Baring, 21 App. Div. 477, 48 N. Y. Supp. 692; Tucker *v.* E. T. Goodsell Co., 14 App. Div. 89, 4 N. Y. Ann. Cas. 86, 43 N. Y. Supp. 460; Abrams *v.* Lavine, 90 Hun 566, 35 N. Y. Supp. 881; Ladenburg *v.* Commercial Bank, 87 Hun 269, 33 N. Y. Supp. 821, *affirmed* in 146 N. Y. 406, 42 N. E. 543; Selser Brothers Co. *v.* Potter Produce Co., 77 Hun 313, 28 N. Y. Supp. 428; Hitner *v.* Bontilier, 67 Hun 203, 22 N. Y. Supp. 64; Scott *v.* Beaudet, 62 Hun 50, 16 N. Y. Supp. 409; Thomas *v.* Dickerson, 58 Hun 603, mem., 11 N. Y. Supp. 436; Kahle *v.* Muller, 57 Hun 144, 11 N. Y. Supp. 26; Brewster *v.* Van Camp, 55 Hun 603, mem., 8 N. Y. Supp. 588; Pride *v.* Indianapolis, etc., R. Co., 51 Hun 640, 4 N. Y. Supp. 15; Commercial Wood, etc., Co. *v.* Northampton Portland Cement Co., 41 Misc. 242, 84 N. Y. Supp. 38, *affirmed* in 87 App. Div. 633, 8 N. Y. Supp. 1121; Taintor *v.* Charles Beseler Co., 33 Misc. 720, 68 N. Y. Supp. 980; Acker *v.* Saynisch, 25 Misc. 415, 54 N. Y. Supp. 937, *affirmed* in 26 Misc. 836, 56 N. Y. Supp. 1025; Weehawken Wharf Co. *v.* Kniekerboeker Coal Co., 24 Misc. 683, 53 N. Y. Supp. 982; Levy *v.* Goldstein, 18 Misc. 639, 43 N. Y. Supp. 774; Einstein *v.* Climax Cycle Co., 18 Misc. 88, 3 N. Y. Ann. Cas. 203, note, 41 N. Y. Supp. 837; Nevada Bank *v.* Cregan, 17 Misc. 241, 40 N. Y. Supp. 1065; Vietor *v.* Goldberg, 6 Misc. 46, 26 N. Y. Supp. 1005; Appleton *v.* Speer, 57 Super. Ct. 119, 6 N. Y. Supp. 511; Becker *v.* Bevins, 102 N. Y. Supp. 144; King *v.* Southwick, 66 How. Pr. (N. Y.) 282; Wentzler *v.* Ross, 59 How. Pr. (N. Y.) 397; Claflin *v.* Baere, 57 How. Pr. (N. Y.) 78; Brewer *v.* Tucker, 13 Abb. Pr. (N. Y.) 76.

48. **In New York**, even in the case of positive averments as to certain facts, unless the circumstances disclose personal knowledge, the affiant must give the sources, which form the basis of his positive averments or the affidavit will be insufficient. Wilson *v.* Puritan S. S. Co., 58 Misc. 317, 110 N. Y. Supp. 914; Geneva Non-Magnetic

sufficient facts and circumstances must be stated to support the information and belief.[49] But in Wisconsin the rule is otherwise.[50]

(IV.) Test of Sufficiency of Averments. — In discussing the sufficiency of the averments of affidavits to support a warrant of attachment, the courts have said, in many cases, that an affidavit of the facts required to be sworn to must be so direct and unequivocal as that if the oath be falsely and corruptly made an indictment for perjury will lie.[51]

Watch Co. *v.* Payne, 5 N. Y. Supp. 68.

If information is based on a telephone conversation, it must appear that affiant was acquainted with plaintiff and recognized his voice. Gumbes *v.* Hicks, 190 N. Y. 532, 83 N. E. 1125, 116 App. Div. 120, 101 N. Y. Supp. 741; Murphy *v.* Jack, 142 N. Y. 215, 33 N. E. 882, 40 Am. St. Rep. 590, *reversing* 76 Hun 356, 27 N. Y. Supp. 802; Haskell *v.* Osborn, 33 App. Div. 127, 53 N. Y. Supp. 361; Andrews *v.* Schofield, 27 App. Div. 90, 50 N. Y. Supp. 132.

Information Derived From Correspondence.—Barrell *v.* Todd, 65 App. Div. 22, 72 N. Y. Supp. 527.

As to matter not essential to jurisdiction the sources of information need not appear. Steele *v.* Raphael, 59 Hun 626, mem., 13 N. Y. Supp. 664.

Affidavit of Informant Appended Is Sufficient.—Mallon *v.* Rothschild, 38 Misc. 8, 76 N. Y. Supp. 710. See also Buell *v.* Van Camp, 119 N. Y. 160, 23 N. E. 538; Mexico City Banking Co. *v.* McIntyre, 105 App. Div. 492, 94 N. Y. Supp. 157; Everitt *v.* Park, 88 Hun 368, 2 N. Y. Ann. Cas. 205, 34 N. Y. Supp. 827; National Bank of Commerce *v.* Whiteman Pulp, etc., Co., 67 Hun 648, mem., 21 N. Y. Supp. 748, *affirmed* in 138 N. Y. 636, 33 N. E. 1084.

Statement by informant as to his belief is unnecessary. Levy *v.* Goldstein, 18 Misc. 639, 43 N. Y. Supp. 774.

Excuses for failure to produce source of information, where it is shown that the persons from whom the affiants profess to have obtained the information are absent or that their depositions cannot be procured. Steuben County Bank *v.* Alberger, 78 N. Y. 252.

Presumption as to the Statement Being Upon Information and Belief.—Merserean *v.* L. K. Hirsch Co., 103 N. Y. Supp. 577, *affirmed* in 119 App. Div. 918, 105 N. Y. Supp. 1130.

49. Jonasson *v.* Herrick, 126 App. Div. 827, 111 N. Y. Supp. 69; Delaney *v.* Bouse, 91 App. Div. 437, 86 N. Y. Supp. 880; J. H. Mohlman Co. *v.* Landwehr, 87 App. Div. 83, 83 N. Y. Supp. 1073; Sizer *v.* Hampton, etc., R. Lumb. Co., 67 App. Div. 547, 73 N. Y. Supp. 1019; Smith *v.* Holt, 37 App. Div. 24, 55 N. Y. Supp. 731; Lehmaier *v.* Buchner, 14 App. Div. 263, 43 N. Y. Supp. 438; Empire Warehouse Co. *v.* Mallett, 84 Hun 561, 32 N. Y. Supp. 861; Newwitter *v.* Mansell, 60 Hun 578, mem., 14 N. Y. Supp. 506; Adams *v.* Hilliard, 59 Hun 626, mem., 14 N. Y. Supp. 120; Claflin *v.* Silberg, 55 Hun 609, 8 N. Y. Supp. 557; Belden *v.* Wilcox, 47 Hun 331; Harroway *v.* Flint, 19 Misc. 411, 41 N. Y. Supp. 335; Monette *v.* Chardon, 16 Misc. 165, 37 N. Y. Supp. 2; Victor *v.* Goldberg, 6 Misc. 46, 25 N. Y. Supp 1005; Ellison *v* Bernstein, 60 How. Pr. (N. Y.) 145; Camp *v.* Tibbetts, 2 E. D. Smith 20, 3 N. Y. Code 45.

Efforts to Locate Absconding Debtor Must Be Disclosed.—Lassen *v.* Burt, 46 Misc. 582, 92 N. Y. Supp. 796.

When an attorney in fact and agent of plaintiff makes an affidavit as to the counterclaims existing, setting forth that the note sued upon was in his possession, and the plaintiff had informed him that there was no counterclaim, and the defendants had admitted to him the making of the note and the delivery thereof and its nonpayment, it is sufficient. Mann *v.* Carter, 71 Hun 72, 24 N. Y. Supp. 591.

50. Rice *v.* Morner, 64 Wis. 599, 25 N. W. 668; Howell *v.* Kingsbury, 15 Wis. 272.

51. **Miss.**—Wallis *v.* Wallace, 6 How. 254. **N. Y.**—Ackroyd *v.* Ackroyd, 3 Daly 38. **Pa.**—Hallowell *v.* Tenney Canning Co., 16 Pa. Super. 60. **Tex.**—Huffman *v.* Hardeman, 1 S. W. 575; Moody *v.* Levy, 58 Tex. 532; Whitemore & Co. *v.* Wilson, 1 Posey Unrep. Cas. 213.

Wis.—Goodyear Rubber Co. *v.* Knapp,

c. *Particular Averments Considered.* — (I.) **As to Style and Commencement of Suit.** — As a general rule the affidavit must identify the suit in which the attachment is sought.[52]

As to Commencement of Suit. — But the affidavit need not contain any statement as to the commencement of the action or the service of a summons,[53] though in the case of ancillary attachments it has been held that the affidavit must show that a suit has been begun by the plaintiff against the defendant.[54]

(II.) As to Property of Defendant. — Unless a statute requires it, an affidavit need not allege that the defendant has property in the state,[55] and where, under a statute, the affiant has made oath that the defendant has property, he cannot be required to specify in what it consists,[56] except that where the remedy by attachment for purchase

61 Wis. 103, 20 N. W. 651; Miller *v.* Morrison, 34 Wis. 579 (although in the words of the statute).

When the source of information is verified by the oath of the informant, and subject to the penalties of perjury, there does not seem to be that necessity for an express statement by the informant that he believes the information, which is sometimes held to be necessary or proper in the case of unverified information. Levy *v.* Goldstein, 18 Misc. 639, 43 N. Y. Supp. 774.

52. Need not use the words "in the suit," as provided for in West Virginia statute, but equivalent words are sufficient. Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409.

Number of suit need not be given in Texas. Bridges *v.* Bank, 47 Tex. Civ. App. 454, 105 S. W. 1018.

53. Blake *v.* Sherman, 12 Minn. 420; Stoiber *v.* Thudium, 44 Hun 70, 8 N. Y. St. 436; Lawton *v.* Kiel, 51 Barb. (N. Y.) 30.

But *compare* Wallace *v.* Castle, 68 N. Y. 370, as to an affidavit showing that an action had been commenced under a code provision that "an action shall be deemed commenced when the summons is issued."

It would be matter of record and therefore such an averment would be unnecessary. Hounshell *v.* Phares, 1 Ala. 580.

54. Peak *v.* Buck, 3 Baxt. (Tenn.) 71; Morris *v.* Davis, 4 Sneed (Tenn.) 452.

Defective Statement as to Commencement Makes the Proceeding Voidable Merely. Jansen *v.* Mundt, 20 Neb. 320, 30 N. Y. 53.

55. **U. S.**—Bigelow *v.* Chatterton, 51 Fed. 614, 10 U. S. App. 267, 2 C. C. A. 402, under Minnesota statutes. **Minn.**—Kenney *v.* Goergen, 36 Minn. 190, 31 N. W. 210. **Neb.**—Grebe *v.* Jones, 15 Neb. 312, 18 N. W. 81. **N. Y.**—Lawton *v.* Kiel, 51 Barb. 30. **N. C.** Foushee *v.* Owen, 122 N. C. 360, 29 S. E. 770; Parks *v.* Adams, 113 N. C. 473, 18 S. E. 665; Branch *v.* Frank, 81 N. C. 180, *overruling* Windley *v.* Bradway, 77 N. C. 333, and Spiers *v.* Halstead, 71 N. C. 209. **Tex.**—Wright *v.* Ragland, 18 Tex. 289.

Want of Belief of Sufficient Property.—Cobb *v.* Miller, 9 Ala. 499; Cobb *v.* Force, 6 Ala. 468.

As against a non-resident, it need not be alleged that there are no personal assets in the state. Reed *v.* Kentucky Bank, 5 Blackf. (Ind.) 227.

Location of Property in County Need Not Be Alleged.—Anderson *v.* Johnson, 32 Gratt. (Va.) 558.

To support service by publication, under the statute, it must appear affirmatively by affidavit, as the basis of such proceeding, when the defendant is a non-resident, that he has property in said state. Balk *v.* Harris, 122 N. C. 64, 30 S. E. 318, 45 L. R. A. 257.

But in Georgia the affidavit must contain a description of the property for which the debt was created. Bruce *v.* Conyers, 54 Ga. 678.

56. Bates *v.* Robinson, 8 Iowa 318.

Personal property disposed of must be described in Pennsylvania. Thomas *v.* Morasco, 5 Pa. Dist. 133.

As to Property Exempt.—The law in terms does not require that the affiant shall state specifically the property that is exempt, and we can conceive of

money is only given "where the debtor who created such debt is in the possession of the property," and the officer can levy "only on the property described in said affidavit, the affidavit should show what goods liable to attachment are in the possession of the defendant."[57]

(III.) As to Existence of Security. — In California and Idaho an affidavit should state, substantially in the purport and language of the statute, that the plaintiff has no security for his claim.[58]

(IV.) As to Vexatious or Injurious Purpose of Attachment. — Some statutes provide that the affidavit shall state that the attachment is not sued out to injure or harass the defendant,[59] or to hinder, delay or defraud any creditor of the defendant.[60]

(V.) As to Parties. — (A.) PARTIES PLAINTIFF.—**(1.) In General.**—The affidavit must show who the plaintiff is.[61]

no good reason why it should be construed as requiring it, by implication or otherwise. Hart *v.* Cummins, 1 Iowa 564.

It is necessary to allege that the property claimed to have been fraudulently disposed of was not a part of defendant's homestead. Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

57. Mayer *v.* Brooks, 74 Ga. 526; Waxelbaum *v.* Paschal, 64 Ga. 275; Joseph *v.* Stein, 52 Ga. 332; Collins *v.* Miller, 6 Ga. App. 744, 65 S. E. 783.

Must Be Described Positively.— Bruce *v.* Conyers, 54 Ga. 678.

58. Sparks *v.* Bell, 137 Cal. 415, 70 Pac. 281; Rodley *v.* Lyons, 129 Cal. 681, 62 Pac. 313; Winters *v.* Pearson, 72 Cal. 553, 14 Pac. 304 (holding alternative statement bad); Scrivener *v.* Dietz, 68 Cal. 1, 8 Pac. 609; O'Connell *v.* Wallser, 12 Cal. App. 668, 108 Pac. 668; Foore *v.* Simon Piano Co., 18 Idaho 167, 108 Pac. 1038; Murphy *v.* Montandon, 3 Idaho 325, 29 Pac. 851, 35 Am. St. Rep. 279.

Affidavit negativing a "lien" includes a "pledge" Glidden *v.* Whittier, 46 Fed. 437, under Idaho statute.

An irregularity in date is immaterial. Woodfolk *v.* Whitworth, 45 Tenn. 561; Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

Clerical Mistake.—Though the statute uses the word pledge "of" personal property, a clerical error in an affidavit in using the word "upon" will not affect its sufficiency. O'Conor *v.* Witherby, 112 Cal. 38, 44 Pac. 340. And see Bohn *v.* Zeigler, 44 W. Va. 402, 29 S. E. 983.

Alleging in the alternative, as, no security ever given, or, if given, it has become valueless, is to be condemned. O'Connell *v.* Wallser, 12 Cal. App. 668, 108 Pac. 668.

As against non-resident this allegation not required. Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741; Foore *v.* Simon Piano Co., 18 Idaho 167, 108 Pac. 1038.

59. Hall *v.* Brazleton, 40 Ala. 406, 46 Ala. 359; Saunders *v.* Cavett, 38 Ala. 51; Gunst *v.* Pelham, 74 Tex. 586, 12 S. W. 233; Burch *v.* Watts, 37 Tex. 135.

The words "injuring" and "harrassing" are employed in the statute as meaning and relating to distinct and independent subjects and cannot be conjunctively used. Moody *v.* Levy, 58 Tex. 532.

And under the statute relating to injuring and harrassing the defendant, where there are several defendants, the affidavit must negative a purpose to injure and harrass all of them. Perrill *v.* Kaufman, 72 Tex. 214, 12 S. W. 125.

When the attachment statute provides that the affidavit shall state "that the attachment is not sued out for the purpose of injuring or harrassing the defendant and the affidavit uses the words 'defendants,' the provision is strictly complied with and it is not necessary to add the words," or either of them. Doty *v.* Moore, 102 Tex. 48, 112 S. W. 1038. To the same effect is Doty *v.* Moore (Tex. Civ. App.), 113 S. W. 955.

60. Harrison *v.* King 9 Ohio St. 388.

Under such a statute as to any creditor of defendant, the affidavit must allege that there is no such purpose as to any creditor. Pejaro Valley Bank *v.* Scurich, 7 Cal. App. 732, 95 Pac. 911.

61. Burgess *v.* Stitt, 12 How. Pr. (N. Y.) 401.

(2.) **Sufficiency of Description.** — But the affidavit is sufficient in its statement of the parties, if such statement identifies them with certainty,[62] and substantially complies with the statute.[63] But as a general rule, the singular number will not include the plural, and *vice versa*.[64]

(3.) **As to Residence or Citizenship.** — Generally, it is unnecessary, in the absence of statutory direction, to allege the residence or citizenship of the plaintiff in the affidavit,[65] but in, at least one jurisdiction, in an action against a non-resident or a foreign corporation the statute makes the averment of the residence of the plaintiff a jurisdictional fact and essential that it be positively stated.[66]

(B.) PARTIES DEFENDANT. — (1.) **In General.** — While the names of the parties defendant must be given in the affidavit,[67] it is sufficient to designate them so that they can be easily identified,[68] and a mere

62. Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N W. 659; Barber *v.* Smith, 41 Mich. 138, 1 N. W. 192; Eilers *v.* Forbes (Tex.), 32 S. W. 709; Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389; Munzesheimer *v.* Heinze, 74 Tex. 254, 11 S. W. 1094.

Blank in affidavit as to name of debtor is fatal. Black *v.* Scanlon, 48 Ga. 12.

When writ is attached to affidavit, plaintiff need not be named in affidavit as well as writ. Burnside *v.* Davis, 65 Mich. 74, 31 N. W. 619; Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886.

Affidavit Not Affected by Setting Out Too Many Defendants.—Cunningham *v.* Von Pustan, 56 Hun 641, mem., 9 N. Y. Supp. 255.

63. O'Conor *v.* Roark, 108 Cal. 173, 41 Pac. 465; Stewart *v.* Katz, 30 Md. 334.

64. Sarrazin *v.* Hotmann, 16 Tex. Civ. App. 351, 40 S. W. 629.

65. **U. S.**—Kurtz *v.* Jones, 2 Cranch C. C. 433, 14 Fed. Cas. No. 7,954; Hard *v.* Stone, 5 Cranch C. C. 503, 12 Fed. Cas. No. 6,046; Decatur *v.* Young, 5 Cranch C. C. 502, 7 Fed. Cas. No. 3,722; Birch *v.* Butler, 1 Cranch C. C. 319, 3 Fed. Cas. No. 1,425. **Md.**—Boarman *v.* Patterson, 1 Gill 372; Baldwin *v.* Neale, 10 Gill & J. 274; Bruce *v.* Cook, 6 Gill & J. 345; Wever *v.* Baltzell, 6 Gill & J. 335; Mandeville *v.* Jarrett, 6 Har. & J. 497. Yerby *v.* Lackland, 6 Har. & J. 446; Shivers *v.* Wilson, 5 Har. & J. 130, 9 Am. Dec. 497. **Miss.**—Amos *v.* Allnutt, 2 Smed. & M. 215.

As Between Residents.—Hawkins *v.* Pakas, 39 App. Div. 506, 57 N. Y. Supp. 317.

Plaintiff a Non-Resident.—Under the statute a non-resident, equally with a resident, may commence suit by attachment against one residing out of the state, and there is no more sense in requiring the non-resident to state his residence in the affidavit than to exact it from the resident citizens, and the affidavit is therefore good without such averment. Jackson *v.* Stanley, 2 Ala. 326.

In Peters *v.* Bower, Minor (Ala.) 69, it was held, under a statute giving the right to a citizen of the state to attach the property of a non-resident, that it is not necessary that the residence of the plaintiff should be stated in the affidavit, but the record should show that the plaintiff resides in the state.

66. Payne *v.* Young, 8 N. Y. 158; Staples *v.* Fairchild, 3 N. Y. 41; Ladenburg *v.* Commercial Bank, 87 Hun 269, 33 N. Y. Supp. 821, *reversing* 24 Civ. Proc. 234, 32 N. Y. Supp. 873, *affirmed* in 146 N. Y. 406, 42 N. E. 543; Talcott *v.* American Credit Indemnity Co., 81 Hun 577, 30 N. Y. Supp. 1118; Smith *v.* Union Milk Co., 70 Hun 348, 24 N. Y. Supp. 79; Adler *v.* Order of American Fraternal Circle, 28 Abb. N. C. 233, 22 Civ. Proc. 336, 19 N. Y. Supp. 835.

Where Trustee Sues.—*In re* Brown, 21 Wend. (N. Y.) 316.

67. **Leaving Name of Defendants Blank Is Fatal.**—Black *v.* Scanlon, 48 Ga. 12.

68. Boyd *v.* Lippincott, 2 Pa. Co. Ct. 585.

An allegation "that the parties aforesaid have assigned" when the language of the statute is "that the defendants have assigned," is not such

clerical error in setting this out will not avoid the affidavit.[69] Plural defendants must be so described, and a description of them in the singular number is bad.[70]

(2.) **Corporate Defendants.** — Where the defendant is a corporation it has been held that it is only in the case of its being a foreign corporation that it is necessary to allege in the affidavit whence the corporate capacity was derived.[71]

(3.) **Majority of Defendant.** — The failure to allege in an affidavit that the defendant is an adult, in the language of the statute, has been held to be immaterial, as majority will be presumed.[72]

(4.) **Defendant's Residence.** — For a domestic attachment, an averment as to the defendant's residence is not required.[73] But in several jurisdictions it is a material requirement that the affidavit state the place of residence of the defendant, or that upon diligent inquiry the affiant has not been able to ascertain it.[74]

(VI.) As to Cause of Action. — (A.) IN GENERAL. — It is generally held that the affidavit must contain an averment of the cause of action,[75] and

a defect as will render the affidavit void, but it should be so construed as to have meaning and significance. Spitz *v.* Mohr, 86 Wis. 387, 57 N. W. 41.

Partnership Name. — Johnston *v.* Smith, 83 Ga. 779, 10 S. E. 354; Foran *v.* Johnson, 58 Md. 144.

69. Davidson *v.* Martin, 33 Miss. 530; Weis *v.* Chipman, 3 Tex. Civ. App. 106, 22 S. W. 225 (where "plaintiff" was written where "defendant" was intended).

70. McMahon *v.* Perkins, 22 R. I. 116, 46 Atl. 405; Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289.

71. Central Min., etc., Co. *v.* Stoven, 45 Ala. 594; Mississippi Cent. R. Co. *v.* Plant, 58 Ga. 167.

The affidavit need not state the title of the act incorporating a defendant corporation. Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344.

But it has been held that when the suit is against a corporation the affidavit must show when it was organized and that 100 days had elapsed since such organization because the statute permits an attachment against them only after such time. U. S. Baking Co. *v.* Bachman, 38 W. Va. 84, 18 S. E. 382.

72. Wentzler *v.* Ross, 59 How. Pr. (N. Y.) 397; Doctor *v.* Schnepp, 2 How. Pr. N. S. (N. Y.) 52, 7 Civ. Proc. 144.

73. Wray *v.* Gilmore, 1 Miles (Pa.) 75.

74. **Ill.**—Prins *v.* Hinchliff, 17 Ill. App. 153. **Ind.**—O'Brien *v.* Daniel, 2 Blackf. 290. **Miss.**—Cantrell *v.* Letwinger, 44 Miss. 437. But see James *v.* Dowell, 7 Smed. & M. 333. **Tex.**—Hall v. Parry, 118 S. W. 561.

Allegation of defendant's intention to change his residence is not sufficient. Nablett *v.* Pratt, 125 N. Y. Supp. 393.

When Objection May Be Availed of on Appeal.—Reitz *v.* People, 77 Ill. 518.

Residence at Time of Making Affidavit Should Be Given. Baldwin *v.* Ferguson, 35 Ill. App. 393.

75. **U. S.**—Laughlin *v.* Queen City Const. Co., 89 Fed. 482. **Cal.**—Weaver *v.* Hayward, 41 Cal. 117; Hisler *v.* Carr, 34 Cal. 641. **N. Y.**—Jonasson *v.* Herrick, 126 App. Div. 827, 111 N. Y. Supp. 69. **Pa.**—Mollet *v.* Fonsera, 4 Serg. & R. 543; Delaware Mut. Safety Ins. Co. *v.* Walker, 1 Phila. 192, 8 Leg. Int. 82.

A statutory "petition in debt" is such a "lawful statement of the plaintiff's cause of action" as will authorize a creditor to sue out an attachment thereon. Chenault *v.* Chapron, 5 Mo. 438.

In New Jersey as against a nonresident, under the statute, the plaintiff in attachment need not specify the cause of action in the writ. Shadduck *v.* Marsh, 21 N. J. L. 434; Day *v.* Bennett, 18 N. J. L. 287.

Claim Sued on to Be Alleged to Be

a statement of the facts upon which the cause of action is based.[76]

(B.) Sufficiency of Statement.—An affidavit will, of course, support an attachment when the facts are stated with the particularity usual in a pleading.[77] The statement of facts, however, is not required to appear in the affidavit with the certainty of a pleading, when the cause of action is specifically averred, and reference is made to the petition for an attachment,[78] or to the verified complaint or declaration, in which the

Due.—**Colo.**—Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464. **Idaho.**—Gatward *v.* Wheeler, 9 Idaho 66, 77 Pac. 23; Kerns *v.* McAulay, 8 Idaho 558, 69 Pac. 539. **N. Y.**—Altworth *v.* Flynn, 29 Misc. 106, 60 N. Y. Supp. 235.

76. **U. S.**—Fisher *v.* Secrist, 48 Fed. 264. **Colo.**—Plummer *v.* Struby & Estabrooke Merc. Co., 23 Colo. 190, 47 Pac. 294. **D. C.**—Boulter *v.* Behrend, 9 Mackey 567. **Ind.**—United States Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832. **Mich.**—McCrea *v.* Muskegon Circuit Judge, 100 Mich. 375, 58 N. W. 118. **Neb.**—Gratte *v.* Nagle, 50 Neb. 363, 69 N. W. 973. **N. Y.** Chambers, etc., Glass Co. *v.* Roberts, 2 App. Div. 181, 37 N. Y. Supp. 855; Blum *v.* Jung, 82 Hun 611, mem., 30 N. Y. Supp. 1020; Pomeroy *v.* Ricketts, 27 Hun 242; Mitchell *v.* Anderson, 32 Misc. 13, 66 N. Y. Supp. 118. **N. D.**—Hemmi *v.* Grover, 18 N. D. 578, 120 N. W. 561. **S. C.**—Addison *v.* Sujette, 50 S. C. 192, 27 S. E. 631. **W. Va.**—Simmons *v.* Simmons, 56 W. Va. 65, 48 S. E. 833.

So that one recovery may bar a future demand. Bond *v.* Patterson, 1 Blackf. (Ind.) 34.

If the suit is on an assigned claim for goods sold the affidavit must aver delivery of the goods and assignment. Altworth *v.* Flynn, 29 Misc. 106, 60 N. Y. Supp. 235.

Allegation in Affidavit Based Entirely on Inferences.—Norfolk, etc., Hosiery Co. *v.* Arnold, 64 Hun 635, mem., 18 N. Y. Supp. 910.

Against Married Women.—Talhelm *v.* Hoover, 4 Pa. Co. Ct. 172.

Intention and Promise to Pay Presumed. United States *v.* Graff, 67 Barb. (N. Y.) 304.

Judgment as Creating Contract for Payment.—Gutta Percha, etc., Mfg. Co. *v.* Houston, 11 N. Y. St. 302.

In an action for damages, an affidavit which fails to disclose facts showing that plaintiff has sustained the damages claimed is insufficient. Chazy Marble Lime Co. *v.* Deely, 88 App. Div. 150, 84 N. Y. Supp. 396; James *v.* Signell, 60 App. Div. 75, 69 N. Y. Supp. 680; Bloomingdale *v.* Cook, 35 App. Div. 360, 54 N. Y. Supp. 924; Haskell *v.* Osborn, 33 App. Div. 127, 53 N. Y. Supp. 361; Westervelt *v.* Agrumaria Sicula, etc., 58 Hun 147, 11 N. Y. Supp. 340; Commercial Wood, etc., Co. *v.* Northampton Portland Cement Co., 41 Misc. 242, 84 N. Y. Supp. 38, *affirmed*, 87 App. Div. 633, 84 N. Y. Supp. 1121; Roth *v.* American Piano Mfg. Co., 35 Misc. 509, 71 N. Y. Supp. 1080; Foster *v.* Scurich, 27 Misc. 25, 57 N. Y. Supp. 95; Duryea *v.* Rayner, 11 Misc. 294, 32 N. Y. Supp. 247.

An affidavit is not sufficient which fails to state the amount and value of the merchandise which forms the basis of account. Nessels *v.* Boettcher, 69 Hun 306, 23 N. Y. Supp. 480, *affirmed* in 138 N. Y. 654, 34 N. E. 513.

77. Lanier *v.* City Bank, 9 Civ. Proc. (N. Y.) 161.

78. **Mo.**—Wirt *v.* Dinan, 44 Mo. App. 583. **Neb.**—Hart *v.* Barnes, 24 Neb. 782, 40 N. W. 322. **Ohio.**—American Mfg. Co. *v.* National Supply Co., 29 Ohio C. C. 433.

A mere recital of the cause of action (Manton *v.* Poole, 4 Hun (N. Y.) 638, 67 Barb. 330; Richter *v.* Wise, 3 Hun (N. Y.) 398, 6 Thomp. & C. 70; Skiff *v.* Stewart, 39 How. Pr. (N. Y.) 385), or a general statement thereof is not sufficient. (**Ala.**—Wigs *v.* Ringemann, 155 Ala. 189, 45 So. 153. **N. Y.**—Cattaraugus Cutlery Co. *v.* Case, 56 Hun 643, 9 N. Y. Supp. 862. McCulloh *v.* Alby, 56 Hun 641, 9 N. Y. Supp. 361 Livingston *v.* Lakwitz, 25 Misc. 119, 53 N. Y. Supp. 1083; Marinette Iron Works Co. *v.* Reddaway, 59 Super. Ct. 575, 3 N. Y. Supp. 426. **W. Va.**—Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787).

An affidavit is not sufficient which

facts are fully set out and pleaded.[79] Thus an affidavit is sufficient when it sets out the contract sued on and shows a breach,[80] when the

does not state the amount which the plaintiff is justly entitled to, but says "that his claim is founded upon a written contract for the delivery of certain linen by the plaintiff to the defendant." Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

Liberal construction in favor of sufficiency. Seibels *v.* Northern Cent. R. Co., 80 S. C. 133, 61 S. E. 435.

A mere statement of embezzlement, without stating the time or what was embezzled, is not sufficient. Greenway *v.* Mead, 26 N. J. L. 303.

79. **Ala.**—Fleming *v.* Burge, 6 Ala. 373; Starke *v.* Marshall, 3 Ala. 44. **D. C.**—Matthai *v.* Conway, 2 App. Cas. 45. **Ind.**—Harlow *v.* Becktle, 1 Blackf. 237. **N. Y.**—Levenson *v.* Briggs, 95 App. Div. 94, 88 N. Y. Supp. 507; Romeo *v.* Garafolo, 21 Misc. 166, 47 N. Y. Supp. 91, *affirmed* in 25 App. Div. 191, 49 N. Y. Supp. 114; Condouris *v.* Imperial Turkish Tobacco, etc., Co., 3 Misc. 66, 22 N. Y. Supp. 695. **S. C.** Seibels *v.* Northern Cent. R. Co., 80 S. C. 133, 61 S. E. 435; Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744; Addeson *v.* Sujette, 50 S. C. 192, 27 S. E. 631; National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028. **Tex.**—Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210.

When the cause of action sufficiently appears in the record, and in the recital of the writ, it is sufficient and its omission in the certificate of affidavit is no irregularity. Howard *v.* Oppenheimer, 25 Md. 350.

80. **Ala.**—Bozeman *v.* Rose, 40 Ala. 212. Alford *v.* Johnson, 9 Port. 320. **Ga.**—Brown *v.* Clayton, 12 Ga. 564. **N. Y.**—Heabler *v.* Bernharth, 115 N. Y. 459, 22 N. E. 167, 17 Civ. Proc. 393, *reversing* 56 Super. Ct. 575, 4 N. Y Supp. 873; American Audit Co. *v.* Industrial Federation, 80 App. Div. 544, 80 N. Y. Supp. 788; Birdsall *v.* Emmons, 89 Hun 603, mem., 34 N. Y. Supp. 1056; Cunningham *v.* Von Pustan, 56 Hun 641, mem., 9 N. Y. Supp. 255; Hamilton *v.* Steck, 5 N. Y. Supp. 831, *affirmed* in 56 Hun 649, 10 N. Y Supp. 177; Reilly *v.* Sisson, 66 How. Pr. 224, 228, 31 Hun 572, 4 Civ. Proc. 361; Smadbeck *v.* Sisson, 66 How. Pr. 220; Johnston *v.* Ferris, 14 Daly 302, 12 N. Y. St. 666. **N. D.**—Gans *v.* Beasley, 4 N. D. 140, 59 N. W. 714. **S. C.**—Chitty *v.* Pennsylvania R. Co., 62 S. C. 526, 40 S. E. 944.

If the substance and effect of an agreement is set forth the cause of action is sufficiently described. Condouris *v.* Imperial Turkish Tobacco, etc. Co., 3 Misc. 66, 22 N. Y. Supp. 695.

In Essex County Nat. Bank *v.* Johnson, 61 Hun 625, mem., 21 Civ. Proc. 321, 16 N. Y. Supp. 71, it was held that not necessary to allege whether the note was taken for value before or after maturity.

Failure to allege a breach of covenant renders an affidavit insufficient. Hoy *v.* Brown, 16 N. J. L. 157; Reilly *v.* Sisson, 31 Hun (N. Y.) 572, 66 How. Pr. 228, 4 Civ. Proc. 361.

Where the action is for breach of warranty in the sale of personal property, it is a moneyed demand, the amount of which can be certainly ascertained and an additional affidavit of the special facts and circumstances, as is required in an action for sums "not certain or liquidated" is unnecessary. Guy *v.* Lee, 81 Ala. 163, 2 So. 273.

Indorsement of Note.—Where the averment in the affidavit is that the defendant had given its promissory note payable to etc., and before maturity and for a valuable consideration it was endorsed to etc., and for a valuable consideration he delivered the same to the plaintiff herein, who is still the lawful owner and holder thereof, it is sufficient. Lewsohn *v.* Kent, etc., Co., 87 Hun 257, 33 N. Y. Supp. 826.

Action on a Contract to Convey Land.—Narregang *v.* Muscatine Mortg., etc., Co., 7 S. D. 574, 64 N. W. 1129.

Where the contract under which the work was done, and the fact that it was done, and alleged in the affidavit, together with the bill of particulars accompanying the complaint, it is sufficient. Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192, 33 S. C. 599, mem., 11 S. E. 638.

When averments as to labor and materials and value thereof appear by affidavit, the affidavit is sufficient. Mallon *v.* Rothschild, 38 Misc. 8, 76 N. Y. Supp. 710.

demand is so identified as to be distinguished from any other demand of like nature;[81] or when it states the grounds thereof with sufficient certainty to show that it is such a cause of action as will permit an attachment to issue.[82]

(C.) Nature of Demand. — (I.) In General. — In general a failure to state in the affidavit the nature of the demand upon which the attachment is prayed is fatal,[83] unless it is supplied by a similar statement in the declaration, complaint,[84] or petition.[85]

(2.) Sufficiency of Statement. — All that is required in the affidavit is a statement sufficiently clear to apprise the other party of the real nature of the cause on which suit has been instituted.[86] The precision of a

81. Bond *v.* Patterson, 1 Blackf. (Ind.) 34.

82. Jonasson, *v.* Herrick, 126 App. Div. 827, 111 N. Y. Supp. 69; Germantown Trust Co. *v.* Whitney, 19 S. D. 108, 102 N. W. 304.

83. Colo.—Leppel *v.* Beck, 2 Colo. App. 390, 31 Pac. 185. N. J.—Jeffery *v.* Wooley, 10 N. J. L. 123. Ohio.—Driscoll *v.* Kelly, 4 Ohio Dec. 124. Tenn.—Willey *v.* Roirden, 2 Baxt. 227. W. Va. Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787.

Express contract sufficiently shown by averments of fact, which, if true, amount to such a contract. Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344.

A Demand on a Judgment.—Oakley *v.* Aspinwall, 2 Sandf. (N. Y.) 7.

Rule in Maryland.—A statute requires the bond, account or other evidence of the debt sued on to be produced so as to show the real nature and character of the plaintiff's claim. Barney *v.* Patterson's Lessee, 6 Har. & J. (Md.) 182.

Transcript of Record of Judgment from Another State.—Cockey *v.* Milne's Lessee, 16 Md. 200.

A voucher which sets out the amount of the indebtedness but fails to state on what account it arose, leaves the defendant entirely uninformed as to the "real nature and character" of the plaintiff's claim. Burk *v.* Tinsley, 80 Md. 98, 30 Atl. 604.

Leaving on File Copies Made by the Clerk.—Franklin Bank *v.* Matthews, 69 Md. 107, 14 Atl. 703.

On failure of clerk to send up such copies with the record it cannot be held that they were insufficient. Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943.

Proof of Genuineness of Notes Produced.—De Bebian *v.* Gola, 64 Md. 262, 21 Atl. 275.

Amount of Written Evidence to be Produced.—Lee *v.* Tinges, 7 Md. 215.

Account and Affidavit Consistent.—Under this statute, an account must show the real nature of the claim and be consistent with the affidavit. Hoffman *v.* Reed, 57 Md. 370; Bartlett *v.* Wilbur, 53 Md. 485; Cox *v.* Waters, 34 Md. 460.

Account Made in Mode Usually Adopted by Merchants.—Stewart *v.* Katz, 30 Katz, 30 Md. 334.

Full Evidence.—But the plaintiff is not required to produce matter showing a complete cause of action. Hard *v.* Stone, 5 Cranch C. C. 503, 11 Fed. Cas. No. 6,046; White *v.* Solomonsky, 30 Md. 585; Dawson *v.* Brown, 12 Gill & J. (Md.) 53.

84. O'Brien *v.* Daniel, 2 Blackf. (Ind.) 290.

In conjunction with the complaint. Grevell *v.* Whiteman, 32 Misc. 279, 65 N. Y. Supp. 974.

85. Worthington *v.* Cary, 1 Met. (Ky.) 470.

86. Cal.—Simpson *v.* McCarty, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37; Norcross *v.* Nunan, 61 Cal. 640. Colo.—Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. 294. Ga.—Force *v.* Hubbard, 26 Ga. 289. Idaho.—Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821. Md.—Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 3 N. E. 135; U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832. Mich.—Emerson *v.* Detroit Steel, etc., Co, 100 Mich. 127, 58 N. W. 659. Minn. Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N W. 964. Neb.—Grotte *v.* Nagle, 50 Neb. 363, 69 N. W. 973; Dorrington *v* Minnick, 15 Neb. 397, 19 N. W. 456. N. Y.—Castellanos *v.* Jones, 5 N. Y. 164; Mitchell *v.* Anderson, 32 Misc. 13, 66 N. Y. Supp. 118; Morgan *v.*

declaration is not required.[87] But it must appear whether the cause is one arising *ex contractu* or *ex delicto*, or upon judgment.[88]

(VII.) As to Indebtedness. — (A.) In General. — It is essential to the validity of the affidavit that the fact of an indebtedness be alleged therein according to the demands of the statute.[89]

(B.) Sufficiency of Averments.—In some jurisdictions a positive averment is required as to the indebtedness of the defendant to the plaintiff.[90] But mere clerical errors or defects in alleging the indebtedness

House, 36 How. Pr. 326; *In re* Gilbert, 7 Wend. 490. **Ohio.**—Pope *v.* Hibernia Ins. Co., 24 Ohio St. 481; Constable & Co. *v.* White, 1 Handy 44. **Utah.**—Bowers *v* London Bank of Utah, 3 Utah 417, 4 Pac. 225.

87. Todd *v.* Gates, 20 W. Va. 464.

88. **Idaho.**—Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821. **Kan.**—Robinson *v.* Burton, 5 Kan. 293. **Mich.** Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812. **Minn.**—Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964. **Mont.**—Newell *v.* Whitwell, 16 Mont. 243, 40 Pac. 866. **N. Y.**—Williams *v.* Barnaman, 19 Abb. Pr. 69; Matter of Marty, 2 Barb. 436, 3 How. Pr. 208; Smith *v.* Luce, 14 Wend. 237. **Wis.**—Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344; Blackwood *v.* Jones, 27 Wis. 498; Klenk *v.* Schwalm, 19 Wis. 111.

An allegation stating that there was a debt justly due the plaintiff upon express and implied contract is sufficient. Buehler *v.* De Lemos, 84 Mich. 554, 48 N. W. 42.

Jurisdictional Requirement. — The omission to state the character of the contract upon which the plaintiff claims is clearly jurisdictional. People *v.* Blanchard, 61 Mich. 478, 28 N. W. 669.

Where there is a failure to charge a breach of contract or to show a contractural relation the affidavit is not sufficient. Rouss *v.* Wright, 14 Neb. 457, 16 N. W. 765.

Contract To Many Sufficient.—Edick *v.* Green, 38 Hun (N. Y.) 202.

Calling a claim a debt is not enough. Rumbough *v.* White, 11 Heisk. (Tenn.) 260; Sullivan *v.* Fugate, 1 Heisk. (Tenn.) 20.

Statement of Separate Items of Account Unnecessary.—Theirman *v.* Vahle, 32 Ind. 400. See also Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23.

Setting out contract is enough. Wilson *v.* Barrett (Ky.), 115 S. W. 812.

89. **Colo.**—Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464. **Idaho.**—Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821. **La.**—Elam *v.* Barr, 11 La. Ann. 622. **N. Y.**—McGinley *v.* Gildersleeve, 124 App. Div. 324, 108 N. Y. Supp. 888; *In re* Hollingshead, 6 Wend. 553.

Indebtedness in Excess of Fifty Dollars.—Gallun *v.* Weil, 116 Wis. 236, 92 N. W. 1091.

Necessity for Setting Out Each Loan. Steuart *v.* Chappell, 98 Md. 527, 57 Atl. 17.

Must Allege Indebtedness to Plaintiff, Not Deponent.—Butcher *v.* Cappon, etc., Leather Co., 148 Mich. 552, 112 N. W. 110, 12 Am. & Eng. Ann. Cas. 169.

Necessity of Changing Affidavit When Declaration Is Amended.—Tully *v.* Herrin, 44 Miss. 626, holding no change necessary, the debt being really one the party named therein, though declaration amended to make his firm nominal plaintiffs.

"As Near as May Be."—In Hawes *v.* Clement, 64 Wis. 152, 25 N. W. 21, it was held, under a statute requiring the affidavit to state the indebtedness "as near as may be, over and above all legal set-offs," that such an averment with the addition of the words "and as the plaintiff is able to determine" introduced an element of uncertainty, and rendered the affidavit insufficient. See also Lathrop *v.* Snyder, 16 Wis. 293, where the qualifying phrase was "as near as this deponent can now estimate the same."

Nature of Indebtedness Need Not Be Described With Any Great Particularity.—Haywood *v.* McCrory, 33 Ill. 459.

In attachment against steamboat, it is sufficient to be averred that the boat is indebted. The General Worth *v.* Hopkins, 30 Miss. 703.

90. **Fla.**—Ross *v.* Steen, 20 Fla. 443. **Mich.**—Mosher *v.* Bay Circuit Judge, 108 Mich. 503, 66 N. W. 384; Wilson *v.*

will not vitiate the affidavit,[91] especially if as to unnecessary matter.

(C.) JUSTNESS OF DEBT. — It is held in many of the jurisdictions that affidavit must state that the demand or claim is justly due, and a failure to so state is fatal to the affidavit.[92]

(D.) MATURITY OF DEBT. — In a number of jurisdictions it is essential that the affidavit state that the debt is due, if such is the case,[93] or if

Arnold, 5 Mich. 98. **S. C.**—Ketchin *v.* Landecker, 32 S. C. 155, 10 S. E. 936. **Wis.**—Talbot *v.* Woodle, 19 Wis. 174.

An allegation that the defendant is indebted to the plaintiff "on a note in the sum," etc., is direct and positive. Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 131.

Qualification of Positive Averment.—"As near as deponent can estimate sum," is sufficient. Nicholls *v.* Lawrence, 30 Mich. 395. But it has been held that after a positive averment, a qualification that the amount is due pursuant to a judgment in another state, is insufficient. Quarles *v.* Robinson, 2 Pin. (Wis.) 97, 1 Chand. 29.

91. Buchanan *v.* Sterling, 63 Ga. 227 (omission of verb); Vogelman *v.* Lewit, 48 Misc. 625, 96 N. Y. Supp. 207.

92. **Ala.**—Mobile Life Ins. Co. *v.* Teague, 78 Ala. 147. **D. C.**—Newman *v.* Hexter, MacArthur & M. 88. **Kan.**—Robinson *v.* Burton, 5 Kan. 293. **Ky.**—Moore *v.* Harrod, 101 Ky. 248, 40 S. W. 675; Bailey *v.* Beadles, 7 Bush 383; Allen *v.* Brown, 4 Met. 342; Worthington *v.* Cary, 1 Met. 470; Taylor *v.* Smith, 17 B. Mon. 536. **Neb.**—Winchell *v.* McKenzie, 35 Neb. 813, 53 N. W. 975. **Ohio.**—Cook *v.* Olds Gasoline Engine Works, 19 Ohio C. C. 732, 10 Ohio Cir. Dec. 236. **Tenn.**—McElwee *v.* Steelman (Tenn. Ch.), 38 S. W. 275. **Tex.**—Force *v.* Wear, etc., Dry Goods Co., 8 Tex. Civ. App. 572, 29 S. W. 75; Scram *v.* Duggan, 1 White & Wills. Civ. Cas. §1271. **W. Va.**—Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787; Reed *v.* McCloud, 38 W. Va. 701, 18 S. E. 924; Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753.

Substantial Compliance Sufficient.—Gutman & Co. *v.* Virginia Iron Co., 5 W. Va. 22.

The Omission of the Word "Justly" Is Not Fatal.—Simon *v.* Johnson, 7 Kulp (Pa.) 166.

Indebted Means Justly Indebted.—Livengood *v.* Shaw, 10 Mo. 273.

When Affidavit Shows Claim To Be Just.—Wilkins *v.* Tourtellott, 28 Kan. 825, holding sufficient either statement that it is just or facts showing that.

Omission of Word "Is" Before Justly Is Fatal.—City Nat. Bank *v.* Flippen, 66 Tex. 610, 1 S. W. 897.

Sufficiency of Averments Under Texas Statute.—Evans *v.* Tucker, 59 Tex. 249; Kennedy *v.* Morrison, 31 Tex. 207; H. B. Claflin Co. *v.* Kamsler, (Tex. Civ. App.), 36 S. W. 1018.

Effect of Failure To Allege Justness of Demand.—In Tennessee the above doctrine is laid down in Rumbough *v.* White, 11 Heisk. 260, and in Sullivan *v.* Fugate, 1 Heisk. 20, but in McElwee *v.* Steelman, 38 S. W. 275, it was held that while the affidavit failed to state the account sued for was just, yet if the record contained the recital that the defendant in the writ was justly indebted the affidavit was not an absolute nullity.

Omission Not Ground for Collateral Attack.—Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. 694.

93. **U. S.**—Laughlin *v.* Queen City Constr. Co., 89 Fed. 482. **Ga.**—Lorillard *v.* Barrett, 77 Ga. 45; Joseph *v.* Stein, 52 Ga. 332. **Idaho.**—Gatward *v.* Wheeler, 10 Idaho 66, 77 Pac. 23; Kerns *v.* McAulay, 8 Idaho 558, 69 Pac. 539. **Mich.**—Mathews *v.* Densmore, 43 Mich. 461, 5 N. W. 669. **N. Y.**—Labalt *v.* Schuloff, 52 Hun 611 mem., 4 N. Y. Supp. 819; Kiefer *v.* Webster, 6 Hun 526; Victor *v.* Henlein, 67 How. Pr. 486. **Wis.**—Bowen *v.* Slocum, 17 Wis. 181; Whitney *v.* Brunette, 15 Wis. 61.

Indebted Not Equivalent to Due.—Cross *v.* McMaken, 17 Mich. 511, 97 Am. Dec. 203.

The form presented by statute is sufficient although the affidavit did not disclose the fact that the debt was not due. Harrill *v.* Humphries, 26 Ga. 514.

Failure To Allege Maturity Ground for Quashal.—Thompson *v.* Towson, 1 Har. & M. (Md.) 504.

Where the defendant is a non-resident there is no statutory requirement that the affidavit shall allege the maturity

the amount sued for is not due, but is a subsisting and not a contingent liability, this must be stated.[94] But it has been held that such a requirement is not satisfied by the mere statement that the amount stated is due.[95]

(E.) Ownership of Claim. — Where the facts set out in the affidavit are sufficient to show that the plaintiff is the owner of the claim, it is generally sufficient to satisfy the requirement that the claim is due to the plaintiff without any positive averment of ownership.[96]

(F.) Amount of Claim. — (I.) Necessity for Stating Amount.— It is essential that the affidavit state the amount that the plaintiff seeks to recover against the defendant,[97] unless such averment can be supplied by

of the demand. Mastin *v.* Kansas City First Nat. Bank, 65 Mo. 16.

Maturity as to Joint Debtors.—If maturity is alleged as to one of several who are alleged to be justly indebted, it follows that the debt is one as to the other. People *v.* Judge, 41 Mich. 326, 2 N. W. 26.

Alleging in Substance Maturity of Claim Is Sufficient.—Delaplaine *v.* Rogers, 29 W. Va. 779, 2 S. E. 798.

Excluding Inference that Debt Is Not Due Is Enough.—McCartney *v.* Branch Bank, 3 Ala. 709.

Word "Indebted" Implies Maturity. Trowbridge *v.* Sickler, 42 Wis. 417. See also Lum *v.* The Buckeye, 24 Miss. 564.

"Really Indebted" Is a Sufficient Statement.—Parmele *v.* Johnston, 15 La. 429.

"Justly Indebted" Is Sufficient.—Scruggs *v.* Gibson, 40 Ga. 511.

"Immediately To Become Due and Payable" Is Sufficient. — Merchants' Nat. Bank *v.* Columbia Spinning Co., 21 App. Div. 383, 47 N. Y. Supp. 442.

Effect of False Allegations as to Maturity of Debt.—The undue part of the debt at the time of filing petition should be shown. Sydnor *v.* Totham, 6 Tex. 189.

Debt Averred Past Due When it Is Not.—Cox *v.* Reinhardt, 41 Tex. 591.

In Texas, the statute does not require it to be stated in the affidavit when the debt became or will become due, if set forth in the petition. Gimbel *v.* Gomprecht, 89 Tex. 497, 35 S. W. 470; Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. 479; Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389; Avery *v.* Zander, 77 Tex. 207, 13 S. W. 971; Tootle *v.* Alexander, 13 Tex. Civ. App. 615, 35 S. W. 821; Bennett *v.* Rosenthal & Co., 3 Wills. Civ. Cas. §156.

94. Stowe *v.* Sewall, 3 Stew. & P. (Ala.) 67; Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971.

An Existing Debt or Demand.—Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

Louisiana Rule.—When the affidavit is positive and explicit that the defendant is indebted in the sum for which judgment is claimed, it is sufficient under the statute. Irish *v.* Wright, 8 Rob. (La.) 428.

95. McLoughlin *v.* Naugle, 34 Misc. 385, 69 N. Y. Supp. 871, holding that it must be shown under §636 of the code that the amount is presumptively owing.

96. Hall *v.* Stryker, 27 N. Y. 596; Herzberg *v.* Boiesen, 5 Ann. Cas. 35, 53 N. Y. Supp. 256. But see Williamson *v.* Frisby, 16 N. J. L. 61.

Affidavit Aided by Allegation in Petition.—Dunlap *v.* McFarland, 25 Kan. 488.

When a Note Constitutes the Claim. Bank of California *v.* Boyd, 86 Cal. 386, 25 Pac. 20. See also Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23.

Title by Assignment Must Be Set Out.—Allworth *v.* Flynn, 29 Misc. 106, 60 N. Y. Supp. 235, *reversing* 27 Misc. 838, 58 N. Y. Supp. 606.

97. Tibbet *v.* Sue, 122 Cal. 206, 54 Pac. 741; Camp *v.* Cahn, 53 Ga. 558.

And this is necessary though the petition is upon a note for a given sum which is alleged to be due and unpaid. Moore *v.* Harrod, 19 Ky. L. Rep. 406, 40 S. W. 675.

Amount Need Not Be Stated When Damages Are Unliquidated.—Sherrill *v.* Fay, 14 Iowa 292. See Ill.—Humphreys *v.* Matthews, 11 Ill. 471; Phelps *v.* Young, 1 Ill. 327. Ia.—Kelley *v.* Donnelly, 29 Iowa 70; Blakley *v.* Bird, 12

a reference to the complaint[98] as a part of the affidavit.

Averments as to Interest. — It is not fatal to the affidavit, however, that it fails to state the amount of interest due upon the demand,[99] or that the statement of the amount in the affidavit varies from that stated in the complaint only by the amount of the interest.[1]

(2.) Sufficiency of Averments. — In General. — By some courts it is held that the affidavit must allege with certainty some fixed and definite sum,[2]

Iowa 601. **N. Y.**—Golden Gate Concentrator Co. *v.* Jackson, 13 Abb. N. C. 476.

Greater Sum Due Than Demanded.—The fact that the affidavit shows that the plaintiff is entitled to a greater sum than he demands in his affidavit is not good basis for an objection. **Idaho.**—Kerns *v.* McAulay, 8 Idaho 558, 69 Pac. 539. **Ind.**—Marnine *v.* Murphy, 8 Ind. 272. **Kan.**—Tootle *v.* Smith, 34 Kan. 27, 7 Pac. 577; Robinson *v.* Burton, 5 Kan. 293. **Ky.**—Lynn *v.* Stark, 6 Ky. L. Rep. 585. **Mich.**—Estlow *v.* Hanna, 75 Mich 219, 42 N W. 812; Hale *v.* Chandler, 3 Mich. 531. **Neb.**—Grotte *v.* Nagle, 50 Neb. 363, 69 N. W. 973; Whipple *v.* Hill, 36 Neb. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313; Winchell *v.* McKenzie, 35 Neb. 813, 53 N. W. 975. **N. Y.**—Lewis *v.* Tindel-Morris Co., 110 App. Div. 887, 96 N. Y. Supp. 1133; Southwell *v.* Kingsland, 85 App. Div. 384, 83 N. Y. Supp. 356; Axford *v.* Seguine, 70 App. Div. 228, 75 N Y. Supp. 35; Romeo *v.* Garafolo, 21 Misc. 166, 47 N. Y. Supp. 91; Dolz *v.* Atlantic, etc., Transp. Co., 3 Civ. Proc. 162. **N. C.**—Fuller *v.* Smith, 58 N. C. 192. **Pa.**—Boyd *v.* Lippencott, 2 Pa. Co. Ct. 585. **S. C.**—Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744.

In Actions Ex Delicto Amount Must Be Stated.—Thompson *v.* Carper, 11 Humph. (Tenn.) 542.

Amount Due at Filing of the Petition.—Avery *v.* Zander, 77 Tex. 207, 13 S. W. 971; Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753; Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

98. Worthington *v.* Cary, 1 Met. (Ky.) 470; Addison *v.* Sujette, 50 S. C. 192, 27 S. E. 631.

If amount can be arrived at only by calculation founded upon the statements of the petition the attachment should be quashed. Marshall *v.* Alley, 25 Tex. 342. But see Roman *v.* Shapard, 2 Wills. Civ. Cas. §296.

99. Smith *v.* Walker, 6 S. C. 169; Wright *v.* Ragland, 18 Tex. 289; Briggs *v.* Lane, 1 White & Wills. Civ. Cas. §961. But see Espey *v.* Heidenheimer, 58 Tex. 662, holding that it is not sufficient where it is necessary to go outside the affidavit to calculate interest and credits.

1. O'Conor *v.* Roark, 108 Cal. 173, 41 Pac. 465.

2. **U. S.**—Munroe *v.* Cocke, 2 Cranch C. C. 465, 17 Fed. Cas. No. 9,928. **Md.** Warwick *v.* Chase, 23 Md. 154. **Wis.**—Lathrop *v.* Snyder, 16 Wis. 293.

But a slight variance between the amount stated and that actually due is immaterial. Grotte *v.* Nagle, 50 Neb. 363, 69 N. W. 973.

Amount Cannot Be Stated Approximately.—Simon *v.* Johnson, 7 Kulp (Pa.) 166.

An Affidavit Upon Information and Belief Is Not Sufficient.—Ackroyd *v.* Ackroyd, 20 How. Pr. (N. Y.) 93, 11 Abb. Pr. 345.

Claim May Be Estimated Value of the Property.—Ward & Co. *v.* Howard, 12 Ohio St. 158.

"Over and Above" a Certain Sum Not Sufficient.—Jones *v.* Webster, 1 Pin. (Wis.) 345.

The word "damages," as used in an affidavit alleging that the defendant is indebted in a certain sum, "debt and damages by open account," does not import an indefinite sum claimed as compensation for a tort or wrong inflicted, but in the connection in which the word is used, means merely interest. Gardner *v.* Swift & Co., 113 Tenn. 1, 80 S. W. 764.

Opinion as to Amount Is Not Sufficient.—Ackroyd *v.* Ackroyd, 11 Abb. Pr. (N. Y.) 345.

Certain Sum.—Under §229 of the code, if the action is for an accounting, and the complaint shows that the plaintiff is unable to state the amount due him, his affidavit that there is a certain sum due him, is not enough to authorize an attachment. Ackroyd *v.* Ackroyd, 11 Abb. Pr. (N. Y.) 345.

and follow literally the language of the statute,[3] while in other cases it is held that a substantial compliance with the statute is sufficient.[4]

Grounds for Statement Must Be Given. — The mere statement of the amount is not sufficient; there must also be a statement of facts upon which the court can exercise its judgment as to value and amount for which the attachment should issue.[5] And the affiant must give the source of his knowledge, when he is not the plaintiff.[6]

(3.) Negativing Existence of Set-offs or Counterclaims. — Necessity for. — In some jurisdictions the affidavit for attachment must allege that the defendant is indebted to the plaintiff in a certain sum over and above all legal set-offs or counter-claims,[7] (it not being necessary to go beyond

3. **"At the Least" Must Be Stated.** Where the affidavit omitted the words "at the least" after the statement of the amount, as required by West Virginia statute, the affidavit was held to be fatally defective. Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702; Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681; Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753; Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409; Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

"At Least" Sufficient.—Carolina Agency Co. *v.* Garlington, 85 S. C. 114, 67 S. E. 225 (since if the defendant owes more he cannot be injured by a seizure for a less amount); Courson *v.* Parker, 39 W. Va. 521, 20 S. E. 583.

"As Near as May Be."—Mairet *v.* Marriner, 34 Wis. 582. But an affidavit adding the words "and as this plaintiff is able to determine" to the words required by statute "as near as may be, over and above all legal set-offs" was held to be defective. Hawes *v.* Clement, 64 Wis. 152, 25 N. W. 21.

4. **Ark.**—Hughes *v.* Stinnett, 9 Ark. 211; Hughes *v.* Martin, 1 Ark. 386. **Ind.**—Fairbank *v.* Lorig, 4 Ind. App. 451, 29 N. E. 452, 30 N. E. 930. **Minn.** Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964. **Mont.**—Cope *v.* Upper Missouri Min., etc., Co., 1 Mont. 53. **N. Y.**—Sperry *v.* Fox, 63 Hun 627 mem., 17 N. Y. Supp. 740, *affirmed* in 133 N. Y. 673, 31 N. E. 625. **Tenn.**—Gardner *v.* Swift, 113 Tenn. 1, 80 S. W. 764. **Tex.**—Rainwater-Boogher Hat Co., *v.* O'Neal, 82 Tex. 337, 18 S. W. 570.

"A sum exceeding" sufficiently alleges that at least that sum was due. Flower *v.* Griffith, 12 La. 345.

Certainty as to a Part.—An allegation that the defendants are indebted in the sum of $500 "and interest and attorney's fees, money of the United States," will sustain the attachment at least of $500. Tibbet *v.* Sue, 122 Cal. 206, 54 Pac. 741.

Set-Off To Be Ascertained Does Not Render Claim Too Uncertain.—Holston Mfg. Co. *v.* Lea, 18 Ga. 647.

"As near as can be specified" instead of "as near as may be." Grover *v.* Buck, 34 Mich. 519; Barker *v.* Thorn, 20 Mich. 264.

5. Dudley *v.* Armenia Ins. Co., 115 App. Div. 380, 100 N. Y. Supp. 818; Dolz *v.* Atlantic, etc., Transp. Co., 3 Civ. Proc. (N. Y.) 162.

A mere expression of opinion as to the amount without facts is not sufficient when the damages are unliquidated. Southwell *v.* Kingsland, 85 App. Div. 384, 83 N. Y. Supp. 356.

6. Wiley *v.* Aultman, 53 Wis. 560, 11 N. W. 32.

Where the amount is stated by plaintiff upon information and belief but there is attached a statement from his agent, the source of his information, who is in a position to know the amount, showing such amount, the affidavit sufficiently alleges the amount due. Lewis *v.* Tindel-Morris Co., 109 App. Div. 509, 96 N. Y. Supp. 576.

7. **Cal.**—De Leonis *v.* Etchepare, 120 Cal. 407, 52 Pac. 718. **Idaho.**—Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821. **Mo.**—Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. 694; Bray *v.* McClury, 55 Mo. 128. Lane *v.* Fellows, 1 Mo. 353. **N. Y.**—Thorington *v.* Merrick, 101 N. Y. 5, 3 N. E. 794; McGinley *v.* Gildersleeve, 124 App. Div. 324, 108 N. Y. Supp. 888; Axford *v.* Sequine, 70 App. Div. 228, 75 N. Y. Supp. 35; Nason Mfg. Co. *v.* Craft Re-

the language of the statute), or it will be held fatally defective,[8] and void.[9]

Who May Make the Affidavit. — In New York, if this affidavit is made by an agent, an explanation must be forthcoming why the principal did not make it.[10]

Sufficiency of Averments. — All that is required is that the averments negativing the existence of set-offs or counter-claims should be sufficiently certain to apprise the opposite party of that fact;[11] otherwise

frig. Mach. Co., 81 Hun 578, 30 N. Y. Supp. 1031; Romeo *v.* Garafolo, 21 Misc. 166, 47 N. Y. Supp. 91, *affirmed* in 25 App. Div. 191, 49 N. Y. Supp. 114; Marine Nat. Bank *v.* Ward, 35 Hun 395; Donnell *v.* Williams, 21 Hun 216, 59 How. Pr. 68. **Can.**—Keeler *v.* Hazlewood, 1 Manitoba 28.

Trial.—Facts constituting offsets need only appear upon the trial, and their non-existence in the affidavit would be no ground for quashing an attachment sued out for a sum certain. Evans *v.* Lawson, 64 Tex. 199.

If there are counter-claims existing of which the affiant is cognizant, the facts must be stated from which the legal conclusion can be drawn that the plaintiff is entitled to recover a certain sum, over and above such counter-claims. Roth *v.* American Piano Mfg. Co., 35 Misc. 509, 71 N. Y. Supp. 1080; Rickerson *v.* Bunker, 26 Misc. 383, 56 N. Y. Supp. 202; Livingston *v.* Lakwitz, 25 Misc. 119, 53 N. Y. Supp. 1083.

On the other hand if there are no counter-claims the facts must be stated from which this appears. Steele *v.* R. M. Gilmour Mfg. Co., 77 App. Div. 199, 78 N. Y. Supp. 1078; Livingston *v.* Lakwitz, 25 Misc. 119, 53 N. Y. Supp. 1083;

When Affidavit Made by Another Than Plaintiff.—Lampkin *v.* Douglass, 63 How. Pr. (N. Y.) 47.

Surplusage.—It is not necessary for the affiant to state more than is required by the statute and where the statute requires the plaintiff, in order to entitle him to an attachment, to show by affidavit that he is entitled to recover a sum stated therein, "over and above all counter-claims known to him," an affidavit stating that the plaintiff demanded a certain sum "over and above all discounts, set-offs and counter-claims known to him" is not defective, since after averring that the plaintiff was entitled to recover a specified sum "over and above all counter-claims known to him," it was superogatory to add the words "discounts and set-offs." Sullivan *v.* Presdee, 9 Daly (N. Y.) 552.

8. **Idaho.**—Kerns *v.* McAulay, 8 Idaho 558, 69 Pac. 539. **N. Y.**—Ruppert *v.* Haug, 87 N. Y. 141, 62 How. Pr. 364, 1 Civ. Proc. 411; McEntee *v.* Aris, 66 Hun 635 mem., 21 N. Y. Supp. 857; Norfolk, etc., Hosiery Co. *v.* Arnold, 64 Hun 635 mem., 18 N. Y. Supp. 910; Lyon *v.* Blakesly, 19 Hun 299; Kelly *v.* Archer, 48 Barb. 68; Taylor *v.* Reed, 54 How. Pr. 27; Trow's Printing, etc., Co. *v.* Hart, 9 Daly 413. **W. Va.**—Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753. **Wis.**—Whitney *v.* Brunette, 15 Wis. 61.

9. Wells *v.* Parker, 26 Mich. 102.

10. Raymond *v.* Ganss, 64 Hun 632, 18 N. Y. Supp. 609. Gribbon *v.* Ganss, 64 Hun 632, 18 N. Y. Supp. 608; Lewis *v.* Vail, 51 Hun 639, 5 N. Y. Supp. 946; Crowns *v.* Vail, 51 Hun 204, 4 N. Y. Supp. 324; Smith *v.* Arnold, 33 Hun (N. Y.) 484; Murray *v.* Hankin, 30 Hun (N. Y.) 37.

11. **Cal.**—O'Conor *v.* Roark, 108 Cal. 173, 41 Pac. 465. **N. Y.**—Buell *v.* Van Camp, 119 N. Y. 160, 23 N. E. 538; Campbell *v.* Emslie, 115 App. Div. 385, 100 N. Y. Supp. 783; Steele *v.* R. M. Gilmour Mfg. Co., 77 App. Div. 199, 78 N. Y. Supp. 1078; Smith *v.* Holt, 37 App. Div. 24, 55 N. Y. Supp. 731; Easton *v.* Durland's Riding Academy Co., 7 App. Div. 288, 40 N. Y. Supp. 283; Selser Bros. Co. *v.* Potter Produce Co., 80 Hun 554, 30 N. Y. Supp. 527, *affirmed*, 144 N. Y. 646, 39 N. E. 494; Manufacturers' Nat. Bank *v.* Hall, 60 Hun 466, 21 Civ. Proc. 131, 15 N. Y. Supp. 208, *affirmed*, 129 N. Y. 663, 30 N. E. 65; Hamilton *v.* Penney, 29 Hun 265; Alford *v.* Cobb, 28 Hun 22; Lamkin *v.* Douglass, 27 Hun 517; Roth *v.* American Piano Mfg. Co., 35 Misc. 509, 71 N. Y. Supp. 1080; Rickerson *v.* Bunker, 25 Misc. 796, 54 N. Y. Supp. 1114, *affirmed*, 26 Misc. 383, 56 N. Y. Supp. 202; Maury *v.* American Motor Co., 25 Misc. 657, 56 N. Y. Supp. 316, *affirmed*, 38 App. Div. 623, 57 N. Y. Supp. 1142; Acker

the affidavit is defective, and a denial of attorney's is not enough.[12]

(VIII.) As to Grounds of Attachment. — (A.) NECESSITY FOR. — It is essential to the validity of the affidavit that the ground of the attachment be stated therein,[13] otherwise the affidavit is void,[14] and hence cannot be amended.[15] But according to some decisions the grounds of the action may be incorporated in the affidavit by reference to the complaint or petition if duly verified.[16]

(B.) REQUISITE AND SUFFICIENCY OF AVERMENT.—(1.) **Positive Averments.**—In some jurisdictions the several averments in an affidavit, as to the existence of the grounds necessary to authorize the issuance of a writ of attachment, must be made in positive and unequivocal terms.[17]

v. Jackson, 3 How. Pr. (N. S.) 160; Doctor *v.* Schnepp, 2 How. Pr. (N. S.) 52, 7 Civ. Proc. 144; Murray *v.* Hankin, 65 How. Pr. 511; Sullivan *v.* Presdee, 9 Daly 552; Solinger *v.* Patrick, 7 Daly 408; Billwiller *v.* Marks, 21 Civ. Proc. 162, 16 N. Y. Supp. 541; Dolbeer *v.* Stout, 60 Super. Ct. 269, 21 Civ. Proc. 359, 17 N. Y. Supp. 184. **S. C.**—Turner *v* McDaniel, 1 McCord 552. **Tex.**—Teague *v.* Lindsey, 31 Tex. Civ. App. 161, 71 S. W. 573.

As to each of several claims, the affidavit need not allege that there is no counter-claim. United States Net, etc., Co. *v.* Alexander, 18 N. Y. Supp. 147.

An affidavit by one of several plaintiffs that the sum mentioned is due, over and above all counter-claims known to him, is sufficient. Acker *v.* Jackson, 3 How. Pr. N. S. (N. Y.) 160. See also Doctors *v.* Schnepp, 2 How. Pr. N. S. (N. Y.) 52, 7 Civ. Proc. 144.

12. Mitchell *v.* Anderson, 32 Misc. 13, 66 N. Y. Supp. 118; Morrison *v.* Ream, 1 Pin. (Wis.) 244.

An affidavit must not only negative the fact of a counter-claim arising out of the contract set forth but must also show the non-existence of one arising out of another or independent contract. Hart *v.* Bernau, 67 Hun 652, mem., 22 N. Y. Supp. 296.

13. **Colo.**—Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464. **Nev.**—Branson *v.* Industrial Workers of the World, 30 Nev. 270, 95 Pac. 354. **Ohio.** American Mfg. Co. *v.* National Supply Co., 29 Ohio C. C. 433. **S. C.**—Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744; Addison *v* Sujette, 50 S. C. 192, 27 S. E. 631. **S. D.**—William Deering & Co. *v.* Warren, 1 S. D. 1035, 44 N. W. 1068. **Tenn.**—Baker *v.* Huddleston, 3 Baxt. 1. **W. Va.**—Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528, 35 **L. R. A.** 847.

Debt Fraudulently Contracted.—To authorize the issuance of the writ upon several causes of action combined in one suit it must appear from the affidavit that the whole of the indebtedness sued upon was fraudulently contracted. Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812.

Where there are two defendants it is not necessary to allege that each is about to dispose of his property; it is sufficient to aver that "said defendants" named in the affidavit, are about to dispose of their property. Bridges & Son *v.* First Nat. Bank, 47 Tex. Civ. App. 454, 105 S. W. 1018. And see Dunn *v.* McAlpin, 90 Ky. 78, 13 S. W. 363.

14. Maples *v.* Tunis, 11 Humph. (Tenn.) 108, 53 Am. Dec. 779.

15. Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464.

16. Branson *v.* Industrial Workers of the World, 30 Nev. 270, 95 Pac. 354; Addison *v.* Sujette, 50 S. C. 192, 27 S. E. 631.

17. **Ark.**—Hellman *v.* Fowler, 24 Ark. 235. **Ga.**—Moore *v.* Neill, 86 Ga. 186, 12 S. E. 222; Meinhard *v.* Neill, 85 Ga. 265, 11 S. E. 613; Enneking *v.* Clay, 79 Ga. 598, 7 S. E. 257; Krutina *v.* Culpepper, 75 Ga. 602; Horn *v.* Guiser Mfg. Co., 72 Ga. 897; Brown *v.* Massman, 71 Ga. 859; Neal *v.* Gordon, 60 Ga. 112; Stowers *v.* Carter, 28 Ga. 351. **Ill.**—Archer *v.* Claflin, 31 Ill. 306; Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73; Syndicate des Cultivators, etc., *v.* Currie, 72 Ill. App. 122; Adams *v.* Merritt, 10 Ill. App. 275. **Ky.**—Williams *v.* Martin, 1 Met. 42. **Minn.**—Morrison *v.* Lovejoy, 6 Minn. 183. **S. C.**—Ivy *v.* Caston, 21 S. C. 583.

Though followed by an indefinite statement of the method in which al-

(2.) Allegations in Conformity With Statute. — A statement of the grounds for the attachment in the language of the statute is, of course, sufficient and should always be adopted as the safest course,[18] whether the ground be that of non-residence,[19] that the defendant has absconded,[20] or concealed himself;[21] that he is actually removing or is

leged fraud was perpetrated, a positive averment of fraud is sufficient. Simon *v.* Johnson, 7 Kulp (Pa.) 166.

"Knows or has good reason to believe," is a positive statement. Mairet *v.* Marriner, 34 Wis. 582.

Description of Property for Which the Debt Was Contracted.—Bruce *v.* Conyers, 54 Ga. 678.

Intent With Which Debtor Left State.—Ely *v.* Titus, 14 Minn. 125; Murphy *v.* Purdy, 13 Minn. 422; Hess *v.* Brower, 76 N. C. 428.

Qualified in Part Only.—Chronicle *v.* Rowland, 72 Ga. 195, where the words "to the best of his knowledge and belief" were held to qualify only the statement as to indebtedness.

When several grounds are alleged, one sworn to positively and the other upon information and belief, the affidavit is sufficient. Dunlap *v.* McFarland, 25 Kan. 488. See also Patterson *v.* Delaney, 59 Hun 626, mem., 20 Civ. Proc. 427, 14 N. Y. Supp. 100.

Must Satisfy a Reasonable Man.—Pierse *v.* Smith, 1 Minn. 82.

18. **U. S.**—Nevada Co. *v.* Farnsworth, 89 Fed. 164. Cheshire Provident Inst. *v.* Johnston, 5 Fed. Cas. No. 2,659. **Kan.**—Reyburn *v.* Brackett, 2 Kan. 227, 83 Am. Dec. 457. **Neb.**—McDonald *v.* Marquardt, 52 Neb. 820, 73 N. W. 288; Burnham *v.* Ramge, 47 Neb. 175, 66 N. W. 277; Tallon *v.* Ellison, 3 Neb. 63; Ellison *v.* Tallon, 2 Neb. 14. **N. D.**—F. Mayer Boot & S. Co. *v.* Ferguson, 17 N. D. 102, 114 N. W. 1091. **Ohio.**—Gans *v.* Thompson, 11 Ohio St. 579. **Okla.**—Thwing *v.* Winkler, 13 Okla. 643, 75 Pac. 1126; Dunn *v.* Claunch, 13 Okla. 577, 76 Pac. 143. **Ore.**—Crawford *v.* Roberts, 8 Ore. 324. **Pa.**—Sharpless *v.* Ziegler, 92 Pa. 467, *reversing* 36 Leg. Int. 244. Rubinsky *v.* Ullman, 4 Pa. Dist. 126; Boyd *v.* Lippincott, 19 Phila. 241, 44 Leg. Int. 47, 2 Pa. Co. Ct. 585. **Wis.**—Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

Statement of ultimate facts in the language of the statute is sufficient. Wheeler *v.* Farmer, 38 Cal. 203.

Additional facts alleged not inconsistent will not vitiate. Emmitt *v.* Yeigh, 12 Ohio St. 335.

19. **Ill.**—Crayne *v.* Wells, 2 Ill. App. 574. **Mo.**—Tufts *v.* Volkening, 51 Mo. App. 7, 122 Mo. 631, 27 S. W. 522. **N. Y.**—Staples *v.* Fairchild, 3 N. Y. 41; Steele *v.* Raphael, 59 Hun 626, 13 N. Y. Supp. 664, **Wis.**—Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

In Mississippi, affidavit must contain notice showing post-office address of defendant. Drysdale *v.* Biloxi Canning Co., 67 Miss. 534, 7 So. 541.

"Not All Residents" An Insufficient Statement.—Powers *v.* Hurst, 3 Blackf. (Ind.) 229.

As to Non-Residence of Partners.—Corbit *v.* Corbit, 50 N. J. L. 363, 13 Atl. 178.

Partnership a Non-Resident.—Chambers *v.* Sloan, 19 Ga. 84.

Untrue allegation as to non-residence nullifies proceedings. Stafford *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023. To the same effect is German Nat. Bank *v.* Kautter, 55 Neb. 103, 75 N. W. 556, 70 Am. St. Rep. 371.

20. Wray *v.* Gilmore, 1 Miles (Pa.) 75; Hawes *v.* Clement, 64 Wis. 152, 25 N. W. 21.

Stating Additional Statutory Phrases. Hewitt *v.* Terry, 56 Mich. 591, 23 N. W. 326, holding that "to the injury of creditors" must be added. And see Conrad *v.* McGee, 9 Yerg. (Tenn.) 428.

"Cannot after due diligence be found" is unnecessary. Luttrell *v.* Martin, 112 N. C. 593, 17 S. E. 573.

Failure to add that "ordinary process of law could not be served upon defendant" is fatal. Page *v.* Ford, 2 Smed. & M. (Miss.) 266; Thompson *v.* Raymon, 7 How. (Miss.) 186.

Alleging an absconding from the city of defendant's residence confers no authority to issue an attachment. Castellanos *v.* Jones, 5 N. Y. 164.

"Has absconded" instead of absconds is insufficient. Levy *v.* Millman, 7 Ga. 167; Brown *v.* McCluskey, 26 Ga. 577.

21. Messner *v.* Hutchins, 17 Tex. 597.

about to remove out of the county,[22] that the debtor is actually removing his property without the limits of the county so that process in the ordinary course of law cannot be severed,[23] or that he has fraudulently disposed of or concealed property.[24] It is not necessary, however, to use the exact words of the statute. Equivalent, or substantial equivalent, terms will suffice,[25] if the material facts are stated so definitely and certainly that those entitled to defend are put on notice.[26] For example, in alleging the ground of non-residence it is only necessary to use terms clear and definite enough to make it manifest that this is the ground relied upon.[27] And this is all that is required in stating the ground

Statement Against Partnership Sufficient.—Guckenheimer *v.* Day, 74 Ga. 1.

"Is concealed" not equivalent to "he conceals himself." Winkler *v.* Barthel, 6 Ill. App. 111.

22. **Ga.**—Irvin *v.* Howard, 37 Ga. 18. **Ky.**—Poage *v.* Poage, 3 Dana 579. **Tenn.**—McCulloch *v.* Foster, 4 Yerg. 162.

"**Did attempt to depart** permanently . . . and is about to remove his property," is not sufficient. New Orleans *v.* Garland, 11 La. Ann. 438.

"**May Depart**" is not sufficiently definite. Reding *v.* Ridge, 14 La. Ann. 36.

23. Cox *v.* Felder, 36 Ga. 597.

24. Zeigler *v.* Cox, 63 Ill. 48; Keith *v.* McDonald, 31 Ill. App. 17.

Want of Allegation.—"That thereby the said plaintiff will probably lose his debt," renders the affidavit insufficient. Sheffield *v.* Gay, 32 Tex. 225.

"**Will dispose**" of his property in order to defraud his creditors, not being in the words of the statute is insufficient. Jackson *v.* Burke, 4 Heisk. (Tenn.) 610.

Specific Acts Constituting Fraud Need Not Be Stated. Nevada Co. *v.* Farnsworth, 89 Fed. 164.

"**To Defraud Creditors Includes Hinder or Delay.**" Clayton *v.* Clark, 76 Kan. 832, 92 Pac. 1117, 123 Am. St. Rep. 169.

Statement Against Partnership.—Where an affidavit alleges, in an action against a partnership, that the defendants named in the affidavit are about to dispose of their property, it is sufficient, and it is not necessary to allege that each of the firm was about to dispose of his property. Bridges & Son *v.* Center First Nat. Bank, 47 Tex. Civ. App. 454, 105 S. W. 1018.

25. **Idaho.**—Knutsen *v.* Phillips, 16 Idaho 267, 101 Pac. 596; Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821; Kerns *v.* McAulay, 8 Idaho 558, 69 Pac. 539. **Ia.**—Crew *v.* McClung, 4 Greene 153. **Md.**—Halley *v.* Jackson, 48 Md. 254. **Mich.**—McCrea *v.* Muskegon Circuit Judge, 100 Mich. 375, 58 N. W. 1118. **Minn.**—Duxbury *v.* Dahle, 78 Minn. 427, 81 N. W. 198; Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 914. **N. Y.**—Wenzell *v.* Morrisey, 115 N. Y. 665, 22 N. E. 271, *affirming* 15 Civ. Proc. 311, 2 N. Y. Supp. 250, 51 Hun 642, mem., 5 N. Y. Supp. 951. **N. D.**—Hemmi *v.* Grover, 18 N. D. 578, 120 N. W. 561. **Pa.**—Long *v.* Goodwin, 5 Pa. Dist. 335, 26 Pittsb. Leg. J. N. S. 449. **Tenn.**—Sparkman *v.* Sparkman, 4 Baxt. 45. **Tex.**—Doty *v.* Moore, 102 Tex. 48, 112 S. W. 1038. **Wyo.**—C. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213.

26. **Cal.**—O'Connell *v.* Walker, 12 Cal. App. 694, 108 Pac. 668. **Fla.**—Tanner *v.* Hall, 22 Fla. 391. **Ga.**—Meinhard *v.* Neill, 85 Ga. 265, 11 S. E. 613. **N. Y.**—Stein *v.* Levy, 55 Hun 381, 8 N. Y. Supp. 505. **N. C.**—Finch *v.* Slater, 152 N. C. 155, 67 S. E. 264. **R. I.**—Kelley *v.* Force, 16 R. I. 623, 18 Atl. 1037. **W. Va.**—Roberts *v.* Burns, 48 W. Va. 92, 35 S. E. 922. **Wyo.**—First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

27. **Ala.**—Graham *v.* Ruff, 8 Ala. 171. **Ia.**—Wiltse *v.* Stearns, 13 Iowa 282. **La.**—Farley *v.* Farior, 6 La. Ann. 725. **Md.**—Franklin *v.* Claflin, 49 Md. 24; Risewick *v.* Davis, 19 Md. 82. **Mich.**—Dorr *v.* Clark, 7 Mich. 310. **Miss.**—Cantrell *v.* Letwinger, 44 Miss. 437. **Mo.**—Avery *v.* Good, 114 Mo. 290, 21 S. W. 815. **Neb.**—Nagel *v.* Loomis, 33 Neb. 499, 50 N. W. 441; Citizens' State Bank *v.* Porter, 4 Neb. (Unof.) 73, 93 N. W. 391. **N. Y.**—

that the defendant absconds or conceals himself;[28] that he is about to remove himself,[29] or is removing and has refused to pay or secure the demand;[30] that the debtor has fraudulently disposed of or is about to dispose of his property;[31] that he has removed or is about to remove his property from the state,[32] or that he has concealed or secreted prop-

Haebler *v.* Bernharth, 115 N. Y. 459, 22 N. E. 167; Campbell *v.* Emslie, 115 App. Div. 385, 100 N. Y. Supp. 783; Outerbridge *v.* Campbell, 87 App. Div. 597, 84 N. Y. Supp. 537; Doheny *v.* Worden, 75 App. Div. 47, 77 N. Y. Supp. 959; New York City *v.* Genet, 4 Hun 487; Gould *v.* Bryan, 3 Bosw. 626. **N. C.**—Luttrell *v.* Martin, 112 N. C. 593, 17 S. E. 573. **Ohio.**—Krumm *v.* Krauss, 26 Ohio St. 529. **S. C.**—Smith & Melton *v.* Walker, 6 S. C. 169. **W. Va.**—Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414; Pendleton *v.* Smith, 1 W. Va. 16.

Bill in Equity.—Ky.—Bentley *v.* Clark, 3 Dana 564. **Tenn.**—Mulherrin *v.* Hill, 5 Heisk. 58. **Va.**—Kelso *v.* Blackburn, 3 Leigh 299.

Additional phrases unnecessary. Conklin *v.* Harris, 5 Ala. 213; Simons *v.* Lehigh Mills Co., 53 Misc. 368, 104 N. Y. Supp. 739; Mersereau *v.* L. K. Hirsch Co., 103 N. Y. Supp. 577. But see Thompson *v.* Chambers, 12 Smed. & M. (Miss.) 488.

"Absence" Not Equivalent to Non-Residence.—Croxall *v.* Hutchings, 12 N. J. L. 84.

Non-Residence As of Time Affidavit Made.—Pullian *v.* Nelson, 28 Ill. 112.

Necessity for negativing ability to serve defendant with process. Lane *v.* Fellows, 1 Mo. 353; McMahan *v.* Boardman, 29 Tex. 170.

28. **Ind.**—Frantz *v.* Wendel, 28 Ind. 391. **Md.**—Dickinson *v.* Barnes, 3 Gill 485. **N. J.**—Conard *v.* Conard, 17 N. J. L. 154. **N. Y.**—Stewart *v.* Lyman, 62 App. Div. 182, 70 N. Y. Supp. 936; *In re* Faulkner, 4 Hill 598. **N. D.**—Severn *v.* Giese, 6 N. D. 523, 72 N. W. 922; Birchall *v.* Griggs, 4 N. D. 305, 60 N. W. 842, 50 Am. St. Rep. 654. **Tex.**—Griffith *v.* Robinson, 19 Tex. 219.

Use of Past Tense Unobjectionable. Wallis *v.* Wallace, 6 How. (Miss.) 254.

29. **Ala.**—Ware *v.* Todd, 1 Ala. 199. **La.**—Sawyer *v.* Arnold, 1 La. Ann. 315; West *v.* Plain, 11 Rob. 292. **Miss.** Hopkins *v.* Grissom, 26 Miss. 143; Lee *v.* Peters, 1 Smed. & M. 503. **Tenn.** Runyan *v.* Morgan, 7 Humph. 210; Alabama Bank *v.* Berry, 2 Humph. 443. **Tex.**—Wright *v.* Smith, 19 Tex. 297.

30. Hart *v.* Cummins, 1 Iowa 564.

31. **Ala.**—Hafley *v.* Patterson, 47 Ala. 271; Free *v.* Hukill, 44 Ala. 197. **Fla.**—Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391. **Ind.**—Cooper *v.* Reeves, 13 Ind. 53. **La.**—Drake *v.* Hager, 10 Iowa 556. **Ky.**—Cabell *v.* Patterson, 98 Ky. 520, 32 S. W. 746. **La.**—Frere *v.* Perret, 25 La. Ann. 500. **Minn.**—Auerbach *v.* Hitchcock, 28 Minn. 73, 9 N. W. 79. **Mo.**—Curtis *v.* Settle, 7 Mo. 452. **Neb.**—Tessier *v.* Reed, 17 Neb. 105, 22 N. W. 225. **N. Y.**—Fox *v.* Mays, 46 App. Div. 1, 61 N. Y. Supp. 295; Lacker *v.* Drecher, 38 App. Div. 75, 55 N. Y. Supp. 979. **Ohio.**—Emmitt *v.* Yeigh, 12 Ohio St. 335. **S. C.** Mixson *v.* Holley, 26 S. C. 256, 2 S. E. 385. **Tex.**—Smith *v.* Dye, 51 S. W. 858.

"Transfer" is sufficient as being narrower than "dispose" which is the word used in the statute. Howard *v.* Caperon, 3 Wills. Civ. Cas. §313.

Clerical error will not vitiate. Corrigan *v.* Nichols, 6 Tex. Civ. App. 26, 24 S. W. 952.

32. **Ala.**—Napper *v.* Noland, 9 Port. 218. **Ark.**—Mandel *v.* Peet, 18 Ark. 236. **Miss.**—Dandridge *v.* Stevens, 12 Smed. & M. 723; Commercial Bank *v.* Ullman, 10 Smed. & M. 411. **Tenn.**—Brown *v.* Pace, 49 S. W. 355; Runyan *v.* Morgan, 7 Humph. 210.

But loose expressions as to removal will not suffice; the statement must be substantially equivalent. Tocci *v.* Gianvecchio, 48 Misc. 351, 95 N. Y. Supp. 583; Craigmiles *v.* Hays, 7 Lea (Tenn.) 720. See also Waldman *v.* Fisher, 1 W. N. C. (Pa.) 360.

Removed "without the state" must be added. Mingus *v.* McLeod, 25 Iowa 452.

Removal before debt becomes due was held necessary in Kleinwort *v.* Klingender, 14 La. Ann. 96; Friedlander *v.* Myers, 2 La. Ann. 920; Crooke *v.* Rutherford, 13 La. 479; Millandon *v.* Foucher, 8 La. 582.

erty;[33] that there is insufficient property in the state to satisfy the demand;[34] or that the debtor was guilty of fraud in contracting or incurring the obligation,[35] or criminally incurred the liability.[36]

(3.) Allegation of Intent.—Unless an intent is a component part of the statutory ground,[37] no intent need be alleged.[38] But when any element of fraud is involved in the ground alleged, more particularity of statement is required than in other cases.[39]

But later, in the statute "or swears" was substituted for "and moreover swears." And now it is held that, upon a debt not due it is not necessary to swear "that said debtor is about to remove his property out of the state before said debt becomes due." Merchants', etc., Bank *v.* McKellar, 44 La. Ann. 940, 11 So. 592.

33. **D. C.**—Wielar *v.* Garner, 4 App. Cas. 329. **Miss.**—Spear *v.* King, 6 Smed. & M. 276. **N. Y.**—Peck *v.* Brooks, 31 Misc. 48, 64 N. Y. Supp. 546, *affirmed*, 51 App. Div. 640, 64 N. Y. Supp. 1145. **Ohio.**—Ravenna Nat. Bank *v.* Latimer, 28 Ohio C. C. 649.

34. Hey *v.* Harding, 21 Ky. L. Rep. 771, 53 S. W. 33; George *v.* Hoskins, 17 Ky. L. Rep. 63, 30 S. W. 406; Nutter *v.* Connet, 3 B. Mon. (Ky.) 199.

35. Biddle *v.* Black, 99 Pa. 380; Pearce *v.* Landenberger, 16 Phila. (Pa.) 12, 40 Leg. Int. 130; Boyd *v.* Bright, 4 Pa. Co. Ct. 518; Sowers *v.* Leiby, 4 Pa. Co. Ct. 223; National Bank of Republic *v.* Tasker, 1 Pa. Co. Ct. 173; Landeman *v.* Wilson, 29 W. Va. 702, 2 S. E. 203.

In Lindquist *v.* Johnson, 12 S. D. 486, 81 N. W. 900, it was alleged that "the said debt was incurred for property obtained under false pretenses," and this was held sufficient.

36. Creasser *v.* Young, 31 Ohio St. 57.

37. **Ia.**—Branch of State Bank *v.* White, 12 Iowa 141; Torbert *v.* Tracy, 12 Iowa 20; Vandevoort *v.* Fanning, 10 Iowa 589; Chittenden *v.* Hobbs, 9 Iowa 417; Pittman *v.* Searcey, 8 Iowa 352; Bowen *v.* Gilhison, 7 Iowa 503; Lockard *v.* Eaton, 3 Greene 543; Chaney *v.* Ostrander, Morris 493. **Neb.**—American Exch. Bank *v.* Puckett, 1 Neb. (Unof.) 358, 95 N. W. 796. **N. C.**—Marsh *v.* Williams, 63 N. C. 371; Leak *v.* Moorman, 61 N. C. 168.

Necessity of More Than Mere Absence.—Love *v.* Young, 69 N. C. 65. See also **Clearwater v. Brill, 61 N. Y.** 625; Proctor *v.* Whitcher, 15 App. Div. 227, 44 N. Y. Supp. 190; Harroway *v.* Flint, 19 Misc. 411, 44 N. Y. Supp. 335; Miller *v.* Brinkerhoff, 4 Denio (N. Y.) 118, 47 Am. Dec. 242; Decker *v.* Bryant, 7 Barb. (N. Y.) 182; Kerchner *v.* McCormac, 25 S. C. 461.

Intent To Avoid Service of Summons.—Finn *v.* Mehrbach, 30 Civ. Proc. 242, 65 N. Y. Supp. 250.

Sufficiency of Allegation of Intent. Ely *v.* Hanks, 8 Fed. Cas. No. 4,430; Franke *v.* Havens, 102 App. Div. 67, 92 N. Y. Supp. 377; Hill *v.* Martin, 88 N. Y. Supp. 708; Allen *v.* Meyer, 7 Daly (N. Y.) 229.

The omission of the word "fraudulent" before "intent" did not render an averment insufficient, under a statute authorizing an attachment to issue when a debtor "is selling and is now trying to sell and dispose of his property, with the intent to cheat, hinder and delay his creditors." Lynn *v.* Stark, 6 Ky. L. Rep. 585.

38. Sherrill *v.* Fay, 14 Iowa 292.

Purchaser's Knowledge of Debtor's Fraudulent Intent.—The petition treated as an affidavit need not be more specific than the language of the statute. Loeb *v.* Smith, 78 Ga. 504, 3 S. E. 458.

39. Merrill *v.* Low, 1 Pin. (Wis.) 221.

When Intent Involved Statement Should Be More in Detail.—Neb.—Seidentopf *v.* Annabil, 6 Neb. 524. **Ohio.**—Harrison *v.* King, 9 Ohio St. 388. **Pa.**—Born *v.* Zimmerman, 8 Phila. 233. But see Werner *v.* Gross, 174 Pa. 622, 34 Atl. 327, 38 W. N. C. 149.

Language of Affidavit Construed.—The language of an affidavit, "for the purpose and with the fraudulent intent to defraud," is sufficiently broad and comprehensive to include the statutory term "hinder and delay" as the greater includes the less. Clayton *v.* Clark, 76 Kan. 832, 92 Pac. 1117.

(4.) **Necessity for Stating Facts To Support Allegation.** — In many jurisdictions it is necessary that the affidavit should be supported by a statement of the facts upon which it is founded,[40] and such facts as stated should be sufficient to support the attachment on the ground set up.[41] Indefinite or general statements,[42] or statements that are merely the conclusions of the pleader, are insufficient.[43] Nor are statements based upon information and belief,[44] or upon hearsay[45] sufficient to satisfy the requirements of this rule.

Facts.—In alleging that the defendant is about to remove some of his property from the state with intent to defraud his creditors, it is necessary to state facts and circumstances to sustain the charge of fraud. Finch *v.* Slater, 152 N. C. 155, 67 S. E. 264; Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847.

40. **N. Y.**—Wilmerding *v.* Cunningham, 65 How. Pr. 344; Conklin *v.* Dutcher, N. Y. Code Rep. (N. S.) 49. **S. C.**—Smith *v.* Walker, 6 S. C. 169; Allen *v.* Fleming, 14 Rich. L. 196. **W. Va.**—Hudkins *v.* Haskins, 22 W. Va. 645.

As to fraudulent disposition of property, see: **Mich.**—Chase *v.* Donovan, 118 Mich. 358, 76 N. W. 913. **N. Y.**—Jaffrey *v.* Nast, 57 Hun 585, 10 N. Y. Supp. 280; Mechanics', etc., Bank *v.* Loucheim, 55 Hun 396, 608, 8 N. Y. Supp. 520, 933. **S. C.**—Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744; Roddey *v.* Erwin, 31 S. C. 36, 9 S. E. 729; Brown *v.* Morris, 10 S. C. 467; Smith *v.* Walker, 6 S. C. 169.

As to hindering and delaying creditors, see Gray *v.* Neill, 86 Ga. 188, 12 S. E. 362.

As to removal of property with fraudulent intent, see Blakeslee *v.* Cattelain, 86 Hun 574, 33 N. Y. Supp. 903.

Fraud in Contracting or Incurring Liability.—U. S.—Fisher *v.* Secrist, 48 Fed. 264. **Nev.**—Branson *v.* Industrial Workers of the World, 30 Nev. 354, 95 Pac. 354.. **N. J.**—Liveright *v.* Greenhouse, 61 N. J. L. 156, 38 Atl. 697. **N. Y.**—Ellison *v.* Bernstein, 60 How. Pr. 145; *Ex parte* Robinson, 21 Wend. 672. **Ohio.**—Shawnee Commercial, etc., Bank Co. *v.* Miller, 24 Ohio C. C. 198. **W. Va.**—Elkins Nat. Bank *v.* Simmons, 57 W. Va. 1, 49 S. E. 893. **Wis.**—Mairet *v.* Marriner, 34 Wis. 582; Miller *v.* Munson, 34 Wis. 579, 17 Am. Rep. 461. **Wyo.**—Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

41. **Ill.**—Keith *v.* McDonald, 31 Ill. App. 17. **Minn.**—Hinds *v.* Fagebank, 9 Minn. 68. **N. Y.**—Parrott *v.* Mayer, 31 Misc. 50, 64 N. Y. Supp. 649. **S. C.** Bray Clothing Co. *v.* Shealy, 53 S. C. 12, 30 S. E. 620; Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272. **W. Va.** Goodman *v.* Henry, 42 W. Va. 726, 26 S. E. 528, 35 L. R. A. 847; Sandheger *v.* Hosey, 26 W. Va. 221; Hale *v.* Donahue, 25 W. Va. 414; Delaplain *v.* Armstrong, 21 W. Va. 211.

When the allegations are equally consistent with an honest intent on the part of the defendant as a dishonest one, it is not sufficient. Bernhard *v.* Cohen, 27 Misc. 794, 58 N. Y. Supp. 363, *affirming* 56 N. Y. Supp. 271. See also Pierce *v.* Johnson, 93 Mich. 125, 53 N. W. 16, 18 L. R. A. 486; J. H. Mohlman Co. *v.* Landwehr, 87 App. Div. 83, 83 N. Y. Supp. 1073.

42. Boulter *v.* Behrend, 9 Mackey (D. C.) 567; Yates *v.* North, 44 N. Y. 271; National Broadway Bank *v.* Barker, 61 Hun 625, mem., 16 N. Y. Supp. 75; Claflin *v.* Silberg, 55 Hun 609, 8 N. Y. Supp. 557; Stein *v.* Levy, 55 Hun 381, 8 N. Y. Supp. 505, 55 Hun 609, 8 N. Y. Supp. 934; Gersenberger *v.* Herman, 51 Hun 640, 3 N. Y. Supp. 855; Kibbe *v.* Herman, 51 Hun 438, 3 N. Y. Supp. 852; Fleitmann *v.* Sickle, 47 Hun 633, mem., 13 N. Y. St. 399.

43. American Horse Exch. *v.* Strauss, 75 Hun 192, 27 N. Y. Supp. 282; Brown *v.* Keogh, 14 N. Y. Supp. 915; Smith *v.* Fogarty, 6 Civ. Proc. (N. Y.) 366.

44. **Minn.**—Keigber *v.* McCormick, 11 Minn. 545. **N. Y.**—Steuben County Bank *v.* Alberger, 78 N. Y. 252; Yates *v.* North, 44 N. Y. 271; Smith *v.* Luce, 14 Wend. 237. **S. C.**—Claussen *v.* Fultz, 13 S. C. 476. **Wis.**—Pratt *v.* Pratt, 2 Chand. 48, 2 Pin. 395.

45. Decker *v.* Bryant, 7 Barb. (N. Y.) 182.

(C.) Statement of More Than One Ground.—(1.) **In the Conjunctive.**—A conjunctive statement of more than one ground of attachment in an affidavit is permissible,[46] and the proof of one or more of the grounds stated will suport a recovery.[47]

Where the grounds alleged are inconsistent, however, and necessarily negative the existence of each other, the affidavit is bad;[48] as when the affidavit avers that the defendant has removed and disposed of his property and is about to remove and dispose of his property.[49]

(2.) In the Alternative or Disjunctive. — Generally, a statement of two distinct grounds of attachment in the affidavit in the alternative or disjunctive is considered fatal to the affidavit,[50] though the contrary is held

46. **Ala.**—Smith *v.* Baker, 80 Ala. 318. **Fla.**—Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391. **Ga.**—Kennon *v.* Evans, 36 Ga. 89. **Ill.**—Lawver *v.* Langhans, 85 Ill. 138. **Mich.**—Detroit Free Press Co. *v.* Medical, etc., Assn., 64 Mich. 605, 31 N. W. 537. **N. Y.** Williams *v.* Rightmyer, 88 Hun 372, 2 N. Y. Ann. Cas. 160, 34 N. Y. Supp. 826. **Okla.**—Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110. **Tex.**—McKay *v.* Elder, 92 S. W. 268; Cleveland *v.* Boden, 63 Tex. 103. **W. Va.**—Delaplaine *v.* Rogers, 29 W. Va. 783, 2 S. E. 800.

But in one case this was held to be bad, where it was impossible to tell which was relied on. Roberts *v.* Burns, 48 W. Va. 92, 35 S. E. 922, 86 Am. St. Rep. 17.

While the affidavit may state as many grounds of attachment as the statute allows, a statement of one of the statutory grounds is usually sufficient. Upp *v.* Neuhring, 127 Iowa 713, 104 N. W. 350; Hemmi *v.* Grover, 18 N. D. 578, 120 N. W. 561.

And if one of two grounds averred is defectively stated, the affidavit will be held good as to the other. Hemmi *v.* Grover, 18 N. D. 578, 120 N. W. 561; Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. 798.

47. **Ill.**—Rosenheim *v.* Fifield, 12 Ill. App. 302. **Ind.** — McCollem *v.* White, 23 Ind. 43. **Pa.**—Simon *v.* Johnson, 7 Kulp 166.

48. Holloway *v.* Herryford, 9 Iowa 353.

49. American Horse Exch. *v.* Strauss, 75 Hun 192, 27 N. Y. Supp. 282; Hale *v.* Prote, 75 Hun 13, 26 N. Y. Supp. 950; Johnson *v.* Buckel, 65 Hun 601, 20 N. Y. Supp. 566; Pearre *v.* Hawkins, 62 Tex. 434; Dunnenbaum *v.* Schram, 59 Tex. 281; Carter *v.* Younger, 2 Posey Unrep. Cas. 445.

Property Consisting of Only One Item.—Hinds *v.* Fagebank, 9 Minn. 68.

Contrary Ruling.—Such allegations have been held not inconsistent in the following cases: **U. S.**—Salmon *v.* Mills, 68 Fed. 180, 32 U. S. App. 422, 15 C. C. A. 356. **Minn.**—Nelson *v.* Munch, 23 Minn. 229. **Utah.**—Deseret Nat. Bank *v.* Little, 13 Utah 265, 44 Pac. 930. **Wash.**—Blackinton *v.* Rumpf, 12 Wash. 270, 40 Pac. 1063.

50. **Ala.**—Watson *v.* Auerbach, 57 Ala. 353; Johnson *v.* Hale, 3 Stew. & P. 331. **Cal.**—Winters *v.* Pearson, 72 Cal. 553, 14 Pac. 304; Merced Bank *v.* Morton, 58 Cal. 360; Wilke *v.* Cohn, 54 Cal. 212. **Ga.**—Brafman *v.* Asher, 78 Ga. 32. **Ia.**—Stacy *v.* Stichton, 9 Iowa 399. **Kan.**—Dickenson *v.* Cowley, 15 Kan. 269. **Mich.**—Kegel *v.* Schrenkheisen, 37 Mich. 174. **Minn.**—Guile *v.* McNanny, 14 Minn. 520, 160 Am. Dec. 244. **Miss.**—Hilton *v.* McLeod, 93 Miss. 516, 46 So. 534; Bishop *v.* Fennerty, 46 Miss. 570. **N. Y.**—Dintruff *v.* Tuthill, 62 Hun 591, 17 N. Y. Supp. 556. **Ohio.** Brownell *v.* Colbath Steam Heating Co., 9 Ohio Dec. (Reprint) 413, 13 Cinc. L. Bul. 35; Schataman *v.* Stump, 8 Ohio Dec. (Reprint) 420, 7 Cinc. L. Bul. 334; Rogers *v.* Ellis, 1 Handy 48, 1 Disney 1. **Pa.**—Jewel *v.* Howe, 3 Watts 144; Simon *v.* Johnson, 7 Kulp 166; Boyd *v.* Lippincott, 2 Pa. Co. Ct. 585. **S. C.**—Hagood *v.* Hunter, 1 McCord L. 511. **Tex.**—Doty *v.* Moore, 102 Tex. 48, 112 S. W. 1038; Dunnenbaum *v.* Schram, 59 Tex. 281; Carpenter *v.* Pridgen, 40 Tex. 32; Culbertson *v.* Cabeen, 29 Tex. 247; Garner *v.* Burleson, 26 Tex. 348; Hopkins *v.* Nichols, 22 Tex. 206; McKay *v.* Elder (Tex. Civ. App.), 92 S. W. 268. **W. Va.**—Roberts *v.* Burns, 48 W. Va. 92, 35

in some jurisdictions.[51] But several aspects of the same ground may be stated disjunctively without vitiating the affidavit.[52] And where either of the distinct grounds set forth in the statute has a disjunctive conjunction within itself, it is always proper to aver it in the terms of the statute.[53]

(D.) Statement of Same Ground in Second Affidavit.—A second affidavit

S. E. 922, 86 Am. St. Rep. 17 ("one or more of the following grounds"); Sandheger *v.* Hosey, 26 W. Va. 223. **Wis.**—Goodyear Rubber Co. *v.* Knapp, 61 Wis. 103, 20 N. W. 651.

An alleggation in the alternative that the indebtedness was upon an express or implied contract is not sufficient. Hawley *v.* Delmas, 4 Cal. 195. See, however, Drew *v.* Dequindre, 2 Dougl. (Mich.) 93. And in Flagg *v.* Dare, 107 Cal. 482, 40 Pac. 804, it was held not to be necessary to state whether the contract is express or implied, if the indebtedness clearly appears.

51. **Ky.**—Hardy *v.* Trabue, 4 Bush 644; Wood *v.* Wells, 2 Bush 197; Barnard *v.* Sebre, 2 A. K. Marsh. 151; Shipp *v.* Davis, Hard. 65. **La.**—Coleman *v.* Teddlie, 106 La. 192, 30 So. 99. **N. C.**—Penniman *v.* Daniel, 90 N. C. 154. **Tenn.**—Smith *v.* Foster, 3 Coldw. 139.

52. **U. S.**—Societe, etc., *v.* Milliken, 135 U. S. 304, 10 Sup. Ct. 823, 34 L. ed. 208. **Ala.**—Cannon *v.* Logan, 5 Port. 77. **Colo.**—McCraw *v.* Welch, 2 Colo. 284. **Ga.**—Brooks *v.* Hutchinson, 122 Ga. 838, 50 S. E. 926; Irvin *v.* Howard, 37 Ga. 18. **Ind.**—Parsons *v.* Stockbridge, 42 Ind. 121. **Kan.**—Cook *v.* Burnham, 3 Kan. App. 27, 44 Pac. 447. **Md.**—Howard *v.* Oppenheimer, 25 Md. 350. **Mich.**—Jones *v.* Peck, 104 Mich. 389, 59 N. W. 659; Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659. **Minn.**—Brown *v.* Minneapolis Lumber Co., 25 Minn. 461. **Miss.**—Bosbyshell *v.* Emanuel, 12 Smed. & M. 63; Commercial Bank *v.* Ullman, 10 Smed. & M. 411. **Neb.**—Tessier *v.* Englehart, 18 Neb. 167, 24 N. W. 734. **N. Y.**—Smith *v.* Wilson, 76 Hun 565, 28 N. Y. Supp. 212. **N. D.**—McCarthy Bros. Co. *v.* McLean County Farmers' Elevator Co., 118 N. W. 1049. **R. I.** Stokes *v.* Potter, 10 R. I. 576. **S. D.** Dawley *v.* Sherwin, 5 S. D. 594, 59 N. W. 1027. **Tex.**—Blum *v.* Davis, 56 Tex. 423. **Utah.**—Johnson *v.* Emery, 31 Utah 126, 86 Pac. 869, 11 Ann. Cas. 23. **W. Va.**—Sandheger *v.* Hosey, 26 W. Va. 221. **Wis.**—Winner *v.* Kuehn, 97 Wis. 394, 72 N. W. 227; Klenk *v.* Schwalm, 19 Wis. 111; Morrison *v.* Fake, 1 Pin. 133.

The test is can perjury be assigned. Goodyear Rubber Co. *v.* Knapp, 61 Wis. 113, 20 N. W. 651.

"About to assign, dispose of, or secrete." Brown *v.* Hawkins, 65 N. C. 645.

Departed From the State or Concealed Himself Within It.—Van Alstyne *v.* Erwine, 11 N. Y. 331. And see Swezey *v.* Bartlett, 3 Abb. Pr. N. S. (N. Y.) 444.

53. **U. S.**—Societe Fonciere, etc., *v.* Milliken, 135 U. S. 304, 10 Sup. Ct. 823, 34 L. ed. 208. **Colo.**—McCraw *v.* Welch, 2 Colo. 284. **Ga.**—Irwin *v.* Howard, 37 Ga. 18. **Ind.**—Parsons *v.* Stockbridge, 42 Ind. 121. **Kan.**—Cook *v.* Burnham, 3 Kan. App. 27, 44 Pac. 447. **Ky.**—Wood *v.* Wells, 2 Bush 197. **La.**—Coleman *v.* Teddlie, 106 La. 192, 30 So. 99. **Md.**—Howard *v.* Oppenheimer, 25 Md. 350. **Miss.**—Helton *v.* McLeod & Dantzler, 93 Miss. 516, 46 So. 534, where the affidavit was held not defective for alleging in the language of the statute "that the said H. has removed or is about to remove himself or his property out of this state." **Neb.**—Tessier *v.* Englehart, 18 Neb. 167, 24 N. W. 734. **N. C.**—Penniman *v.* Daniels, 90 N. C. 154. **N. D.**—McCarthy Bros. Co. *v.* McLean County Farmers' Elev. Co., 18 N. D. 176, 118 N. W. 1049, quoting from Shinn on Attachment & Garnishment, §145, p. 237; Waples on Attachment, §136, and *citing* Drake on Attachment, §102. **Tenn.**—Conrad *v.* McGee, 9 Yerg. 428. **Utah.**—Johnson *v.* Emery, 31 Utah 126, 86 Pac. 869; Bank *v.* Little, Roundy & Co., 13 Utah 265, 44 Pac. 930. **Wis.**—Winner *v.* Kuehn, 97 Wis. 394, 72 N. W. 227; Klenk *v.* Schwalm, 19 Wis. 111.

Rule Judicially Stated.—In Parsons *v.* Stockbridge, 42 Ind. 121, the court said: "The ground of the motion

merely repeating the ground stated in a prior one, will be repeated as surplusage.[54]

G. AMENDMENT OF AFFIDAVIT. — **1. Right To Amend.** — In some jurisdictions, it seems that the affidavit cannot be amended at all,[55] due to the fact, no doubt, that there is no statute allowing it.[56]

2. Amendable Defects. — a. *In General.* — It is generally held, however, that while in matters of substance an affidavit is not amendable,[57]

to dismiss the attachment was the insufficiency of the affidavit in stating the cause for the attachment. . . . The objection is not well taken. Where the disjunctive 'or' is used not to connect two distinct facts or different natures, but to characterize and include two or more phases of the same fact, attended with the same results, the construction contended for is not applicable."

54. Wharton *v.* Conger, 9 Smed. & M. (Miss.) 510.

55. **Cal.**—Winters *v.* Pearson, 72 Cal. 553, 14 Pac. 304. **Pa.**—Mylert *v.* White, 1 W. N. C. 626. **Tex.**—Avery *v.* Zander, 77 Tex. 207, 13 S. W. 971; Marx *v.* Abramson, 53 Tex. 264; Sydnor *v.* Chambers, 2 Dall. 601.

Where the affidavit presented, though defective, is amendable, it is sufficient to give the court jurisdiction. Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. 694.

56. Flexner *v.* Dickerson, 65 Ala. 129.

Where an affidavit before a notary, and the warrant from a justice to a clerk are from a jurisdiction separate from that of the circuit court, the latter can exercise no power of amendment over them. Halley *v.* Jackson, 48 Md. 254.

A statute which provides for amendment of other proceedings, but which is silent as to the affidavit, indicates an intention that the affidavit shall not be amendable. Cohen *v.* Manco, 28 Ga. 27; Brown *v.* McClusky, 26 Ga. 577.

57. **Ala.**—Flexner *v.* Dickerson, 65 Ala. 129; Shield *v.* Dothard, 59 Ala. 595. **Cal.**—Pajaro Valley Bank *v.* Scurich, 7 Cal App. 732, 95 Pac. 911. **Ill.**—Clark *v.* Roberts, 1 Ill. 285. **N. C.** Palmer *v.* Bosher, 71 N. C. 291. **Tenn.** Lillard *v.* Carter, 7 Heisk. 604. **W. Va.** Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787. **Wyo.**—Blyth, etc., Co. *v.* Swensen, 7 Wyo. 303, 51 Pac. 873.

Allowing Name of Defendant To Be Stricken Out.—Blair *v.* Winston, 84 Md. 356, 35 Atl. 1101.

Failure to allege ground of attachment cannot be supplied by amendment. **Colo.**—Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464. **Ga.**—Moore *v.* Neill, 86 Ga. 186, 12 S. E. 222. **Ia.**—Bundy *v.* McKee, 29 Iowa 253. See also Wadsworth *v.* Cheeny, 10 Iowa 257. **N. Y.**—Zerega *v.* Benoist, 7 Robt. 199, 33 How. Pr. 129. See *infra*, VIII.

Plaintiff Resident or Contract Made in the State.—Unless the fact appear in the affidavit that as against a foreign corporation the plaintiff is a resident, or that the cause of action arose on a contract made in the state, the affidavit is defective in a jurisdictional matter and is not amendable. Adler *v.* Order of American Fraternal Circle, 22 Civ. Proc. 336, 28 Abb. N. C. 233, 19 N. Y. Supp. 885.

Failure to state the absence of the plaintiff is not amendable.— Pool *v.* State, 3 Met. (Ky.) 278.

Amendments To Add Additional Grounds.—Amendments are generally permitted to set out a new or additional ground of attachment. **U. S.** Fitzpatrick *v.* Flannagan, 106 U. S. 648, 1 Sup. Ct. 369, 27 L. ed. 211. **Ga.** Dolvin *v.* Hicks, 4 Ga. App. 653, 62 S. E. 95. **Ill.**—Booth *v.* Rees, 26 Ill. 45; Ray *v.* Keith, 134 Ill. App. 119, *affirmed*, 231 Ill. 213, 83 N. E. 152. **Ia.**—Citizens' Nat. Bank *v.* Converse, 105 Iowa 669, 75 N. W. 506. **Ky.**—Hey *v.* Harding, 21 Ky. L. Rep. 771, 53 S. W. 33. **Mo.**—Musgrove *v.* Mott, 90 Mo. 107, 2 S. W. 214. **Neb.**—Brookmire *v.* Rosa, 34 Neb. 227, 51 N. W. 840. **N. Y.**—Cammann *v.* Tompkins, Code Rep. (N. S.) 16.

To Change Ground Alleged.—An amendment as to the ground of the attachment is permissible under the statute, and the plaintiffs may be permitted to amend their affidavit from the ground of "removing a material

amendments in matters of form may be allowed if authorized by statute.[58] But in some states, defects either of form or of substance

part of their property out of the state'' to ''about to sell, convey or otherwise dispose of.'' Winter *v.* Kirby, 68 Ark. 471, 60 S. W. 34.

Discretion of Lower Court.—The discretion of the lower court in sustaining a motion to strike an amendment to the petition alleging an additional ground of attachment will not be interferred with in the absence of abuse. Emerson *v.* Converse, 106 Iowa 330, 76 N. W. 705.

Amendments are also allowed to set out the grounds which have already been alleged. **Ga.**—Brumby *v.* Rickoff, 94 Ga. 429, 21 S. E. 232. **Miss.**—Helton *v.* McLeod, 93 Miss. 516, 46 So. 534. **Mo.**—Norton *v.* Flake, 36 Mo. App. 698; Stewart *v.* Cabanne, 16 Mo. App. 517. **N. C.**—Sheldon *v.* Kivett, 110 N. C. 408, 14 S. E. 970.

To State Facts Constituting Fraud. Where an affidavit sets forth the fraudulent disposition of property in the language of the statute it may be amended to state the facts constituting the fraud. Josephi *v.* Mady Clothing Co., 13 Mont. 195, 33 Pac. 1.

Negativing Purpose of Harrassing Defendant.—Hall *v.* Brazleton, 40 Ala. 406, 46 Ala. 359; Saunders *v.* Cavett, 38 Ala. 51.

Where jurdisdictional facts have not been stated, an affidavit is not amendable with respect thereto. Ladenburg *v.* Commercial Bank, 24 Civ. Proc. 234, 32 N. Y. Supp. 873, *reversed,* 87 Hun 269, 33 N. Y. Supp. 821.

To Offer Additional Proofs Not Allowable.—Buhl *v.* Ball, 41 Hun (N. Y.) 61.

Amendments in Substance Allowed. Langworthy *v.* Waters, 11 Iowa 432.

58. **Ala.**—Pearsoll *v.* Middlebrook. 2 Stew. & P. 406. **Kan.**—Baker Wire Co. *v.* Kingman, 44 Kan. 270, 24 Pac. 476; Burton *v.* Robinson, 5 Kan. 287. **Mo.**—Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. 694. **N. C.**—Penniman *v.* Daniels, 93 N. C. 332; Brown *v.* Hawkins, 65 N. C. 645. **Okla.**—Reister *v.* Land, 14 Okla. 34, 76 Pac. 156.

To Show Disposition of Property. An attachment affidavit may be amended to show the fact that the defendant had entirely disposed of the property purchased from the plaintiff by fraudulent representations. Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 496.

Description of Cause of Action.—Henderson *v.* Drace, 30 Mo. 358.

Two Grounds of Attachment Disjunctively Joined.—Salmon *v.* Mills, 49 Fed. 333, 4 U. S. App. 101, 1 C. C. A. 278.

Amendable in Federal Courts, Although Not in State Courts.—Erstein *v.* Rothschild, 22 Fed. 61.

To Make Reference to Suit Pending. Roberts *v.* Dunn, 71 Ill. 46.

To Show That Defendant Had Property Not Exempt.—Bunn *v.* Pritchard, 6 Iowa 56.

To correct an affidavit taken before one interested in cause. Yoakan *v.* Howser, 37 Kan. 130, 14 Pac. 433; Swearingen *v.* Howser, 37 Kan. 126, 14 Pac. 436.

But this defect was held not amendable in Owens *v.* Johns, 59 Mo. 89.

Amendment to show agency or relation of attorney and client. Ala.—Paulhaus *v.* Leber, 54 Ala. 91. **Kan.** Tracy *v.* Gunn, 29 Kan. 508. **Mo.**—Kirksville Sav. Bank *v.* Spangler, 59 Mo. App. 172.

To Show Venue of Affidavit.—**Mo.** Avery *v.* Good, 114 Mo. 290, 21 S. W. 815. **Neb.**—Struthers *v.* McDowell, 5 Neb. 491. **N. Y.**—Fisher *v.* Bloomberg, 74 App. Div. 368, 77 N. Y. Supp. 541.

Amendment may be allowed properly entitling the affidavit. S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135.

Omission of officer's jurat may be supplied by amendment. **Ala.**—Hyde *v.* Adams, 80 Ala. 111. **Colo.**—Skinner *v.* Beshoar, 2 Colo. 383. **La.**—State *v.* Downing, 48 La. Ann. 1420, 20 So. 907. **Miss.**—Boisseau *v.* Kahn, 62 Miss. 757. **N. Y.**—Lawton *v.* Kiel, 51 Barb. 30. **Tenn.**—Wiley *v.* Bennett, 9 Baxt. 581; Scott *v.* White, 1 Shannon Tenn. Cas. 23, Thomp. Tenn. Cas. 38. **W. Va.** Bohn *v.* Zeigler, 44 W. Va. 402, 29 S. E. 983.

The irregularity may be cured by permitting the officer to sign the jurat *nunc pro tunc.* Simon *v.* Johnson. 7 Kulp (Pa.) 166; Hart *v.* Jones, 6 Kulp (Pa.) 326.

As to Date of Jurat.—Where by an error of an officer the jurat attached to

are amendable under express direction of the legislature.[59]

b. *As to Parties.* — While amendments are permitted very generally in order to supply the names of the parties or to more fully describe them,[60] or to show the place of residence of the defendant,[61] it has been held that no amendment will be allowed to introduce a new party plaintiff,[62] or to strike out one of the defendants.[63]

c. *As to Averments of Nature and Amount of Indebtedness.* — An amendment of the affidavit in the averment of the nature and amount of plaintiff's claim is generally permitted,[64] but not to state a cause

an affidavit was dated one day subsequent to the issuance of the writ, and there is no doubt that the affidavit preceded the writ, an amendment to cure the defect should have been allowed. Arkansas City Lumb. Co. *v.* Scott, 5 Kan. App. 636, 47 Pac. 545.

Executors and Administrators.— Booth *v.* Callahan, 97 Md. 317, 55 Atl. 625; Alston *v.* Sharp, 2 Lea (Tenn.) 515.

Want of affiant's signature may be supplied by amendment. **Ala.**—McCain *v.* Street, 136 Ala. 625, 33 So. 872; Savage *v.* Aikins, 124 Ala. 378, 27 So. 514. **Ark.**—Fortenheim *v.* Claflin, 47 Ark. 49, 14 S. W. 462. **Ia.**—Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138. **Okla.**—Dunn *v.* Drummond, 4 Okla. 461, 51 Pac. 656.

Although, in some jurisdictions the failure of the affiant to subscribe is held to make the affidavit a nullity and therefore, non-amendable. **Mo.**—Sedalia Third Nat. Bank *v.* Garton, 40 Mo. App. 113. **Tenn.**—Watt *v.* Carnes, 4 Heisk. 532. **Tex.**—Davis *v.* Sherrill, 113 S. W. 556.

Stating grounds disjunctively is amendable. **U. S.**—Salmon *v.* Mills, 49 Fed. 333, 4 U. S. App. 101, 1 C. C. A. 278. **Miss.**—Bishop *v.* Fennerty, 46 Miss. 570. **Wash.**—Nesqually Mill Co. *v.* Taylor, 1 Wash. Ter. 1.

Affidavit improperly made upon affiant's belief, or information and belief, is amendable. **Ark.**—Landfair *v.* Lowman, 50 Ark. 446, 8 S. W. 188; Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458. **Ill.**—Booth *v.* Rees, 26 Ill. 45. **Neb.**—Clarke Bkg. Co. *v.* Wright, 37 Neb. 382, 55 N. W. 1060.

59. Savage *v.* Atkins, 124 Ala. 378, 27 So. 514.

Affidavit for Enforcement of Statutory Lien.—Under a statute allowing amendments as a matter of right, which do not entirely change the parties, or the subject-matter, an affidavit defective in substance for the enforcement of a statutory lien may be amended so as the pleading will be sustained by the evidence sought to be introduced. Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458.

60. **Ala.**—McKissack *v.* Witz, 120 Ala. 412, 25 So. 21; *Ex parte* Nicrosi, 103 Ala. 104, 15 So. 507; Rosenberg *v.* H. B. Claflin Co., 95 Ala. 249, 10 So. 521; Sims *v.* Jacobson, 51 Ala. 186. **Mich.**—Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659; Barber *v.* Smith, 41 Mich. 138, 1 N. W. 992. **N. C.**—Hall *v.* Thorburn, 61 N. C. 158.

Where a material party should have appeared as co-plaintiff in the writ and affidavit, leave should have been given the plaintiff to amend the affidavit and writ. Shaw *v.* Brown, 42 Miss. 309.

To Show That Party Is a Receiver. Muth *v.* Erwin, 14 Mont. 227, 36 Pac. 43.

61. Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232.

62. Fargo *v.* Cutshaw, 12 Ind. App. 392, 39 N. E. 532.

63. Halley *v.* Jackson, 48 Md. 254, in the absence of statutory authority.

64. **Ill.**—Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232; Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695. **Kan.**—Wells *v.* Danford, 28 Kan. 487. **Ky.**—Allen *v.* Brown, 4 Met. 342. **Mont.**—S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135; Newell *v.* Whitwell, 16 Mont. 243, 40 Pac. 866. **N. Y.**—Sulzbacher *v.* Cawthra, 14 Misc. 545, 36 N. Y. Supp. 8.

Debt Not Due.—A petition or affidavit defective in not stating that the debt was not due may be amended to cure this defect. **Ia.**—Wadsworth *v.* Cheeney, 13 Iowa 576. **Miss.**—Dal-

of action different from that stated in the original affidavit.[65]

3. Something To Amend By. — If the affidavit is void it cannot of course be amended because there is nothing to amend by.[66]

4. What Stage of Proceedings. — Defects in an affidavit may be amended as soon as discovered,[67] or after a motion has been made to quash on account of such defect,[68] and before ruling is made on a plea in abatement,[69] or even, it has been held, at any time after the commencement of the trial and before final judgment.[70] But an amendment cannot be allowed to affect rights which have been legally and properly fixed before such amendments were allowed.[71]

H. Supplemental Affidavits. — **1. Right To File.** — In most jurisdictions, the affiant is permitted to file an additional or supplemental

sheimer *v.* McDaniel, 69 Miss. 339, 12 So. 338. **Neb.**—*Contra*, John V. Farwell Co. *v.* Wright, 38 Neb. 445, 56 N. W. 984. **Tex.**—Gimbel *v.* Gompreeht, 89 Tex. 497, 35 S. W. 470; Tootle *v.* Alexander, 13 Tex. Civ. App. 615, 35 S. W. 821.

But in Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391, it was held that the failure of the affidavit to allege that as to a claim not due "the amount of The debt or demand claimed and charged against the opposite party is actually an existing debt or demand" is a substantial defect, and such is not amendable, but vitiates the proceedings.

Overdue Book Accounts.—Leppel *v.* Beck, 2 Colo. App. 390, 31 Pac. 185.

To Correct a Variance.—George F. Dittman Boot, etc., Co. *v.* Mixon, 120 Ala. 206, 24 So. 847.

Where an affidavit is in form of that of a debt past due, while the declaration showed that the principal part of the debt to the plaintiff was not due at that time and that so much as was due was less than that over which the circuit court had jurisdiction, it is not amendable for attachment, is a purely statutory remedy, and a party resorting to it must bring himself within the statute. Yale *v.* McDaniel, 69 Miss. 337, 12 So. 556.

"Justly Indebted." — Tommey *v.* Gamble, 66 Ala. 469.

65. **Neb.**—Westover *v.* Van Dorn Iron Works, 70 Neb. 415, 97 N. W. 598. **Okla.**—Jaffray *v.* Wolf, 1 Okla. 312, 33 Pac. 945. **Pa.**—Sagee *v.* Rudderow, 1 Pa. Co. Ct. 373.

When an amendment to the petition sets up an inconsistent cause of action, the cause of action set out in the original petition must be deemed abandoned, and the attachment cannot be maintained on the amended petition. Young *v.* Broadbent, 23 Iowa 539.

66. Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498.

67. Musgrove *v.* Mott, 90 Mo. 107, 2 S. W. 214.

68. Moline, etc., Co. *v.* Curtis, 38 Neb. 520, 57 N. W. 161; Clarke Banking Co. *v.* Wright, 37 Neb. 382, 55 N. W. 1060; Struthers *v.* McDowell, 5 Neb. 491.

Even after a motion to quash the attachment has been filed the court may properly permit the notary public, before whom the affidavit was made, to insert the proper venue, according to the fact, and thereupon overrule the motion. Struthers *v.* McDowell, 5 Neb. 491.

69. Simpson *v.* East, 124 Ala. 293, 27 So. 436. But see Kelly *v.* Bently, 9 La. Ann. 586.

70. Moore *v.* Harrod, 101 Ky. 248, 40 S. W. 675; Claflin *v.* Hoover, 20 Mo. App. 314.

71. Ala.—Haas *v.* Cook, 148 Ala. 670, mem., 41 So. 731. **Ky.**—Northern Lake Ice Co. *v.* Orr, 102 Ky. 586, 44 S. W. 216; Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186. **Wis.**—Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408.

affidavit,[72] before objection has been made,[73] or after a motion to quash has been sustained.[74]

2. Scope of Supplemental Affidavits. — In some jurisdictions, supplemental affidavits are permitted not only to contradict, answer or explain those submitted by the defendant, but to support the original application.[75]

I. VARIANCE. — **1. As to Parties.** — A material variance between the names as stated in the affidavit and in the other papers in the cause, will avoid the affidavit.[76] But no such variance exists between the affidavit and other proceedings with respect to the parties as will render the attachment invalid where the variance existing in the setting out of the parties occurs merely through the further description of the same persons in the various proceedings.[77]

2. As to Cause of Action. — There must be no variance between the statement of the cause of action in the affidavit and in the other papers in the cause.[78] But no variance exists where the facts set forth in the

72. Spreen *v.* Delsignore, 94 Fed. 71; Clark *v.* Clark, 64 N. C. 150.

In Pennsylvania it was held that an attachment proceeding under the act of 1869 must stand or fall on the first affidavit. Robinson *v.* Atkins, 2 W. N. C. 111. See also Talhelm *v.* Hoover, 4 Pa. Co. Ct. 172; National Bank of Republic *v.* Tasker, 1 Pa. Co. Ct. 173; Jacobs *v.* Tichenor, 27 W. N. C. 35; Miller *v.* Smith, 2 Pearson 265.

In Eldridge *v.* Robinson, 4 Serg. & R. (Pa.) 548, it was held that the plaintiff, having made an affidavit which was not sufficient, would not be permitted in the appellate court to offer a supplemental affidavit, because such a rule is adapted to produce certainty and avoid the temptation to perjury.

Additional Affidavit Not Allowed.— United States Banking Co. *v.* Bachman, 38 W. Va. 84, 18 S. E. 382.

Additional bond required in Illinois if additional grounds are set forth. Page *v.* Dillon, 61 Ill. App. 282.

73. Grim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753.

74. Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847.

75. Yates *v.* North, 44 N. Y. 271; Davis *v.* Reflex Camera Co., 97 App. Div. 73, 89 N. Y. Supp. 587; Morgan *v.* Avery, 7 Barb. (N. Y.) 656; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348; Morgan *v.* Avery, 2 N. Y. Code Rep. 92, 121.

Supplemental Affidavits May Be Filed To Set Up Newly-Discovered Evidence.—Lewis *v.* Bragg, 47 W. Va. 707, 35 S. E. 943; Miller *v.* Zeigler, 44 W. Va. 484, 29 S. E. 981, 67 Am. St. Rep. 777; Burgunder *v.* Zeigler, 44 W. Va. 413, 29 S. E. 1034.

76. Focke *v.* Hardeman, 67 Tex. 173, 2 S. W. 363; Sims *v.* Howell Bros. Shoe Co., (Tex. App.), 15 S. W. 120; 4 Wills. Civ. Cas. §180.

Allegations in State and Federal Courts.—Where in order to get jurisdiction in the federal court the affidavit stated that the defendant was a resident, and the property being brought within the state, the suit was voluntarily discontinued and an attachment suit brought in the state court under an affidavit alleging the defendant to be a resident, the court held the affidavit to be insufficient to support the attachment, being in direct variance with the one held in the federal court. Gilbert *v.* Hollinger, 14 La. Ann. 441.

77. Clanton *v.* Laird, 12 Smed. & M. (Miss.) 568; Commercial Bank *v.* Ullman, 10 Smed. & M. (Miss.) 411; Prince *v.* Turner, 2 Wills. Civ. Cas. §657.

Common Law and Statutory Liability of Married Women.—Wright *v.* Snedecor, 46 Ala. 92.

Liability of Surviving Partners.— Sheffield *v.* Key, 14 Ga. 537.

78. Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787.

There is such variance as will invalidate the proceedings where there is no relation whatever between the cause

affidavit will support the cause of action declared in the other proceedings.[79]

3. As to Amount of Claim. — Immaterial variances between the amount stated in the affidavit and that stated in the other proceedings in the cause will not vitiate the proceedings.[80]

4. As to Grounds of Attachment. — Where there is a variance in the grounds of the attachment as alleged in the petition and the affidavit or between the evidence as brought out and the facts alleged in the affidavit, it has been held to be fatal.[81]

5. Immaterial Variances. — An immaterial variance between the writ and the affidavit, will not vitiate it.[82]

6. How Availed of. — A variance between the affidavit and the other papers in the cause, cannot be raised by demurrer.[83]

J. DEFECTS IN AFFIDAVIT.— **1. Particular Defects.** —Venue. — According to the older cases, an affidavit for attachment which contains no venue is fatally defective.[84] But the doctrine generally prevailing now

of action as stated in the affidavit and the one stated in the other proceedings. Deering *v.* Collins, 38 Mo. App. 80.

In Horton *v.* Miller, 84 Ala. 537, 4 So. 370, the affidavit for attachment before a justice of the peace was based on a statutory claim for advances made to a tenant; on appeal an amended claim was filed containing only the common counts.

When the cause of action set forth in the declaration is opposed or contradictory to that stated in the affidavit, this is a fatal variance. Simmons *v.* Simmons, 56 W. Va. 65, 48 S. E. 833, 107 Am. St. Rep. 890.

79. **Ill.**—Palmer *v.* Logan, 4 Ill. 56. **Miss.**—Hambrick *v.* Wilkins. 65 Miss. 18, 3 So. 67, 7 Am. St. Rep. 631. **S. C.** Fleming *v.* Byrd, 78 S. C. 20, 58 S. E. 965.

80. **Ark.**—Heard *v.* Lowry, 5 Ark. 522; Grotte *v.* Nagle, 50 Neb. 363, 69 N. W. 973; Tessier *v.* Lockwood, 18 Neb. 167, 24 N. W. 734. **Tex.**—Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706.

The variance between the amount stated in the affidavit and in the other proceedings is immaterial if the affidavit states the smaller amount. Henrie *v.* Sweasey, 5 Blackf. (Ind.) 273; Elrod *v.* Rice (Tex.), 99 S. W. 733; Smith *v.* Mather (Tex.), 49 S. W. 257; Aultman *v.* Smyth (Tex.), 43 S. W. 932; Piggott *v.* Schram, 64 Tex. 447; Stewart *v.* Heidenheimer, 55 Tex. 644.

But if the amount stated in the affidavit is larger than that stated in the petition or other papers, the variance is material. Hughes *v.* Foreman, 78 Ill. App. 460; Sanger *v.* Texas Gin, etc. Co. (Tex.), 47 S. W. 740; Rogers *v.* East Line Lumb. Co., 11 Tex. Civ. App. 108, 33 S. W. 312.

Omission of item amendable, and variance therefore not material. La-Force *v.* Schiff-Lewin Co. (Tex.), 29 S. W. 77.

81. Brooks *v.* Hutchinson, 122 Ga. 838, 50 S. E. 926; Simpson *v.* Holt, 89 Ga. 834, 16 S. E. 87; Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210.

82. Stewart *v.* Chappell, 98 Md. 527, 57 Atl. 17.

Nature of indebtedness, whether for rent of land or on a bond. Perkerson *v.* Snodgrass, 85 Ala. 137, 4 So. 752.

Mistake by Court.—Lovelady *v.* Harkins, 6 Smed. & M. (Miss.) 412.

Additional Particulars no Variance. Doty *v.* Sprinkle (W. Va.), 60 S. E. 882.

Amendment Changing Date.—Orlopp *v.* Schueller, 26 Ohio C. C. 127; Donnelly *v.* Elser, 69 Tex. 282, 6 S. W. 563.

83. Odom *v.* Shackleford, 44 Ala. 331; Longyear *v.* Minnesota Lumb. Co., 108 Mich. 645, 66 N. W. 567.

See generally the title "Demurrer."

84. Rudolf *v.* McDonald, 6 Neb. 163; Trow's Printing, etc. Co. *v.* Hart, 9 Daly (N. Y.) 413, 60 How. Pr. (N. Y.) 190. See Kesler *v.* Lapham, 46 W.

is that the venue is really no part of the affidavit, its office being simply to show by an inspection of the instrument whether it was made within the jurisdiction of the officer who administered the oath.[85]

2. Who May Avail of.— Only parties to the proceeding can take advantage of defects in the affidavit.[86]

3. Time of Raising Objections. — a. *In General.* —Objections to the affidavit should be made in the earlier stages of the proceedings.[87]

b. *Exceptions and Objections in Appellate Court.* — Objections to defects in the affidavit must be taken in the court below and cannot be made for the first time on appeal.[88]

4. Manner of Raising Objections. — Objections to the affidavit may be raised by motion to dissolve the attachment,[89] or by plea in abatement.[90]

5. Specifying Objections. — In raising objections to the affidavit by motion, it must be definitely specified wherein the affidavit is defective.[91]

6. Effect of Defects. — While the defects in an affidavit in attachment cannot effect or impair the plaintiff's cause of action or defeat his right to recover, they do affect the plaintiff's lien upon the defendant's property,[92] and subsequent proceedings upon a fatally defective affidavit will not avail for no lien can result from an invalid attachment.[93]

Va. 293, 33 S. E. 289, where it is said that under the old common law, such defect would have been serious.

85. Avery *v.* Good, 114 Mo. 290, 21 S. W. 815; Struthers *v.* McDowell, 5 Neb. 491, *citing* Drake Attachm. (6th ed.) §90c.

In a recent decision it is held that if the affidavit in any way tells the authority of the officer, and indicates of what county he is an officer, it is good, though not containing that formal part usually found in pleadings and other papers called the "venue." Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289.

And it has been further said that though the affidavit does not show venue, if it does not show in any way that it was taken without the jurisdiction of the notary, the presumption of law will be that it was taken within his jurisdiction, and it will not be void from the mere absence of venue. **Del.**—Albright *v.* United Clay Production Co., 5 Penne. 198, 62 Atl. 726. **Ia.**—Snell *v.* Eckerson, 8 Iowa 284. **Mo.**—Avery *v.* Good, 114 Mo. 290, 21 S. W. 815 (citing many cases); Englehart-Davison Merc. Co. *v.* Burrell, 66 Mo. App. 117.

86. **Ala.**—Haas *v.* Cook, 148 Ala. 670, 41 So. 731. **Neb.**—Rudolf *v.* McDonald, 6 Neb. 163. **Nev.**—Moresi *v.* Swift, 15 Nev. 215. **N. Y.**—Brown *v.* Guthrie, 39 Hun 29. **N. C.**—Skinner *v.* Moore, 19 N. C. 138, 30 Am. Dec. 155. **Tex.** Slade *v.* LePage, 8 Tex. Civ. App. 403, 27 S. W. 952.

Interveners.—Clamageran *v.* Bucks, 4 Mart. N. S. (La.) 487, 16 Am. Dec. 185; Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

87. Carothers *v.* Click, Morris (Iowa) 54.

88. **Ala.**—Burt *v.* Parish, 9 Ala. 211. **Ark.**—Landfair *v.* Lowman, 50 Ark. 446, 8 S. W. 188. **Ill.**—Ruthledge *v.* Stribling, 26 Ill. App. 353. **Kan.**—Leser *v.* Glaser, 32 Kan. 546, 4 Pac. 1026. **Ky.**—Ryon *v.* Bean, 2 Met. 137.

89. Avery *v.* Good, 114 Mo. 290, 21 S. W. 815.

90. Watson *v.* Auerbach, 57 Ala. 353; Archer *v.* Claflin, 31 Ill. 306.

91. **When Affidavit Does Not Sufficiently State the Nature of Plaintiff's Claim.**—Ferguson *v.* Smith, 10 Kan. 396.

92. Elliott *v.* Mitchell, 3 Greene (Iowa) 237.

93. Teutonia Loan etc. Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

7. Waiver of Objection. — a. *In General.* —And defects will be deemed to be waived, unless objected to.[94]

b. *By Appearance and Plea.* —The defendant is deemed to have waived the irregularities and defects of the affidavit by an appearance and plea to the merits.[95] But such waiver does not occur where there is a special appearance by the defendant,[96] or where the affidavit is a nullity or the defect therein is jurisdictional.[97]

8. Collateral Attack. — Since defects and irregularities in the affidavit render it voidable only, it cannot be attacked collaterally.[98] If, however, by reason of a defective affidavit, the court has not acquired jurisdiction, the judgment is a nullity and may be attacked at any time by any interested person.[99]

X. BOND OR UNDERTAKING. — A. Necessity For. — **1. In General.** — Generally the giving of a bond or undertaking, with se-

94. Brewster *v.* James, 3 Ill. 464; Beecher *v.* James, 3 Ill. 462.

95. Ark.—Hynson *v.* Taylor, 3 Ark. 552. **Cal.**—Hammond *v.* Starr, 79 Cal. 556, 21 Pac. 971. **Ga.**—Pool *v.* Perdue, 44 Ga. 454. **Ind.**—Brayton *v.* Freese, Smith 35. **Mich.**—Gunn Hardware Co. *v.* Denison, 83 Mich. 40, 46 N. W. 940. **Miss.**—Bishop *v.* Fennerty, 46 Miss. 570. **Mo.**—Schlatter *v.* Hunt, 1 Mo. 651. **Pa.**—Bollinger *v.* Gallagher, 144 Pa. 205, 22 Atl. 815. **Tenn.**—Hearn *v.* Crutcher, 4 Yerg. 461. **Va.**—Anderson *v.* Johnson, 32 Gratt. 558. **Wis.**—Blackwood *v.* Jones, 27 Wis. 498. **Wyo.**—Roy *v.* Union Mercantile Co., 3 Wyo. 417, 26 Pac. 996; Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

By a Plea in Bar.—Garmon *v.* Barringer, 19 N. C. 502.

By Traverse.—The defendant cannot object to the affidavit after he has traversed it. Rice *v.* Hauptman, 2 Colo. App. 565, 31 Pac. 862.

By filing a plea in abatement the defendant waives defects in the affidavit. **Ill.**—Archer *v.* Claflin, 31 Ill. 306. **Mo.**—Henderson *v.* Drace, 30 Mo. 358. **Nev.**—Williams *v.* Glasgow, 1 Nev. 533. **N. Y.**—Horton *v.* Francher, 14 Hun 172.

96. Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 3 N. E. 135; Freer *v.* White, 91 Mich. 74, 51 N. W. 807.

97. Wood *v.* Baily, 77 Miss. 815, 27 So. 1001; Sedalia Third Nat. Bank *v.* Garton, 40 Mo. App. 113.

98. U. S.—Graff *v.* Louis, 71 Fed. 591. **Ala.**—Martin *v.* Hall, 70 Ala. 421. **Ark.**—Boothe *v.* Estes, 16 Ark. 104. **Cal.**—Hillman *v.* Griffin, 127 Cal. xviii mem., 59 Pac. 696; Scrivener *v.* Dietz, 68 Cal. 1, 8 Pac. 609. **Ill.**—Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep., 232; Moore *v.* Mauck, 79 Ill. 391. **Kan.**—Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911. **Ky.** Paul *v.* Smith, 82 Ky. 451. **La.**—Augusta Bank *v.* Jandon, 9 La. Ann. 8. **Mo.**—Avery *v.* Good, 114 Mo. 290, 21 S. W. 815; Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. 694; Sloban *v.* Mitchell, 84 Mo. 546; Harvey *v.* Wickham, 23 Mo. 112. **Neb.**—Horkey *v.* Kendall, 53 Neb. 522, 73 N. W. 953, 68 Am. St. Rep. 623; Crowell *v.* Johnson, 2 Neb. 146. **N. J.**—Westcott *v.* Sharp, 50 N. J. L. 392, 13 Atl. 243; Russell *v.* Work, 35 N. J. L. 316; Weber *v.* Weitling, 18 N. J. Eq. 441. **N. Y.**—Carr *v.* Van Hoesen, 26 Hun 316; *In re* Griswold, 13 Barb. 412; McBlane *v.* Speelman, 6 Civ. Proc. 401. **N. C.**—Spillman *v.* Williams, 91 N. C. 483. **Tenn.**—McElwee *v.* Steelman (Tenn. Ch.), 38 S. W. 275; Boyd *v.* Gentry, 12 Heisk. 625. **W. Va.**—Hall *v.* Hall, 12 W. Va. 1.

Proceedings that are still at a stage permitting correction by amendment cannot be overthrown by collateral attack. Barber *v.* Smith, 41 Mich. 138, 1 N. W. 992.

Affidavit Not Copied in the Record. Biggs *v.* Blue, 5 McLean 148, 3 Fed. Cas. No. 1,403.

99. Colo.—Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464. **Ga.**—Krutina *v.* Culpepper, 75 Ga. 602. **Md.**—Bruce *v.* Cook, 6 Gill & J. 345. **N. Y.**—Staples *v.* Fairchild, 3 N. Y. 41. **Wash.** Tacoma Grocery Co. *v.* Draham, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907.

curity, upon the part of the plaintiff, is a prerequisite[1] to the issuing of the attachment.[2] The deposit of a sum of money, in lieu of an undertaking, has been held insufficient,[3] as has also the giving of indemnity to the sheriff on levying the attachment.[4]

Reasons for Rule. — A bond is intended to afford to the opposite party ample redress for any injury which may result from the abuse, or improper exercise, of the writ by the plaintiff.[5]

Service of Copy of Bond or Undertaking. — Service of a copy of the bond or undertaking upon the defendant is not required.[6]

In the federal courts, the requirements of the state statute as to amount of the bond and the qualifications and the residence of the sureties, must be observed.[7]

In Equity. — In a court of equity, although a bill states facts sufficient to bring the case within chancery jurisdiction, yet such proceedings, when taken, must be substantially conformable to the directions of the statute, since proceedings of this nature are authorized only by statute,[8] and an exercise of the discretion of the presiding judge in quashing the attachment by reason of the failure, upon the part of the plaintiff, to give a bond or undertaking, will not be interfered with.[9]

Judicial Attachments. — The giving of a bond or undertaking with security before the issuance of an attachment is as essential in judicial attachments as it is in attachments, generally, as the facility with which a judicial attachment may be obtained, makes necessary security against abuse.[10]

1. See *infra*, X, E.

2. See the statutes of the various jurisdictions and the cases generally throughout the section, and particularly: **Conn.**—Starr *v.* Lyon, 5 Conn. 538. **Ga.**—Clay *v.* Tapp, 79 Ga. 596, 7 S. E. 256 (against a fraudulent debtor); Rogers *v.* E. M. Birdsall Co., 72 Ga. 133. **Kan.**—Ballinger *v.* Lantier, 15 Kan. 608. **Ky.**—Lynn *v.* Stark, 6 Ky. L. Rep. 586.

As to one made defendant after issuance of writ judgment is void if no new bond is filed. Baldwin *v.* Ferguson, 35 Ill. App. 393.

Record Must Show Bond Before Issuance of Attachment.—Levy *v.* Millman, 7 Ga. 167.

3. In Bate *v.* McDowell, 16 Jones & S. (N. Y.) 219 (appeal dismissed in 97 N. Y. 646), this was made one of the grounds of setting aside the attachment. "On this point, Judge Freedman said, 'The attachment should be vacated, because the undertaking required to be given by section 640 was not given. Though the attachment on its face recites that the plaintiff gave the undertaking required by law, yet no undertaking of any sort was given, and hence there is nothing that can be amended. The provision that the judge, before granting the warrant, must require a written undertaking with sufficient sureties to the effect as prescribed by section 640, is mandatory, and as in the case of an attachment no provision exists, as in some other cases pursuant to which the undertaking may be dispensed with or something else accepted in lieu of it, the judge who granted the attachment had no power to accept a form of security different from that prescribed by the statute and the effect of which may give rise to dispute.' " On this opinion the order appealed from was affirmed with costs.

4. Campbell *v.* Conner, 9 Jones & S. (N. Y.) 459.

5. Delano *v.* Kennedy, 5 Ark. 457.

6. Mazurette *v.* Richard Carle Amusement Co., 49 Misc. 604, 99 N. Y. Supp. 1109.

7. Singer Mfg. Co. *v.* Mason, 5 Dill. 488, 22 Fed. Cas. No. 12,903. See also the title "Federal Courts;" and U. S. Rev. St. §915, 4 Fed. St. Ann. 577.

8. Smith *v.* Moore, 35 Ala. 76; McGown *v.* Sprague, 23 Ala. 524.

9. Hart *v.* Hart, 52 Ga. 376.

10. Briggs *v.* Smith, 13 Tex. 269.

2. Failure To Return and File. — In some cases it has been held that it is not only the duty of the plaintiff to give a bond or undertaking, but also to see to it that the bond or undertaking is returned with the affidavit and filed in court,[11] while, on the other hand, it has been said that an attachment will not be quashed because of the failure of the officer to return and file the bond, no injury having resulted to the defendant, as this would work a hardship upon the plaintiff, he not having been in fault.[12]

3. Exceptions to the Rule. — a. *In General.* —But a bond or undertaking need not be given by the United States,[13] nor by a state, county, or city.[14] And it has been held that in an action to enforce a statutory lien for work the plaintiff need not give a bond or undertaking,[15] and that after execution of *fieri facias* is returned by the officer endorsed "no property found" the plaintiff may have an attachment against the property of the defendant in the execution, similar to the general attachment provided for, without either the affidavit or bond therein required.[16] By statute, in at least one jurisdiction, an alias attachment may issue without bond or undertaking,[17] and in Louisiana there is under the statute a writ of provisional seizure which issues without a bond or undertaking.[18]

Suing In Forma Pauperis. — In at least one jurisdiction, it has been held that the general statute allowing a poor person, unable to give bond, to sue, is applicable to attachment proceedings, and that an attachment may be issued upon proper oath being made by such person in lieu of a bond or undertaking.[19]

b. *As to Non-Resident Defendants.* — In several jurisdictions, when the defendant in attachment is a non-resident, no bond or undertaking is required.[20]

11. Ford *v.* Woodward, 2 Smed. & M. (Miss.) 260.

Reason of Rule.—That separating the duty of giving the bond and affidavit and returning them to court by the plaintiff for the purpose of pleading will lead to a construction which destroys the text of the statute and tends to the elusion of its provisions. State Bank *v.* Hinton, 12 N. C. 397.

12. Augusta Bank *v.* Conrey, 28 Miss. 667.

13. United States *v.* Ottman, 3 Mac Arthur (D. C.) 73; United States *v.* Murdock, 18 La. Ann. 305, 89 Am. Dec. 651.

14. Morgan *v.* Menzies, 60 Cal. 341.

15. De Morris *v.* Wilbur Lumb. Co., 98 Wis. 465, 74 N. W. 105.

16. Lewis *v.* Quinker, 2 Met. (Ky.) 284.

17. When the attachment has not been executed; when no property has been found; when the property seized is insufficient to pay the debt; when plaintiff desires to garnishee other persons. Jeffries *v.* Daneey, 44 Miss. 693.

18. Roquest *v.* The B. E. Clarke, 12 La. Ann. 300; Smith *v.* Smith, 2 La. Ann. 447.

19. Phipps *v.* Burnett, 96 Tenn. 175, 33 S. W. 925; Barber *v.* Denning, 4 Sneed (Tenn.) 267.

20. **Kan.**—Simon *v.* Stetter, 25 Kan. 155; Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147. **Miss.**—Baird *v.* Georgia Pac. R. Co., 12 So. 547. **Neb.** Grebe *v.* Jones, 15 Neb. 312, 18 N. W. 81. *Compare* Gutterson *v.* Meyer, 68 Neb. 767, 94 N. W. 969. - **N. J.**—Wilkinson *v.* Bloch, 67 Atl. 117.

Both parties being non-resident, if the district court obtains jurisdiction it may issue the attachment without a bond or undertaking. Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147.

Resident and Non-Resident Co-Defendants.—Such a statute does not

When Sheriff Seizes the Property. — In several jurisdictions, a bond is required in an action against a non-resident only when the sheriff is directed to take the property into her possession.[21]

Upon the return of two summons "non est" the judge is authorized to issue the attachment without bond.[22]

B. EFFECT OF FAILURE TO GIVE. — **In General. — Liability of Officer.** Generally the officer issuing or serving an attachment without the required bond or undertaking being given, becomes liable in damages to the persons who may suffer from such unauthorized acts.[23]

To Illustrate. — When jurisdiction is conferred upon an officer to issue the attachment only when he has required a bond or undertaking to be given, the issuance without such bond renders him liable,[24] and when a sheriff has served the process of attachment before the bond or undertaking has been given he becomes liable for damages suffered by reason thereof.[25]

Effect Upon Proceedings. — Upon motion to dismiss for failure of the party obtaining an attachment to give a bond or undertaking, as required by statute,[26] the attachment will be discharged, quashed or abated,[27] and upon reversal of judgment on this ground the defendant

necessarily include all the parties defendant in the case, when some are residents. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911.

A resident of this state can become a non-resident only by leaving the state with intention of becoming a non-resident. Ballinger *v.* Lantier, 15 Kan. 608.

How Jurisdiction Is Conferred.—In case of a non-resident defendant having property in this state, the attachment must be filed in the county in which the property is situated and the process must be executed by seizure or levy upon the property and publication for the appearance of the defendant in order to confer jurisdiction upon the court. Baird *v.* Georgia Pac. R. Co. (Miss.), 12 So. 547.

Contitutionality of Statute Relieving Plaintiff of Giving Bond Against a Non-Resident.—Marsh *v.* Steele, 9 Neb. 96, 1 N. W. 869, 31 Am. Rep. 406.

Under such an act entitled "an act for the relief of creditors against absent and absconding debtors," it was said that relief could not be constitutionally included against debtors resident in the state. Hotel Registry Corporation *v.* Stafford, 70 N. J. L. 528, 57 Atl. 145. But later the title of that act was amended by adding the word "fraudulent," thus doing away with the constitutional objection. Wilkinson, Gaddis & Co. *v.* Bloch (N. J.), 67 Atl. 117.

21. **Ky.**—See Kerr *v.* Smith, 5 B. Mon. 552. **Va.**—Kenefick *v.* Caulfield, 88 Va. 122, 13 S. E. 348. **W. Va.**—Bowlby *v.* De Witt, 47 W. Va. 323, 34 S. E. 919; Cosneer *v.* Smith, 36 W. Va. 783, 15 S. E. 977.

22. Dirickson *v.* Showell, 79 Md. 49, 28 Atl. 896.

23. Blincoe *v.* Head, 103 Ky. 106, 44 S. W. 374; Jones *v.* Ealer, 1 Ohio Dec. (Reprint) 385, 8 West. L. J. 500. *Compare* Banta *v.* Reynolds, 3 B. Mon. (Ky.) 80.

24. Blincoe *v.* Head, 103 Ky. 106, 44 S. W. 374 (as to clerk of court); Davis *v.* Marshall, 14 Barb. (N. Y.) 96 (as to justice of the peace).

25. Jones *v.* Ealer, 1 Ohio Dec. (Reprint) 385, 8 West. L. J. 500.

26. Alabama Bank *v.* Fitzpatrick, 4 Humph. (Tenn.) 311.

27. **Ark.**—Alexander *v.* Pardue, 30 Ark. 359; Kellogg *v.* Miller, 6 Ark. 468, 472; Didier *v.* Galloway, 3 Ark. 501. **Ia.**—Eads *v.* Pitkin, 3 Greene 77. **Kan.**—Ballinger *v.* Lantier, 15 Kan. 608. **Ky.**—Anderson *v.* Sutton, 2 Duv. 480; Lewis *v.* Butler, Sneed 246; Worthington *v.* Damarin, 5 Ky. L. Rep. 684; Freeman *v.* Lander, 3 Ky. L. Rep. 324. **La.**—Erwin *v.* Commercial, etc., Bank, 3 La. Ann. 186. **Mich.**—Wight *v.* Warner, 1 Dougl. 384. **Miss.**—Tyson

may recover of the plaintiff his costs expended in that behalf.[28]

C. Assignability. — An attachment bond or undertaking is assignable under certain statutes,[29] and by the terms of the contract itself.[30]

D. Parties — 1. By Whom To Be Given. — a. *General Statement.* The liability of a plaintiff is, in some jurisdictions, independent of his signing the bond, it being based solely upon the fact of the wrongful institution by him of the suit.[31] In other jurisdictions it is held that under the statutes therein, it is not only material, but absolutely essential to the validity of the bond or undertaking and hence of the attachment, that the bond or undertaking be signed by the plaintiff, or by his agent or attorney.[32] A bond or undertaking has been held to be sufficient under the statute when given by the agent of a town and of plaintiffs in similar capacities, in his own name and not purporting to bind his principals,[33] when made by usees in actions for the use of certain third persons,[34] and when given by the syndic of a bankrupt in an action brought in the name of the bankrupt upon a chose in action.[35]

b. *Attorney or Agent.* — The bond or undertaking, when given by the agent or attorney, in the name of the principal, is sufficient to sustain the attachments.[36]

An attorney at law employed in any given case from the fact of his employment, has the right to give the bond as his client's agent, without any other special authority.[37] A subsequent ratification by the principal, gives validity to an act of an agent or attorney,[38] as where the principal appears in court and prosecutes an attachment which has

v. Hamer, 2 How. 669. **N. Y.**—Van Loon *v.* Lyons, 61 N. Y. 22. *Compare* Millbank *v.* Broadway Bank, 3 Abb. Pr. N. S. 223, holding that the omission to file a bond may be supplied.

Not Supplied by Agreement.—Kelly *v.* Archer, 48 Barb. (N. Y.) 68.

Fact of bond not being given must be shown, for it is always to be presumed that an officer has done his duty until the contrary appears. Kincaid *v.* Neall, 3 McCord (S. C.) 201.

28. Lewis *v.* Butler, Sneed (Ky.) 246.

29. State *v.* Heckart, 49 Mo. App. 280.

In Moorman *v.* Collier, 32 Iowa 138, the court said: "All instruments, under our statute, are assignable so that the assignee shall have a right of action in his own name."

30. Bamberger *v.* Oshinsky, 21 Misc. 716, 48 N. Y. Supp. 139; Hale *v.* Schults, 3 McCord L. (S. C.) 218.

31. State *v.* Fortinberry, 54 Miss. 316. See *infra*, X, G.

32. **La.**—Grove *v.* Harvey, 12 Rob. 221. **Miss.**—Ford *v.* Hurd, 4 Smed. & M. 683. **S. C.**—Wagener *v.* Booker, 31 S. C. 375, 9 S. E. 1055; National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028; Myers *v.* Lewis, 1 McMull. 54.

33. Clanton *v.* Laird, 12 Smed. & M. (Miss.) 568.

34. Grand Gulf R. etc., Co. *v.* Conger, 9 Smed. & M. (Miss.) 505.

35. Tully *v.* Herrin, 44 Miss. 626.

36. See the statutes in the various jurisdictions generally, and Holden *v.* Meyer, 1 White & Wills. Civ. Cas. §§828, 830.

37. Fulton *v.* Brown, 10 La. Ann. 350; Wetmore *v.* Daffin, 5 La. Ann. 496.

38. Grove *v.* Harvey, 12 Rob. (La.) 221.

A ratification before the issuance of the writ would cure the want of authority but not a subsequent ratification. Kellogg *v.* Miller, 6 Ark. 468.

Upon a plea in abatement the pleader must negative the fact of ratification of the act by the plaintiff or it will be presumed to have been ratified before the issuance of the writ. Mandel *v.* Peet, 18 Ark. 236.

been sued out in his name, the bond being in due form, by a person assuming to act as his agent.[39]

As Binding the Agent or Attorney Personally. — A bond or undertaking is also held to be sufficient to sustain the attachment when given by the agent[40] or attorney so as to bind him personally.[41]

c. *Firm or Partner.* — To validate an attachment it has been held that a bond or undertaking given merely in the name of the firm, is sufficient, *prima facie*,[42] and it is very generally now considered that one signed in the firm name, by one of the partners, is sufficient to bind the partnership under the attachment statutes, though this is a departure from the common law rule as to the right of one partner to bind the partnership without special authority.[43] And it has also been held that signing the firm name by an agent is sufficient,[44] and that if one of the partners sign his name as a partner, binding himself thus upon a bond or undertaking, this will fulfil the demands of the statute.[45]

Signature by Partner as an Individual or by His Agent. — An attachment is not supported, however, by a bond or undertaking given by one of the partners as an individual,[46] or by an agent of an individual partner.[47]

2. To Whom To Be Given. — A bond or undertaking will sustain an attachment though given for the use of the defendant, and made to an individual, to the United States,[48] or to a state,[49] and it has been held that a bond made payable to the state is sufficient to vest in the owner

39. Augusta Bank *v.* Conrey, 28 Miss. 667.

40. **Fla.**—Conklin *v.* Goldsmith, 5 Fla. 280. **Md.**—Stewart *v.* Katz, 30 Md. 334. **Mich.**—Walbridge *v.* Spaulding, 1 Dougl. 451. **Miss.**—Page *v.* Ford, 2 Smed. & M. 266; Frost *v.* Cook, 7 How. 357. **S. C.**—Byne *v.* Byne, 1 Rich. 438.

41. Bryan *v.* Knight, 12 Fla. 165; Simpson *v.* Knight, 12 Fla. 144; Messner *v.* Lewis, 20 Tex. 221.

42. **Ia.**—Churchill *v.* Fulliam, 8 Iowa 45. **Mo.**—Claflin *v.* Hoover, 20 Mo. App. 314. **Tex.**—Gray *v.* Steelman, 63 Tex. 95.

43. **Fla.**—Jeffreys *v.* Coleman, 20 Fla. 536. **Ga.**—Dow *v.* Smith, 8 Ga. 551. **Miss.**—Wallis *v.* Wallace, 6 How. 254.

The written deposition of one partner that he authorized and ratified the signing of the bond in the copartnership name, by the other partner is sufficient to bind him to the act, and the bond is the deed of both partners. Jeffreys *v.* Coleman, 20 Fla. 536.

"Undertaking" Not Under Seal. — One member of a firm may sign, without special authority, an "undertaking," which does not require a seal. Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

The Practice Should Be Discouraged. Danforth *v.* Carter, 1 Iowa 546.

44. Munzesheimer *v.* Heinze, 74 Tex. 254, 11 S. W. 1094; Messner *v.* Lewis, 20 Tex. 221; Slov *v.* Powell, Dall. (Tex.) 467.

45. Kyle *v.* Connelly, 3 Leigh (Va.) 719.

46. Jones *v.* Anderson, 7 Leigh (Va.) 308.

47. Guckenheimer *v.* Dryfus, 43 S. C. 443, 21 S. E. 331.

48. Barnes *v.* Webster, 16 Mo. 258, 57 Am. Dec. 232.

49. Taaffe *v.* Rosenthal, 7 Cal. 514.

In Louisiana under a statute requiring a bond to be "made payable to the clerk of the court which issues the writ," a bond was held to be sufficient which had been made to the clerk, naming him, and his successors in office, as the name was considered to be mere surplusage. Scooler *v.* Alstrom, 38 La. Ann. 907.

all rights under the bond, though the words "for the use and benefit" of the defendant were omitted.[50]

If there are several defendants, the bond or undertaking should generally be made to all,[51] but the bond and attachment will be sustained if the bond is made to the one or more of the defendants whose property is actually levied upon.[52]

Made to a Partnership. — The bond or undertaking has been held to be good and valid when made to a firm,[53] or to the individual member of the firm.[54]

3. Description of Parties. — In describing the parties by and to whom the bond or undertaking is to be given, it is sufficient, generally, if the description is set out with such exactness as will enable the defendant to recover the damages and costs suffered by him by reason of the attachment.[55]

When Held Sufficient. — Generally applying the foregoing rule, it has been held that a bond will not be vitiated because the description of the party in the body of the bond is different from that set out in the style of the case and the opening line of the bond;[56] because the full name in the body of the bond fails to comply with the signature;[57] because the obligor affixes the word "agent" to his name;[58] because of the omission of the words "for the use and benefit;"[59] or if, when describing the persons to whom the bond shall be paid, a word is used sufficient to embrace all defendants who may be damaged.[60]

When Held Not Sufficient. —And so it has been held that the bond is insufficient to support the attachment when it was made payable to the individuals composing the firm instead of to the partnership, without reciting that the obligees composed the firm;[61] when the defendants names were left blank;[62] and when a stranger, so far as the record shows, entered into bond, the statute directing that the one suing out the attachment shall give bond.[63]

E. Time When Bond Must Be Given. — In, by far the majority of the jurisdictions, it is held that the giving of a bond or undertaking

50. The Napoleon *v.* Etter, 6 Ark. 108.

51. Hadley *v.* Bryars, 58 Ala. 139.

52. **D. C.**—Bradford *v.* Brown, 22 App. Cas. 455. **Ia.**—Patterson *v.* Stiles, 6 Iowa 54. **Ky.**—Knox *v.* Atterberry, 3 Dana 580. **Tex.** — Archenhold *v.* B. C. Evans Co., 11 Tex. Civ. App. 138, 32 S. W. 795; Branshaw *v.* Tinsley, 4 Tex. Civ. App. 131, 23 S. W. 184.

53. Voorheis *v.* Eiting (Ky.), 22 S. W. 80; De Caussey *v.* Baily, 57 Tex. 665.

54. Gray *v.* Steedman, 63 Tex. 95.

Bond to firm after dissolution, not good. Courrier *v.* Cleghorn, 3 Greene (Iowa) 523.

55. See cases generally, throughout this subdivision.

56. Beckham *v.* Hargadine-McKittrick Dry-Goods Co. (Tex.), 33 S. W. 578; Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389.

57. **Ark.**—Mandel *v.* Peet, 18 Ark. 236. **Idaho.**—Finney *v.* Moore, 9 Idaho 284, 74 Pac. 866. **Mich.**—Walbridge *v.* Spalding, 1 Dougl. 451. **Tex.**—Laning *v.* Iron City Nat. Bank, 36 S. W. 481.

58. Hadley *v.* Bryars, 58 Ala. 139.

59. The Napoleon *v.* Etter, 6 Ark. 103.

60. Bryan *v.* The Enterprise, 53 N. C. 260.

61. Birdsong *v.* McLaren, 8 Ga. 521.

62. Schrimpf *v.* McArdle, 13 Tex. 368.

63. Work *v.* Titus, 12 Fla. 628.

with security upon the part of the plaintiff, is an absolute prerequisite to the issuance of the attachment, and that an attachment is invalid which has been issued without a bond having been previously filed,[64] and it must appear by the record that the bond was approved prior to the issuance of the writ.[65]

Time Held Immaterial — In at least one jurisdiction, however, it is held that the time of issuance of the bond or undertaking is immaterial, if the defendant is secured against loss and damage which is the whole purpose.[66]

F. AMOUNT. — **1. In General.** — Where the statute requires the bond or undertaking to be in a certain amount, the giving of a bond

64. **Cal.**—Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332. **Ga.**—Bailey *v.* Clay, 79 Ga. 600, 7 S. E. 258; Enneking *v.* Clay, 79 Ga. 598, 7 S. E. 257; Clay *v.* Tapp, 79 Ga. 596, 7 S. E. 256; Rogers *v.* Birdsall Co., 72 Ga. 133; Levy *v.* Millman, 7 Ga. 167. **Miss.**—Houston *v.* Belcher, 12 Smed. & M. 514; Tyson *v.* Hamer, 2 How. 669. **Mo.**—Stevenson *v.* Robbins, 5 Mo. 18. **Tex.**—Osborn *v.* Schiffer, 37 Tex. 434. **Wis.**—Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238, upon a claim of debt not due.

Continuance to show bond given before issuance of attachment, though by mistake in date it appeared otherwise. Snelling *v.* Bryce, 41 Ga. 513.

As to Debt Not Due.—The execution and service of an undertaking after the suit was begun could not relate back so as either to give the plaintiff a cause of action, as upon a demand already due, or to bring him within the provisions of the law for maintaining an action upon a contract not due when suit was commenced. Bradley *v.* Kroft, 19 Fed. 295, under a Wisconsin statute.

When the clerk, having no authority to issue an attachment on a debt not due, took a bond thereon, and subsequently the judge granted an order of attachment upon condition that the necessary bond be given, the attachment on the judge's order was properly discharged on failure to give the bond, as the bond taken on the clerk's order was no protection to the attachment on the judge's order. Kleiner *v.* Nie, 88 Ky. 542, 11 S. W. 590.

A mandate of the judge upon the margin of the attachment directing that "upon the execution of a good and sufficient bond under the law in attachment cases to be approved by the clerk of the Superior Court of Sumpter county, the attachment will take effect," can have no effect when it appears upon the face of the record that no bond was given until after the judge issued the attachment, for, under the statute, this prior issuance immediately vitiates the attachment. Clay *v.* Tapp, 79 Ga. 596, 7 S. E. 256.

65. Marnine *v.* Murphy, 8 Ind. 272.

Recital in a bond that the plaintiffs "have this day sued out an attachment" is evidently intended to identify the case in which the bond was given and not to indicate the order, in point of time, of the proceeding, and the bond is therefore good. Wright *v.* Ragland, 15 Tex. 289. *Compare* Hucheson *v.* Ross, 2 A. K. Marsh. (Ky.) 349.

If the bond recite in the condition thereof that the writ had issued before the bond was filed, and there being nothing in the record to show the contrary, the attachment will be quashed. Root *v.* Monroe, 5 Blackf. (Ind.) 594.

Recital in Writ.—"Upon the filing of which bond and affidavit" in a writ is sufficient to show that the bond was approved before the issuing of the writ. Marnine *v.* Murphy, 8 Ind. 272; Reed *v.* Kentucky Bank, 5 Blackf. (Ind.) 227.

Compliance With Law Presumed.—McKenzie *v.* Buchan, 1 Nott & M. (S. C.) 205.

Parol evidence admissible to show correct date when bond and writ contradict each other as to the day of issuance of latter. Summers *v.* Glancey, 3 Blackf. (Ind.) 361.

66. Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356; Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347.

in at least that amount is considered, generally, to be an absolutely essential condition to the issuing of the attachment.[67]

Amount Left Blank. — In some jurisdictions it is held that leaving the amount blank will vitiate the attachment.[68]

The security given must be sufficient for the full amount of the bond, it not being sufficient that the sureties can answer for the amount of property actually attached.[69]

Immaterial Errors. — The proceedings are not vitiated by such errors as the failure to mention the interests;[70] a mistake in the amount set forth in the condition of the bond;[71] making the bond for a greater amount than that demanded by statute,[72] or equal, simply, to the amount claimed.[73] So if the penalty of the bond is below the amount required by law and is afterwards enlarged to the requisite amount.[74]

2. Discretion of Court or Clerk. — In some jurisdictions the amount of the bond or undertaking is left to the discretion of the court or judge,[75] and in others it is left to the discretion of the clerk within cer-

67. See cases generally throughout this sub-division, and particularly the following cases: **Ind.**—Louisville, etc., R. Co. *v.* Lake, 5 Ind. App. 450, 32 N. E. 590. **Ia.**—Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573. **La.**—Allen *v.* Champlin, 32 La. Ann. 511; Planters' Bank *v.* Byrne, 3 La. Ann. 687; Graham *v.* Burckhalter, 2 La. Ann. 415. **Wis.** Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971; Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238.

In Bluegrass Canning Co. *v.* Steward, 175 Fed. 537, 99 C. C. A. 159, a case arising in Kentucky, it was held that under Kentucky Civ. Code Proc. §682, providing for the giving of a new bond to replace a defective one, within such reasonable time as the court may fix, the attachment is only voidable when the bond is not in double the amount of the claim. The court relied upon Banta *v.* Reynolds, 3 B. Mon. (Ky.) 80, and pointed out that Samuel *v.* Brite, 3 A. K. Marsh (Ky.) 317; Martin *v.* Thompson, 3 Bibb (Ky.) 252, and McDaniel *v.* Sappington, Hard. (Ky.) 94, were all antecedent to the above section.

68. Louisville, etc., R. Co. *v.* Lake, 5 Ind. App. 450, 32 N. E. 590; Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504. See, however, Frankel *v.* Stern, 44 Cal. 168, where the intention of the parties was plain, and it was held the omitted word could be supplied.

In Tischler *v.* Fishman, 34 Misc. 172, 68 N. Y. Supp. 787, it was held that the only effect of omitting the penalty was to make the liability commensurate with the condition.

69. Jackson *v.* Warwick, 17 La. 436.

70. Smith *v.* Pearce, Gilmer (Va.) 34.

Interest for the future need not be considered. Hemmi *v.* Grover, 18 N. D. 578, 120 N. W. 561.

71. Houston *v.* Belcher, 12 Smed. & M. (Miss.) 514.

72. **Cal.**—Wigmore *v.* Buell, 122 Cal. 144, 54 Pac. 600. **Ind.**—Fellows *v.* Miller, 8 Blackf. 231. **Ky.**—Bourne *v.* Hocker, 11 B. Mon. 23. **Tex.**—Aultman, Mills & Co. *v.* Smyth (Tex. Civ. App.), 43 S. W. 932.

73. Hughes *v.* Mattes, 104 La. 218, 28 So. 1006.

74. Elliott *v.* Stevens, 10 Iowa 418.

75. Riggs *v.* Cleveland, etc., R. Co., 21 N. Y. Wkly. Dig. 45, holding that requiring an undertaking in the sum of $5,000 on attaching bonds of the par value of $163,568.30, but whose real value was probably much less, was not an abuse of discretion. See also the New York cases generally following.

In an amount to secure defendant for costs, disbursements and damages. Fuerstenberg *v.* American Soda Fountain Co., 21 App. Div. 501, 48 N. Y. Supp. 508.

Following Statutory Rule on Order of Arrest.—Bamberger *v.* Duden, 9 N. Y. St. 686.

Value of Goods Seized.—Requiring

tain limits.[76] Under such a statute the court has advised that the clerk should in all cases require the undertaking not to be less than the amount of the claim sued for.[77] But unless such discretion has been abused, if in its exercise the conditions required by the statute are complied with, an order fixing the amount will not be interfered with.[78]

3. Double Amount of Claim or of Property Levied Upon. — In jurisdictions where a bond or undertaking in double the amount of the plaintiff's claim is required there can be no other standard than the amount claimed.[79] And the same is true where the amount of the bond

bond for an amount less than the value of the goods is not exorbitant. Manda *v.* Etienne, 13 App. Div. 237, 43 N. Y. Supp. 194.

Amount Equal to Expenses Already Incurred.—Ives *v.* Ellis, 35 Misc. 333, 71 N. Y. Supp. 971.

Not Exceeding Double the Claim.—Where this is the provision of the statute the bond may be properly fixed at the amount of the claim, and, if insufficient, may be increased on motion. Gapen *v.* Stephenson, 18 Kan. 140.

Alienating Wife's Affections.—Guest *v.* Lowther, 84 App. Div. 462, 82 N. Y. Supp. 1015.

76. Bowers *v.* London Bank, 3 Utah 417, 4 Pac. 225, holding that a statute requiring the clerk to take a written undertaking "in a sum not less than $200, nor exceeding the amount claimed by the plaintiff," had been complied with when the clerk required a bond of $4,000, the action being for $66, 333.70.

See also, under a similar statute, Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821; Willman *v.* Friedman, 3 Idaho 734, 35 Pac. 37.

77. Willman *v.* Friedman, 3 Idaho 734, 35 Pac. 37.

78. Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821; Riggs *v.* Cleveland, etc., R. Co., 21 N. Y. Wkly. Dig. 45 (holding that the appointment of a foreign receiver for a corporation was not sufficient reason for vacating an order fixing the amount of the bond and undertaking).

Under Louisiana Code of Practice, §245, the bond must be for a sum exceeding by one-half the amount of the claim. Fleitaf *v.* Cockren, 101 U. S. 301, 25 L. ed. 954; Jackson *v.* Warwick, 17 La. 436; Williams *v.* Barrow, 3 La 57; Erwin *v.* Commercial, etc., Bank, 12 Rob. (La.) 227.

When the amount of the bond is less than such statute requires by one dollar, the maxim *de minimis non curat lex* applies. Bodet *v.* Nibourel, 25 La. Ann. 499. And see Pharr *v.* Estey Piano & Organ Co., 7 Ga. App. 262, 66 S. E. 618.

That amount was fixed by order of judge will not cure the defect of insufficiency. Graham *v.* Burckhalter, 2 La. Ann. 415.

Affidavit Governs the Amount of the Bond.—Planters' Bank *v.* Byrne, 3 La. Ann. 687, pointing out that in Pope *v.* Hunter, 13 La. 308, the affidavit stated a certain sum due, "besides interest, damages," etc., and the bond was properly proportioned to the principal sum named, as the writ of attachment was only for the specified sum, and was silent as to damages and interest.

Giving bond in a larger amount than required, does not vitiate it. Miller *v.* Chandler, 29 La. Ann. 88.

79. **U. S.**—See Bluegrass Canning Co. *v.* Steward, 175 Fed. 537, 99 C. C. A. 159, under a Kentucky statute. **Ga.** Shockley *v.* Davis, 17 Ga. 175. **Ind.** Marnine *v.* Murphy, 8 Ind. 272. **Ky.**—Martin *v.* Thompson, 3 Bibb 252; McDaniel *v.* Sappington, Hard. 94. **S. C.**—Brown *v.* Whiteford, 4 Rich. L. 327. **Tex.**—East, etc., Texas Lumber Co. *v.* Warren, 78 Tex. 318, 14 S. W. 783; Aultman, Miller & Co. *v.* Smyth (Tex. Civ. App.), 43 S. W. 932.

As to Partnership Property. — If partnership property is taken for the debt of one of the partners the penalty of the bond will be double of that partner's legal interest which is the subject of the levy and not double the value of the articles of property, the whole of which are not levied on, but only taken into possession, to make effectual the levy on the interest of the partner. Stewart *v.* Hunter, 1 Handy (Ohio) 22.

or undertaking is required to be double the value of the property levied upon.[80]

4. Dependency Upon Affidavit. — In some cases it is held that the amount specified in the affidavit as due is the foundation upon which to reckon the amount of the bond or undertaking.[81]

G. FORM. — **1. In General.** — Where the form of the bond or undertaking is prescribed by statute, it is sufficient if it follows the statutory form.[82] Unless it so conforms substantially it is void.[83]

The distinction between a bond and an undertaking has been drawn in at least two jurisdictions, and the forms necessary to be observed in preparing the one are not necessary in the other.[84]

When Held Sufficient. — It has been held to be a sufficient compliance with the statutes generally if the bond or undertaking is such as to sufficiently identify the suit and the parties to it and the cause in which the cause is pending.[85] Consequently it is not sufficient to vitiate the bond or undertaking that the magistrate issuing the attachment did not attest the bond, but merely accepted a bond already executed;[86] that

80. Bradley *v.* Kroft, 19 Fed. 295; Hamble *v.* Owen, 20 Iowa 70; Hamill *v.* Phenicie, 9 Iowa 525; Churchill *v.* Fulliam, 8 Iowa 45.

81. The basis for the writ is the affidavit, and the clerk must look to that alone, and not to the complaint, for the purpose of determining the amount for which an undertaking is to be given. **Cal.**—Baldwin *v.* Napa, etc., Wine Co., 137 Cal. 646, 70 Pac. 732. **Fla.**—Gallagher *v.* Cogswell, 11 Fla. 127. **Ga.**—Saulter *v.* Butler, 10 Ga. 510. **Miss.**—Lawrence *v.* Featherston, 10 Smed. & M. 345.

Amount Demanded Need Not Be Stated in the Bond.—The controlling idea is, that if the bond is really for double the debt or amount demanded it answers its purpose. Strong *v.* Lake Weir Chautauqua Assn., 25 Fla. 765, 6 So. 882.

82. **Fla.**—West *v.* Woolfolk, 21 Fla. 189. **Idaho.**—Ross *v.* Gold Ridge Mining Co., 14 Idaho 687, 95 Pac. 821. **Ill.**—Love *v.* Fairfield, 10 Ill. 303. **La.** Grove *v.* Harvey, 12 Rob. 221. **Miss.** Proskey *v.* West, 8 Smed. & M. 711; McIntyre *v.* White, 5 How. 298. **Pa.**—Meyers *v.* Rauch, 4 Pa. Dist. 333; Elliott *v.* Plukart, 6 Pa. Co. Ct. 151.

Record on Appeal.—If the undertaking is not incorporated in the record it must be presumed that it was in due form and in full compliance with the law. La Dow *v.* National Bldg., etc., Co., 11 Cal. App. 308, 104 Pac. 838, *citing* Harris *v.* Frank, 81 Cal. 289, 22 Pac. 856; Ohleyer *v.* Bunce, 65 Cal. 544, 4 Pac. 549.

83. Kern Valley Bank *v.* Koehn, 157 Cal. 237, 107 Pac. 111.

84. Schweigel *v.* Shakman Co., 78 Minn. 142, 80 N. W. 871, 81 N. W. 529; Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347.

85. Hann *v.* Ruse, 35 La. Ann. 725; Eilers *v.* Forbes (Tex.), 32 S. W. 709.

The proceedings being ex parte and in rem, and the judgment by default, the rules which require a strict conformity to the statute must prevail, and the recital in the condition of a bond is essentially defective which describes no court from which it has been issued, nor to which it is to be returned, nor the term to which it is returnable. Lawrence *v.* Yeatman, 3 Ill. 15.

In The General Worth *v.* Hopkins, 30 Miss. 703, however, the court said that it appeared from the record with sufficient certainty that the attachment was issued from a court within the state having jurisdiction of the subject matter.

When a bond, made payable to an officer, is intended as security for a particular individual, suit may be brought thereon in the name of any person intended to be secured, under our statute. Moorman *v.* Collier, 32 Iowa 138.

86. Dobbs *v.* Justices, 17 Ga. 624.

To hold that the proviso of the statute saying "that the judge, justices or

the names of the sureties did not appear[87] or that the defendant corporation is described by its initials in the body of the instrument;[88] or that it is not stated in the caption where the same was executed.[89]

When Held Not Sufficient.— Statutory provisions are not complied with unless conditions precedent have been fulfilled.[90] Consequently, when the clerk has not issued an attachment in the manner prescribed by statute;[91] when there has been a failure to have the bond or undertaking proved by the subscribing witnesses;[92] when the bond has not an obligation, with a penalty, and a condition, which expressly mentions what money is to be paid, and the limited time for the performance thereof;[93] or when the acts necessary to confer jurisdiction have not been performed,[94] the proceedings have been held invalid and unauthorized.

2. Conditions. — The condition in the bond or undertaking must substantially conform to the requirements of the statute to be valid.[95]

magistrates, before issuing it, shall take bond or security, etc.,'' meant to say that the attachment should not issue unless the bond is attested by the same magistrate would be an unnecessary literal construction. He must see to it that a bond is given, and if not the process is a nullity. But if he takes a bond duly executed and presented to him the statute is substantially complied with. Brown *v.* Clayton, 12 Ga. 564.

87. McLean *v.* Wright, 137 Ala. 644, 35 So. 45, 97 Am. St. Rep. 67; Gallatin First Nat. Bank *v.* Wallace (Tex.), 65 S. W. 392.

88. Lively *v.* Southern Bldg., etc., Assn., 46 W. Va. 180, 33 S. E. 93.

89. Aultman, Miller & Co. *v.* Smyth (Tex. Civ. App.), 43 S. W. 932.

90. **Ga.**—Levy *v.* Millman, 7 Ga. 167. **Ky**—Horne *v* Mitchell, 7 Bush 131. **La.**—Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504; Hann *v.* Ruse, 35 La. Ann. 725; Bonner *v.* Brown, 10 La. Ann. 334; Grove *v.* Harvey, 12 Rob. 221. **N. Y.**—Van Loon *v.* Lyons, 61 N. Y. 22. **S. C.**—Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272; Boyd *v.* Boyd, 2 Nott & M. 125.

91. Horne *v.* Mitchell, 7 Bush (Ky.) 131.

92. Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

93. Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125.

94. Bonner *v.* Brown, 10 La. Ann. 334; Van Loon *v.* Lyons, 61 N. Y. 22.

95. **Ala.**—Saltmarsh *v.* Evans, 1 Stew. 132. **Ga.**—Kahn *v.* Herman, 3 Ga. 266. **Md.**—Howard *v.* Oppenheimer, 25 Md. 350. **Miss.**—Bosbyshell *v.* Emanuel, 12 Smed. & M. 63. **Pa.**—Harrisburg Boot, etc., Co. *v.* Johnson, 3 Pa. Dist. 433. **S. C.** — Leach *v.* Thomas, 2 Nott & M. 110. **Tenn.** Lucky *v.* Miller, 8 Yerg. 90. **W. Va.** Lively *v.* Southern Bldg., etc., Assn., 46 W. Va. 180, 33 S. E. 93.

All the parts of the bond should be considered together, and the conditions should be given effect according to the manifest intention of the parties if it can be ascertained. Berry *v.* Wasserman, 179 Mass. 537, 61 N. E. 228.

The fact that the condition is written underneath the signature does not affect the validity of the bond. Melvin *v.* The General Shields, 15 Ark. 207.

Distinction Between Conditions as to Wrongful Issuance and as to Damages.—The condition of an undertaking was first that plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by the wrongful suing out of the attachment. The amended statute says that if the defendant recover judgment, or if the court shall finally decide that the plaintiff shall not be entitled to an attachment, the plaintiff will pay all damages. This condition is broader and of wider scope than that required by the original section. Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347. See also Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356.

To Illustrate. — There is not the requisite substantial compliance where the condition is so worded as to make the sureties liable for the acts of one of the plaintiffs, and not of the other, in the attachment suit,[96] or where a blank is left after the word "against," thus failing to designate the person against whom judgment must be rendered to call the condition into effect,[97] or when it fails to contain the stipulation required by statute "that if the attachment should be discharged on the ground that plaintiff was not entitled thereto under" the statute, the plaintiff will pay all damages, etc.;[98] or makes the plaintiff liable for the wrongful suing out of the attachment only, when, under the statute, he should become liable for all damages the defendant may sustain by reason of the suing out of the attachment,[99] or renders the plaintiff liable up to a certain amount when the statute makes him liable to the extent of all the damages suffered by defendant;[1] nor where the condition is that plaintiff would prove his demand on a trial at law,[2] or that plaintiff will prosecute his action with effect when the statute requires that he will prosecute the attachment with effect;[3] nor when the bond or undertaking is not conditioned for the payment of costs.[4]

3. The Signature. — In some jurisdictions it is not necessary for the plaintiff, or his agent, to sign the bond or undertaking if sufficient security be given as required.[5] An irregular signature adopted by the plaintiff has been held sufficient.[6]

Signing of Principal's Name by Agent or Attorney. — A bond or undertaking signed in the principal's name by an agent or attorney is binding on the principal if the agent or attorney had authority to sign, or if the act is ratified by the principal.[7] So if the principal appears to

96. Solinskey *v.* Young (Tex.), 17 S. W. 1083, 4 Wills. Civ. Cas. §269; Winn *v.* Sloan, 1 White & Wills. Civ. Cas. §1105.

97. Rino *v.* Parrish (Tex. Civ. App.), 130 S. W. 611.

98. Kern Valley Bank *v.* Koehn, 157 Cal. 237, 107 Pac. 111.

99. Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356; Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347.

1. Hisler *v.* Carr, 34 Cal. 641.

2. Delano *v.* Kennedy, 5 Ark. 459.

3. Starbird *v.* Koonse, 10 Pa. Co. Ct. 449.

4. **Such Defect Cannot Be Amended.** Winn *v.* Sloan, 1 White & Wills. Civ. Cas. §1104. See also Johnson *v.* Brunson, 1 White & Wills. Civ Cas. §842; Whitley *v.* Jackson, 1 White & Wills. Civ. Cas. §574. But *compare* Peters *v.* Bower, Minor (Ala.) 69.

5. **Ark.**—Mandel *v.* Peet, 18 Ark. 236; McMeechan *v.* Hoyt, 16 Ark. 303; Taylor *v.* Ricards, 9 Ark. 378. **Ia.** Pitkins *v.* Boyd, 4 Greene 255. **Miss.**—State *v.* Fortinberry, 54 Miss. 316. **Mont.**—Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356; Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347. **Neb.**—Story *v.* Finklestein, 50 Neb. 177, 69 N. W. 856; Eckman *v.* Hammond, 27 Neb. 611, 43 N. W. 397. **S. D.**—Black Hills Mercantile Co. *v.* Gardiner, 5 S. D. 246, 58 N. W. 557, 5 S. D. 256, 58 N. W. 559. **Wis.**—Shakman *v.* Koch, 93 Wis. 595, 67 N. W. 925.

Principal obligor not required to whom others should stand in the relation of sureties. Howard *v.* Manderfield, 31 Minn. 337, 17 N. W. 946.

It is not necessary that the fact of the residence of the obligors appear in the bond. Jackson *v.* Stanley, 2 Ala. 326.

6. Bridges *v.* Center First Nat. Bank (Tex.), 105 S. W. 1018, where the name was signed by a typewriting machine.

7. **Fla.**—Pollock *v.* Murray, 38 Fla. 105, 20 So. 815; Forbes *v.* Porter, 25 Fla. 303, 6 So. 62. **Ga.**—Guckenheimer

prosecute the suit, an objection that the bond was signed by the agent or attorney is frivolous.[8]

Necessity of Authority Under Seal. — In some jurisdictions the power authorizing an agent to sign an attachment bond or undertaking, so as to be binding upon the principal, should be special.[9] While the magistrate must be satisfied of the relationship of principal and agent, the authority to sign as agent need not appear in the bond.[10] In others a formal power of attorney authorizing the agent or attorney to act is not necessary, but some evidence of his authority should appear of record.[11] The authority of an agent to sign his principal's name is matter of evidence *aliunde* and forms no part of the bond, and the court will not gratuitously make up the issue.[12] And in at least one jurisdiction, authority to an attorney to bring suit confers authority to do all the things necessary to the successful prosecution of the suit, including signing his client's name to the bond.[13]

Necessity of Authority Under Seal. — In several jurisdictions when the act of agency is required to be done under seal, in the name of the principal, the authority must be conferred, generally, by instrument under seal.[14]

Signature Binding Agent Personally. — If signature binds the agent individually and proper security is given, it has been held to be sufficient.[15]

4. The Seal. — Generally a seal is held to be essential to the validity of the instrument.[16]

v. Day, 74 Ga. 1. **La.**—Fulton *v.* Brown, 10 La. Ann. 350; Trowbridge *v.* Weir, 6 La. Ann. 706; Alexander *v.* Burns, 6 La. Ann. 704. **Miss.**—Dove *v.* Martin, 23 Miss. 588; Lindner *v.* Aaron, 5 How. 581. **S. C.**—Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744. **Va.**—Mantz *v.* Hendley, 2 Hen. & M. 308.

In B. F. Bridges & Son *v.* First Nat. Bank, 47 Tex. Civ. App. 454, 105 S. W. 1018, the signature of the bank was held sufficient without the addition of the name of the particular officer, especially as the bank had received the benefit.

If attorney signs the plaintiff's name to the bond, the latter having made the affidavit a dismissal is not necessary. Anthanissen *v.* Brunswick, etc., Steam Towing, etc., Co., 92 Ga. 409, 17 S. E. 951. See also Long *v.* Hood, 46 Ga. 225.

Authority Conferred by Telegram.—Furness *v.* Calhoun, 70 S. C. 537, 50 S. E. 194; Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744.

8. Dove *v.* Martin, 23 Miss. 588.

9. Grove *v.* Harvey, 12 Rob. (La.) 221.

10. Jackson *v.* Stanley, 2 Ala. 326.

11. Wallace *v.* Plukart, 6 Pa. Co. Ct. 151; National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

12. Lindner *v.* Aaron, 5 How. (Mass.) 581.

13. Fulton *v.* Brown, 10 La. Ann. 350; Trowbridge *v.* Weir, 6 La. Ann. 706; Alexander *v.* Burns, 6 La. Ann. 704.

14. Forbes *v.* Porter, 25 Fla. 363, 6 So. 62; Wanamaker *v.* Bowes, 36 Md. 42.

15. Taylor *v.* Ricards, 9 Ark. 378; Goble *v.* Brooks, 48 Md. 108; Stewart *v.* Katz, 30 Md. 334.

16. **Mass.**—George M. Pierce Co. *v.* Casler, 194 Mass. 423, 80 N. E. 494. **Mo.**—State *v.* Eldridge, 65 Mo. 584; Underwood *v.* Dollins, 47 Mo. 259. **N. Y.**—Tiffany *v.* Lord, 65 N. Y. 310. **Pa.**—Elliott *v.* Plukart, 6 Pa. Co. Ct. 151.

In Suits Before a Justice of the Peace a Seal Is Unnecessary.—State *v.* Chamberlin, 54 Mo. 338.

Where Undertaking Only Is Required. — In those jurisdictions where the distinction between a bond and undertaking is clearly adhered to, and only an undertaking is required by statute, a seal is unnecessary.[17]

Distinction Between Sealed and Unsealed Instruments Abolished. — Where the distinction between sealed and unsealed instruments in writing has been abolished by statute, a seal is immaterial.[18]

Form of Seals. — The seal upon a bond is none the less the seal of the one who executes it whether he fixes it before or after his signature, or whether he adopts as his seal one which has already been affixed to the instrument by another, or is affixed to it at his request, by another, after his signature has been made;[19] or if the word "seal" printed between brackets thus: [Seal], has been adopted.[20]

5. Approval. — Generally, it is required that the clerk shall approve the bond or undertaking given by the plaintiff,[21] and the approval may be by his deputy,[22] except when the clerk issues an attachment for himself individually.[23]

Evidence of Approval. — A formal endorsement or entry by the clerk of his approval is not necessary,[24] for it is the approval and not the endorsement that makes the bond sufficient,[25] and the reception of the bond, and the issuing of the attachment by virtue thereof, is *prime facie* evidence of approval;[26] and this may be shown by facts *aliunde* the bond itself.[27] But when the attachment has been issued by the judge and the bond is brought before the clerk the approval of the clerk should be endorsed thereon.[28]

17. McLain *v.* Simington, 37 Ohio St. 484; Ferst *v.* Powers, 58 S. C. 398, 36 S. C. 744; Grollman *v.* Lipsitz,, 43 S. C. 329, 21 S. E. 272.

18. **In Tennessee**, a statute providing that "the addition of a private seal to an instrument shall not affect its character in any respect" abolishes so completely the distinction between sealed and unsealed instruments of writing that the signature of the firm name to a bond though followed by a private seal is binding on the firm. Brooks *v.* Hartman, 1 Heisk. 36.

In Texas.—Gosquet *v.* Collins, 57 Tex. 340; Bernhard *v.* De Forrest, 36 Tex. 518. See Hart *v.* Kanady, 33 Tex. 720, and Read *v.* Levy, 30 Tex. 738.

19. George N. Pierse Co. *v.* Cosler, 194 Mass. 423, 80 N. E. 494.

Two parties signing opposite one seal. Baars *v.* Gordon, 21 Fla. 25.

20. Underwood *v.* Dollins, 47 Mo. 259.

21. See the cases generally under this sub-section.

By Magistrate or Notary Public.— If a magistrate or notary public is empowered to issue an attachment and approve the bond, the bond need not be given in the presence of, or be approved by, the magistrate who issues the attachment. Smith *v.* Joinder, 27 Ga. 65.

And the attorney of the plaintiff, who is a notary public, cannot approve the bond. Wilkowski *v.* Halle, 37 Ga. 678, 95 Am. Dec. 374.

22. Finn *v.* Rose, 12 Iowa 565.

23. Owens *v.* Johns, 59 Mo. 89.

24. Jones *v.* Leadville Bank, 10 Colo. 464, 17 Pac. 272; Griffith *v.* Robinson, 19 Tex. 219.

25. **Ind.**—Blaney *v.* Findley, 2 Blackf. 338. **Mo.**—Whitman Agricultural Assn. *v.* National R., etc., Assn., 45 Mo. App. 90. **S. C.**—Watson *v.* Pasehall, 73 S. C. 413, 53 S. E. 646.

26. **Ala.**—Hyde *v.* Adams, 80 Ala. 111. **Ark.**—Mandel *v.* Peet, 18 Ark. 236. **Fla.**—West *v.* Woolfolk, 21 Fla. 189. **Ind.**—Levi *v.* Darling, 28 Ind. 497. **Md.** Dean *v.* Oppenheimer, 25 Md. 368; Howard *v.* Oppenheimer, 25 Md. 350.

27. Mandel *v.* Peet, 18 Ark. 236.

Clerk Competent To Prove the Facts. Simpson *v.* Minor, 1 Blackf. (Ind.) 229.

28. Watson *v.* Pasehall, 73 S. C. 413, 53 S. E. 646.

H. SURETIES. — **1. Necessity for.** — A bond or undertaking without sureties is generally held to be fatal.[29] But the parties need not be described as sureties,[30] or be named as sureties in the body of the bond to make them liable as such.[31]

2. Who May Become Sureties. — A firm or partnership may become sureties upon a bond or undertaking in attachment.[32]

Reason. — The partner who signs is personally bound, and there is the presumption that the officer who took the bond satisfied himself of the authority of the signer.[33]

An attorney at law, also, may become surety,[34] though the practice is disapproved,[35] and, by rule of court, in some states prohibited.[36]

An officer or director of a corporation may become surety on the bond or undertaking of the corporation since a corporation is a separate entity.[37]

Trust and Surety Companies. — A trust company, or a surety company, may go on the bond.[38]

3. Residence. — **Generally.** — Sureties must be residents of the state in which the attachment is isued,[39] though not necessarily of the county.[40]

The fact of residence need not appear in the bond.[41]

4. Number. — Unless the statute demands more,[42] one surety is sufficient if indemnity is secured to the defendant.[43]

29. See cases generally throughout this sub-section, and Ford *v.* Rogers, 12 Rich. L. (S. C.) 385.

Where there were blanks for sureties, and the bond was signed merely by the plaintiff, it was merely insufficient and not a nullity, and the suit should not have been dismissed before any application for a better bond had been made in pursuance of the statute. Jasper County *v.* Chevault, 38 Mo. 357.

The Record of the Case Must Contain a Copy of the Bond.—Cousins *v.* Brashier, 1 Blackf (Ind.) 85.

30. Baars *v.* Gordon, 21 Fla. 25.

31. Gallatin First Nat. Bank *v.* Wallace (Tex. Civ. App.), 65 S. W. 392.

32. **Ia.**—Churchill *v.* Fulliam, 8 Iowa 45. **La.**—Thatcher *v.* Goff, 13 La. 360. **Tex.**—Donnelly *v.* Elser, 69 Tex. 282, 6 S. W. 563; Eikel *v.* Hanscom, 3 Wills. Civ. Cas. §473.

33. Thatcher *v.* Goff, 13 La. 360; Donnelly *v.* Elser, 69 Tex. 282, 6 S. W. 563.

34. **Ind.**—Abbott *v.* Zeigler, 9 Ind. 511. **La.**—Daly *v.* Duffy, 26 La. Ann. 468. **Md.**—Lewis *v.* Higgins, 52 Md. 614. **Tex.**—Rogers *v.* Burbridge, 5 Tex. Civ. App. 67, 24 S. W. 300.

35. Tessier *v.* Crowley, 17 Neb. 207, 22 N. W. 422.

36. Levin *v.* American Furn. Co., 133 Ga. 670, 66 S. E. 888.

37. Levin *v.* American Furn. Co., *supra;* Laning *v.* Iron City Nat. Bank (Tex. Civ. App.), 36 S. W. 486.

38. Steppacher *v.* McClure, 75 Mo. App. 135; Aldrich *v.* Columbia R. Co., 39 Ore. 263, 64 Pac. 455.

39. **U. S.**—Singer Mfg. Co. *v.* Mason, 5 Dill. 488, 22 Fed. Cas. No. 12,903. **Ala.**—Mobile Mut. Ins. Co. *v.* Cleveland, 76 Ala. 321. **Ga.**—Thompson *v.* Arthur, Dud. 253, where it was said that in the absence of an express provision it will be presumed that the legislature intended only such security as could be enforced in the courts of the state. **Kan.**—Ferguson *v.* Smith, 10 Kan. 396. **La.**—Miller *v.* Chandler, 29 La. Ann. 88. **Tex.**—Caldwell *v.* Lamkin, 12 Tex. Civ. App. 29, 33 S. W. 316.

40. Mobile Mut. Ins. Co. *v.* Cleveland, 76 Ala. 321; Ferguson *v.* Smith, 10 Kan. 396. But see McCook *v.* Willis, 28 La. Ann. 448.

41. Jackson *v.* Stanley, 2 Ala. 326.

42. Spettigue *v.* Hutton, 9 Pa. Co. Ct. 156.

43. **Ind.**—Church *v.* Drummond, 7 Ind. 17, holding one *prima facie* suffi-

5. Sufficiency of Security. — Unless the requirements of the statute are fully complied with, the security is not sufficient.[44]

Test of Sufficiency. — The question to be decided is, has the surety present means to meet the liability which his signature imposes?[45] He must be good for the full amount of the bond.[46]

If the bond is good upon its face the burden is then upon the person attacking its sufficiency to show that it is insufficient,[47] or that the officer accepting it acted corruptly or was imposed upon.[48]

Same Person Principal and Surety. — One cannot be bound as principal and as surety, and bonds which are signed in this manner are invalid.[49]

One surety is not released by the fact that the bond cannot be enforced against another.[50]

6. Justification. — Justification of sureties is generally required.[51] A failure to justify the sureties is not such an irregularity as will

cient. **Ia.**—Elliott *v.* Stevens, 10 Iowa 418, where it was said that "sureties" may be construed in the singular number, the important thing being pecuniary responsibility. **N. Y.**—Williams *v.* Barnaman, 19 Abb. Pr. 69.

As a rule of practice in some jurisdictions two sureties are required though the rule is relaxed where an approved surety company goes on the bond. Goldmark *v.* Magnolia Metal Co., 28 App. Div. 264, 51 N. Y. Supp. 68.

44. **Ga.**—Lockett *v.* de Neufville, 55 Ga. 454. **La.**—McCook *v.* Willis, 28 La. Ann. 448, where, of four who signed, three were insolvents and one was a non-resident. **Tex.**—Winn *v.* Sloan & Co., 1 White & Wills. Civ. Cas. §1105.

45. Lard *v.* Strother, 4 Rob. (La.) 95.

Other obligations are to be considered. Durham *v.* Lisso, 32 La. Ann. 415.

46. Lockett *v.* de Neufville, 55 Ga. 454; Jackson *v.* Warwick, 17 La. 436.

47. **Ga.**—Reid *v.* Armour Pack. Co., 93 Ga. 696, 21 S. E. 131. **La.**—Austin *v.* Latham, 19 La. 88, where it was held that the question whether or not the surety was a freeholder was immaterial. **Tex.**—C. B. Cones, etc., Mfg. Co. *v.* Rosenbaum (Tex. Civ. App.), 45 S. W. 333.

48. May *v.* Gamble, 14 Fla. 467.

49. Marshall *v.* Ravisies, 22 Fla. 583; Bayne *v.* Cusimano, 50 La. Ann. 361, 23 So. 361 (where the bond was signed in the firm name and by one partner individually).

50. Gable *v.* Brooks, 48 Md. 108, where a firm could not be held.

51. See the statutes in the various jurisdiction.

Waiver.—"The presentation of the undertaking so executed by the Guaranty Company (a corporation) was, in effect, offering a new surety, as to whom defendant was entitled to examine with regard to its sufficiency. Fox *v.* Hale & Norcross S. M. Co., 97 Cal. 353, 32 Pac. 446; State *v.* District Court, 58 Minn. 352, 59 N. W. 1055. There is nothing in the record disclosing that the agent and representative of such corporation surety was not at the time present in court; nor is there anything showing that defendant questioned the sufficiency of said surety, or that defendant was denied the right to examine said surety as to its sufficiency. The facts of the case clearly show a waiver on the part of defendant of other than the *prima facie* justification made by presenting and filing an undertaking duly executed. Bank of Escondido *v.* Superior Court of San Diego, 106 Cal. 43, 39 Pac. 211; Blair *v.* Hamilton, 32 Cal. 53." La Dow *v.* National Bldg. & Pac. Brick Co., 11 Cal. App. 308, 104 Pac. 838.

render the proceedings void.[52] By rule upon the clerk the misprision may be corrected.[53]

If the intent of the statute is carried out it is enough.[54]

I. Defects Objections and Amendments. — 1. Defects. — What is merely an irregularity as distinguished from a jurisdictional defect in a bond is not generally so material as to call for the quashal of the attachment,[55] if the plaintiff amends within a reasonable time.[56] Thus, if a word which is omitted by mistake can be readily supplied from the context, the omission is not fatal.[57] The omission of "out" after "suing" is not fatal;[58] nor the failure to include the words "or the writ shall be set aside or vacated;"[59] nor the failure to set out the names of the sureties in the body of the bond;[60] nor the insertion of irrelevant words evidently used inadvertently.[61] A defective bond is harmless when no bond is required.[62] But there may be clerical errors which invalidate the bond.[63] So the bond is defective if it fails to name the "defendant" to whom the damages are payable;[64] and a material alteration, made without the consent of the obligor in a necessary bond, will destroy the writ.[65] The dissolution of the attachment because of a defect in the bond is not ground for dismissing the suit.[66]

2. Objections. — a. *Bond Good Until Objection.* — In some cases it has been held that until objection is made, and until a reasonable opportunity has been given to perfect it, the bond or undertaking is to be treated as valid.[67] If, finally, there is a failure within

52. Baxter *v.* Smith, 2 Wash. Ter. 97, 4 Pac. 35.

53. Jones *v.* Leadville Bank, 10 Colo. 464, 17 Pac. 272.

54. Taaffe *v.* Rosenthal, 7 Cal. 514, where a justification reading A and B, each having duly sworn, deposes and says that they are worth the sum of $1200, over and above his just debts and liabilities, exclusive of property exempt from execution was held good.

55. See cases later in this section, and Wood *v.* Squires, 28 Mo. 528; Hall *v.* Kintz, 12 Pa. Co. Ct. 90, 2 Pa. Dist. 16.

Mistake as to term of court held cured by the execution and filing which properly fixed the term. Huffman *v.* Hardeman (Tex.), 1 S. W. 575. And see Houston *v.* Belcher, 12 Smed. & M. (Miss.) 514.

56. Ala.—Planters', etc. Bank *v.* Andrews, 8 Port. 404. Ia.—Cheever *v.* Lane, 9 Iowa 193. Ky.—Nutter *v.* Connet, 3 B. Mon. 199.

57. Frankel *v.* Stern, 44 Cal. 168; Berry *v.* Wasserman, 179 Mass. 537, 61 N. E. 228.

58. La Force *v.* Wear, etc., Dry Goods Co., 8 Tex. Civ. App. 572, 29 S. W. 75.

59. Schweigel *v.* L. A. Shakman Co., 78 Minn. 142, 80 N. W. 871, *affirmed* 78 Minn. 150, 81 N. W. 529.

60. Williams *v.* Barnaman, 19 Abb. Pr. (N. Y.) 69; McLain *v.* Simington, 37 Ohio St. 484.

61. Simmons Hdw. Co. *v.* Alturas Commercial Co., 4 Idaho 334, 39 Pac. 350, 95 Am. St. Rep. 66.

62. Lilburn *v.* Buster's Admr. 3 Ky. L. Rep. 389, on return of no property found.

63. Levy *v.* Millman, 7 Ga. 167, where bond was dated 1849, and attachment 1840, and the court said it could do nothing but act on the record as it was certified.

64. Rohrbough *v.* Leopold, 68 Tex. 254, 4 S. W. 460.

65. Jackson *v.* Stanley, 2 Ala. 326; Starr *v.* Lyon, 5 Conn. 538.

66. Elliott *v.* Mitchell, 3 Greene (Iowa) 237, where the court said: "Such defects could not impair the plaintiff's cause of action or defeat his right to recover against the defendant."

67. Ala.—Watson *v.* Auerbach, 57

proper time to amend the bond or undertaking the levy may be dismissed and the attachment quashed.[68]

b. *Time for Objection.* — Objection to defects in the bond or undertaking cannot be taken for the first time on appeal.[69] To allow objection there would be to deprive the defendant of proper opportunity to correct the defect.[70]

Failure to give a bond is in its nature matter in abatement and the objection cannot be made after plea to the merits.[71]

c. *Who Can Object.* — Only the defendant can object to errors and irregularities and to the failure to give a bond,[72] and not sureties on a replevin bond;[73] or a garnishee;[74] or one holding a chattel mortgage

Ala. 353 (by plea in abatement or on motion to quash); Lowe *v.* Derrick, 9 Port. 415; Alford *v.* Johnson, 9 Port. 320; Planters', etc. Bank *v.* Andrews, 8 Port. 404. **Cal.**—Moynihan *v.* Drobaz, 124 Cal. 212, 56 Pac. 1026, 71 Am. St. Rep. 46. **Ia.**—Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573. **Mo.**—McDonald *v.* Fist, 53 Mo. 343; Jasper County *v.* Chenault, 38 Mo. 357; Tevis *v.* Hughes, 10 Mo. 380; Claflin *v.* Hoover, 20 Mo. App. 314; Cummings *v.* Denny, 6 Mo. App. 602.

68. **Ala.**—Lowry *v.* Stowe, 7 Port. 483. **Ga.**—Lockett *v.* DeNeufville, 55 Ga. 454. **N. Y.**—Corbit *v.* Nicoll, 12 Civ. Proc. 235, 9 N. Y. St. 525.

In Pflaum *v.* Grinberg, 5 Heisk. (Tenn.) 215, it was held that it is incumbent upon the defendant to have the attachment discharged and that his failure to do so is a waiver of the right subsequently to invoke judicial action on a rule to show cause which had been long pending.

69. **Ala.**—Jones *v.* Pope, 6 Ala. 154. **Ark.**—Fletcher *v.* Menken, 37 Ark. 206. **Ill.**—Lawver *v.* Langhans, 85 Ill. 138; Morris *v.* School Trustees, 15 Ill. 266; Miere *v.* Brush, 4 Ill. 21, saying that objections were waived when not taken below. **Ia.**—Bretney *v.* Jones, 1 Greene 366. **Kan.**—Myers *v.* Cole, 32 Kan. 138, 4 Pac. 169. **Ky.**—Behan *v.* Warfield, 90 Ky. 151, 13 S. W. 439. **Miss.**—Barrow *v.* Burbridge & Co., 41 Miss. 622.

Not on Writ of Error.—Bickerstaff *v.* Dellinger, 1 N. C. 388; Powell *v.* Hampton, 1 N. C. 218.

70. Lawver *v.* Langhans, 85 Ill. 138.

71. **Ala.**—Kirkman *v.* Patton, 19 Ala. 32. **Ark.**—Austin *v.* Goodbar Shoe Co., 60 Ark. 444, 30 S. W. 888; Fletcher *v.* Menken, 37 Ark. 206; Reagan *v.* Irvin, 25 Ark. 86. **Ga.**—Perry *v.* Mulligan, 58 Ga. 479. **Ind.**—Voorhees *v.* Hoagland, 6 Blackf. 232. **La.**—Ealer *v.* McAllister & Co., 14 La. Ann. 821. **Mich.**—Bryant *v.* Hendee, 40 Mich. 543. **S. C.** Callender & Co. *v.* Duncan, 2 Bailey L. 454; Young *v.* Gray, Harp. L. 38. **Tex.** Drake *v.* Brander, 8 Tex. 351.

When the defendant appears in his right name after having been sued under the wrong one. Hammond *v.* Starr, 79 Cal. 556, 21 Pac. 971.

Cured by Judgment.—Kirkman *v.* Patton, 19 Ala. 32; Augusta Bank *v.* Jaudon, 9 La. Ann. 8.

Not on Motion for New Trial.—Ganz *v.* Weisenberger, 66 Mo. App. 110.

Non-residence is no excuse for failure to object in proper time. Jones *v.* People, 6 Ala. 154.

Not Ground for Demurrer.—Brace *v.* Grady, 36 Iowa 352.

Special bail to sheriff does not shut out plea in abatement. Delano *v.* Kennedy, 5 Ark. 457.

Nor a Replevin Bond.—Delano *v.* Kennedy, 5 Ark. 458.

72. **Ark.**—Austin *v.* Goodbar Shoe Co., 60 Ark. 444, 30 S. W. 888, where it was said that by not taking objection he waived defects. **Miss.**—Atkinson *v.* Foxworth, 53 Miss. 741. **Ohio.**—O'Farrell *v.* Stockman, 19 Ohio St. 296. **S. C.**—Wigfall *v.* Byne, 1 Rich. L. 412.

So He May Waive.—O'Farrell *v.* Stockman, 19 Ohio St. 296.

But objection to the jurisdiction is not a waiver (Tiffany *v.* Lord, 65 N. Y. 310), nor the giving of a replevin bond (Dusseldorf *v.* Redlich, 16 Hun (N. Y.) 624, additional security).

73. Craig *v.* Herring, 80 Ga. 709, 6 S. E. 283.

74. Camberford *v.* Hall, 3 McCord (S. C.) 345.

given by the defendant, in an action to recover the property.[75]

3. **Amendments.** —a. *In General.* — Unless the defect goes to the jurisdiction of the court[76] the bond or undertaking may be amended, generally, whenever the defect therein is pointed out.[77]

When Not Allowed. — In some jurisdictions, it has been held, however, that an attachment bond or undertaking is not amendable;[78] and an amendment cannot be allowed to reach back and confer jurisdiction so as to legalize acts done without jurisdiction, and which, when done, were *ultra vires* and void.[79] Nor can an amendment be allowed which would change the character of the bond and impair the lien of the defendant,[80] and the court may refuse an amendment which would not validate the bond.[81]

b. *What May or May Not Be Amended.* — **In General.** — Where an amendment may be required or permitted, it has been held that it may be allowed if the signing of the plaintiff's name by his agent or attorney, under the circumstances was not lawful;[82] or to supply the signature of the plaintiff when the undertaking had been signed only by the sureties;[83] or to correct a recital that the proceedings were had in one county when, in fact, they were had in another;[84] or to supply a penalty or condition where the breach contained neither;[85] to add a new party defendant;[86] to allow sureties to sign individually

75. Moresi *v.* Swift, 15 Nev. 215.

76. See, *infra*, this section.

77. **Ala.**—Sims *v.* Jacobson, 51 Ala. 186. **Ark.**—Bergman *v.* Sells & Co., 39 Ark. 97. **Ga.**—Guckenheimer *v.* Day, 74 Ga. 1; Lockett *v.* DeNeufville, 55 Ga. 454. **Ill.**—Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Lea *v.* Vail, 3 Ill. 473. **Ia.**—Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Hamill *v.* Phenicie, 9 Iowa 525; Churchill *v.* Fulliam, 8 Iowa 45. **Minn.**—Blake *v.* Sherman, 12 Minn. 420. **Mont.**—Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356. **N. Y.**—Finn *v* Mehrbach, 30 Civ. Proc. 242, 65 N. Y. Supp. 250.

If motion to amend is not made in the lower court the appellate court cannot consider the matter. Alabama Bank *v.* Fitzpatrick, 4 Humph. (Tenn.) 311.

In the Interest of Justice.—Liberality is exercised, under the statute, to prevent injustice, and it is in the defendant's interest. Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356; Finn *v.* Mehrbach, 30 Civ. Proc. 242, 65 N. Y. Supp. 250.

78. **Cal.**—Tibbet *v.* Sue, 122 Cal. 206, 54 Pac. 741 (*citing* Winters *v.* Pearson, 72 Cal. 553, 14 Pac. 304). **Pa.** Price *v.* Motter, 2 Pearson 221; Wallace *v.* Plugart, 6 Pa. Co. Ct. 151. **Tex.**—East, etc. Texas Lumb. Co. *v.* Warren, 78 Tex. 318, 14 S. W. 783; Winn *v.* Sloan, 1 White & Wills. Civ. Cas. §1104; Whitley *v.* Jackson, 1 White & Wills. Civ. Cas. §575.

Subsequent to Issue of Writ.—Houston *v.* Belcher, 12 Smed. & M. (Miss.) 514.

79. Wagener *v.* Booker, 31 S. C. 375, 9 S. E. 1055.

80. Work *v.* Titus, 12 Fla. 628.

81. Hunter *v.* Ladd, 2 Ill. 551.

82. Anthanissen *v.* Brunswick, etc. Steam Towing Co., 92 Ga. 409, 17 S. E. 951.

83. Seattle First Nat. Bank *v.* Fish, 2 Alaska 344.

84. Holmes *v.* Budd, 11 Iowa 186.

85. Blake *v.* Sherman, 12 Minn. 420.

86. McKissack *v.* Witz, 120 Ala. 412, 25 So. 21; Glover & Son Com. Co. *v.* Abilene Mill. Co., 136 Mo. App. 365, 116 S. W. 1112 (where the effect was to dismiss as to a defendant corporation and several individuals and to make an entire substitution of new names of persons doing business under the name of the Milling Company).

In such a case, it was held in Stein *v.* Bowers, 2 W. N. C. (Pa.) 542, that a new bond was required.

instead of as a partnership;[87] and, generally, to correct defects in matters of form[88]

Amount. — Amendment is allowable to enlarge the amount by new or additional security,[89] except where, by the rule of strict construction, the bond is a nullity unless for a specified amount.[90]

As to Approval of the Bond or Undertaking. — The endorsement of ap-

87. Boisseau *v.* Kahn, 62 Miss. 757.

88. Seattle First Nat. Bank *v.* Fish, 2 Alaska 344; Oliver *v.* Wilson, 29 Ga. 642.

89. **U. S.**—Isenburger *v.* Roxbury Distilling Co., 163 Fed. 133; Bumberger *v.* Gerson, 24 Fed. 257. **Ala.**—Jackson *v.* Stanley, 2 Ala. 326; Lowe *v.* Derrick, 9 Port. 415; Planters', etc. Bank *v* Andrews, 8 Port. 404; Lowry *v.* Stowe, 7 Port. 483. **Ga.**—Long *v.* Hood, 46 Ga. 225; Irvin *v.* Howard, 37 Ga. 18. **Ia.**—Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Elliott *v.* Stevens, 10 Iowa 418; VanWinkle *v.* Stevens, 9 Iowa 264. **Mich.**—Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679; Kidd *v.* Dougherty, 59 Mich. 240, 26 N. W. 510. **Miss.**—Proskey *v.* West, 8 Smed. & M. 711; House *v.* Bierne, 5 Smed. & M. 622. **Mo.**—Owens *v.* Johns, 59 Mo. 89; Henderson *v.* Drace, 30 Mo. 358; Beardslee *v.* Morgan, 29 Mo. 471; Wood *v.* Squires, 28 Mo. 528; Van Arsdale *v.* Krum, 9 Mo. 397; Stevenson *v.* Robbins, 5 Mo. 18; State *v.* Finke, 66 Mo. App. 238; Whitman Agricultural Assn. *v.* National R., etc. Industrial Assn., 45 Mo. App. 90. **Mont.**—Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356; Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347. **N. Y.**—Ives *v.* Ellis, 35 Misc. 333, 71 N. Y. Supp. 971; Kissam *v.* Marshall, 10 Abb. Pr. 424; Whitney *v.* Deniston, 2 Thomp. & C. 471. **Tenn.**—Alexander *v.* Lisby, 2 Swan 107.

Power Inherent in Court.—§682 of the Code of Civil Procedure expressly conferred powers upon the court to require additional security, and before it was thus expressly conferred it was held to be incident to the regulation and conduct of provisional remedies. Manda *v.* Etienne, 13 App. Div. 237, 43 N. Y. Supp. 194.

Defect by No Fault of Plaintiff.—*Ex parte* Damon, 103 Ala. 477, 15 So. 862.

Bond Not Affected by Death of Plaintiff.—Rheubottom *v.* Sadler, 19 Ark. 491.

Where testimony of a security is needed upon the trial, a new bond may be ordered. Shaw *v.* Trunsler, 30 Tex. 390. To the same effect, see Garmon *v.* Barringer, 19 N. C. 502.

90. **U. S.**—Bradley *v.* Kroft, 19 Fed. 295, in Wisconsin. **Fla.**—Roulhac *v.* Bigby, 7 Fla. 336. **La.**—Planters' Bank *v.* Byrne, 3 La. Ann. 687; Graham *v.* Burckhalter, 2 La. Ann. 415; Erwin *v.* Commercial, etc. Bank, 12 Rob. 227. **S. C.**—Wagener *v.* Booker, 31 S. C. 375, 9 S. E. 1055. **Tex.**—East, etc. Texas Lumb. Co. *v.* Warren, 78 Tex. 318, 14 S. W. 783; Drake *v.* Brander, 8 Tex. 351; Caldwell *v.* Lamkin, 12 Tex. Civ. App. 29, 33 S. W. 316; Whitley *v.* Jackson, 1 White & Wills. Civ. Cas. §575.

In Louisiana.—In Durham *v.* Lisso, 32 La. Ann. 415, the court said: "We cannot assert to the intimation that this court has power to order a new and sufficient security. What the lower court might have done upon application to dissolve the attachment because of the insufficiency of the surety, it is not necessary for us to say. It is certain that we cannot order a new security to be taken." And see Graham *v.* Burckhalter, 2 La. Ann. 415.

The plaintiff may give a new bond and substitute a new surety when no liability has accrued under the first bond. Tyson *v.* Lansing, 10 La. 444.

In Bumberger *v.* Gerson, 24 Fed. 257, Judge Boarman says in effect that the courts of Louisiana in laying down the inflexible rule in that state that an attachment must stand or fall according to the state of facts at the date when it issues, and it cannot be cured by a subsequent act, did not mean to treat and consider the matter of sufficiency of sureties as one of the facts which must necessarily enter into the state of facts existing when the writ issues, for the plaintiff presents his bond and the clerk exercising his quasi-judicial function may approve or reject, and if he approves the plaintiff has done all he can do; if he rejects the plaintiff may tender another surety.

proval is merely evidence of approval, and the omission therefore may be corrected.[91]

c. *Effect of Amendment.* — A new or amended bond takes the place of the original one and, by relation, validates the proceedings throughout.[92]

XI. WRIT OR WARRANT OF ATTACHMENT. — A. Definition and Nature.—The terms writ of attachment and the warrant of attachment have no clearly defined distinction, and for the purposes of this article they are used synonymously and interchangeably.[93]

The term "order of attachment," has, however, been used to designate merely the ancillary process, as distinguished from the original process of attachment.[94]

B. Issuance of Writ or Warrant. — **1. Definitions.** — Under a statute it has been held that the word "issuing" refers to the actual delivery of the writ of attachment to the sheriff to be executed.[95]

2. Nature of Act of Issuance. — If the court or judge issues the writ his act in so doing is judicial,[96] but the issuance, by the clerk, of the writ or warrant of attachment, is a ministerial act.[97]

3. Who May Grant or Issue. — a. *In General.* — The authority to grant or issue a writ or warrant of attachment is not inherent in any court, but must be conferred by special enactment.[98] This right may

91. **Ark.**—Mandel *v.* Peet, 18 Ark. 236. **Fla.**—West *v.* Woolfolk, 21 Fla. 189. **N. Y.**—Conklin *v.* Dutcher, Code Rep. (N. S.) 49, 5 How. Pr. 386. **W. Va.**—Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

92. **Colo.**—McCraw *v.* Welch, 2 Colo. 284. **Ia.**—Branch of State Bank *v.* Morris, 13 Iowa 136; VanWinkle *v.* Stevens, 9 Iowa 264; Bretney *v.* Jones, 1 Greene 366. **Tex.**—Shaw *v.* Trunsler, 30 Tex. 390.

93. "There is nothing in the distinction between the warrant provided for under the law in force in 1865 and the writ provided for under the law in force in November, 1866. . . . for, if there be any doubt whether the warrant be a writ, there can certainly be none that it is a process, and, therefore, required to be executed in the same way and with the same formalities as a writ." O'Farrell *v.* Heard, 22 Minn. 189.

94. Houghton *v.* Ault, 16 How. Pr. 77; Gutman *v.* Virginia Iron Co., 5 W. Va. 22.

Nature of Process or Mandate.—The nature of the writ or warrant of attachment is not such as that it could be inserted in a bill in equity for an accounting between partners and served by arresting the defendant (Com. *v.* Sumner, 5 Pick. (Mass.) 360); nor could it issue as an original attachment to recover for damages arising from torts, but only in aid of a summons in cases of tort (Gibson *v.* Carroll, 1 Heisk. (Tenn.) 23). Some jurisdictions have also used the phraseology of order of attachment for the order of allowance made by the judge or court to the clerk. **U. S.**—Perry *v.* Sharpe, 8 Fed. 15. **Ark.**—Baker *v.* Ayers, 58 Ark. 524, 25 S. W. 834. **Neb.**—Philpott *v.* Newman, 11 Neb. 299, 9 N. W. 94.

95. Hancock *v.* Ritchie, 11 Ind. 48; Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

96. Haslett *v.* Rodgers, 107 Ga. 239, 33 S. E. 44.

97. Van Camp *v.* Searle, 147 N. Y. 150, 41 N. E. 427, *affirming* 79 Hun 134, 29 N. Y. Supp. 757; Evans *v.* Etheridge, 96 N. C. 42, 1 S. E. 633.

It has therefore been held that a clerk may issue a warrant or writ in his own behalf. Evans *v.* Etheridge, 96 N. C. 42, 1 S. E. 633.

It has, however, been held to be so far a judicial act, that writs issued by him are not returnable to the court of which he is clerk. Matthews *v.* Ansley, 31 Ala. 20.

98. Vann *v.* Adams, 71 Ala. 475 (where it was pointed out that such writs do not pertain to the ordinary

be exercised by the legislature in general or specific terms."[99] And the authority having been conferred, will not be affected by a subsequent statute referring to processes issued by other courts.[1] When authority has been conferred upon a court to issue attachments in certain cases, the court has power to issue them only in the particular cases specified.[2]

And as between different courts, the statutory jurisdiction as conferred must be observed.[3]

As between different officers, the officer issuing the writ or warrant of attachment need not be the same who took the affidavit upon which the process is based;[4] nor is it essential that the one before whom the affidavit was made and the one issuing the writ or warrant, should be residents of the same county.[5]

Constitutional Statutory Provisions. — The right of the legislature to confer the authority to issue a writ or warrant of attachment will not be considered as curtailed by mere implication from a constitutional provision.[6]

b. *Persons Interested in the Proceedings.* — The officer issuing the writ or warrant of attachment should not be interested or involved in the outcome of the suit.[7]

process and jurisdiction of courts); McDonough *v.* Phelps, 15 How. Pr. (N. Y.) 372; Mershon *v.* Leonard Scott Pub. Co., 4 Civ. Proc. (N. Y.) 319.

A statute authorizing attachments against debtors on the ground of fraud, under which a motion to dissolve may be acted upon by the judge as in the nature of an equity power, and providing that a decision granting or refusing the attachment is subject to review by the supreme court, refers only to attachments returnable to the superior court. And a local act applicable to a city court cannot trench upon the general touching that class of attachments. Rome First Nat. Bank *v.* Ragan, 92 Ga. 333, 18 S. E. 295.

In Wisconsin any officer authorized to administer oaths is a "proper officer." Mayhen *v.* Dudley, 1 Pin. 95.

99. Renard *v.* Hargous, 2 Duer (N. Y.) 540.

Provisions authorizing a judge of probate to grant an attachment in a cause pending in the district court where it is made to appear that the judge of the district court is absent from the county at the time, and where a proper showing is made, are not invalid under the organic act of the territory as conferring upon the probate court authority over matters other than probate matters. Central Loan, etc., Co. *v.* Campbell Commission Co., 5 Okla. 396, 49 Pac. 48, *reversed* on other grounds in 173 U. S. 84, 19 Sup. Ct. 346, 43 L. ed. 623.

1. Sutherland *v.* DeLeon, 1 Tex. 250, 46 Am. Dec. 100.

2. Granieri *v.* New York Shoe Repairing Co., 56 Misc. 121, 106 N. Y. Supp. 1107; Sullivan *v.* Presdee, 9 Daly (N. Y.) 552; Reeves *v.* Brown, 2 Pa. L. J. 196, 3 Pa. L. J. 464.

3. **Mich.**—Welles *v.* Detroit, 2 Dougl. 77. **Miss.**—Wragg *v.* Kelley, 42 Miss. 231, as between circuit and county courts. **Mo.**—Monks *v.* Strange, 25 Mo. App. 12, as between circuit and justice courts. **N. Y.**—Renard *v.* Hargous, 13 N. Y. 259. **Tex.**—Grizzard *v.* Brown, 2 Tex. Civ. App. 584, 22 S. W. 252.

On disqualification of the judge of the circuit, an attachment must be issued by the judge of an "adjoining" circuit, as directed by the statute. McAndrew *v.* Irish-American Bank, 117 Ga. 510, 43 S. E. 858.

4. Wicker *v.* Schofield, 59 Ga. 210.

5. Dickinson *v.* Barnes, 3 Gill (Md.) 485.

6. Lyle *v.* Longley, 6 Baxt. (Tenn.) 286.

7. Wilkowski *v.* Halle, 37 Ga. 678, 95 Am. Dec. 374

And so an attorney who is a notary

c. *Notaries.* — Where the constitution of the state conferred upon notary publics the same jurisdiction as the justices of the peace, and a subsequent statute conferred upon the justices of the peace the right to issue a writ or warrant of attachment, it did not confer that right upon notary publics by implication.[8]

d. *Sheriff or Deputy.* — A sheriff or his deputy cannot issue the writ in the absence of a statute authorizing it.[9]

e. *Judicial Officers.* — (I.) In General. — The power and authority of court or judge to issue or to order the issuance of a writ of attachment, not being inherent,[10] rests upon statutory authority,[11] and such statutes are strictly construed.[12]

(II.) Order of Allowance. — Necessity for Order. — When an order of allowance by the judge, court or chancellor is required, in any case by statute, the making of such an order of allowance is deemed an essential prerequisite to the issuance of the writ of attachment.[13]

public is not authorized to issue the writ or warrant in a case in which he is employed (Wilkowski *v.* Halle, 37 Ga. 678, 95 Am. Dec. 374); but the fact that the person applying for the writ and the officer issuing it were co-employes does not constitute such a relationship as would make it improper for the officer to issue the writ (Georgia Ice Co. *v.* Porter, 70 Ga. 637).

8. Nordlinger *v.* Gordon, 72 Ala. 239; Vann *v.* Adams, 71 Ala. 475.

9. **Sheriff or Deputy.**—A sheriff or his deputy cannot issue the writ. Smith *v.* Saxton, 6 Pick. (Mass.) 483.

10. Dirickson *v.* Showell, 79 Md. 49, 28 Atl. 896; Reed *v.* Bagley, 24 Neb. 332, 38 N. W. 827.

11. Wanet *v.* Corbet, 13 Ga. 441.

Presumption is that judge issuing writ is the one designated. Reed *v.* Bagley, 24 Neb. 332, 38 N. W. 827.

12. Lord *v.* Gaddis, 6 Iowa 57.

Authority To Order Not To Issue.—Noyes *v.* Phipps, 10 Kan. App. 580 mem., 63 Pac. 659.

Authority of Probate Judge.—Buck *v.* Panabaker, 32 Kan. 466, 4 Pac. 829.

As Between Judges of Different Courts.—Under a statute providing that a creditor "may petition the judge of the superior court" to issue "an attachment against the property of such debtor," a judge of a city court has no power to issue an attachment authorized by that statute. Fordham *v.* Ehrlich, 117 Ga. 883, 45 S. E. 264.

A justice of the peace can only make the order in the terms and under the conditions laid down by the statute. Smith *v.* Greenleaf, 4 Har. & M. (Md.) 162.

13. Worthington *v.* Damarin, 5 Ky. L. Rep. 684; Hotel Registry Realty Corp. *v.* Stafford, 70 N. J. L. 528, 57 Atl. 145 (the statute in terms requiring the judicial order to precede the issuance of the writ).

Considering Affidavit and Other Testimony in Place of Order.—Loeb *v.* Smith, 78 Ga. 504, 3 S. E. 458.

Order Necessary in Case of Amended Petition.—Purdee *v.* Cocke, 18 La. 482.

Attachment issued by registrar without order therefor is void. McKenzie *v.* Bentley, 30 Ala. 139.

Showing Officer Issuing Writ.—It is not necessary that it should appear upon the warrant what officer allowed it to issue. Shaubhut *v.* Hilton, 7 Minn. 506.

Order of Allowance Need Not Appear on Writ.—Armstrong *v.* Lynch, 29 Neb. 87, 45 N. W. 274.

Upon a Claim Not Due.—In some jurisdictions when the action is upon a claim not due, an order of allowance is a prerequisite to the issuing of the attachment. **U. S.**—Perry *v.* Sharpe, 8 Fed. 15. **Ky.**—Scott *v.* Doneghy, 17 B. Mon. 321. **Neb.**—Philpott *v.* Newman, 11 Neb. 299, 9 N. W. 94. **Wyo.**—Crain *v.* Bode, 4 Wyo. 255, 39 Pac. 747.

Action Not Founded on Contract.—In Iowa a statute provides that if the plaintiff's demand is not founded on contract, he must get an order of allowance before the issuance of the writ of attachment. Swan *v.* Smith, 26 Iowa 87; Johnson *v.* Butler, 2 Iowa 535.

But when the writ is issued by the judge having jurisdiction to make the order of allowance, it is not necessary that he make a written order of allowance to himself authorizing the issuance.[14]

Who May Make Order. — The making of the order of allowance is primarily within the powers of the judge or chancellor, and no others may make it unless given the right by special statute.[15]

Sufficiency of the Order. — An order of allowance by the judge in writing constitutes all the formalities necessary to make such an order sufficient,[16] and informalities and surplusage in the address of such order do not invalidate it.[17]

Necessity of a Seal. —It seems that a seal is not essential to the validity of the order of allowance.[18]

f. *Court of Commissioners.* — The commissioners of the circuit court of the United States have no power to issue writs of attachment.[19]

g. *Clerks of Court.* — In some jurisdictions clerks of court are expressly empowered to issue writs of attachment,[20] without any order whatever.[21] And, of course, in all such cases the power of the clerk

An action to recover a penalty for breaking a town ordinance is one *ex contractu*, and allowance by the judge unnecessary. Decorah *v.* Dunston, 34 Iowa 360.

14. Peoples Sav. Bank, etc. Co. *v.* Batchelder Egg Case Co., 51 Fed. 130, 4 U. S. App. 603, 2 C. C. A. 126; Winchell *v.* McKenzie, 35 Neb. 813, 53 N. W. 975.

15. An order reading "Read and considered. It is ordered and adjudged by the court that attachment do issue in above stated case as prayed for," was held demurable on the ground that it was issued by the clerk without an express order by the judge. Bates *v.* Shelton, 99 Ga. 164, 25 S. E. 16; Dillon *v.* O'Donnell, 4 Baxt. (Tenn.) 213.

Order Reissued by Clerk After Withdrawal.—Dean *v.* Garnett, 1 Duv. (Ky.) 408.

16. Loeb *v.* Smith, 78 Ga. 504, 3 S. E. 458; Genin *v.* Tompkins, 12 Barb. (N. Y.) 265.

17. McLoy *v.* Boyle, 10 Md. 391.

18. Seeligson *v.* Rigmaiden, 37 La. Ann. 722. See **Ia.**—Sherrill *v.* Fay, 14 Iowa 292. **Neb.**—Winchell *v.* McKinzie, 35 Neb. 813, 53 N. W. 975. **N. Y.**—Genin *v.* Tompkins, 12 Barb. 265.

19. Chittenden *v.* Darden, 2 Woods 437, 5 Fed. Cas. No. 2,688.

20. **Ala.**—Stevenson *v.* O'Hara, 27 Ala. 362. **Ky.**—Patterson *v.* Caldwell, 1 Met. 489. **N. C.**—Cherry *v.* Nelson, 52 N. C. 141. **Ohio.**—Alexander *v.* Brown, 2 Disney 395. See also Morris *v.* Davis, 4 Sneed (Tenn.) 452, as to the effect of the act of 1852.

A Clerk and Master in Chancery.—Johnson *v.* Rankin (Tenn.), 59 S. W. 638.

As to Special Attachments.—Sample *v.* Rogers, 32 Ky. L. Rep. 784, 107 S. W. 222.

Judicial Attachment. — Garner *v.* Johnson, 22 Ala. 494.

As to Debt Not Due.—Kleine *v.* Nie, 88 Ky. 542, 11 S. W. 590.

Debt or Demand Certainly Ascertainable.—Atkinson *v.* James, 96 Ala. 214, 10 So. 846; Tennessee River Transp. Co. *v.* Kavanaugh, 93 Ala. 324, 9 So. 395.

By Deputy Clerk.—A deputy clerk, duly appointed and qualified, has full power to transact all the business of the clerk (Minniece *v.* Jeter, 65 Ala. 222; Finn *v.* Rose, 12 Iowa 565), and a deputy clerk *de facto* and one *de jure* have the same power, and there is no distinction so far as the public and third persons are concerned (Joseph *v.* Cawthorn, 74 Ala. 411).

21. Byers *v.* Brannon (Tex.), 19 S. W. 1091; Bull *v.* Forest, 1 White & Wills. Civ. Cas. §179.

Where the clerk has authority to issue the writ, it is not necessary for him to make an order, which a statute empowers him to make, to himself. Overbacker *v.* H. B. Claflin Co., 96 Ky. 235, 28 S. W. 506.

extends to such cases only as are covered by the statute.[22]

Constitutional Prohibition on Power of Clerk. — And in one jurisdiction, the making of an order of allowance being a judicial act, it is held under a constitutional provision prohibiting clerks of court from performing judicial duties, that the clerks cannot be given the power by statute to make such orders.[23]

4. In Whose Name Issued. — It is essential to the validity of the writ that it be issued in the name of the legal plaintiff.[24]

5. Time of Issuance. — a. *In General.* — The time for issuing the writ is usually regulated by statute in the different jurisdictions.[25]

b. *Terms of Court.* — The writ is generally issued at the same term at which it is awarded,[26] and at term time or in vacation according to the statutes in the particular jurisdiction.[27]

c. *On Sundays and Holidays.* — In some jurisdictions, statutes authorize its issuance on Sunday.[28] But in the absence of statutory authority, it has been held that the issuance of a writ or warrant of attachment on Sunday or a legal holiday is good and valid only where

22. **Ala.**—Lewis *v.* Dubose, 29 Ala. 219; Matthews *v.* Sands, 29 Ala. 136; Flash *v.* Paul, 29 Ala. 141; Stevenson *v.* O'Hara, 27 Ala. 362. **Ky.**—Ouerbacker *v.* H. B. Claflin Co., 96 Ky. 235, 28 S. W. 506. **Md.**—Rodemer *v.* Detmold, 9 Gill 249. **N. Y.**—Ostertoch *v.* Lent, 1 Hilt. 158, 3 Abb. Pr. 141.

The issuance by the clerk of a writ or warrant has been held to be void, therefore, when the grounds set out for the issuance are only such as that, under the statute, the writ or warrant could be granted by the court or judge. Dillin *v.* O'Donnell, 4 Baxt. (Tenn.) 213.

23. Jacoby *v.* Drew, 11 Minn. 408; Merrit *v.* St. Paul, 11 Minn. 223; Guerin *v.* Hunt, 8 Minn. 477; Zimmerman *v.* Lamb, 7 Minn. 421; Morrison *v.* Lovejoy, 6 Minn. 183.

24. Davis *v.* Wyer, 1 Cranch C. C. 527, 7 Fed. Cas. No. 3,660.

25. **Under specific statutes in some jurisdictions** the suing out of a writ of attachment in aid of an action can be done any time. **U. S.**—Camilloz *v.* Johns, 1 Cranch C. C. 38, 4 Fed. Cas. No. 2,343. **Ill.**—Dutcher *v.* Crowell, 10 Ill. 445. **Neb.**—Strickler *v.* Hargis, 34 Neb. 468, 51 N. W. 1039.

Under a statute requiring the affidavit to state that the defendant absconded or concealed himself within three months after the injury sued for was done, the attachment must be sued out within that time. Webb *v.* Bowler, 50 N. C. 362.

Presumption as to Time the Writ Issued.—When a question is raised as to the relation in point of time of the issuance of the writ or warrant and any other requisite in the attachment proceeding, it will be presumed that that was done first which ought, in strictness, to have been done first in order to give the proceedings validity. Blackman *v.* Wheaton, 13 Minn. 326; Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

Thus if all the processes were issued and returned together, it will be presumed that they were concurrent in their issuance in accordance with the requirement of the statute. Nuckols *v.* Mitchell, 4 Greene (Iowa) 432; Pitkins *v.* Boyd, 4 Greene (Iowa) 255.

Issued After Adjournment.—A writ of attachment is valid though issued after the adjournment of the court on the last day of the term where it is made returnable forthwith and is returned on that day. Jones *v.* Ealer, 1 Ohio Dec. (Reprint) 385, 8 West L. J. 500.

26. **The intervention of a term before the issuing** of a writ after it was awarded is a mere irregularity and does not vitiate it. Barney *v.* Patterson, 6 Har. & J. (Md.) 182.

27. And under a statute authorizing a judge or commissioner "in vacation" to issue attachments against a foreign corporation, a commissioner has no power to issue such writs in term time. Anonymous, 3 Hill (N. Y.) 454. See also Clements *v.* Utley, 91 Minn. 352, 98 N. W. 188. See the title "**Courts.**"

28. Levy *v.* Elliott, 14 Nev. 435.

the issuance is the performance of a duty merely ministerial in its nature;[29] if its issuance is in its nature a judicial act it is illegal and void if issued on Sunday or a legal holiday.[30]

d. *Prior to the Commencement of the Action.* — No attachment can issue until the action is commenced, either by the filing of a petition or declaration, or the issuance of a summons;[31] a writ of attachment issued previously is a nullity.[32] But it is not necessary that the service

Where the writ is allowed by statute to be issued on Sunday upon certain grounds, those grounds must be set out in order to authorize its issuance. Updyke *v.* Wheeler, 37 Mo. App. 680.

29. Whipple *v.* Hill, 36 Neb. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313.

30. Thomas *v.* Hinsdale, 78 Ill. 259; Merchants' Nat. Bank *v.* Jaffray, 36 Neb. 218, 54 N. W. 258, 19 L. R. A. 316.

In an Attachment When Debt Not Due.—Matthews *v.* Ansley, 31 Ala. 20; Merchants' Nat. Bank *v.* Jaffray, 36 Neb. 218, 54 N. W. 258, 19 L. R. A. 316.

31. Central Sav. Bank Co. *v.* Langenbach, 1 Ohio Dec. 182, 1 Ohio N. P. 124.

In some jurisdictions, unless a petition has been filed precedent to or concurrent with the issuing of the writ, as required by statute, the whole proceeding will be treated as a nullity and the entire cause dismissed. **U. S.**—First Nat. Bank *v.* Batchelder Egg Case Co., 51 Fed. 138, 4 U. S. App. 615, 2 C. C. A. 142; Helena Bank *v.* Batchelder Egg Case Co., 51 Fed. 137, 4 U. S. App. 615, 2 C. C. A. 142; People's Sav. Bank, etc. Co. *v.* Batchelder Egg Case Co., 51 Fed. 130, 4 U. S. App. 603, 2 C. C. A. 126. **Ia.**—Hagan *v.* Bureh, 8 Iowa 309. **Kan.** Dunlap *v.* McFarland, 25 Kan. 488; Smith *v.* Payton, 13 Kan. 362. **Neb.**—Coffman *v.* Brandhoeffer, 33 Neb. 279, 50 N. W. 6. **Ohio.**—Seibert *v.* Switzer, 35 Ohio St. 661. **Tex.**—Powers *v.* Chaney, 21 Tex. 363; Wooster *v.* McGee, 1 Tex. 17; Fowler *v.* Poor, Dall. 401.

Clerical Error Presumed.—In Smith *v.* Payton, 13 Kan. 362, the court held that when an order of attachment was issued on September 25, it will be presumed that the making of the petition as having been filed on September 28 was a clerical error.

A petition, answer and proof of claim are not necessary before a writ issues. Fremd *v.* Ireland (Ky.), 33 S. W. 89; Hall *v.* Grogan, 78 Ky. 11; Brent *v.* Taylor, 6 Md. 58.

Petition and Warning Order Necessary.—The filing in the office of the clerk of a petition stating the cause of action, and a summons being issued or a warning order made commences the action. Kellar *v.* Stanley, 86 Ky. 240, 5 S. W. 477.

Insufficient Petition and Void Warning Order.—When there was no statement in the petition that the defendant was a non-resident or believed to be absent from the state, as required by statute, the warning order was void, and an attachment issued before the warning order or summons is void. Redwine *v.* Underwood, 101 Ky. 190, 40 S. W. 462.

Waiver of Petition.—When, however, by contract the defendant has waived notice and accepted service and agreed that judgment might be entered against him at the following term, the fact that the petition in the cause was not filed then is but an irregularity and did not render the judgment void nor subject it to collateral attack. Byers v. Brannon (Tex.), 19 S. W. 1091.

Before Judgment or Verdict.—Under a statute providing that a writ of attachment may issue "at or after the commencement" of an action, it has been held that the writ may issue after the return of the verdict, during the pendency of the action, and before the final determination of the same. Davis *v.* Jenkins, 46 Kan. 19, 26 Pac. 459.

32. **U. S.**—Spreen *v.* Delsignore, 94 Fed. 71. **Cal.**—Wheeler *v.* Farmer, 38 Cal. 203; Low *v.* Henry, 9 Cal. 538. **Colo.**—Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505. **Mont.**—Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645. **N. Y.**—Allen *v.* Meyer, 73 N. Y. 1; Wallace *v.* Castle, 68 N. Y. 370; Webb *v.* Bailey, 54 N. Y. 164; American Exch. Bank *v.* Voisin, 44 Hun 85; Pickhardt *v.* Antony, 27 Hun 269; Waffle *v.* Goble, 53 Barb. 517. See also Webb *v.* Bailey, 54 N. Y. 164; and Kerr

of the summons be consummated prior to the issuance of the writ.[33]

Issuance of Summons and Writ Simultaneous Acts. — The issuance of the summons and of the writ of attachment may be simultaneous.[34]

e. *Proceedings Against Non-Residents.* — **In General.** — In proceedings against non-residents, the warrant of attachment may issue at the time of issuing the summons and be levied before the service of summons.[35]

Service of Summons by Publication. — Whether service of summons by publication is made before or after the writ of attachment is issued makes no difference so far as the validity of the proceeding under the writ is concerned,[36] and under the statutes in some jurisdictions, the

v. Mount, 28 N. Y. 659, decided upon a statute under which the rule was limited to actions for the recovery of money only. **N. C.**—Marsh *v.* Williams, 63 N. C. 371. **Ore.**—White *v.* Johnson, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

Citation Issued.—King *v.* Robinson, 2 Wills. Civ. Cas. §555; Schwabacher *v.* Abrahams Grocery Co., 14 Wash. 225, 44 Pac. 257.

When Are Actions Commenced.—When the general law provides that civil actions are commenced by filing a complaint and that summons may be issued at any time within one year thereafter, and the attachment law declares that at the time of issuing summons, or at any time thereafter, an attachment may be issued, an attachment is void when the writ was issued before the issuance of the summons. Henrietta Min., etc., Co. *v.* Gardner, 173 U. S. 123, 19 Sup. Ct. 327, 43 L. ed. 637, *reversing* 5 Ariz. 211, 81 Pac. 1226; Furst *v.* Banks, 101 Va. 208, 43 S. E. 360.

33. **Colo.**—Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505. **Neb.**—Darnell *v.* Mack, 46 Neb. 740, 65 N. W. 805. **N. Y.**—Corson *v.* Ball, 47 Barb. 452; Mills *v.* Corbett, 8 How. Pr. 500; Hulbert *v.* Hope Mut. Ins. Co., 4 How. Pr. 275, 415, 2 Code Rep. 148; Towle *v.* Covert, 15 Abb. Pr. (N. S.) 193. **S. C.** Smith *v.* Walker, 6 S. C. 169.

In an action against non-residents, an attachment may be issued before the personal service of summons, but a levy before personal service would be invalid. Woodward *v.* Stearns, 10 Abb. Pr. N. S. (N. Y.) 395; Gould *v.* Bryan, 3 Bosw. (N. Y.) 626.

Where it appears that a summons was made out and accompanied the affidavit on which the warrant was granted by being annexed to it. This is undoubtedly a sufficient compliance with the statute in the broadest view that can be taken in favor of the appellant's motion. Stoiber *v.* Thudium, 44 Hun (N. Y.) 70.

34. Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186; Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

An attachment against the property of a non-resident defendant may be issued and accompany the summons into the hands of the sheriff and may be served after the summons has been duly personally served; and an attachment so issued and served is regular and valid. Gould *v.* Bryan, 3 Bosw. (N. Y.) 626, *overruling* Fisher *v.* Curtis, 2 Sandf. (N. Y.) 660.

Service of Summons and Levy Simultaneously.—Cushman *v.* Fischer, 16 Abb. Pr. (N. Y.) 246 note.

Ancillary Proceedings.—In the case of ancillary proceedings the action of attachment may be begun simultaneously with or subsequent to the issuance of the summons. Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240; Wheeler *v.* Farmer, 38 Cal. 203; Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257; Barber *v.* Denning, 4 Sneed (Tenn.) 267; Thompson *v.* Carper, 11 Humph. (Tenn.) 542.

35. Webb *v.* Bailey, 54 N. Y. 164.

36. **U. S.**—Ranch *v.* Werley, 152 Fed. 509. **Ia.**—Elliott *v.* Stevens, 10 Iowa 418. Finn *v.* Mehrbach, 30 Civ. Proc. 242, 65 N. Y. Supp. 250.

Summons Issued When Made Out.—In the case of a non-resident the summons must be regarded as issued, under the statute, as soon as it is made out and an application founded on it for an attachment. Smith *v.* Walker, 6 S. C. 169.

writ of attachment must even precede the publication as it constitutes the ground for the publication.[37]

f. *With Reference to Issuance or Filing of Other Papers.* — **In General.** — To obtain the writ of attachment it is only necessary to file the proper affidavit and bond with the clerk—a praecipe is not required by law.[38]

Prior to the Execution of the Affidavit. — An attachment may not issue prior to the execution of the affidavit.[39]

Time Intervening Between Affidavit and Writ. — The time intervening between the making of the affidavit and the issuance of the writ must not be unreasonable, under the circumstance of the case, or it will be held to be sufficient ground to vitiate the writ.[40]

Prior to the Execution of the Bond. — A writ or warrant of attachment which issues before a bond is filed has been held to be void.[41]

6. Order of Issuance. — The writ will be issued to the applicants in the order in which they make application therefor.[42]

7. Record of Issuance. — There must be a proper record entry by the clerk showing the issuance of the writ.[43] But errors made by the

37. Dye *v.* Crary, 12 N. M. 460, 78 Pac. 533, 13 N. M. 439, 85 Pac. 1038, 9 L. R. A. (N. S.) 36, *affirmed*, 208 U. S. 515, 28 Sup. Ct. 360, 52 L. ed. 595.

38. "Statute here makes a clear distinction between the manner of commencing a suit against the person and against the estate of the defendant. In the one case the praecipe is required to be filed and recorded before a summons can issue to the person; in the other the filing of the affidavit is the first act necessary to obtain process against the estate of the defendant." Simpson *v.* Knight, 12 Fla. 144. See also Bryan *v.* Knight, 12 Fla. 165.

39. **Cal.**—Lick *v.* Madden, 25 Cal. 202. **Md.**—Brent *v.* Taylor, 6 Md. 58. **Mich.**—Howell *v.* Muskegon Circuit Judge, 88 Mich. 369, 50 N. W. 308; Buckley *v.* Lowry, 2 Mich. 418. **Tex.**—Lewis *v.* Stewart, 62 Tex. 352.

The affidavit must be made and attached to the writ, otherwise no service of the writ can be justified. Wiley *v.* Aultman, 53 Wis. 560, 11 N. W. 32.

But it will be presumed that the affidavit preceded the writ. Hubbardston Lumb. Co. *v.* Covert, 35 Mich. 254; Morrell *v.* Buckley, 20 N. J. L. 667.

40. Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289.

Twenty Days Not Unreasonable.—Foster *v.* Illinski, 3 Ill. App. 345.

If time intervening be of such a length as to raise a presumption that the process of court is abused or used oppressively, or that the cause of action may not be true when the writ is sued out, it will avoid the writ. McClanahan *v.* Brack, 46 Miss. 246; Campbell *v.* Wilson, 6 Tex. 379.

Fifteen Months Is Unreasonable Delay. — Wilson *v.* Galbraith, 2 Posey Unrep. Cas. (Tex.) 391.

Intervention of One Day.—And by statute, in at least one jurisdiction, the intervention of more than one day between the filing of the affidavit and the issuing of the writ is sufficient to abate the writ. Fessenden *v.* Hill, 6 Mich. 242; Drew *v.* Dequindre, 2 Dougl. (Mich.) 93.

Where the statute provides that the affidavit shall not be deemed insufficient by reason of the intervention of a day between the date of the jurat and the issuing of the writ, the time provided does not begin to run until the expiration of the day upon which the affidavit is executed, and the writ may issue after the expiration of the intervening day. Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109.

41. Hucheson *v.* Ross, 2 A. K. Marsh. (Ky.) 349; Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977. See *supra*, X, A.

42. Lick *v.* Madden, 25 Cal. 202.

43. **Sufficiency of Record.**—The mere copy of a writ of attachment found in the files of the register of deeds' office is not a sufficient record to prove that an attachment has been issued with

clerk of the court in recording the issuance of the writ, will not ordinarily vitiate the writ.[44]

8. **Whence Issued.** — Statutes in many of the jurisdictions provide that the writ must be sued out where one of the parties resides.[45]

C. *Form, Sufficiency and Contents.* — 1. **In General.** — The attachments acts should receive a strict construction. Accordingly, when they prescribe a form for proceeding under them, that should be followed; and when no form is specified, there should be a substantial compliance with all the requirements of the law in this regard.[46] But when a form of the writ is prescribed by statute, if such form is not adequate to the remedy to which the plaintiff is entitled, another form may be used, without vitiating the writ, which substantially complies with the statute and gives the plaintiff an adequate remedy.[47]

2. **Execution and Authentication of Writ.** — a. *Annexing Affidavit to Writ.* — It is not essential that the affidavit be annexed to the writ unless a statute requires.[48]

b. *Date.* — If the date of the issuance of the writ can be deduced from the other papers in the proceeding and no question has been raised as to the date the process should not be declared void for want of date.[49]

c. *Signature.* — **Necessity for.** — It is usually provided that the writ shall be signed by the clerk.[50] And when under the constitution

the necessary processes (Stanhilber *v.* Graves, 97 Wis. 515, 73 N. W. 48), nor will a statement in the record that the writ of attachment issued imply that it was placed in the sheriff's hands for service, but only that it remained in the clerk's office (Hancock *v.* Ritchie, 11 Ind. 48).

44. Morrel *v.* Buckley, 20 N. J. L. 667; Mitchell *v.* Eyster, 7 Ohio (pt. i) 257. See also Hennessey First Nat. Bank *v.* Hesser, 14 Okla. 115, 77 Pac. 36, holding that a lien is not lost because the justice of the peace failed to make satisfactory entries of the proceedings before him.

Reason of rule is that the act of entering the record of the issuance of the writ of attachment is merely directory to the clerk. Morrel *v.* Buckley, *supra.*

45. Schloss *v.* Joslyn, 61 Mich. 267, 28 N. W. 96.

46. Shockley *v.* Bullock, 18 Ga. 283; Webster *v.* Edson, Smith (N. H.) 370. See, *supra,* III.

Insertion of a summons and garnishment clause in writ does not affect validity of writ. Weil *v.* Kittay, 40 Ark. 528.

An Endorsement on the Subpoena Issuing from a Court of Chancery. — McKim *v.* Fulton, 6 Call (Va.) 106.

47. Webster *v.* Edson, Smith (N. H.) 370.

48. Burnside *v.* Davis, 65 Mich. 74, 31 N. W. 619.

And even in jurisdictions where the statute requires the annexing of the affidavit to the writ prior to its being executed, a failure to comply is not grounds for quashing the writ or warrant, but only has the effect of setting aside the service thereof. Simpson *v.* Oldham, 2 Pin. (Wis.) 461, 2 Chand. 129.

49. Lyle *v.* Longley, 6 Baxt. (Tenn.) 286.

And even where the statutes require the writ to be dated at the foot it has been held that this is directory merely and an indorsement upon the back of the paper is a sufficient conformity thereto. Swan *v.* Roberts, 2 Coldw. (Tenn.) 153.

50. Land *v.* Marks, 65 How. Pr. (N. Y.) 127.

When a signature by the clerk is not required by statute, its absence is immaterial. Nugent *v.* Garvey, 1 N. Y. City Ct. 319.

Where the warrant of attachment should have been signed by the clerk, and the allowance of the warrant

or statutes the signature of the clerk is required to be signed to the writ or warrant, the failure of the clerk or his deputy to place his signature thereon will avoid the writ,[51] And the failure of the attorney of the plaintiff to sign the writ if required by statute also vitiates the writ.[52]

Manner of Signing. — The failure of a deputy clerk to sign the writ as deputy clerk will not vitiate it.[53]

d. *Endorsement.* — In some states an endorsement on the writ is required by a designated person.[54]

e. *Seal.* — A paper issued by the clerk in the form of a writ is no writ, unless it has impressed upon it the seal of the court from whence it issues. Without this seal it is no more available for the purpose of a writ than is blank paper.[55]

f. *Attestation.* — When the statute requires the writ to be attested by an officer and the writ is issued by such officer, it is not essential to the validity of the writ that he also attest it, as that would simply amount to his writing his name twice,[56] but in jurisdictions where the writ is to take the place of a summons it has been held that the writ must be attested in the same manner as the summons.[57]

g. *Presumptions as to Due Execution.* — There is a legal presumption in favor of the due execution of papers emanating from a public office and upon proof that a writ of attachment emanated from a

should have been endorsed upon the warrant by the justice with his own hand, yet the signing of the attachment by the justice instead of the clerk was nothing more than an irregularity. Sullivan *v.* Presdee, 9 Daly (N. Y.) 552.

51. **Minn.**—Clements *v.* Utley, 91 Minn. 352, 98 N. W. 188; O'Farrell *v.* Heard, 22 Minn. 189; Wheaton *v.* Thompson, 20 Minn. 196. **Mo.**—Smith *v.* Hackley, 44 Mo. App. 614. **Tenn.** Wiley *v.* Bennett, 9 Baxt. 581.

Signature of Judge.—A warrant of attachment not signed by a judge will be vacated. Worthington *v.* Dorsett, 43 Hun 636, 6 N. Y. St. 861.

52. Lassen *v.* Burt, 46 Misc. 582, 92 N. Y. Supp. 796; Remington *v.* Benoit, 19 R. I. 698, 36 Atl. 718 (signature of justice, attorney or plaintiff, sufficient).

But the absence of the signature of the attorney to the writ, not only does not raise a presumption that the writ was irregularly issued, but on the other hand, the presumption is that it was lawfully issued and obtained. Remington *v.* Benoit, 19 R. I. 698, 36 Atl. 718.

53. Wimberly *v.* Boland, 72 Miss. 241, 16 So. 905.

Reasons of Rule.—The court will take judicial notice of the signatures of the clerks and the deputy clerks, whose appointments, as such, must be approved by the court. Clements *v.* Utley, 91 Minn. 352, 98 N. W. 188.

54. **Service Without Endorsement.** Jones *v.* Ealer, 1 Ohio Dec. (Reprint) 385, 8 West. L. J. 500.

55. **Ill.**—Williams *v.* Vanmetre, 19 Ill. 293. **Ia.**—Foss *v.* Isett, 4 Greene 76, 61 Am. Dec. 117. **Minn.**—Clements *v.* Utley, 91 Minn. 352, 98 N. W. 188; O'Farrell *v.* Heard, 22 Minn. 189; Wheaton *v.* Thompson, 20 Minn. 196.

Private seal is sufficient in absence of official one. Wehrman *v.* Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167.

56. Lyle v. Longley, 6 Baxt. (Tenn.) 286.

Attestation of Signature.—The failure of the clerk to put his official title after his signature is not sufficient to vitiate the writ. Henderson *v.* Pitman, 20 Ga. 735, 65 Am. Dec. 649.

57. Bennett *v.* Hartford F. Ins. Co., 19 Wend. (N. Y.) 46.

regular court, its sufficiency as to form and seal, in the absence of any proof impeaching it, will be presumed.[58]

3. Style, Address and Command. — a. *Style.* — The constitutional provision existing in most states, which requires all writs to run in the name of the state, has been extended to writs of attachment.[59]

Writs Against Personal Representatives. — A writ of attachment against an administrator must run against the goods and estate of the deceased.[60]

b. *Address.* — **Necessity for.** — When the writ fails to contain a direction to the sheriff to summon the defendants, as required by statute, it avoids the writ.[61]

To Whom and Where Addressed. — Statutory requirements as to the place to which and the person to whom a writ must be directed are to be strictly complied with.[62] A writ must be directed, under the statutes, to the sheriff or other executive officer of the court from which the writ issues or of which the clerk is an officer,[63] and it has been held that it is only necessary that the particular instructions be in such language as to make known to attorneys, officers, and others familiar with such business, the design thereof.[64]

Direction to a Particular County. — The direction in a writ to a sheriff or the constables of a particular county authorizes them to take property in their county only,[65] unless there is an express statute specifying

58. French *v.* Reel, 61 Iowa 143, 12 N. W. 573, 16 N. W. 55.

To Illustrate.—When the seal of the court is attached, the presumption is that the clerk, personally, or his deputy, issued the writ. Clements *v.* Utley, 91 Minn. 352, 98 N. W. 188. And it will be presumed that the writ was sealed and issued by the clerk, until the contrary appears. Morrel *v.* Buckley, 20 N. J. L. 667.

59. **Ky.**—Yeager *v.* Groves, 78 Ky. 278; McDaniel *v.* Sappington, Hard. 94. **Tex.**—King *v.* Robinson, 2 Wills. Civ. Cas. §554. **W. Va.**—Sims *v.* Charleston Bank, 3 W. Va. 415.

This provision does not extend to the order of attachment. Gutman *v.* Virginia Iron Co., 5 W. Va. 22. See also Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77.

Writ Cannot Run in the Name of the Clerk.—Yeager *v.* Groves, 78 Ky. 278.

Writ Attached to Summons.—If the writ was endorsed on the summons and the summons ran in the name of the state, it was sufficient to make the writ valid. Rice *v.* Dale, 45 Ark. 34; Northern Bank *v.* Hunt, 93 Ky. 67, 19 S. W. 3.

60. Thayer *v.* Comstock, 39 Me. 140.

61. **Entire Absence of Direction Vitiates the Writ.**—Sims *v.* Charleston Bank, 3 W. Va. 415; Whitney *v.* Brunette, 15 Wis. 61.

62. Thomas *v.* Lavender, 15 Ga. 267. **To an Indifferent Person for Service.** Gillett *v.* Johnson, 30 Conn. 392.

63. **Constables.**—Freeman *v.* Lind, 112 Iowa 39, 83 N. W. 800.

To Any Constable.—A writ directed to "any constable of the city of St. Louis" issued by a justice of the peace in the city of St. Louis is not void by reason thereof. Branahl *v.* Watson, 13 Mo. App. 596.

City Court Cannot Issue to Sheriff of Another County.—Neely *v.* McGrandle, 4 Civ. Proc. (N. Y.) 327.

64. Kimball *v.* Davis, 19 Me. 310.

"Mr. Officer, attach suf't," indorsed on back of the process but not signed, was held to be sufficient. Abbott *v.* Jacobs, 49 Me. 319.

65. McArthur *v.* Boynton, 19 Colo. App. 234, 74 Pac. 540.

And, in the case of a non-resident defendant, under the provision of the statute, the writ may be addressed to any county in which such defendant has property (Pendleton *v.* Smith, 1 W. Va. 16); but the fact that the writ directs that property be attached in a certain county or anywhere in the

that no writ of attachment can be levied in a county different from that where it was issued and to which it is returnable.[66]

When there are several defendants who reside or have property in different counties or when a single defendant has property or effects in different counties, separate writs of attachments may be addressed to every such county, whenever, under the statute, a suit may be instituted where the defendant resides or has property.[67]

Effect of Defects and Imperfections in the Address. — When there is an omission of a proper direction to the sheriff, or to any sheriff of the state, it is not ground for quashing the writ, if the writ was, in fact, executed by the proper officer.[68]

4. Recitals and Averments. — a. *Description of Parties.* — When there is a failure to specify the names of the parties in the writ or warrant,[69] or where they are described by wrong or fictitious names,[70] the writ is a nullity unless it can be aided by reference to the affidavit and bond.[71]

b. *Necessity to Allege Residence of Plaintiff.* — It has been held that it is not necessary to state in the writ or warrant that the plaintiff is a resident, if that fact is alleged in the affidavit upon which the writ or warrant of attachment is sued out.[72]

c. *Description of Property To Be Levied Upon.* — **In General.** —

judicial district in which such county is situated, does not render the writ bad in that county, but renders it null anywhere else (Sadler *v.* Tatti, 17 Nev. 429, 30 Pac. 1082).

Issuing in One County and Directed to Another.—But a writ of attachment issuing from one county may be addressed to another county and the levy made in the other county has been held to be good and valid. Pendleton *v.* Smith, 1 W. Va. 16.

66. Starke *v.* Marshall, 3 Ala. 44.

67. Carter *v.* Arbuthnot, 62 Mo. 582.

68. Ware *v.* Todd, 1 Ala. 199; Askew *v.* Stevenson, 61 N. C. 288.

Direction Essential Only When Levy Attempted in Another County.—Blair *v.* Miller, 42 Ala. 308.

69. Barber *v.* Swan, 4 Greene (Iowa) 352, 61 Am. Dec. 124; Clay *v.* Neilson, 5 Rand. (Va.) 596.

Stating Defendant To Be an Adult. A writ or warrant need not state that the defendant is an adult. Hall *v.* Anderson, 17 Misc. 270, 40 N. Y. Supp. 354.

70. **Fictitious Names of Defendants.** Patrick *v.* Solinger, 9 Daly (N. Y.) 149.

Surnames.—Davenport *v.* Doady, 3 Abb. Pr. (N. Y.) 409.

Writs Against Partnerships.—Under some statutes, it has been held sufficient in issuing a writ against a partnership, to describe the parties in their firm name alone or by their individual names. Gazan *v.* Royce, 78 Ga. 512, 3 S. E. 753; Nester *v.* Carney Bros. Co., 98 Ill. App. 630.

Although in at least one jurisdiction it has been held that this is true only in justices' courts. Barber *v.* Smith, 41 Mich. 138, 1 N. W. 992.

71. It has been held that the affidavit and bond and other processes of attachment may be looked to in aid of the writ or warrant when the writ or warrant is wanting in certainty as to the first against whom it was intended that the writ or warrant should be issued (Moore *v.* Brewer, 94 Ga. 260, 21 S. E. 460; Lovelady *v.* Harkins, 6 Smed. & M. (Miss.) 412), or when some mis-recital exists or mistake has been made in the naming of the defendant (Norris *v.* Anderson, 181 Mass. 308, 64 N. E. 71, 92 Am. St. Rep. 420).

72. Manry *v.* American Motor Co., 25 Misc. 657, 56 N. Y. Supp. 316, *affirmed*, 38 App. Div. 623, 57 N. Y. Supp. 1142.

If the writ or warrant follows the form as set out in the statute, and is the same in substance and words as all attachments, absence of an averment of citizenship of the plaintiff and non-residence of the defendant is im-

Such a description of the defendant's property is necessary in the writ as will fulfill the requirements of the statute or as will enable the officer to know what to attach.[73]

Description of Personal Property in Particular. — A writ is insufficient unless the description clearly identifies the goods to be seized.[74]

d. *Statement as to Affidavit.* — In the case of an attachment issued from a court of limited jurisdiction, it has been said that the

material. Bloomfield *v.* Hancock, 1 Yerg. (Tenn.) 101.

73. See cases generally throughout this sub-section and especially the following: **Ark.**—Pool *v.* The Thomas P. Ray, 19 Ark. 641. **Me.**—Kimball *v.* Davis, 19 Me. 310. **Vt.**—Langdon *v.* Dyer, 13 Vt. 273.

Upon Any Property in the State.—Skeels *v.* Oceana Circuit Judge, 119 Mich. 290, 77 N. W. 996.

Amount as Stated in Affidavit.—The "demand" referred to in the direction of the writ to the sheriff to attach and safely keep so much of the defendant's property "as may be sufficient to satisfy the plaintiff's demand," is that which is stated in the affidavit upon which the writ is sought, and not the amount for which the plaintiff has asked in his complaint judgment against the defendant. Baldwin *v.* Napa, etc., Wine Co., 137 Cal. 646, 70 Pac. 732, holding that a statute providing that the amount of this "demand" must be stated "in conformity with the complaint," is to be construed as limited to a complaint upon a cause of action for which a writ of attachment is authorized, and does not declare that the amount of the demand shall be the same as the amount claimed by the plaintiff in the prayer of his complaint.

Property Mentioned in Affidavit Not Mentioned in Order.—Where an equitable proceeding was brought against a non-resident, and the order of attachment does not direct the sheriff to attach the specific property of the debtor mentioned in the affidavit but directs him to attach the estate, both real and personal, of the debtor, and the order was duly levied on the real estate of the debtor, it was held not essential to the validity of the attaching order, and the levy thereof, that the property mentioned in the affidavit be mentioned in the order, as this is not a suit for specific property. King *v.* Board, 7 W. Va. 701.

Description of Real Estate in Particular.—The description of land in the writ of attachment is sufficient if the same description would be competent to pass the land in a grant by the owner (Morris *v.* Anderson, 181 Mass. 308, 64 N. E. 71, 92 Am. St. Rep. 420), or if the requirement of the statute has been complied with (Pulliam *v.* Aler, 15 Gratt. (Va.) 54; Clark *v.* Ward, 12 Gratt. (Va.) 440).

Writ Directed Against the Estate of the Defendant.—Vance *v.* Cooper, 2 Coldw. (Tenn.) 497.

Description by endorsement on the writ. Pulliam *v.* Aler, 15 Gratt. (Va.) 54; Clark *v.* Ward, 12 Gratt. (Va.) 440.

It has been held, however, that a description of the real estate in the writ as being "the interest in the estate of his mother of which she died possessed in Davidson County" was sufficient where no claim was set up on behalf of an innocent purchaser. Taylor *v.* Badoux (Tenn.), 58 S. W. 919.

A direction in the writ to the sheriff to attach lands and tenements of defendant is simply nugatory, attachment remains good as to personal property. Mechanics' Nat. Bank *v.* Miners' Bank, 13 W. N. C. (Pa.) 515.

Need not state property exempt. Cooke *v.* Gibbs, 3 Mass. 193, wherein the court said that the officer is presumed to know what is included in the execution laws and be familiar therewith.

74. **Ga.**—Levin *v.* American Furn. Co., 133 Ga. 670, 66 S. E. 888, where the exhibit attached to the affidavit contained a list of articles with prices thereof, and the writ commanded the officers to seize the property of the defendant and make the sum stated in the affidavit, "out of the property above described," and this was held sufficient. **Me.**—Stedman *v.* Perkins, 42 Me. 130. **N. H.**—Wasan *v.* Martel, 68 N. H. 560, 39 Atl. 438.

Against Goods and Chattels, Etc.—

writ should recite that a proper affidavit was duly taken before the granting of a domestic attachment.[75]

e. *Statement as to Grounds of Attachment.* — **Necessity for Stating Grounds.** — While under the rulings of the court, in one jurisdiction, the grounds of the attachment need not be stated in the writ when they have been stated already in the petition,[76] it is the general rule that the writ must briefly state the ground upon which the remedy was sought.[77]

Sufficiency of Statement. — The writ should state the grounds clearly and distinctly, though it is not necessary to use the same precision as is required in pleadings.[78]

Under a statute providing that the writ be directed against the "estate of the defendant," a writ is sufficient which issued "against the goods and chattels, lands and tenements of the defendant," for the operation and effect of the writ is the same. Vance *v.* Cooper, 2 Coldw. (Tenn.) 497.

Action Against Several Defendants. Kennedy *v.* State Sav. Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163.

Person in Possession of Effects.— Pulliam *v.* Alen, 15 Gratt. (Va.) 54.

75. Hagood *v.* Hunter, 1 McCord (S. C.) 511.

But generally it is held that when such a recital is not required by statute, the insertion thereof is not essential to the validity of the writ. **Fla.** Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391. **Neb.**—Tessier *v.* Crowley, 16 Neb. 369, 29 N. W. 264. **W. Va.**—King *v.* Board, 7 W. Va. 701.

76. Wadsworth *v.* Cheeney, 13 Iowa 576.

77. Barber *v.* Swan, 4 Greene (Iowa) 352, 61 Am. Dec. 124; Castellanos *v.* Jones, 5 N. Y. 164; Van Camp *v.* Sehrle, 79 Hun 134, 24 Civ. Proc. 16, 29 N. Y. Supp. 757, 147 N. Y. 150, 41 N. E. 427; Galligan *v.* Groten, 18 Misc. 428, 42 N. Y. Supp. 22; MacDonald *v.* Kieferdorf, 22 Civ. Proc. 105, 18 N. Y. Supp. 763; Pierce *v.* Martin, 89 N. Y. Supp. 434; Burkhardt *v.* Sanford, 7 How. Pr. (N. Y.) 329.

Where the writ of attachment does not pursue the affidavit, and is uncertain as to the ground of this extraordinary, instead of the ordinary remedy, it should be quashed on this ground. Woodley *v.* Shirley, Minor (Ala.) 14.

Untrue Recital.—As a Ground of Motion.—Where the recital of the ground of the attachment, as set out in the writ, is untrue, it cannot be taken advantage of by motion, either by the defendant or by a subsequent attaching creditor, where a statute has prescribed the grounds upon which such a motion may be made, and this is not one of such grounds. Thames, etc., Marine Ins. Co. *v.* Dimick, 66 Hun 634, mem., 22 N. Y. Supp. 1096.

Incorrect Description Does Not Vitiate Writ.—Fox *v.* Mays, 46 App. Div. 1, 61 N. Y. Supp. 295.

78. **Conjunctive and Disjunctive Grounds.**—Grounds may be stated conjunctively (Hall *v.* Anderson, 17 Misc. 270, 40 N. Y. Supp. 354), and where acts which are separate and distinct are set out as grounds of the attachment in the writ in the alternative by use of the word "or," the writ is rendered null and void (Cronin *v.* Crooks, 143 N. Y. 352, 38 N. E. 268; Stewart *v.* Lyman, 62 App. Div. 182, 70 N. Y. Supp. 936; Cronin *v.* Crooks, 76 Hun 120, 27 N. Y. Supp. 822; 80 Hun 602, 29 N. Y. Supp. 1142; Dintruff *v.* Tuthill, 62 Hun 591, 17 N. Y. Supp. 556; Gregg *v.* York, Dall. (Tex.) 528), but when the disjunctive "or" is used, not to connect two distinct grounds of attachment, but to characterize and include two or more phases of the same fact or grounds of attachment attended with the same result, the writ is valid (Jurgens *v.* Tum Suden, 32 App. Div. 1, 52 N. Y. Supp. 662; Garson *v.* Brumberg, 75 Hun 336, 23 Civ. Proc. 306, 26 N. Y. Supp. 1003; Sturz *v.* Fischer, 15 Misc. 410, 25 Civ. Proc. 202, 2 Ann. Cas. 365, 36 N. Y. Supp. 893; Herzberg *v.* Boiesen, 5 Ann. Cas. 35, 53 N. Y. Supp. 256).

Grounds Partially or Incorrectly Stated. — When the grounds set forth in the writ are sufficient for the issuing of an attachment, the writ or warrant is not void for omitting to state all of them.[79]

f. *Statement as to Cause of Action.* — (I.) **In General.** — *In some jurisdictions the cause of action should be stated,* it is held, in the writ or warrant, and when so required it is sufficient where the writ sets forth a cause of action but states it defectively,[80] though it is insufficient when it is so stated as to give to the defendant no style of action to which he may appear and put in bail.[81] But the writ need not contain a declaration nor any description of the cause of action, if a declaration in the suit is seasonably filed,[82] provided that the body of the writ bears date of the same day with the filing of the petition and the amount of indebtedness and the non-residence of the defendant, etc., as stated in the petition, are set forth, so as to directly refer and relate to the petition.[83]

Ancillary Attachment. — In the case of a writ in an ancillary attach-

79. Maury *v.* American Motor Co., 25 Misc. 657, 56 N. Y. Supp. 316, *affirmed,* 38 App. Div. 623, 57 N. Y. Supp. 1142; Lawton *v.* Kiel, 51 Barb. (N. Y.) 30, 34 How. Pr. 465.

80. Ela *v.* Shepard, 32 N. H. 277. **Under a statute in Maine,** a count for money had and received must be drawn with sufficient precision in the writ as to be a specification, in itself, or a specification thereof must be annexed to the writ, or the writ will be held insufficient to attach real estate. Briggs *v.* Hodgdon, 78 Me. 514, 7 Atl. 387; Bartlett *v.* Ware, 74 Me. 292; Belfast Sav. Bank *v.* Kennebec Land, etc., Co., 73 Me. 404; Shaw *v.* Nickerson, 60 Me. 249; Poor *v.* Larrabee, 58 Me. 543; Phillips *v.* Pearson, 55 Me. 570; Drew *v.* Alfred Bank, 55 Me. 450; Jordan *v.* Keen, 54 Me. 417; Forbes *v.* Hall, 51 Me. 568; Hanson *v.* Dow, 51 Me. 165; Neally *v.* Judkins, 48 Me. 566; Osgood *v.* Holyoke, 48 Me. 410. **Prior to the act,** such specification was not required. French *v.* Lord, 69 Me. 537; Smith *v.* Keen, 26 Me. 411.

81. Hoy *v.* Brown, 16 N. J. L. 157.

82. Binney *v.* Globe Nat. Bank, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379.

In Monroe *v.* Castleman, 3 A. K. Marsh. (Ky.) 399, it was held that, in the absence of a declaration, the cause of action should be stated in the writ of attachment with sufficient exactness as to make it a good bar in a future action for the same cause. While it need not possess all the requisites of a declaration it must answer the end of process as well as pleading.

In earlier cases in Massachusetts it was held that the writ of attachment should state the cause of action. See Crane *v.* Adams, 16 Gray 542; Whitwell *v.* Brigham, 19 Pick. 117; Adams Bank *v.* Anthony, 18 Pick. 238; Fairfield *v.* Baldwin, 12 Pick. 388; Brigham *v.* Este, 2 Pick. 423; Willis *v.* Crooker, 1 Pick. 204.

A statute requiring the cause of action to be endorsed on the back of the writ has been held to apply only to writs of initiatory process issued by clerk, and not to those issued by a judicial officer. Lowry *v.* Stowe, 7 Port. (Ala.) 483. See also Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404.

Where the writ of attachment did not specify any sum of money as being demanded in the suit, nor names of plaintiff or defendant it is therefor defective, and unfit to be the foundation of the judgment. Clay *v.* Neilson, 5 Rand (Va.) 596.

In Nebraska. — Defendant cannot take advantage of any failure of the order to state the nature of the plaintiff's claim. The most that can be said of it is that failing to state the nature of the plaintiff's claim, they admit that defendant is entitled to the maximum exemption. Tessier *v.* Englehart, 18 Neb. 167, 24 N. W. 734.

83. Pitkins *v.* Boyd, 4 Greene (Iowa) 255.

ment it has been held essential that the cause of action should be set forth.[84]

(II.) As to Performance of Precedent Conditions. — The writ or warrant of attachment should contain all the averments as to the action requisite to authorize the issuance thereof under the statute.[85] If materially defective in this respect, the writ may be quashed.[86]

(III.) Statement as to Amount. — The amount for which suit has been brought and the writ of attachment issued should be recited in the writ.[87]

84 Peak *v.* Buck, 3 Baxt. (Tenn.) 71; Lowenheim *v.* Lockhard, 2 Baxt. (Tenn.) 214; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Morris *v.* Davis, 4 Sneed (Tenn.) 452.

85. Peak *v.* Buck, 3 Baxt. (Tenn.) 71. See also Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25, wherein the court said that the writ itself is the mere mandate of the law to the officer and simply requires him to perform an official duty and it would seem unnecessary in the absence of any rule upon the subject that the writ should contain anything more than the direction to the officer except in the ancillary writ which must refer to and identify the suit in aid of whom the writ issues.

In Ancillary Proceedings.—In an ancillary proceeding it is necessary for the writ to state that a suit has been commenced by the plaintiff against the defendant, the nature thereof, the tribunal in which it is depending, the amount of damages laid in the action, and that the cause of action stated is just. Lowensheim *v.* Lockhard, 2 Baxt. (Tenn.) 214; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Morris *v.* Davis, 4 Sneed (Tenn.) 452; Thompson *v.* Carper, 11 Humph. (Tenn.) 545.

86. Barber *v.* Swan, 4 Greene (Iowa) 352, 61 Am. Dec. 124, holding that a writ must show *prima facie*, a compliance with the code,—that the action was for the recovery of money and the names of the parties and the grounds authorizing the issuance of the writ, sufficient to confer authority upon the clerk to issue the writ.

87. See the cases generally throughout this subdivision, and the following cases: Helena First Nat. Bank *v.* Batchelder Egg Case Co., 51 Fed. 138, 4 U. S. App. 615, 2 C. C. A. 142; Helena Bank *v.* Batchelder Egg Case Co., 51 Fed. 137, 4 U. S. App. 614, 2 C. C. A. 141; Fitzgerald *v.* Blake, 42 Barb. (N. Y.) 513.

It has been held that the amount to be stated in the writ or warrant is left to the discretion of the judge issuing it and that discretion should be guided in fixing the amount, by that which it is probable, will be recovered (Rouge *v.* Rouge, 14 Misc. 421, 35 N. Y. Supp. 836); and that the amount recited in the writ does not limit the amount to be attached, as the direction is permissive, not peremptory. Aldrich *v.* Arnold, 13 R. I. 655.

In an action for alienation of a wife's affections, laying damages at $75,000, wherein the writ stated the same amount in a *per curiam* decision the court said: "While it is exceedingly difficult in cases of this kind to determine what amount of damages the plaintiff will probably recover in the event of his success in the action, we think the amount specified in the attachment in the case is altogether too high, and that it should be reduced to the sum of $50,000." Guest *v.* Lowther, 84 App. Div. 462, 82 N. Y. Supp. 1015.

Statute Applicable Only to Actions in Tort.—McGinn *v.* Butler, 31 Iowa 160. And see Johnson *v.* Butler, 2 Iowa 535.

Where a statute does not require the warrant to describe the character of the debt, whether due by bond, note or account, with the precision of a declaration, the amount due must be specified, as a guide to the officer, that he may attach so much of the debtor's estate as may be sufficient to satisfy the debts and costs. McCluny *v.* Jackson, 6 Gratt. (Va.) 96.

In the cases of ancillary attachment the amount of damages laid in the action must be stated in the writ. Smith *v.* Foster, 3 Coldw. (Tenn.) 139.

Sufficiency of Statement. — The amount to be set out in the writ is usually the amount asked for in the sworn pleadings in the cause.[88] And while it is very generally held that the amount stated in the writ on warrant may be an amount less than that demanded in the complaint,[89] it must not be for a greater amount.[90]

g. *Recitals as to the Giving or Filing a Bond.* — Unless the statute requires such recital, it is generally considered unnecessary that the writ or warrant of attachment should recite that a bond or undertaking has been given, upon the part of the plaintiff.[91]

D. SERVICE AND RETURN. — **1. Service.** — When a writ of original attachment issued more than five days before the term to which it was returnable, the presumption is that it was served in due time.[92]

2. Return. — When and Where Returnable. — In General. — The writ should contain directions as to when and where it is returnable,[93] otherwise it is a nullity.[94]

When Returnable. — The statutes in the various jurisdictions differ materially as to the time when the writ must be returned, and it can only be stated that such direction in the statute must be complied with.[95] If the statute is specific as to the return time of the writ,

The writ is not invalidated where, in the statement of the amount in the writ, the costs are added to the amount appearing in the petition or affidavit, even under a statute requiring the amount set out in the writ to "be the amount sworn to by the plaintiff in the petition," or to be "in conformity with the complaint." Ellis *v.* Cossitt, 14 Ark. 222.

An order of attachment, which directs that the attachment issue for the amount claimed in the petition, is sufficient. Kleine *v.* Nie, 88 Ky. 542, 11 S. W. 590.

88. Wilson *v.* Barbour, 21 Mont. 176, 53 Pac. 315.

When the difference in the amounts stated in the writ and petition or complaint, occasioned by a mistake of the pleader, the facts upon which the calculations were made being clearly stated therein, is not considerable, it will not vitiate the writ. Gallatin First Nat. Bank *v.* Wallace (Tex. Civ. App.), 65 S. W. 392.

Including Attorney's Fees, Interest, and Costs.—Toledo Sav. Bank *v.* Johnston, 90 Iowa 749, 57 N. W. 622.

Costs and Expenses of Keeping Property.—Wigmore *v.* Buell, 122 Cal. 144, 54 Pac. 600.

When the words "or thereabouts" are added after the sum named in the writ. Davis *v.* Baker, 88 Cal. 106, 25 Pac. 1108.

Amount Set Out Greater Than Amount Recovered.—The fact that the amount set out in the writ proves to be in excess of the amount recovered, is not a ground for quashing the writ in a case on contract. Williams *v.* Louisiana Lumb. Co., 105 La. 90, 29 So. 491.

89. Hale Bros. *v.* Milliken, 142 Cal. 134, 75 Pac. 653; DeLeonis *v.* Etchepare, 120 Cal. 407, 52 Pac. 718; Reed *v.* Kentucky Bank, 5 Blackf. (Ind.) 227.

90. Kennedy *v.* California Sav. Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163; Reed *v.* Kentucky Bank, 5 Blackf. (Ind.) 227. *Contra*, Dawson *v.* Brown, 12 Gill & J. (Md.) 53.

91. **Fla.**—Tanner, etc., Engine Co., *v.* Hall, 22 Fla. 391. **Ia.**—Ellsworth *v.* Moore, 5 Iowa 486. **Neb.**—Tessier *v.* Crowley, 16 Neb. 369, 20 N. W. 264.

It is the giving of the bond, in fact, and not a statement that it has been done, that is the substance—that is that which is necessary to entitle a party to his attachment. Hays *v.* Gorby, 3 Iowa 203.

92. Boyd *v.* Buckingham, 10 Humph. (Tenn.) 434.

93. Bachalan *v.* Littlefield, 64 N. C. 233.

94. Washington *v.* Sanders, 13 N. C. 343, 21 Am. Dec. 336.

95. Chase *v.* Hill, 13 Wis. 222.

A general statute governing the time in which process in actions shall be

the use of words not inconsistent therewith may be regarded as surplusage and will not avoid the writ.[96]

Where Returnable.— In like manner the statutory provisions as to the place to which the writ is to be returned should be strictly com-

made returnable, governs the return of a writ of attachment. Edwards *v.* Haring, 59 Ill. App. 147.

Statute as to Warrants for Arrest.— Hiatt *v.* Simpson, 35 N. C. 72.

To the Next Term of the Superior or Inferior Court of the County.—Irvin *v.* Howard, 37 Ga. 18; Duke *v.* Horton, 32 Ga. 637; Wanet *v.* Corbet, 13 Ga. 441.

"Next term" means next general term. Wilkie *v.* Jones, Morris (Iowa) 97.

To the First Day of the Succeeding Term.—Ziegenhager *v.* Doe, 1 Ind. 296.

First Monday of Next Term or Intermediate Mondays.—Under a Pennsylvania statute. Slingluff *v.* Sisler, 193 Pa. 264, 44 Atl. 423. See Williamson *v.* McCormick, 126 Pa. 274, 17 Atl. 591, 24 W. N. C. 51; Parks *v.* Watts, 112 Pa. 4, 6 Atl. 106; Hall *v.* Kintz, 12 Pa. Co. Ct. 90, 2 Pa. Dist. 16; Starbird *v.* Koonse, 10 Pa. Co. Ct. 449; Simon *v.* Johnson, 7 Kulp 166.

To the Next Term After Issuance or Next But One.—Denison *v.* Crafts, 74 Conn. 38, 49 Atl. 851.

Writ Returnable Instanter. — Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. 479. See also, H. B. Claflin Co. *v.* Kamsler (Tex.), 36 S. W. 1018.

To rules or to term of court in Virginia. McAllister *v.* Guggenheimer, 91 Va. 317, 21 S. E. 475.

The statute formerly required the writ to be returnable to a term of court. Carig *v.* Williams, 90 Va. 500, 18 S. E. 899, 44 Am. St. Rep. 934. See also Grinberg *v.* Singerman, 90 Va. 645, 19 S. E. 161, 44 Am. St. Rep. 934.

Foreign Attachments.—The statute requiring domestic attachments to be returned within twenty days was held not to apply to foreign attachments in Harlow *v.* Becktle, 1 Blackf. (Ind.) 237. See Andrews *v.* Reid, 7 Blackf. (Ind.) 256.

Short Attachment Against Non-Resident.—Webber *v.* Gay, 24 Wend. (N. Y.) 485.

Long Attachment Against Resident Debtor.—Haviland *v.* Wehle, 65 N. Y. 85.

Effect of Errors and Defects.—A slight departure from the requirements of the statute in the direction in the writ as to when it shall be returned is generally held to make the writ voidable but not void. **U. S.**—Wehrman *v.* Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167. **Fla.**—Post *v.* Bird, 28 Fla. 1, 9 So. 888. **Kan.**—Smith *v.* Payton, 13 Kan. 362. **Miss.**—Dandridge *v.* Stevens, 12 Smed. & M. 723. **Mo.**—State Bank *v.* Matson, 26 Mo. 243, 72 Am. Dec. 208. **N. C.**—Backalan *v.* Littlefield, 64 N. C. 233. **Okla.** Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110.

Discretion of Lower Court in Abating Attachment. — Thompson *v.* McHenry, 18 Ark. 537.

Omission of Year From Time Returnable.—A writ tested and issued on February 7, 1867, and made returnable "on Tuesday, the second day of April," was held not void, but to be understood as returnable in the April following its issuance. Nash *v.* Mallory, 17 Mich. 232.

Material Defects.—It has been held that the departure from the requirement as to the time when the writ is made returnable may be so great as to render it absolutely null and void. Casey *v.* Wiley, 5 Ga. 333, as to twelve months.

Term Past.—A writ, by its terms, made returnable on a day and to a term of court then past, was void upon its face and all proceedings thereunder were invalid. Holzman *v.* Martinez, 2 N. M. 271. See Dame *v.* Fales, 3 N. H. 70.

96. Brose *v.* Doe, 2 Ind. 666; Ziegenhagan *v.* Doe, Smith (Ind.) 174.

Unauthorized Direction by Clerk.— The sheriff is not bound to return a writ within the time stated by the clerk, when the law does not require the return of the order of seizure and sale within such time; such unauthorized direction does not deprive the writ of validity, but it will be treated as mere surplusage. *In re* Hall, 21 La. Ann. 692.

plied with.[97] But a direction as to the court to which the writ is returnable is not essential when that is fixed by the statute.[98] Under statutory provisions, the officers of one county may make a writ returnable to the courts of another county for the convenience and advantage of suitors.[99]

E. Alterations. — An alteration make by an unauthorized person invalidates the writ,[1] or when the writ has been materially altered after service.[2] This is not so as to an alteration made prior to the service.[3]

F. Effect of Invalidity. — The invalidity of the writ does not make invalid the action to which it is ancillary,[4] but it renders void all proceedings under the attachment.[5] Consequently an invalid writ cannot uphold a levy or a statutory bond executed in consequence of such levy;[6] nor will any title be conferred upon a purchaser at the sale by virtue of a judgment thereunder.[7]

G. Objections. — Errors or defects in the proceedings where the court has jurisdiction must be corrected by some direct proceeding before it, or by appeal.[8] Only the defendant can object to mere de-

97. **As to a foreign corporation,** it was held in Bennett *v.* Hartford F. Ins. Co., 19 Wend. (N. Y.) 46, that a writ against a foreign corporation must be made returnable to the supreme court under the statute.

Direction as to What Term Returnable Immaterial.—In Blair *v.* Miller, 42 Ala. 308, Chief Justice Walker, delivering the opinion of the court, said: "We do not regard the direction as to the term to which the attachment is returnable as essential. As the law prescribes the term to which it is returnable it is not indispensable to insert it in the attachment."

Place of Return Dependent on Amount.—Smith *v.* Terrill, 14 B. Mon. (Ky.) 256.

Formal errors will not vitiate. Bourne *v.* Hocker, 11 B. Mon (Ky.) 23.

Effect of Mistake in Direction.—A mistake as to what court the writ is made returnable, in its direction, will not invalidate the writ when the nature of the writ shows that it could be returnable to only one court (Byrd *v.* Hopkins, 8 Smed. & M. (Miss.) 441), or when the return was really made to the proper county (Carter *v.* O'Bryan, 105 Ala. 305, 16 So. 894; Blake *v.* Camp, 45 Ga. 298). But when the officer issuing makes it returnable to a court to which he has no power to order it returned, it has been held fatal to the writ (Brooks *v.* Goodwin, 8 Ala. 296, holding that a justice of the peace did not have power to make a writ returnable to the circuit court).

98. Westphal *v.* Sherwood, 69 Iowa 364, 28 N. W. 640.

99. **Return to Court of Another County.**—Brooks *v.* Hutchinson, 122 Ga. 838, 50 S. E. 926; Cox *v.* Felder, 36 Ga. 597; Meridian Fertilizer Factory *v.* Bush, 77 Miss. 697, 27 So. 645.

1. **By Sheriff.**—Clarke *v.* Lyman, 10 Pick. (Mass.) 45.

2. Harris *v.* Barker, 87 Me. 270, 32 Atl. 896; Clough *v.* Curtis, 62 N. H. 409, 700.

As to Third Parties.—Handly *v.* Call, 30 Me. 9.

3. Gile *v.* Devens, 11 Cush. (Mass.) 59; Parkman *v.* Crosby, 16 Pick. (Mass.) 297; Gardner *v.* Webber, 16 Pick. (Mass.) 251.

4. Elliott *v.* Mitchell, 3 Greene (Iowa) 237; Cureton *v.* Dargan, 16 S. C. 619.

5. Holzman *v.* Martinez, 2 N. M. 271; Dillin *v.* O'Donnell, 4 Baxt. (Tenn.) 213.

6. Bruce *v.* Conyers, 54 Ga. 678; White *v.* Johnson, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

7. Stewart *v.* Mitchell, 10 Heisk. (Tenn.) 488; Morris *v.* Davis, 4 Sneed (Tenn.) 452; Conrad *v.* McGee, 9 Yerg. (Tenn.) 428.

8. Manton *v.* Hoyt, 43 Md. 254, where the writ omitted the clause of scire facias, a defect insufficient to im-

fects and irregularities.[9] A claimant can take advantage only of such defects as render the writ absolutely void.[10]

Waiver of Defects. — The general rule is that by appearing and pleading to the action, the defendant waives all objections to the mere form or regularity of the writ,[11] but the defendant, by his appearance and pleading cannot waive defects which make the writ void and an absolute and complete nullity,[12] nor can he thereby confer jurisdiction when none existed before;[13] nor waive the tortious seizin of his goods,[14] nor the defect of a substantial departure from the legal mode prescribed as against other creditors.[15]

II. AMENDMENTS.— **1. General Statement.** — The general rule that nothing is void that is amendable applies to the writ in attachment proceedings.[16] An amendment presupposes the existence of a defect.

peach the sale except by direct inquiry.

A variance between a writ and bond and affidavit cannot be taken advantage of by plea but by setting out the affidavit and bond on oyer. Goldsticker *v.* Stetson, 21 Ala. 404.

9. Lindau *v.* Arnold, 4 Strobh. L. (S. C.) 290; Paine *v.* Tilden, 20 Vt. 554.

That Debt Is Not Due.—Shakman *v.* Schwartz, 89 Wis. 72, 61 N. W. 309.

Mistake in Preliminary Affidavit.—Westcott *v.* Sharp, 50 N. J. L. 392, 13 Atl. 243.

10. Matthews *v.* Densmore, 109 U. S. 216, 3 Sup. Ct. 126, 27 L. ed. 912, *reversing* 43 Mich. 461, 5 N. W. 669; Carter *v.* O'Bryan, 105 Ala. 305, 16 So. 894; Nordlinger *v.* Gordon, 72 Ala. 239.

11. Wolf *v.* Cook, 40 Fed. 432.

When the defendant has appeared and denied the affidavit, and tries the case as if the affidavit were legal in its terms, a variance is cured. **Colo.**—De Stafford *v.* Gartley, 15 Colo. 32, 24 Pac. 580. **Ga.**—Johnston *v.* Smith, 83 Ga. 779, 10 S. E. 354. **Ill.**—Clayburg *v.* Fords, 3 Ill. App. 542. **Ind.**—Brayton *v.* Freese, 1 Ind. 121. **Ia.**—Graves *v.* Cole, 2 Greene 467. **Miss.**—Smith *v.* Cromer, 66 Miss. 557, 5 So. 619; McClanahan *v.* Brack, 46 Miss. 246; Ligon *v.* Bishop, 43 Miss. 527; Redus *v.* Wofford, 4 Smed. & M. 579. **Mo.**—Henderson *v.* Drace, 30 Mo. 358. **N. C.** Symons *v.* Northern, 49 N. C. 241; Price *v.* Sharp, 24 N. C. 417. **S. C.**—Young *v.* Gray, Harp. L. 38.

Necessity for Objecting at First Opportunity.—Smith *v.* Walker 6 S. C. 169.

Waiver by Laches.—Barney *v.* Patterson's Lessee, 6 Har. & J. (Md.) 182.

Failure To Make Objection.—An attorney moving to quash the attachment should make all the objections which can be urged in support of his motion. An objection not made is waived. Norton *v.* Dow, 10 Ill. 459. See also Hutchison *v.* Powell, 92 Ala. 619, 9 So. 170; Gile *v.* Devens, 11 Cush. (Mass.) 59.

By Execution of a Bond.—Inman *v.* Strattan, 4 Bush (Ky.) 445.

Untrue Recital in Writ.—Marietta First Nat. Bank *v.* Bushwick Chemical Wks., 119 N. Y. 645, 23 N. E. 1149, *affirming* 53 Hun 635, 17 Civ. Proc. 229, 6 N. Y. Supp. 318.

Writ Issued by Clerk of Wrong Court.—Wagner *v.* Romero, 3 N. M. 131, 3 Pac. 50.

Collateral Attack.—Kruse *v.* Wilson, 79 Ill. 233.

12. Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561.

13. Egan *v.* Lumsden, 2 Disney (Ohio) 168.

No Jurisdiction After Writ Quashed. Smith *v.* Hackley, 44 Mo. App. 614.

14. Stetson *v.* Goldsmith, 30 Ala. 602.

15. Deere *v.* Eagle Mfg. Co., 49 Neb. 385, 68 N. W. 504.

16. As for example, where the caption names an improper judicial district (Standard Cotton Seed Oil Co. *v.* Mathison, 47 La. Ann. 710, 17 So. 251), or if the word "dollars" is omitted after the amount (Hines *v.* Chambers, 29 Minn. 7, 11 N. W. 129).

Variance Between Writ and Affidavit.—Ligon *v.* Bishop, 43 Miss. 527.

So it is not an amendment to substitute in a writ, complete on its face, the name of another county for that named therein to whose sheriff it was issued.[17] On the other hand if the writ is so defective that there is nothing to amend, as where it states no cause of action,[18] nor the names of the parties,[19] nor any specification of claim,[20] it cannot be amended.[21] An invalid attachment cannot be made valid by an amendment of the writ.[22] When no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others.[23] And this subject is one so completely dependent upon statute that little can be done here aside from referring to specific illustrations. For a statement of the general rules governing the power of amendment, reference is made to another part of this work.[24] It may be stated broadly that an amendment will be allowed to correct mere matters of form, or irregularities,[25] but not to change the writ in matter of substance.[26] Under some stat-

17. Mississippi Mills *v.* Meyer, 83 Tex. 433, 18 S. W. 748.

18. Brigham *v.* Este, 2 Pick. (Mass.) 420, where there was no count or declaration.

Variance Between Writ and Bond.—Jones *v.* Anderson, 7 Leigh (Va.) 308.

As to Cause of Action.—Browning *v.* Pasquay, 35 Md. 294; Boarman *v.* Patterson, 1 Gill (Md.) 372.

19. Barber *v.* Swan, 4 Greene (Ia.) 352, 61 Am. Dec. 124.

20. Drew *v.* Alfred Bank, 55 Me. 450.

21. Clawson *v.* Sutton Gold Min. Co., 3 S. C. 419.

22. Bisbee *v.* Mt. Battie Mfg. Co. (Me.), 77 Atl. 778 (where the suit was "for balance due," without items, and, after entry, plaintiffs amended their writ by filing an itemized account); Drew *v.* Alfred Bank, 55 Me. 451.

23. **U. S.**—Tilton *v.* Cofield, 93 U. S. 163, 23 L. ed. 858. **Mass.**—Parkman *v.* Crosby, 16 Pick. 297. **N. Y.**—Gilbert *v.* Thompkins, N. Y. Code Rep. (N. S.) 16, *affirmed*, 12 Barb. 265; Camman *v.* Thompkins, N. Y. Code Rep. (N. S.) 12, *affirmed*, 12 Barb. 265.

Amendment of Writ for Clerical Defect.—Martin-Brown Co. *v.* Milburn, 2 Wills. Civ. Cas. §215.

Defects Which Do Not Affect Substantial Rights.—Helena First Nat. Bank, *v.* Batchelder Egg Case Co., 51 Fed. 138, 4 U. S. App. 615, 2 C. C. A. 142; People's Sav. Bank, etc., Co. *v.* Batchelder Egg Case Co., 51 Fed. 130, 4 U. S. App. 603, 2 C. C. A. 126.

A warrant of a justice of the peace cannot be amended in the circuit court so as to strike out the name of one of the defendants. Halley *v.* Jackson, 48 Md. 254.

An endorsement of the writ may be made after service. Garvin *v.* Legery, 61 N. H. 153.

An endorsement of writ by plaintiff's attorney may be made after motion to quash. Cicero *v.* Bates, 2 Mich. (N. P.) 25.

Regular writ erroneously levied in wrong county cannot be amended to give validity to the sheriff's act. McArthur *v.* Boynton, 19 Colo. App. 234, 74 Pac. 540.

Mistake as to Court to Which Returnable.—Where the writ recited that the petition was filed in a court which was no longer in existence, and as a matter of fact the petition had been filed in another court, amendment was proper. Rock Island Plow Co. *v.* Breese, 83 Iowa 553, 49 N. W. 1026.

Amendment Before Defendant Enters Appearance.—Lee *v.* Smyser, 96 Ky. 369, 29 S. W. 27.

24. See the title "Amendments."

25. **Conn.**—Johnson *v.* Huntington, 13 Conn. 47. **Ga.**—Cooper *v.* Lockett, 65 Ga. 702. **Me.**—Wentworth *v.* Sawyer, 76 Me. 434. **Mass.**—Diettrich *v.* Wolffsohn, 136 Mass. 335; Wight *v.* Hale, 2 Cush. 486, 48 Am. Dec. 677. **Miss.**—McClanahan *v.* Brack, 46 Miss. 246. **N. H.**—Garvin *v.* Legery, 61 N. H. 153.

26. In Haven *v.* Snow, 14 Pick. (Mass.) 28, the court referring to the

tutes, however, amendments in matters of substance are proper.[27]

Discretion of Court. — The appellate court will not reverse the action of the lower court in refusing to allow an amendment when it does not appear that there was a manifest abuse of discretion.[28]

2. Illustrations. — It is permitted to cure by amendment a mistake, as to time when the court is held at which the original suit is to be tried,[29] a defect as to the direction to the sheriff;[30] an error as to amount of the writ;[31] or the omission at the time of the levy of the sum claimed by the plaintiff,[32] and a clerical error of the clerk as to the form of action in which the suit was brought.[33] And a writ may

case of Emerson *v.* Upton, 9 Pick. (Mass.) 167, said that there was a remark made in that case which may require some explanation, and continued: "It is there said, that 'it will be found on examination of the cases in which amendments of writs have been grated that the effect of them, when any change has been made, has been limited to the parties to the suit in which the amendment is granted.' It must not be inferred from this remark that all amendments are to be thus limited, for it is clear, we think, that amendments in form merely will not dissolve an attachment so as to let in subsequently attaching creditors, or discharge bail. To have this effect the amendment must be such as may let in some new demand, or new cause of action."

New Ground of Action or New Party. Amendment improper. Peck *v.* Sill, 3 Conn. 157.

A writ of attachment to enforce laborers' liens was amended, after issue joined, by inserting "Edmund" instead of "Edward," and this was held to dissolve the attachment. Flood *v.* Randall, 72 Me. 439.

Variance as to Parties.—Ia.—Musgrave *v.* Brady, Morris 456. N. H.—Bennett *v.* Zabriski, 2 N. M. 7, 176. S. C.—Lamar *v.* Reid, 2 McMull. L. 346.

27. Herring *v.* Kelly, 96 Ala. 559, 11 So. 600; Matthews *v.* Blossom, 15 Me. 400. And see cases cited *infra*, this section.

28. Thompson *v.* McHenry, 18 Ark. 537.

29. Scott *v.* Macy, 3 Ala. 250.

30. Herring *v.* Kelly, 96 Ala. 559, 11 So. 600. And see Blair *v.* Miller, 42 Ala. 308; Warren *v.* Purtell, 63 Ga. 428.

31. Shaubhut *v.* Hilton, 7 Minn. 506; Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389; Joiner *v.* Perkins, 59 Tex. 300; Elrod *v.* Rice (Tex. Civ. App.), 99 S. W. 733; Moore *v.* Corley (Tex. App.), 16 S. W. 787.

Amount Too Large.—Peiffer *v.* Wheeler, 76 Hun 280, 27 N. Y. Supp. 771. But where the clerk issued an order for an amount almost twice that of the affidavit the attachment was quashed. Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510.

Clerical Error.—Gourley *v.* Carmody, 23 Iowa 212.

Increase Within Discretion of the Court.—Danielson *v.* Andrews, 1 Pick. (Mass.) 156.

In Magoon *v.* Gillett, 54 Iowa 54, 6 N. W. 131, when the statute that provides that the court shall not quash the attachment of the deputy, whatever it be, can be amended, the court had the discretionary power to make the allowance which should relate back to the time the attachment was issued, and also to order or fix the amount in value of the additional property which could be attached.

As to Costs.—If the clerk specifies too large an amount as the probable costs, it is an irregularity which is amendable. Emerson *v.* Thatcher, 6 Kan. App. 325, 51 Pac. 50.

32. Atkins *v.* Womeldorf, 53 Iowa 150, 4 N. W. 905.

33. Jackson *v.* Fletcher, Morris (Iowa) 230.

Omissions by clerk will not vitiate a writ duly and rightfully issued. The things prescribed to be done will be intended by the court until the opposite appears. Morrel *v.* Buckley, 20 N. J. L. 667.

be amended to make specific reference to the affidavits in order to strengthen it.[34]

Date of Writ.—It is very generally held that the date of the writ is not such a material part as that a mistake therein will avoid the writ, and it is such an irregularity, therefore, as is subject to amendment.[35]

Signature.— The generally accepted view is that the omission of a signature is a mere irregularity and, therefore, subject to amendment.[36] Generally the absence of a seal is merely an irregularity which may be supplied by amendment.[37] But whether or not it can be supplied depends upon the statute. If by statute "process can be amended before or after a judgment has been rendered, the failure of a clerk of court to attach to a writ his official seal, when so required by law, will be regarded as a remedial irregularity; but if the statute does not authorize such a change of process, the neglect to affix the seal makes the writ void."[38]

Attestation Clause— The attestation clause is not such a material part of the writ as that the parties will be misled, and may be amended.[39]

Style. — Generally, a failure of the writ to run in the name of the state or of "the people of the state," may be amended.[40]

Direction For the Return.— Generally a defect or irregularity in the direction for the return, appearing upon the face of the writ, is

34. Hallock *v.* Van Camp, 55 Hun 1, 8 N. Y. Supp. 588.

35. **Md.**—McCoy *v.* Boyle, 10 Md. 391. **Mass.**—Gardner *v.* Webber, 16 Pick. 251. **Wis.**—Shakman *v.* Schwartz, 89 Wis. 72, 61 N. W. 309.

36. Miller *v.* Zeigler, 44 W. Va. 484, 29 S. E. 981, 67 Am. St. Rep. 777; Burgander *v.* Zeigler, 44 W. Va. 413, 29 S. E. 1034.

As to Official Title.—Dickson *v.* Thurmond, 57 Ga. 153.

The failure of the deputy to sign his name as deputy to the writ does not render it void as this is, at most, a mere irregularity amendable under a statute. Wimberly *v.* Boland, 72 Miss. 241, 16 So. 905.

The signing of the warrant by a justice instead of by the clerk is nothing more than an irregularity, and if objection to it is seasonably made, it would be perfectly proper for the justice to cause the irregularity to be corrected. Sullivan *v.* Presdee, 9 Daly (N. Y.) 552.

It has been held that, when the constitution requires that the writ shall run in the name of this state, and bear tests and be signed by the clerk, a writ issued without such signature is void and that an amendment cannot be made. Wiley *v.* Bennett, 9 Baxt. (Tenn.) 581.

37. **Ia.**—Magoon *v.* Gillett, 54 Iowa 54, 6 N. W. 131 (reversing the early cases under a different statute); Murdough *v.* McPherrin, 49 Iowa 479. **N. Y.**—Talcott *v.* Rosenberg, 8 Abb. Pr. (N. S.) 287. **Tex.**—Whittenberg *v.* Lloyd, 49 Tex. 633.

Wrong Seal Attached.—Murdough *v.* McPherrin, 49 Iowa 479.

After Removal to the Federal Court. Though it was not practicable to cause the proper seal to be affixed, the court will nevertheless, deem that done which ought to be done and order that the writ stand amended. Wolf *v.* Cook, 40 Fed. 432.

38. Starkey *v.* Lunz (Ore.), 110 Pac. 703.

39. Skinner *v.* Beshoar, 2 Colo. 383; Wright *v.* Moran, 43 N. J. L. 49.

Date.—Brack *v.* McMahon, 61 Tex. 1, where there was a blank in the date of the attestation clause but the date of issuance of the writ was given in full.

40. Kahn *v.* Kuhn, 44 Ark. 404; Livingston *v.* Coe, 4 Neb. 379. *Contra*, Harper *v.* Turner, 101 Tenn. 686, 50 S. W. 755, where it was held that under the constitution the writ was absolutely null and void because of the omission.

amendable both as to the time when it is returnable,[41] and as to the court to which it is returnable.[42]

As to the Description of Parties and Property. — Amendments are generally permitted to correct a mistake in the name of a party,[43] and to insert the Christian name of a party,[44] to make the name in the writ correspond to that in the affidavit.[45] It may also be amended by adding a new party defendant,[46] or by substituting a new party for the original plaintiff,[47] or to insert the individual names of the parties composing the firms named as parties.[48]

Circumstantial errors or defects in the writ, with respect to the description of the property to be levied upon, may be amended in order to make it rightly understood.[49] But no amendment will be allowed to the prejudice of subsequent attaching liens or creditors, or other third persons having rights in the property.[50]

Ground for Attachment. — The failure to set out in the writ the ground for the attachment which has been stated in the affidavit, is a mere irregularity which may be amended upon motion.[51]

41. Kent *v.* Downing, 44 Ga. 116 (where it was such that the mistake was clearly a clerical error); McClanahan *v.* Brack, 46 Miss. 246.

Cured by Appearance of Defendant. Graves *v.* Cole, 2 Greene (Iowa) 467.

42. Archibald *v.* Thompson, 2 Colo. 388; Rock Island Plow Co. *v.* Breese, 83 Iowa 553, 49 N. W. 1026.

Defendant appeared, thus showing that he was not misled, and amendment allowed. Covington *v.* Cothrans, 35 Ga. 156.

The practice is, where an attachment is made on a writ but no summons is served on the defendant to alter the date and return of the writ, so as to make it returnable to the next term. Gardner *v.* Webber, 16 Pick. (Mass.) 251, 17 Pick. 407.

43. Wight *v.* Hale, 2 Cush. (Mass.) 486, 48 Am. Dec. 677, to change Wright to Wight.

44. **U. S.**—Birch *v.* Butler, 1 Cranch, C. C. 319, 3 Fed. Cas. No. 1,425. **Mich.** Meyers *v.* Vilburn, 2 Mich. (N. P.) 25. **N. C.**—Hall *v.* Thorburn, 61 N. C. 158.

45. Alford *v.* Johnson, 9 Port. (Ala.) 320.

46. **Ala.**—McKissack *v.* Witz, 120 Ala. 412, 25 So. 21. **Mass.**—Whitcher *v.* Josslyn, 6 Allen 350. **Miss.**—Shaw *v.* Brown, 42 Miss. 309.

A partnership may be brought in by amendment. Wright *v.* Herrick, 125 Mass. 154.

47. **Hazen *v.* Quimby, 61 N. H. 76.**

As to Trustees.—The court held that as a foreign attachment was only to compel appearance, and as the defendant had appeared by putting in special bail, under the statute, the case might proceed as in cases commenced by summons, and that the plaintiff was entitled to amend the original process so that the title should read: "William F. Leeds, for the use of Edward T. Bellah, trustee," instead of "Edward T. Bellah, assignee of Wm. F. Leeds." Bellah *v.* Hilles, 2 Penn. (Del.) 34, 43 Atl. 89.

Party Deceased.—When a note upon which the suit was brought was a note given to three persons and one of them was dead, when the suit was commenced, and the attorney joined the names of his executor as co-plaintiff, it was the opinion of the court that the writ might be amended by striking out the executor's name, as the action remained the same, the ground the same, and the amendment only struck out that which was entirely useless. Johnson *v.* Huntington, 13 Conn. 47.

48. Sims *v.* Jacobson, 51 Ala. 186; Dobell *v.* Loker, 1 Handy (Ohio) 574.

49. Murphy *v.* Adams, 71 Me. 113, 36 Am. Rep. 299; Connelly *v.* Lerche, 56 N. J. L. 95, 28 Atl. 430.

50. Wason *v.* Martel, 68 N. H. 560, 39 Atl. 438.

51. Cline *v.* Patterson, 88 Ill. App. 360 (under a statute allowing amendment for "any insufficiency") *re-*

Use of the Disjunctive "Or." — So "and" may be substituted for "or" in the statement of the grounds for the attachment, this being a mere irregularity.[52]

XII. EXECUTION. — A. Levy Essential. — It is not the writ, but the levy of the writ by the actual seizure of the property, that constitutes the attachment.[53]

Defendant or Subsequent Purchasers or Lienors. — The necessity for a full levy is necessarily affected by the consideration whether any suggested objection concerns the rights of the defendant in the attachment or subsequent *bona fide* purchasers and attaching creditors, and this depends upon whether the conditions of the levy which may not have been complied with are for the benefit of the defendant or whether their purpose is to give notice to third parties, and the discussion throughout this division must be read in view of this principle. For instance, the duty to attach in the presence of credible wit-

versed on another point, in 191 Ill. 246, 61 N. E. 126; King *v.* King, 68 App. Div. 189, 74 N. Y. Supp. 119; King *v.* King, 59 App. Div. 128, 68 N. Y. Supp. 1089.

And amendment has been permitted when the recital, as set out, does not show a ground for attachment (Macdonald *v.* Kieferdorf, 22 Civ. Proc. 105, 18 N. Y. Supp. 763), or not the true ground (Thames, etc. Marine Ins. Co. *v.* Dimick, 66 Hun 634, memo., 22 N. Y. Supp. 1096).

52. Stone *v.* Pratt, 90 Hun 39, 25 Civ. Proc. 176, 35 N. Y. Supp. 519; Rothschild *v.* Mooney, 59 Hun 622, 13 N. Y. Supp. 125; Herzberg *v.* Boiesen, 5 Ann. Cas. 35, 53 N. Y. Supp. 256.

Motion to amend must be made or amendment will not be allowed. Cronin *v.* Crooks, 143 N. Y. 352, 38 N. E. 268, where the warrant recited that the defendant "has assigned and disposed of, or is about to assign or dispose of her property."

53. **Colo.**—Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664, holding insufficient a notice of suit and intention to levy. **Conn.**—Gates *v.* Bushnell, 9 Conn. 530. **Ky.**—Robson *v.* Shea, 5 Ky. L. Rep. 601; Williamson *v.* Elliott, 1 Ky. L. Rep. 279. **Me.**—Gower *v.* Stevens, 19 Me. 92. **Mass.**—Shephard *v.* Butterfield, 4 Cush. 425. **Mo.**—McIntosh *v.* Smiley, 2 Mo. App. 125. **N. H.**—Bryant *v.* Osgood, 52 N. H. 182. **N. Y.**—Rodgers *v.* Bonner, 45 N. Y. 379; Yale *v.* Matthews, 20 How. Pr. 430; Learned *v.* Vandenburgh, 8 How. Pr. 77; Kuhlman *v.* Orser, 5 Duer 242. **S. C.**—Robertson *v.* Forest, 2 Brev. 466. **Tenn.**—Evans *v.* Higdon, 1 Baxt. 245; Avery *v.* Warren, 12 Heisk. 559. **Vt.**—Flanagan *v.* Wood, 33 Vt. 332. See *infra*, XV.

As a **requisite to jurisdiction** over the subject-matter, see **U. S.**—Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931. **Ill.**—Truitt *v.* Griffin, 61 Ill. 26; Schrorer *v.* Pettibone, 58 Ill. App. 436. **Ind.**—Randolph *v.* Hill, 11 Ind. 354, holding that the court rendering judgment upon appearance and answer could not order a sale of the property, there being no service. **Miss.**—Bias *v.* Vance, 32 Miss. 198. **Mo.**—Bray *v.* McClury, 55 Mo. 128. **Ohio.**—Mitchell *v.* Eyster, 7 Ohio (pt. i) 257. **Tenn.**—Nashville Bank *v.* Ragsdale, Peck 296.

In Equity.—In an action on a return of "no property," where the proceeding is to subject property specifically described, no attachment levy is necessary to give a lien as against the defendant in the action. The lien is an incident to such a proceeding in equity, and independent of the code. In such case a general attachment may be issued, the levy of which will create a lien, or a lien may be created by the service of a summons, with the object of the action indorsed thereon, on the person holding or controlling the defendant's property. Murphy *v.* Cochran, 80 Ky. 239.

The filing of a bill which describes the property sought to be attached operates as a *lis pendens*, during which all transfers are void, and the property is thus practically secured until the

nesses[54] is for the benefit of the defendant, and a failure to thus levy would be ground for setting aside an attachment at his instance, but does not render it void as to third parties,[55] while, on the other hand, a levy may be good as against the defendant in the writ when it would not be good as to third persons.[56] And so, a levy may be valid as against the defendant though the officer does not take into his possession property capable of manual seizure,[57] or even where the goods are not within view or subject to the dominion of the officer and the defendant assent to the levy,[58] though such a levy would not be sufficient to hold a lien upon the property as against subsequent purchasers and attaching creditors.[59]

B. The Officer. — **1. General Authority.** — Generally speaking a writ of attachment can be levied only by an officer authorized to execute such process and under circumstances proper for its execu-

lien of the attachment can be made to adhere to it; but the lien is not created by the mere filing of the bill, and without levy of a writ of attachment. Sharp *v.* Hunter, 7 Coldw. (Tenn.) 389.

On instructions not to levy which are followed the property is not bound. Gray's Admr. *v.* Patton's Admr, 13 Bush (Ky.) 625.

Attachment not necessarily set aside because levy is. Gaar *v.* Lyons, 99 Ky. 672, 37 S. W. 73, 148. quashing the levy and sustaining the attachment.

54. See, *infra*, this section.

55. Davidson & Co. *v.* Kuhn, 1 Disney (Ohio) 405.

The notice of the attachment required to be given forthwith by the officer to the defendant is not necessary to the validity of the attachment, for by the terms of the statute, it is the lodgment in the proper office, with the officer's return, that creates the lien and holds the property. Barron *v.* Smith, 63 Vt. 121, 21 Atl. 269.

56. Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610.

57. Nockles *v.* Eggspieler, 47 Iowa 400; Dreishbach *v.* Mechanics' Nat. Bank, 113 Pa. 554, 6 Atl. 147; Mechanics' Nat. Bank *v.* Miners' Bank, 13 W. N. C. (Pa.) 515.

See, *infra*, XII, D, 6.

"In general, it may be said that it must be such a custody as to enable the officer to retain and assert his control over the property so that it cannot probably be taken from him by a *bona fide* purchaser or subsequent attaching creditor." Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131.

Where there are no conflicting rights of creditors, constant possession and control, or removal of the property which would be attended with great and unnecessary expense, is unnecessary for the preservation of the lien. Bicknell *v.* Trickey, 34 Me. 273, where it was further said that what is required in the case of sale would be sufficient so far as regards the continuance of possession.

Goods Returned to Debtor.—A lien is not lost as respects the debtor, by the mere fact that he is again given possession for his convenience, or for the mutual convenience of himself and the officer. He holds under the officer. Train *v.* Wellington, 12 Mass. 495; Baldwin *v.* Jackson, 12 Mass. 131; Treadwell *v.* Brown, 43 N. H. 290.

58. Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610.

59. **Colo.**—Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664. **Me.**—Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131. **N. H.**—Dunklee *v.* Fales, 5 N. H. 527.

Far greater strictness is required in the levy when it is being asserted, not against the rights of the defendant in the writ, but against third parties. Russell *v.* Major, 29 Mo. App. 167.

Presumption of fraud is raised by the failure to remove property, when the rights of another attaching creditor are involved. Burrows *v.* Stoddard, 3 Conn. 160.

Without a certificate of levy filed with recorder, there is no valid lien as against creditors and purchasers. Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602.

As to subsequent attaching creditors with notice of the levy and the attach-

tion[60] though when the attaching creditor, the debtor, and his assignee have all waived irregularity, subsequent judgment creditors may not object that the attachment was executed by an unauthorized officer.[61]

Territory of Officer. — In the absence of statute changing the common law rule the officer can levy only within his territorial jurisdiction.[62]

Constables. — One serving process as a constable or policeman must be presumed to have been appointed by competent authority in the absence of evidence impeaching his title.[63] A constable can levy an attachment, however, only when the process and service are within his jurisdiction as to the court from which the writ has issued,[64] or the

ment is still subsisting the attachment will not be dissolved because the property has again gone into the hands of the debtor. Treadwell *v.* Brown, 43 N. H. 290; Young *v.* Walker, 12 N. H. 502; Whitney *v.* Farwell, 10 N. H. 9.

60. Citizens' Sav. Bank *v.* Miller, 6 Ky. L. Rep. 511.

Wallace *v.* Seales, 36 Miss. 53, holding that, under a statute providing for execution by a constable against one "about to remove out of this state, or removing his effects," an attachment may be executed by a constable upon a boat.

Carroll County Bank *v.* Goodall, 41 N. H. 81; Weingardt *v.* Billings, 51 N. J. L. 354, 20 Atl. 59.

Failure of a constable duly elected and qualified to give bond, does not invalidate the attachment. Bowman *v.* Barnard, 24 Vt. 355.

Notwithstanding Previous Arrest of Person.—Where a writ of attachment was served by arresting the body of the debtor, but before any return, the creditor discovering goods belonging to the debtor, released his body, and caused the goods to be attached by the same writ, it was held that the process was legal. Scott *v.* Crane, 1 Conn. 255.

61. Walter *v.* Bickham, 122 U. S. 320, 7 Sup. Ct. 1197, 30 L. ed. 1185.

62. Jones *v.* Baxter, 146 Ala. 620, 41 So. 781, 119 Am. St. Rep. 54..

Pomroy *v.* Parmlee, 9 Iowa 140, 74 Am. Dec. 328, where a sheriff levied in his own county upon property which he had improperly taken possession of in another county. See also Sadler *v.* Tatti, 17 Nev. 429, 30 Pac. 1082, (as to a sheriff serving process within counties attached for judicial purposes).

A mistake of the sheriff as to the boundary of his jurisdiction does not render the service valid. Matter of Tilton, 19 Abb. Pr. (N. Y.) 50.

Under the Greater New York charter, providing that "marshals shall be assigned by the mayor to such duty within the boroughs wherein they reside respectively as is or may be provided by law," a warrant directed "to any marshal of the City of New York to whom the annexed summons is delivered," is in excess of the power of the municipal court of the city of New York. Tausend *v.* Handlear, 33 Misc. 587, 68 N. Y. Supp. 77.

Statutory authority to pursue removed property contemplates a removal from the county so recently that the property has not acquired another status. House *v.* Hamilton, 43 Ill. 185.

63. Miller *v.* Fay, 40 Wis. 633.

A general deputy constable, duly appointed, may serve a writ of attachment which could be served by the constable himself; the process should be directed to the constable though it is expected that the process will be executed by a deputy constable. McCormick *v.* Miller, 3 Penn & Watts (Pa.) 230.

64. Weingardt *v.* Billings, 51 N. J. L. 354, 20 Atl. 59, holding that an attachment by a constable of a writ of attachment issued out of a circuit court, without authority from the sheriff, is invalid.

Alabama Code §2956 authorizing levies to be made in certain cases by a constable if the amount does not exceed the amount of the constable's bond, was intended to be confined to a bonded officer, and a special deputy who made the levy in this case was a

court to which it is returnable,[65] as to the cause in which the remedy is sought,[66] or as to the territory within which it is to be levied.[67]

2. Officer to Whom Writ Is Directed. — A writ can be levied only by the officer or by one of the class of officers to whom it is properly directed,[68] unless, by statute, any other duly qualified officer than the one to whom the writ is directed may execute the process.[69]

3. Person Specially Appointed. — In some instances in a proper case, a person other than a regular officer may be specially appointed to levy an attachment.[70] To authorize such an appointment it must be made to appear that there was no duly qualified officer available,[71] and a person interested in the result of the action cannot be deputized to

trespasser. Carter *v.* Ellis, 90 Ala. 138, 7 So. 531.

A Kentucky statute, providing that a city marshal of a town of the fifth class "shall and is hereby authorized to execute and return all process issued and directed to him by any legal authority," must be restricted to process issued and directed by municipal authority, and the service of a writ of attachment directed by the clerk of the circuit court to such an officer creates no lien. Pinckard *v.* Davis, 99 Ky. 269, 35 S. W. 921.

65. Solomon *v.* Ross, 49 Ala. 198 (as to the authority of a constable to levy an attachment issued by a justice of the peace and returnable to the same court).

Under an Alabama statute, providing that a justice of the peace issuing an attachment returnable to the circuit court "may, by indorsement on the process, direct it to be executed by the constable of the precinct, who shall return the same to the court in which it is returnable," no set phrase or form of words to the exclusion of others is necessary. Drewry *v.* Leinkauff, 94 Ala. 486, 10 So. 352.

66. Martin *v.* Dollar, 32 Ala. 422, an original attachment, for a sum exceeding fifty dollars, and returnable to the circuit court.

A statute which authorizes a constable to execute attachments against absconding debtors is enabling, and does not authorize him to execute an attachment against a non-resident defendant. Lawrence *v.* Featherston, 10 Smed. & M. (Miss.) 345.

67. Briggs *v.* Strange, 17 Mass. 405, holding that a constable may attach property within the town though the defendant may be an inhabitant of and resident in another town.

68. Hawkins *v.* McAlister, 86 Miss. 84, 38 So. 225; Carroll County Bank *v.* Goodall, 41 N. H. 81. See also Porter *v.* Stapp, 6 Colo. 32 (holding that a writ directed by a justice of the peace "to any constable of said county," cannot be levied by a sheriff or a sheriff's deputy); Menderson *v.* Specker, 79 Ky. 509 (to whom it is in fact directed, and to whom it might have been directed).

69. **Directed to Constable—Executed by Sheriff.**—Bain *v.* Mitchell, 82 Ala. 304, 2 So. 706.

A levy by a special bailiff, invested by statute with full powers in the general performance of their duties, is valid, under a writ directed "to sheriffs and constables." Wade *v.* Stout, 36 Ga. 95.

70. **A Special Deputy Authorized by the Sheriff.**—Morrel *v.* Gardner, 20 N. J. L. 673.

Different persons called to assist the sheriff not in violation of the letter of the statute. Will *v.* Whitney, 15 Ind. 194.

A Sheriff Cannot Ratify the Act of an Unauthorized Person.—Perkins *v.* Reed, 14 Ala. 536. *Compare* Clark *v.* Gary, 11 Ala. 98.

71. McFarland *v.* Tunnel, 51 Mo. 334, one specially appointed by the court.

A person appointed by the clerk of the court as special sheriff in a certain case, upon the mere statement by the plaintiff that he had looked with diligence but in vain to find the sheriff or his deputy to serve process, may not legally serve the process when it is not shown that the judge was not in the county when the clerk undertook to appoint, and that the sheriff and his deputies were in fact absent from the

make the levy.[72] A person specially appointed has the powers of an officer but he must show his authority to act, if questioned.[73]

4. Possession of Process. — The officer must have official possession or control of the writ, to justify any official act under it,[74] though it is not necessary that he should actually have the writ with him when he makes a levy.[75] And so a levy is invalid when made before the attachment issued[76] or before the officer received the writ.[77]

5. Time of Levy.[78] — A writ or warrant of attachment cannot be levied upon property after the writ has been returned,[79] nor, it has been held, after the return day,[80] or term.[81] And in those jurisdictions which recognize the right to issue and levy an attachment at any time during the pendency of the action, and in which an attachment is deemed to be a proceeding in aid of a suit pending, a levy cannot be made after the entry of judgment in the cause.[82]

county or disqualified. Dolan *v.* Topping, 51 Kan. 321, 32 Pac. 1120.

Where a constable has no authority to levy an attachment, a justice cannot specially appoint under a statute conferring upon justices the power to appoint a person "in cases of emergency" to act in place of the constable. Brinsfield *v.* Austin, 39 Ala. 227. To the same effect see Peebles *v.* Weir, 60 Ala. 413.

72. Dyson *v.* Baker, 54 Miss. 24, where it was said that the statutory provision, that where the sheriff is interested all process shall be directed to and served by the coroner, is only a legislative recognition of a common law principle.

73. Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

The appointment of an indifferent person to make service of the process is a judicial power and cannot be delegated. Kelly *v.* Paris, 10 Vt. 261, 33 Am. Dec. 199.

74. Taylor *v.* Evans (Tex. Civ. App.), 29 S. W. 172.

75. Barney *v.* Rockwell, 60 Vt. 444, 15 Atl. 163.

76. Wilson *v.* Stricker, 66 Ga. 575.

77. Wales *v.* Clark, 43 Conn. 183, holding that land is not attached by the officer's lodging with the town clerk the required certificate on the day before he received the writ.

78. See, *supra*, XI, B, 5.

79. Wheaton *v.* Neville, 19 Cal. 41.

In Courtney *v.* Carr, 6 Iowa, the court said that before the actual return of the writ it is the duty of the officer to serve it; and though the defendant may have had no property at one time, yet if he had subsequently, and before the return of the writ, acquired property, or if further search developed property belonging to him, it was proper to attach it.

Duty to Use Diligence in Completing Levy.—Wheaton *v.* Neville, 19 Cal. 41; Whitney *v.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584 (officer required to avoid unreasonable delay according to the facts of the case).

80. Osborn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413; Jordan *v.* Henderson, 39 Tex. Civ. App. 89, 86 S. W. 961; Nance *v.* Barber, 7 Tex. Civ. App. 111, 26 S. W. 151.

The indorsement of a levy on land after the return day, as shown upon the face of the writ, is invalid. Peters *v.* Conway, 4 Bush (Ky.) 565.

81. Albright-Pryor Co. *v.* Pacific Selling Co., 126 Ga. 498, 55 S. E. 251; Dame *v.* Fales, 3 N. H. 70 (where by mistake the writ was made returnable to a term already past).

82. Lynch *v.* Crary, 52 N. Y. 181, *reversing* 2 Jones & S. 461; Schieb *v.* Baldwin, 22 How. Pr. (N. Y.) 278, 13 Abb. Pr. 469.

Under the rule that writs of attachment issue at any time during the pendency of a cause, and are to be returned when executed, it has been held that they may run till executed and should be returned immediately upon execution. Will *v.* Whitney, 15 Ind. 194.

Where the statute contains no provision as to the time within which a levy of an attachment must be made, it may be made at any time before judgment and before the return of the

C. The Property. — 1. Defendant's Property. — In executing a writ or warrant of attachment the officer can seize only the property of the person against whom it was issued.[83] It is the duty of the officer to attach whatever property of the debtor he can find by the exercise of reasonable diligence, respecting the ownership of which there is no reasonable doubt.[84] He should levy upon such property only as he has reasonable and probable cause to believe belongs to the defendant in attachment.[85]

2. Property Designated. — It is the duty of the officer to attach personal property, instead of real property, if directed,[86] as also to serve the writ in a particular manner,[87] or to make immediate service.[88] Before levying the writ, he is not required to call upon the defendant to point out property,[89] but when there is any reasonable ground to

writ. Westphal *v.* Sherwood, 69 Iowa 364, 28 N. W. 640.

83. **Conn.**—Calkins *v.* Lockwood, 17 Conn. 154. **Ga.**—Wilson *v.* Paulsen, 57 Ga. 596, holding that property of a similar kind recently sold by defendant could not be seized. **Miss.**—Ford *v.* Dyer, 26 Miss. 243. **Mo.**—Norton *v.* Thiebes-Stierling Music Co., 82 Mo. App. 216, where an attachment against an opera company was attempted to be made by watching trunks belonging to the members. **Pa.**—Rothermel *v.* Marr, 98 Pa. 285.

The decree is a nullity as to the true owner, not a party to the proceeding. Merrielles *v.* State Bank, 5 Tex. Civ. App. 483, 24 S. W. 564.

Property Described in an Affidavit.—Reid *v.* Tucker, 56 Ga. 278.

The real owner may successfully defend the possession of property after the attachment defendant has unlawfully taken it from the sheriff. The Bonnie Doon, 36 Fed. 770.

The true owner may treat the property as abandoned to the officer or attaching creditor and sue for its conversion. Sammis *v.* Sly, 54 Ohio St. 511, 44 N. E. 508, 56 Am. St. Rep. 731.

84. Hill *v.* Pratt, 29 Vt. 119.

85. DeWitt *v.* Oppenheimer & Co., 51 Tex. 103.

86. Moulton *v.* Chadbourne, 31 Me. 152.

87. Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603, the court saying: "When a sheriff takes a writ, with directions to serve it in a particular manner without requiring a written indemnity, he is bound to serve it, if he may, according to the instructions; and it is not a sufficient excuse for him that he subsequently obtained some information which led him to suppose that a service in the manner directed would be ineffectual for the interests of the plaintiff, and even expose himself to an action, if his supposition was erroneous, and a service in the manner directed would, in fact, have been legal and effectual."

On a writ against two joint debtors, the creditor has a right to direct an attachment of the property of both or of either. Marion *v.* Faxon, 20 Conn. 495.

88. "When a plaintiff in a writ of attachment, is desirous of having it served immediately, he has a right so to direct the officer, when he delivers to him the process. And the officer receiving it, under such instructions, is bound to follow them, and, on failure, is answerable for the consequences. But when no such instructions are given, the officer is not bound to act with that degree of vigilance, and generally has a right to serve the process, at any time within the period prescribed by law. He is indeed bound to act reasonably; and if, as the court instructed the jury, he has knowledge, or reasonable ground to believe, that there will be danger resulting to the plaintiff, by delaying the service, he is bound to act with greater diligence." Tucker *v.* Bradley, 15 Conn. 46.

89. Samuels *v.* Reviere, 92 Fed. 199, 63 U. S. App. 752, 34 C. C. A. 294; Woldert *v.* Nedderhut Packing & Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378.

As to Other Attaching Creditors.—The right to point out property to be seized, or to object to the seizure of one species of property instead of an-

induce an officer to believe that in making an attachment he may make a mistake by attaching goods not the property of the debtor, he may insist on the creditor's showing him the debtor's goods.[90] It has been held that a special direction given to the officer to attach certain property excuses him from making any other attachment,[91] but it does not deprive him of the legal authority to obey the general command in the precept, to attach sufficient to secure the demand, if he has opportunity to do it, and chooses to avail himself of it.[92] And the fact that the officer has attached less than he was directed to does not render invalid the attachment of so much as has been levied on invalid.[93]

3. **Property Previously Levied on.** — a. *By Same Officer.* — Where property is in the possession of an officer under process of attachment or execution, a writ of attachment against the same defendant may be levied upon such property by the same officer,[94] and in such case the officer, on levying a second attachment need not perform any overt act to effect a levy, other than make due return that he has at-

other, is personal to the debtor, and other attaching creditors have no right to complain. Hoy *v.* Eaton, 26 La. Ann. 169.

90. Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

Both officer and plaintiff are liable in trover if the officer, by the direction of the plaintiff, levy on and remove the goods of a person not the defendant. Calkins *v.* Lockwood, 17 Conn. 176, 42 Am. Dec. 729.

91. Turner *v.* Austin, 16 Mass. 181; Goddard *v.* Austin, 15 Mass. 133.

But in Welton *v.* Scott, 4 Conn. 527, it was held that a direction given the officer by a party to attach certain articles of much less value than the debt does not absolve the officer from the search and enquiry which the law has prescribed.

Verbal directions as to the articles or species of property to be attached, are binding on the officer, when general directions in writing to attach have been given. Kimball *v.* Davis, 19 Me. 310.

When an original writ is delivered to the officer with special indorsement and direction, he may follow the direction, but when he is verbally directed to attach certain chattels he is bound to obey this verbal direction if he lawfully can. Marshall *v.* Hosmer, 4 Mass. 60.

If the petition concludes with a prayer for the attachment of a specific debt, the sheriff cannot attach anything else. Astor *v.* Winter, 8 Mart. (La.) 171.

92. Turner *v.* Austin, 16 Mass. 181.

93. Bean *v.* Ayers, 70 Me. 421.

94. **In making an attachment of real estate** the officer does not intermeddle with the land; and whatever may be the number of the attachments, they may be made by different officers. Kimball *v.* Morrison, 40 N. H. 117.

The second attaching creditor should delay proceedings until the suit, on which the prior attachment was made, is concluded. Barnard *v.* Fisher, 7 Mass. 71.

See, *supra*, VI.

When, under an execution, property is in possession of an officer, he may levy an order of attachment, properly directed to him, in the absence of a statute prohibiting such a levy, just as he may levy two or more executions of different dates, or successive orders of attachment, against the same debtor upon the same property. Perry *v.* Sharpe, 8 Fed. 15. See also Day *v.* Becher, 1 McMull (S. C.) 92.

Where the property is already in the hands of the sheriff under an execution, no formal levy or notice is needed. Wehle *v.* Conner, 83 N. Y. 231.

Where property was erroneously levied upon on Sunday, and on Monday was levied on by the same officer under an alias writ and under a writ issued in another attachment, without first returning the property to the owner,

tached the interest of the defendant in the property then in his possession.[95]

b. *By Different Officers.* — In at least two jurisdictions it is held that when personal property has been attached by an officer, either by taking it into his actual possession, or by leaving a copy of the writ in the town clerk's office, no subsequent attachment can be legally made of the same property by another officer, while the first attachment remains in force;[96] an attachment so made would be valid, however, as to the debtor, and when the actual or constructive possession of the officer under the first attachment is terminated by the discontinuance of that suit, the second attachment becomes operative and effectual so as to make the lien.[97] It is generally held, however, that where a valid levy on property has been made, the same property cannot again be attached under a writ or warrant in the hands of a dif-

such irregularity did not render the subsequent levy absolutely void. Blair *v.* Shew, 24 Kan. 280.

95. **U. S.**—Corning *v.* Dreyfus, 20 Fed. 426. **Cal.**—O'Connor *v.* Blake, 29 Cal. 312. **Mass.**—Turner *v.* Austin, 16 Mass. 181.

And Give Notice to the Defendant.—German Sav. Bank *v.* Capital City Oatmeal Co., 108 Iowa 380, 79 N. W. 270.

So long as personal property remains in possession of the officer other attachments coming into his hands may be levied thereon, but when the property has been taken from his possession by the execution of an order of replevin and its delivery to the plaintiff in the replevin suit, he can create no additional liens upon it. Merrill *v.* Wedgwood, 25 Neb. 283, 41 N. W. 149.

Goods Sold Under Previous Attachment.—Although no overt act by the attaching officer is necessary to constitute an attachment of property previously in his custody, yet an effectual attachment of goods cannot exist without custody or possession either by the officer or his servant. Where goods previously attached have been sold and converted into money, and have passed out of the officer's possession and control more than two months before the claimant's writ was issued, by the sale the title of the principal defendant to the goods was transferred to the purchasers, and the officer thereby became accountable not for the goods, but for the proceeds of the sales. Adams *v.* Lane, 38 Vt. 640, the court saying: "If the attachments made by the claimants had been made while the attaching officer held the official charge and custody of the proceeds of the sales of the attached property under the plaintiff's first attachment, we should have considered it as creating an effectual lien upon those proceeds; but we think that no lien upon the proceeds of the sales could be created by a subsequent attachment unless the subsequent attachment was made while the first attachment was subsisting."

After the issue of a valid writ of seizure from a chancery court, an attachment previously issued from and returnable to a court of law but not served, cannot be levied upon the property embraced in the writ of seizure, and cannot be executed unless the officer can find property not embraced in the writ of seizure, on which to levy the attachment. Read *v.* Sprague, 34 Ala. 101.

96. Pierce *v.* Jackson, 65 N. H. 121, 18 Atl. 319; Kimball *v.* Morrison, 40 N. H. 117; Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39; Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164; West River Bank *v.* Gorham, 38 Vt. 649; Rogers *v.* Fairfield, 36 Vt. 641; Burroughs *v.* Wright, 19 Vt. 510; Burroughs *v.* Wright, 16 Vt. 619.

97. Coffrin *v.* Smith, 51 Vt. 140; Rogers *v.* Fairfield, 36 Vt. 641.

Failure to take possession within statutory time where a copy is left in the clerk's office nullifies the attachment as to subsequent attaching creditors and *bona fide* purchasers. Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164.

ferent officer in such a manner as to disturb the possession of the officer or his custodian under the first process.[98]

In some jurisdictions, property in the hands of an officer under process or his keeper may be levied on under an attachment writ in the hands of a different officer, when statutes permit levies on property by notice or other like proceeding and the possession of the officer under the first process is not interfered with.[99] But where proper custody has not been maintained by the officer who levied the first process, either by placing a custodian over the property or by procuring a receiptor, a subsequent attachment may be levied thereon by another officer, and the fact that the latter possessed knowledge that an at-

98. **Colo.**—Flanagan *v.* Newman, 5 Colo. App. 245, 38 Pac. 431. **Conn.**—Tomlinson *v.* Collins, 20 Conn. 364. **Pa.** Davis *v.* Chadwick, 3 Pa. Co. Ct. 540.

Where, on attachment from a United States court, property is in possession of the marshal, an officer may make a constructive levy of an attachment from a state court, subject to all prior liens, and without disturbing the marshal's possession, by serving notice upon the marshal. Gumbel *v.* Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. ed. 374, the court further saying that in such a case, the attaching creditor in the state court may acquire a right in the property and to appear in the proceedings in the United States court to enforce it on a motion to distribute the proceeds of the sale of the attached property in its custody.

A circuit court of the United States, by reason of the existence of section 915 of the Revised Statutes of the United States, administers the attachment law of the state where such court is held; and when the statute of the state provides for successive levies, the marshal of the United States court may make a levy of a writ of attachment *sub modo,* and such levy will be sufficient, when the property is already in the custody of the law by virtue of a prior levy upon a writ issued from a state court, to enable the plaintiff to assert his lien if the attachment is sustained, as it may affect the property remaining after the satisfaction of the first attachment. Brooks *v.* Fry, 45 Fed. 776.

In the case of attachment writs from the state and federal courts against the same defendant, the writ under which the property is first actually taken into custody has priority, and possession under one levy prevents a second attachment and conflict of jurisdiction. Adler *v.* Roth, 5 Fed. 895.

Goods in possession of one summoned as trustee may be attached at the suit of another creditor, and the attaching officer will hold them subject to the lien of the creditor who previously summoned the trustee. Platt *v.* Brown, 16 Pick. (Mass.) 553; Burlingame *v.* Bell, 16 Mass. 318.

Where a levy by constructive seizure on bulky articles has been made by filing a copy of the writ, with the officer's return thereon, in the office of the town clerk, another officer making a nominal levy on the property without interfering with the rights under the former levy, is not liable to the first officer for any conversion of the property. Polley *v.* Lenox Iron Works, 15 Gray (Mass.) 513.

99. **Ark.**—Derrick *v.* State, 60 Ark. 394, 30 S. W. 760; Goodbar *v.* Brooks, 57 Ark. 450, 22 S. W. 96. **N. Y.**—Benson *v.* Berry, 55 Barb. 620. **S. C.**—Lindau *v.* Arnold, 4 Strobh. 290.

"A notification to the officer holding the goods, of the writ of attachment and the endorsement of the levy is all that can be done by the officer holding junior writs, and thereafter the officer holding the prior writ must be treated in the law as the custodian of the officer making a second or any subsequent levy, as to any surplus that may arise from the sale of the property, or as to the residue of the goods in his hands after selling sufficient to satisfy his prior lien." White *v.* Culter, 12 Ill. App. 38.

Where in accordance with the custom of officers in a locality it is understood by them that when they made levies subject to previous levies, and notified

tachment had been made will not avail to prevent his attachment, if no possession be retained under the former.[1]

c. *Effect of Taking Receipt or Delivery to Bailee.* — An officer who has placed property in the possession of a receiptor may make another attachment or levy, without an actual seizure, by making return thereof and giving notice to the receiptor that he has so attached or levied, and that he must hold the property to answer the same,[2] but another officer cannot obtain a levy thereon even by arrangement with the receiptor.[3]

On Redelivery to Defendant. — If the property has been returned by the receiptor to the defendant, then it must be seized wherever it can be found upon such subsequent attachment,[4] and this seizure may be made by a different officer.[5] But the person who gives the receipt and the defendant are estopped, by the receipt, from denying the attachment of the property within the precinct of the officer.[6]

And when property has been delivered to the plaintiff as bailee, the same or any other officer may attach it while in this situation.[7]

the officer first levying, unless there was objection made at the time, the first officer would hold for the officer making subsequent levies, when the officer first levying leaves goods in charge of an agent, who afterwards agrees to take charge for a subsequent attaching officer subject to the first officer who also consented, this constitutes a valid levy. National Wall-Paper Co. *v.* Fourth Nat. Bank (Tenn.), 51 S. W. 1002.

By Garnishment.—Bailey *v.* Childs, 46 Ohio St. 557, 24 N. E. 598; Locke *v.* Butler, 19 Ohio St. 587 (as to property held under execution); Day *v.* Becher, 1 McMull. L. (S. C.) 92 (as to property in possession of an officer under execution). *Compare* Davidson *v.* Kuhn, 1 Disney (Ohio) 405.

See the title "Garnishment."

1. Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720.

2. Bell *v.* Shafer, 58 Wis. 223, 16 N. W. 628.

But if an attachment is deemed dissolved by taking a receipt for the goods in a certain form, a subsequent attachment creates no lien unless there is a seizure of the property. Waterman *v.* Treat, 49 Me. 309, 77 Am. Dec. 261; Knap *v.* Sprague, 9 Mass. 258, 6 Am. Dec. 64.

3. Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39.

4. Bell *v.* Shafer, 58 Wis. 223, 16 N. W. 628.

The officer may again take the property out of the possession of the defendant to whom it has been restored by a receiptor. Bond *v.* Padelford, 13 Mass. 394.

5. Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164. See Hall *v.* Walbridge, 2 Aik. (Vt.) 215.

"When left in the debtor's hands it is liable to attachment by other creditors, and to sale by the debtor, and the object in procuring it receipted is to give the debtor back his property, by his furnishing a security in its place. And although in this state the officer has in form been allowed to treat the receiptor as bailee of the property for him, and maintain trover against him for non-delivery on demand, yet this has been rather a legal fiction, and the receipt has been treated substantially as a contract between the receiptor and officer, measuring and governing their respective rights." Soule *v.* Austin, 35 Vt. 515.

6. Lyman *v.* Lyman, 11 Mass. 317; Howes *v.* Spicer, 23 Vt. 508.

Nominal attachments by leaving the property in the hands of the debtor, and taking a receipt of some third person, are so far valid as to bind the officer for the value of the property, and to bind the parties, but with respect to strangers, other creditors or purchasers without notice, the attachment is wholly inoperative. Bridge *v.* Wyman, 14 Mass. 190.

7. Tomlinson *v.* Collins, 20 Conn. 364.

4. Property on Which There Was a Previous Attempt To Levy. If the officer has failed to make a valid levy upon property he may later levy under the same process while the writ is still in his hands,[8] and before it has been actually returned.[9] So also in the absence of fraud, a second levy may be made under the same writ, where property once taken has been surrendered by mistake or otherwise, no rights intervening and the legal owner not objecting.[10] A second attachment on the same writ is not necessarily wrongful because the first attachment was illegal, it not appearing that the first levy was made for the purpose of making the second or that the second was effected by means of the first.[11] But when property has been replevied, it cannot again be taken by virtue of the same process on which it had been originally taken.[12]

Question for Jury. — Where a variety of articles are attached, as in the case of goods in a store, it may occupy considerable time for the officer to take possession of, inventory, and secure them all, yet if he goes about the service, and with no unnecessary delay, continues in it, till he has secured all the goods, it should be treated as but one act.[13]

5. Joint and Several Interests. — When an attachment issues against several defendants, it may be levied on the property of either defendant, in which he has an interest subject to levy, or on the joint property of all the defendants.[14] And in a suit against a tenant in common, the officer, in levying, may take possession of the entire quantity,[15] though on levying an attachment on such property, the

8. Dolan *v.* Wilkerson, 57 Kan. 758, 48 Pac. 23.

9. Dolan *v.* Wilkerson, 57 Kan. 758, 48 Pac. 23; U. S. Bank *v.* Taylor, 7 Vt. 116.

10. Butte First Nat. Bank *v.* Boyce, 15 Mont. 162, 38 Pac. 829.

11. Gile *v.* Devens, 11 Cush. (Mass.) 59.

12. Vanderburgh *v.* Bassett, 4 Minn. 242.

13. Bishop *v.* Warner, 19 Conn. 460, holding that it is a question for the jury to determine whether there was one act or distinct levies.

14. Hadley *v.* Bryars, 58 Ala. 139.

On an attachment against two defendants, where the record showed personal service made upon one, and that after failing to find the other, the officer left a copy of the attachment and inventory with the defendant served and in whose possession the goods were found, this was in accordance with the statute, and the court, in the case of two joint debtors, was authorized to proceed, personal service having been had upon one. Buehler *v.* DeLemos, 84 Mich. 554, 48 N. W. 42.

On Interest of Partner.—Where land was levied on as the property of a certain person as the sole member of a certain firm, when in fact another person was also a member of the firm and was the owner of the property levied on, such levy did not create a lien upon the property by making such other person a party to the suit. Armistead *v.* Cocke, 62 Miss. 198.

15. North West Bank *v.* Taylor, 16 Wis. 609.

Notwithstanding a Mortgage of the Other Tenant's Interest.—Gaar *v.* Hurd, 92 Ill. 315.

No Necessity For Garnishment.—Walter *v.* Kierstead, 74 Ga. 18.

As Tenant In Common of Land.—An attachment of "all the debtor's right, title and interest in any real estate in the town of B." is a good attachment of his tenancy in common in a particular tract in that town. Crosby *v.* Allyn, 5 Me. 453.

Under Texas statutes, providing that "the writ of attachment shall be levied in the same manner as is or may be the

officer has no power to make a division of the property between the tenants or to attach a specific parcel as the property of the debtor,[16] and at the execution sale thereunder, the officer sells and the purchaser acquires only the interest of the judgment debtor or part owner.[17]

6. Leaseholds. — In the absence of statute, a leasehold interest in land should be levied on as personal property,[18] and buildings and improvements erected on the land of another which by the terms of the contract may be removed when it is terminated are regarded as mere personalty and must be attached as such.[19]

But under a statutory definition of "land," by which it includes lands, tenements, hereditaments, and all rights thereto and interests therein, a leasehold may be levied on as land.[20]

7. Amount. — It is the duty of the officer to attach sufficient to secure the payment of what may finally be recovered, provided property belonging to the debtor can be found to such an amount,[21] and where an attachment has been sued out in another state, and the property released on the execution of a bond for a certain amount, another

writ of execution upon similar property," and that "the levy upon personal property is made by taking possession thereof when the defendant in execution is entitled to possession," an attachment is valid where the defendant was one of two joint owners and in joint possession of the property attached and only the interest of the defendant was levied on. Coulson *v.* Panhandle Nat. Bank, 54 Fed. 855, 13 U. S. App. 39, 4 C. C. A. 616.

The part owner of a vessel which had been attached in a suit against a co-owner has the right to remove the vessel and use her, and be accountable to the officer or attaching creditor for the interest of the attachment defendant. Williams *v.* Brooks, 2 Root (Conn.) 34.

16. Veach *v.* Adams, 51 Cal. 609; Walker *v.* Fitts, 24 Pick. (Mass.) 191.

17. Bernal *v.* Hovious, 17 Cal. 541, 79 Am. Dec. 147; Reed *v.* Howard, 2 Met. (Mass.) 36; Eldridge *v.* Laney, 17 Pick. (Mass.) 352.

18. Burr *v.* Graves, 4 Lea (Tenn.) 552.

19. **Ind.**—Porter *v.* Byrne, 10 Ind. 146, 71 Am. Dec. 305. **Ia.**—Melhop *v.* Meinhart, 70 Iowa 685, 28 N. W. 545. **Me.**—Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131. **Mass.**—Ashmun *v.* Williams, 8 Pick. 402, (holding, however, that if the building cannot be removed without the consent of the owner of the fee, it may be attached as real property, and no actual and open possession need be taken by the attaching officer). **Tenn.** Burr *v.* Graves, 4 Lea 552.

20. Burr *v.* Graves, 4 Lea (Tenn.) 552.

In Mayhew *v.* Hathaway, 5 R. I. 283, the court said: "We hold that to be real estate in the sense of our attachment law, which our law with regard to the conveyance of real estate treats as such, and requires to be conveyed with the solemnities and public notice with which real estate is, according to its policy, to be conveyed; and regard the notice, required in attachments of real estate to be left at the town clerk's office, as congruous with, and suggestive of, this test of discrimination," and held that all estates in lands and tenements of a longer duration than one year, are, according to this standard, real estate, and should be attached as such; that is, with the public notice appropriate to the creation of a lien upon that species of property, but that all lesser estates in lands and tenements, and certainly all buildings placed on soil in which their owners have no certain interest, are to be regarded as mere chattels, and to be attachable as such.

21. Bradford *v.* McLellan, 23 Me. 302.

Under the code, the sheriff is required to attach the real and personal estate of the debtor. Mechanics', etc.,

attachment on the same cause of action should cover, as to the property to be levied upon, only an amount adequate as additional security, and not a cumulative security for the whole amount claimed.[22] When the levy of an attachment is made by statute equivalent to the service of ordinary process, a levy on any property, however limited in value is sufficient to sustain the attachment, if the levy is really made and the property is of any value.[23]

Excessive Levy. — It is the general rule that primarily the extent of the seizure is within the exercise of a sound discretion by the officer, as he is responsible to both parties for the exercise of a sound and reasonable discretion in performing his duty.[24] Under this rule, though

Bank *v.* Dakin, 33 How. Pr. (N. Y.) 316.

22. Trubee *v.* Alden, 6 Hun (N. Y.) 75.

23. Thornton *v.* Winter, 9 Ala. 613.

24. Fitzgerald *v.* Blake, 42 Barb. (N.Y.) 513; Harrison *v.* Harwood, 31 Tex. 650.

"We think the true rules, as deduced from the weight of authority upon the subject of the duties and liability of an officer in making a sufficient levy, are these: That the process in his hands being designed as a security for the plaintiff's debt, and not as an instrument of oppression to the debtor, he should on the one hand avoid making an insufficient levy, and on the other avoid making an excessive one; that in determining what should be a sufficient levy, so as to prevent accountability from negligence or a design to injure either of the parties interested, he should exercise a caution and reasonable discretion, such as should influence the conduct of prudent and discreet men generally in the management of their own affairs; that, tested by this standard, if the levy is either insufficient or excessive, then he should be responsible in damages to the party injured. If, however, he comes up to this measure, then he should not be responsible, although damage in fact may have accrued to one or the other." Dewitt *v.* Oppenheimer, 51 Tex. 103.

Third persons cannot interpose and claim to set aside an attachment, though the officer acted oppressively and might be liable to an action by the party injured. Merrill *v.* Curtis, 18 Me. 272. See also Dickson *v.* Back, 32 Ore. 217, 51 Pac. 727, holding that a right of action accrues only to the party injured, and that a third person cannot take advantage of the officer's wrong.

It does not necessarily follow, that an officer acted oppressively or illegally because he attached property estimated by him to be of greater value than the amount required to be attached. Merrill *v.* Curtis, 18 Me. 272.

An officer may attach an indivisible article of property, though far beyond the value he was directed by his precept to attach. Moulton *v.* Chadborne, 31 Me. 152.

On Several Attachments.—Where an officer after a levy of an attachment and before appraisement, received other attachments against the same defendant, a statute authorizes one appraisement upon all the attachments, and there is no excessive levy unless the property exceeds in value the amount needed to satisfy all the attachments and probable costs. Connelly *v.* Edgerton, 22 Neb. 82, 34 N. W. 76.

An attachment of land creates no lien, as against a subsequent purchaser, when the attaching officer certified only part of the sum claimed to be due, and the excess of property levied on is not capable of separation. Bacon *v.* Deming, 33 Me. 171.

The fact that a demand embraces more property than the plaintiff is entitled to would not justify the defendant in refusing or neglecting to deliver within a reasonable time that part of the property demanded, to which the demandant is entitled. But where the demandant informs the other at the time that he would not accept any less than the whole that he demanded, the latter would be absolved from tendering that portion of the property demanded, which the demandant was entitled to. Gragg *v.* Hull, 41 Vt. 217.

a levy is so excessive as to amount to oppression, this will not render the levy void so that a sale will not pass title to the purchaser as against a purchase of the property from the debtor subsequent to the levy,[25] but there must be an application to the court for relief therefrom.[26]

If the remedy provided by statute for securing release of property from an excessive levy is not pursued in the proper court, it cannot be assumed in the appellate court that the complaining party was damaged by the levy[27]

D. Manner of Levy. — **1. In General.** — It has been said that whether there is a valid levy depends upon the effect of what was done rather than upon the intent with which it was done.[29] Statutory provisions directing the procedure to be observed are in some cases held to be directory only, so that substantial compliance therewith is sufficient,[30] while other cases hold that the statute must be strictly

25. McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782.

26. Hughes *v.* Tennison, 3 Tenn. Ch. 641.

Nature of Inquiry by the Court.— While an excessive levy is sufficient ground, when properly proved, to discharge a part of the property attached, the court cannot investigate what amount the plaintiff is likely to recover upon the trial, but can only inquire into an determine whether too much property has been taken under the attachment to satisfy the claim or damages alleged. Tucker *v.* Green, 27 Kan. 355.

When the property attached was not enough to satisfy the execution, there was no abuse of process. Riley *v.* Skidmore, 53 Hun 632, 6 N. Y. Supp. 107.

Where the sheriff could not foresee what claims would be filed under the attachment, a levy could not be said to be excessive. Dronillard *v.* Wristler, 29 Ind. 552.

Instances of Oppressive Levies Vel Non.—A levy on property valued at $1,225 of an attachment for $76.74 was held to be oppressively excessive. Anderson *v.* Heile, 23 Ky. L. Rep. 1115, 64 S. W. 849.

An attachment of goods inventoried at $4,400 on a claim for $1,150, was held not to be so excessive as to affect the plaintiff's rights under the writ. Kompass *v.* Light, 122 Mich. 86, 80 N. W. 1008.

A levy for the principal sum of $260 on shares of stock in a domestic corporation of the par value of $1,000 and market value of $2,000 is not excessive as a matter of law. M. Fugazzi & Co. *v.* Simpson (Ga.), 70 S. E. 642.

27. Anderson *v.* Thero, 139 Iowa 632, 118 N. W. 47, a levy upon cattle subject to a mortgage.

"**Failing to take legal steps to reduce the amount of the levy,** the debtor must be taken to have elected to rely upon his remedy against the sheriff for damages as for an excessive levy." McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782.

29. Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. 714, 9 Am. St. Rep. 497.

30. **Mo.**—Bryant *v.* Duffy, 128 Mo. 18, 30 S. W. 317. **N. J.**—Cord *v.* Newlin, 71 N. J. L. 438, 59 Atl. 22; Thompson *v.* Eastburn, 16 N. J. L. 100. **N. Y.** Hayden *v.* National Bank, 130 N. Y. 146, 29 N. E. 143, *affirming* 54 Hun 636, 7 N. Y. Supp. 551.

"**It can be of no consequence what knowledge** the holder of the attached property may have as to the particular property intended to be attached, unless such knowledge is derived from the notice required by the statute to be served upon him, and unless there is a substantial compliance with the statute title to the property is not divested and the holder thereof remains liable to the owner." Hayden *v.* National Bank, 130 N. Y. 146, 29 N. E. 143, *affirming* 54 Hun 636, 7 N. Y. Supp. 551.

Opening packages of goods not authorized. Gaskill *v.* Glass, 1 B. Mon. (Ky.) 252.

Examining books and papers, and copying letters is an abuse of process

complied with, and that failing in this there is no attachment.[31]

In the Night-Time. — A levy made in the night-time is not always invalid.[32]

On Sunday. — If the service of a writ be begun before sunset on Saturday it may be completed after sunset notwithstanding a statute which declares void service between the setting of the sun on Saturday and twelve o'clock on Sunday night.[33]

2. Tested by Comparison With Execution. — In some cases, the sufficiency of a levy under attachment has been tested by comparing it with an execution levy upon the same class of property. Thus, it has been held that the officer's possession of personal property must be such as would constitute a seizure on execution,[34] and that, under a statute providing that "the practice and pleadings in attachment suits, except as otherwise provided in this act, shall conform, as near as may be, to the practice and pleadings in other suits at law," the seizure to be made, under the attachment writ should conform as near as may be in the method of effecting it, to the seizure of the same species of property under an execution issued in other suits at law.[35] Other cases hold, however, that no such test can be applied.[36]

3. Entry on Premises. — An attachment made by breaking the outer door of a dwelling is invalid,[37] though the officer may enter any building other than, and not connected with, a dwelling house against the will of the occupant, for the purpose of effecting a levy upon property therein,[38] the only qualification to the authority to break into a building not a dwelling house being that he shall first ask admittance, if there be any person present to grant it, and be refused.[39] And when

under a statute authorizing a levy upon books and papers, the duty of the officer being merely to take and safely keep them. Hergman *v.* Dettlebach, 11 How. Pr. (N. Y.) 46.

31. Ames *v.* Parrott, 61 Neb. 847, 86 N. W. 503, 87 Am. St. Rep. 536; Schneider *v.* Sears, 13 Ore. 69, 8 Pac. 841. For greater detail, see *infra*.

32. **The maxim that "a man's house is his castle"** only extends to his dwelling house, and therefore a levy made in the night-time, by raising a window or forcing an outer door into a storehouse where the merchandise is stored and not connected with the dwelling, is valid. Silinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836.

See *supra*, XII, D, 3.

33. Fifield *v.* Wooster, 21 Vt. 215. Pearson *v.* French, 9 Vt. 349.

34. Waterhouse *v.* Smith, 22 Me. 337.

35. Union Nat. Bank *v.* Byram, 131 Ill. 92, 22 N. E. 842.

36. Guernsey *v.* Reeves, 58 Ga. 290 where under the statute notice of the levy was not required.

Actual Levy or Delivery of Writ to Officer.—Robinson *v.* Columbia Spinning Co., 23 App. Div. 499, 49 N. Y. Supp. 4, distinguishing attachment from execution in that in the former the sheriff must have actual custody of property capable of manual delivery, but in the latter not.

37. Isley *v.* Nichols, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; Bailey *v.* Wright, 39 Mich. 96, though the tenant be absent.

Peaceable and permitted entry allows attachment on furniture in the house. Hitchcock *v.* Holmes, 43 Conn. 528.

The outer door of an apartment house is not the outer door of each apartment. Swain *v.* Mizner, 8 Gray (Mass.) 182, 69 Am. Dec. 244.

38. Ramsay *v.* Burns, 27 Mont. 154, 69 Pac. 711. See, *infra*, XII, D, 6.

39. **Ky.**—Rountree *v.* Glatt, 13 Ky L. Rep. 462. **Mont.**—Ramsey *v.* Burns,

he has once entered upon premises either by permission or by force, the officer may retain possession for a reasonable time to perfect the levy and to arrange for the removal of the attached property,[40] but not longer against the will of the occupant.[41]

4. In Presence of Witnesses. — Certain statutes declare, in substance, that the officer, on levying an attachment, shall make a declaration in the presence of a stated number of witnesses that he attaches the property at the suit of the plaintiff. Such requirements are generally held to be directory merely and not imperative. A substantial compliance is therefore sufficient, and though the failure thus to levy would be ground for setting aside an attachment at the instance of the defendant, it does not render it absolutely void as to third parties.[42] It is sufficient if the persons are mere bystanders.[43] No particular form of words need be used by the officer.[44]

5. On Real Property in Particular. — a. *In General.* — In the absence of statute providing the mode, it is generally held that an attachment may be levied on land without the officer taking possession,

27 Mont. 154, 69 Pac. 711. **Vt.**—Fullam *v.* Stearns, 30 Vt. 443, a levy on machinery in a building occupied by a third person.

Demanding admission of one who has the key of a warehouse is enough without inquiring how such person got the key. Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

He is not obliged to seek elsewhere for goods and chattels to attach, before breaking and entering such shop or building to attach goods therein. Clark *v.* Wilson, 14 R. I. 11.

40. Ramsey *v.* Burns, 27 Mont. 154, 69 Pac. 711.

41. Malcom *v.* Spoor, 12 Met. (Mass.) 279, 46 Am. Dec. 675.

In the Premises of a Third Person. Messner *v.* Lewis, 20 Tex. 221; Perry *v.* Carr, 42 Vt. 50.

The time and manner of removal must depend, in a great degree, upon the nature and character of the property attached.

In all cases, the officer has a reasonable time to effect it; and where the property is cumbrous and incapable of removal, it is dispensed with. In such case, his continual presence, by himself or an agent, is not necessary. It is sufficient if he uses due vigilance to prevent the property from going out of his control. Slate *v.* Barker, 26 Vt. 647.

The officer has the right to schedule the goods before removing them. Com. *v.* Middleby, 187 Mass. 342, 73 N. E. 208.

Delay Caused by Defendant.—On a question of unreasonable delay in removing goods, the jury may consider a notice given by the defendant to the officer that part of the goods belonged to another. Com. *v.* Middleby, 187 Mass. 342, 73 N. E. 208.

Though a Trespasser Ab Initio Attachment Valid.—Newton *v.* Adams, 4 Vt. 437. And see Davis *v.* Stone, 120 Mass. 228, where occupancy of a house in a city for seven hours in the daytime without taking any steps towards removal, was unreasonable and made the officer a trespasser.

42. **U. S.**—James *v.* Jenkins, Hempst. 189, 13 Fed. Cas. No. 7,181a. **Ark.** Harrison *v.* Trader, 29 Ark. 85, holding sufficient a public declaration by the officer in the presence of a citizen of the county. **Ind.**—Marnine *v.* Murphy, 8 Ind. 272. **Ia.**—Tiffany *v.* Glover, 3 Greene 387. **Neb.**—Ames *v.* Parrott, 61 Neb. 847, 86 N. W. 503, 87 Am. St. Rep. 536. **N. J.**—Cord *v.* Newlin, 71 N. J. L. 438, 59 Atl. 22; Thompson *v.* Eastburn, 16 N. J. L. 100. **Ohio.**—Humphrey *v.* Wood, Wright 566; Davidson *v.* Kuhn, 1 Disney 405. **Tex.** Morgan *v.* Johnson, 15 Tex. 568, where the return was that the officer executed "by levying the within attachment in the presence of" two certain persons named.

43. Davidson *v.* Kuhn, 1 Disney (Ohio) 405.

44. Taylor *v.* Evans (Tex. Civ. App.), 29 S. W. 172.

going upon or seeing it, as a return of the officer showing a levy thereon is sufficient.[45]

In Georgia it is held that, notwithstanding the absence of statutory regulation, in order to constitute a valid levy of an attachment upon land, the officer must do some act showing that he has seized the property and exercised dominion over it, sufficient to put the owner or his tenant upon notice that the officer has seized the land and is in possession of it, and that merely writing out an entry of levy upon the attachment without going upon or otherwise taking possession of the land, is not sufficient.[46]

45. **U. S.**—Steam Stone-Cutter Co. *v.* Sears, 9 Fed. 8. **Me.**—Crosby *v.* Allyn, 5 Me. 453. **Mass.**—Taylor *v.* Mixter, 11 Pick. 341; Perrin *v.* Leverett, 13 Mass. 128. **Miss.**—Saunders *v.* Columbus L. Ins. Co., 43 Miss. 583. **N. H.**—Odiorne *v.* Cooley, 2 N. H. 66, 9 Am. Dec. 39, pointing out that as to real estate reasons exist for less strictness. **N. Y.**—Rodgers *v.* Bonner, 45 N. Y. 379; Rodgers *v.* Bonner, 55 Barb. 9; Burkhardt *v.* McClellan, 1 Abb. App. Dec. 263; Learned *v.* Vandenburgh, 7 How. Pr. 379. **Tex.**—Hancock *v.* Henderson, 45 Tex. 479; Miller *v.* Sims, 3 Wills. Civ. Cas. §65.

Indiana Civil Code, §206, provides that "an order of attachment binds the defendant's property subject to execution, and becomes a lien thereon from the time of its delivery to the sheriff in the same manner as an execution." See First Nat. Bank *v.* Farmers' & Mchts.' Nat. Bank (Ind App.), 82 N. E. 1013.

Personal property need not first be levied on. Samuels *v.* Reviere, 92 Fed. 199, 63 U. S. App. 752, 34 C. C. A. 294 (under Texas statute). See also Woldert *v.* Nedderhut Packing & Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378, holding that a statute providing that "an attachment shall be levied in the same manner as is or may be the writ of execution upon similiar property" does not make applicable in attachment proceedings those preliminary steps which are required to be taken before levying an execution.

An attempt to attach a dwelling house as personal property is nugatory. Bryant *v.* Knapp, 102 Me. 139, 68 Atl. 640, *citing*, Skillin *v.* Moore, 79 Mo. 554, 11 Atl. 603.

Notice of Lis Pendens.—In levying an attachment on real estate, the officer is not authorized to interfere in any manner with the possession, and a seizure requires nothing more than the doing of some act by the officer, with intent to make the property liable to the process, and this will create a lien upon the property against the debtor, and all claiming under lien by title subsequently acquired, except bona fide purchasers and encumbrancers, as against whom there must be a lis pendens filed. Rodgers *v.* Bonner, 45 N. Y. 379. See, *infra*, XV, E, and the title "Lis Pendens."

Notice on Agent of Heirs Instead of Devisees.—That a notice of an attachment on real property was served on one as agent for heirs and legatees, instead of on such person as agent for the devisees and legatees, presents no objection when the notice served its purpose and the defendants were not prejudiced. Kilham *v.* Western Bank, etc., Co., 30 Colo. 365, 70 Pac. 409.

An attachment which was not laid per schedule, but only "in the hands" of a trustee of the debtor, does not create a lien upon the land but affects only the rights and credits, goods and chattels, of the debtor. Herzberg *v.* Warfield, 76 Md. 446, 25 Atl. 664. See, *infra*, XII, E.

Where there proves to be an unregistered mortgage on land attached, the proper course is to levy upon the fee, and not to sell the equity, if the creditor is entitled and intends to take the estate against the claim of the mortgagee. Nason *v.* Grant, 21 Me. 160.

A pew in a church must be attached and levied on as real property, and it is not necessary for the officer to enter. Perrin *v.* Leverett, 13 Mass. 130; Huntington *v.* Blaisdell, 2 N. H. 317.

46. Harris *v.* Kittle, 119 Ga. 29, 45

The rule that no disturbance of possession is required not only applies, as stated above, when there is no statute governing the mode of effecting a levy of an attachment on real property, but it will be found that the statutory modes of attaching such property do not generally require the occupant to be dispossessed.[47]

In Louisiana, writs of attachment on land which is cultivated and occupied as a residence must be levied on by seizure and taking actual possession when there is no garnishment,[48] but in attaching a vacant lot of ground or tract of land, it is not the duty of the officer to take actual possession.[49]

b. *Under Statutory Provisions Generally.* — But the mode of levying an attachment upon real property is generally regulated by statute, and when this is so, there must be a substantial compliance with the statutory provisions,[50] thus, that the levy must be made in the

S. E. 729; Smith *v.* Brown, 96 Ga. 274, 23 S. E. 849 (holding that an entry by the sheriff on the attachment that he had levied the same upon the land and that he had notified the defendant by mail, is not sufficient to constitute a legal levy); Groover, Conoly & Davis *v.* Melton (Ga. App.), 58 S. E. 488 (saying that some overt act of constructive seizure is essential). See also Baker *v.* Aultman, 107 Ga. 339, 33 S. E. 423, 73 Am. St. Rep. 132, holding that information given to the non-resident defendant in the city of his residence by the plaintiff's attorney, of the attachment and levy, is not sufficient, the court saying: "The law must provide in some way for notice to the defendant, so that he may appear and plead; otherwise it would be taking his property without due process of law."

An entry upon an attachment, "tenant in possession notified," does not necessarily relate to the defendant in attachment, and is not as to him a valid seizure. New England Mortg. Security Co. *v.* Watson, 99 Ga. 733, 27 S. E. 160.

As Against Third Persons.—A provision that an entry of the levy of an attachment upon the docket, under the statute, takes effect as a lien on realty as against third persons, and such entry of levy, without taking actual possession or without notice to the defendant in possession of the land either in person or by tenant, by the terms of the statute does not "affect the validity or force of any attachment, as between the parties thereto." New England Mortg. Security Co. *v.* Watson, 99 Ga. 733, 27 S. E. 160.

47. Wood *v.* Weir, 5 B. Mon (Ky.) 544. See generally, *infra*, under XII, D, 5, b.

48. Scott *v.* Davis, 26 La. Ann. 688; Kilbourne *v.* Frellsen, 22 La. Ann. 207; Stockton *v.* Downey, 6 La. Ann. 581.

Where the sheriff went upon the property and gave notice to all the occupants thereof of his seizure, and notified the tenants to pay rents to him, and appointed one of the tenants keeper for him, this was a sufficient seizure. Paul *v.* Hoss, 28 La. Ann. 852.

The recording of an attachment in the office of the recorder of mortgages is useless. Page *v.* Generes, 6 La. Ann. 549.

49. Boyle *v.* Ferry, 12 La. Ann. 425.

Property in occupancy of military forces dispenses with actual possession by the sheriff. Budd *v.* Stinson, 20 La. Ann. 573.

50. Williams *v.* Olden, 7 Idaho 146, 61 Pac. 517, 97 Am. St. Rep. 250; Bryant *v.* Duffy, 128 Mo. 18, 30 S. W. 317.

In People's Bank *v.* West, 67 Miss. 729, 7 So. 513, 8 L. R. A. 727, the court said that unless the statute is complied with, in the case of occupied property, by going on the land and declaring that the officer attaches it, no lien is created.

When to enforce a mechanic's lien an attachment is issued on the land, it may be levied as an attachment of the land including the buildings, fixtures and improvements. Burr *v.* Graves, 4 Lea (Tenn.) 552.

presence of disinterested witnesses,[51] by filing a copy of the attachment or an abstract of the levy, according to the statutory requirements, in the clerk's office,[52] or in the recorder's office of the county

In Another County.—An *Indiana* statute respecting a levy on real estate, which provides that when an officer "shall seize upon any real estate or interest therein, by virtue of any writ of attachment, or shall levy upon any such real estate or interest therein, by virtue of any execution issued to him from any court other than the court of the county in which he is sheriff or coroner," he shall file with the clerk a written notice of the proceedings, requires such a notice to be filed when the writ is issued from a court of the county in which the land is situated as well as when issued from another county. Peoria First Nat. Bank *v.* Farmers', etc., Nat. Bank, 171 Ind 323, 86 N. E. 417, tranferred from Appellate court and *reversing* 82 N. E. 1013.

A **North Carolina** statute requiring the levy of an attachment to be certified to the clerk of the superior court of the county where the land lay, merely prescribes that the levy of the attachment shall be a lien only from the date of the entry of the certificate by the clerk, and failure to make such certificate and entry does not invalidate the efficiency of such levy as the basis of jurisdiction. Evans *v.* Alridge, 133 N. C. 378, 45 S. E. 772.

A **Texas** statute providing that when land levied upon is in a county other than the one in which the suit is pending, then, in the case of failure to record, the attachment lien shall not be valid against subsequent purchasers for value and without notice, and subsequent lien holders in good faith, shows that the failure to record the writ and return in the county where the land is situated will not affect the lien by virtue of the levy. Davis *v.* John V. Farwell Co. (Tex. Civ. App.), 49 S. W. 656.

On a Bill in Equity.—Where a suit in the nature of a foreign attachment in chancery is brought to enforce a legal demand, and the bill positively avers that the debtor is a non-resident of the state and has real estate within it, and in the jurisdiction of the court, fully sets out the demand, particularly describes the estate sought to be subjected to the payment of the debt, and contains all other necessary and proper allegations, this gives a lien upon the real estate without any endorsement on the subpoena or any process of attachment. Cirode *v.* Buchanan, 22 Gratt. (Va.) 205.

51. Citizens' State Bank *v.* Porter, 4 Neb. (Unof.) 73, 93 N. W. 391, holding that when a statute requires that the officer goes to the place where the property may be found and there in the presence of two residents of the county declare that by virtue of the order he attaches the property, a levy is not made by the officer delivering a copy of the order to the tenant, and then going a mile or more away seeking and getting together two appraisers and telling them that he had levied.

Plaintiff Not a Disinterested Witness.—When a statute requires a levy to be made in the presence of two witnesses, this implies that they must be disinterested, and a valid levy has not been made when one of the witnesses was the plaintiff in the attachment. Ames *v.* Parrott, 61 Neb. 847, 86 N. W. 503, 87 Am. St. Rep. 536.

52. **Under a Massachusetts statute,** regulating attachment of real estate, if the requirement that, on the return being deposited in the clerk's office, it shall be the duty of the clerk to enter, in a book to be kept for that purpose, the names of the parties, the time when the attachment was made, etc., is not complied with, there is no lien as against a subsequent purchaser. Cheshire *v.* Briggs, 2 Met. (Mass.) 846. See also Goodnow *v.* Willard, 5 Met. (Mass.) 517.

An objection to the validity of an attachment, on the ground that in the copy left at the clerk's office there was a misdescription as to the day when the attachment was made, can avail only as to subsequent purchasers and attaching creditors. Pomroy *v.* Stevens, 11 Met. (Mass.) 244.

Under a New Hampshire statute, upon a general return, it cannot be intended that the copy was left with the town clerk on the day the return was made, but the true time when the copy was actually delivered to the

where the real estate is situated,[53] by filing a copy of the writ with

town clerk must be ascertained, and when delivered after a conveyance of the property, the grantee will hold the land. Cogswell *v.* Mason, 9 N. H. 48.

Actual Notice of Levy.—The very essence of an attachment of real estate consists in leaving with the town clerk a copy of the writ and return of the attachment, otherwise a levy is not good even as against a subsequent attaching creditor who had knowledge that the officer had gone upon the land in order to make the attachment. Kittredge *v.* Bellows, 7 N. H. 399. Compare, *infra,* under the Vermont statute.

As to a New York statute, C. C. P., sec. 649, subd. 1, see Hodgman *v.* Barker, 60 Hun 156, 20 Civ. Proc. 341, 14 N. Y. Supp. 574, *affirmed* 128 N. Y. 601, 27 N. E. 1029.

Where an Oregon statute required the officer to deliver a certificate of the attachment of land to the county clerk, and thereafter the office of county clerk was abolished and in lieu thereof the offices of clerk of the circuit court, clerk of the county court, and recorder of conveyances were created, the officer should deliver the certificate of attachment to the clerk of the court out of which the writ issued. Dickson *v.* Back, 32 Ore. 217, 51 Pac. 727.

Under a statute requiring the officer to deliver a certificate of the attachment of land to the county clerk within ten days from the date of the attachment, third persons are bound by the notice which the certificate affords, while the owner of the fee and those who are in privity with him are chargeable with this notice, and also bound by such knowledge as they may have that the real property has been attached. Dickson *v.* Back, 32 Ore. 217, 51 Pac. 727.

A Vermont statute requires a copy of the attachment with a description of the estate to be recorded, and when the defendant is a non-resident and no tenant, agent or attorney be known, then a copy of the writ with the officer's return thereon to be lodged in the office in which a deed ought to be recorded, a service is not sufficient unless a copy is left for a non-resident defendant as well as depositing a copy with the clerk to be recorded. Washburn *v.* New York, etc., Min. Co., 41 Vt. 50.

Where the officer certifies in his return that he left "a like copy of the writ in the town clerk's office," but without stating that it contained a copy of the service, specifying the property attached, this does not create a lien as against a subsequent purchaser. Cox *v.* Johns, 12 Vt. 65.

A purchaser or subsequent attaching creditor who has actual notice of a prior attachment must be postponed thereto when the officer has left the copy and given the necessary direction, though the substance is not recorded. Huntington *v.* Cobleigh, 5 Vt. 49. Compare, *supra,* under the New Hampshire statute.

If the copy is so wholly defective that the original, if like it, would be altogether void, and could not be made good by amendment, it is no regular notice of an attachment. But if a variance is trifling and unimportant, a lien is created by the attachment. Huntington *v.* Cobleigh, 5 Vt. 49.

If through neglect of the clerk, the papers have been lost, there is no lien as against a bona fide purchaser of the property, who has made his purchase during the existence of the attachment and without any notice of it. Burchard *v.* Fair Haven, 48 Vt. 327, wherein the court said: "The defendant relies principally upon some portions of the opinion in Braley *v.* French, 28 Vt. 546. In that case, the officer made a legal attachment of the land in controversy, but before the town clerk had recorded the substance of the copy of the writ that the officer had left with him, the officer withdrew it from the office without authority from the plaintiff in the writ. The subsequent purchaser had actual notice of the attachment, and of the withdrawal of the copy by the officer. The court properly held that the officer had no authority by virtue of his office, to vacate an attachment once made by him, and that, as the subsequent purchaser had actual notice of his proceedings, the attaching creditor could hold the land."

53. Bryant *v.* Duffy, 128 Mo. 18, 30 S. W. 317; Shaw *v.* O'Brien, 69 Mo. 501; Huxley *v.* Harrold, 62 Mo. 516.

The filing of the abstract is an act to be done at the time of indorsing the levy upon the writ, and is an act entering into and constituting a part of

the recorder and delivering to the occupant or posting upon the prem-

a levy of an attachment upon lands, and is a condition precedent to a valid attachment lien. Stanton *v.* Boschert, 104 Mo. 393, 16 S. W. 393.

By a failure of the sheriff to file an abstract of the attachment in the recorder's office of the county where the real estate is situated, no valid attachment is made. Bryant *v.* Duffy, 128 Mo. 18, 30 S. W. 317.

Under a statute providing that real estate shall be bound and the attachment shall be a lien thereon from the time a certified copy of the attachment with a description of the real estate attached, is deposited in the office of the register of deeds, such filing is a condition for the establishment of the lien, as the object is not to give notice to third parties, but to fix the lien. Davis Sewing Mach. Co. *v.* Whitney, 61 Mich. 518, 28 N. W. 674.

As against bona fide creditors and purchasers, there has been no valid lien where no certificate of the levy of an attachment upon property has been filed with the recorder, as required by statute. Gaty *v.* Pittman, 11 Ill. 20; Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602.

The failure of the recorder to make proper record of the abstract is only material when there are other attaching creditors, or the rights of third parties have intervened. Richards *v.* Harrison, 71 Mo. App. 224.

Return Is the Attachment.—The attachment is made, not by any act on the land itself, but by the officer writing a return on the writ that he has attached the real estate. Notwithstanding that this must be followed by filing in the registry of deeds an attested copy of the return, etc., as provided by statute, the attachment is made when the return is written. The return is the attachment and the only attachment. Bryant *v.* Knapp, 103 Me. 139, 68 Atl. 640.

In McLaughlin *v.* Phillips, 10 Pa. Co. Ct. 382, is was held under Act of 1836, that the entry by the prothonotary upon his docket "of the names of the parties with the date of the execution of the writ, etc.," is no part of the execution of the writ, and the neglect of the prothonotary to make such entry does not release the land from the lien obtained by the execution of the writ.

Declaratory Statute.—A statute providing that "in order to make a levy on real estate it shall not be necessary for the officer to go upon the ground, but it shall be sufficient for him to indorse such levy upon the writ," is but declaratory of what the law was previous to its adoption. Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. 378; Miller *v.* Sims, 3 Wills. Civ. Cas. §65.

Sufficiency of Return.—Every corner of the return may be examined to discover its meaning. While the return must affirmatively state attachment, no particular words or phrases need be used. "They will be sufficient if the intention is clearly made known by the language used." Technical accuracy is not required. Bryant *v.* Knapp, *supra, citing* Lombard *v.* Pike, 33 Me. 152; Roberts *v.* Bourne, 23 Me. 168, 39 Am. Dec. 614.

Sufficiency of Record.—A copy of a register's certificate: "Writ. Samuel Kendall *v.* Richard Look, dated Nov. 21st, 1850. Attachment dated Nov. 30th, 1850. Recorded Dec. 30th, 1850," is not sufficient proof that the copy of the return of an attachment of real estate was lodged in the register's office. Kendall *v.* Irving, 42 Me. 339.

Where a writ was returned as having been made on October 5, and the return to the registry of deeds purported to be a copy of a return of an attachment on October 18, no lien was created as against a third person. Bessey *v.* Vose, 73 Me. 217.

An attachment is void when the return of the officer to the registry of deeds describes the defendant in the suit as "Henry M. Hawkins" when his true name was "Henry F. Hawkins," by which latter name he was sued. Dutton *v.* Simmons, 65 Me. 583, 30 Am. Rep. 729.

Caption to Certificate.—A statute providing the sheriff shall make a certificate containing the title of the cause, the names of the parties to the action, a description of the real property, and a statement that the same has been attached, and deliver the same to the clerk of the county in which the attached real estate is situated, does not require a caption or

ises a copy of the writ,[54] or by the officer entering the levy in the incumbrance book of the county wherein the land is situated.[55]

heading to the certificate, as required in the case of a complaint. Haines *v.* Connell, 48 Ore. 469, 87 Pac. 265, 88 Pac. 872, 120 Am. St. Rep. 835, the court saying: "When a certificate of attachment attempts to state the title of the cause and the names of the parties in a caption, it must state them correctly, and an error therein is not cured by a subsequent recital in the body of the certificate. But where no caption is used, it is enough if the essential facts required to be stated appear in the body of the certificate." McDowell *v.* Parry, 45 Ore. 99, 76 Pac. 1081.

One Only of Several Defendants Mentioned.—When of several defendants the certificate filed in the office of the register of deeds mentioned the name of only one defendant, it was sufficient to give notice of the attachment of the property of such person, though insufficient in regard to the property of the other defendants. Lincoln *v.* Strickland, 51 Me. 321.

As to stating the sum sued for, see Farrin *v.* Rowse, 52 Me. 409; Nash *v.* Whitney, 39 Me. 341.

Attestation of the copy of the return is required. Farrin *v.* Rowse, 52 Me. 409.

It is not necessary for the officer personally to carry the copy of his return to the register's office; but it must be "lodged" there, or the attachment is not perfected and the lien created. Kendall *v.* Irving, 42 Me. 339.

As to Previously Acquired Rights.—A statute providing that real estate shall be bound and that the attachment shall be a lien thereon, if a copy of the attachment with a description of the property, shall be deposited in the office of the register of deeds, does not interfere with the previously acquired rights of third persons. French *v.* De Bow, 38 Mich. 708.

54. Westervelt *v.* Hagge, 61 Neb. 647, 85 N. W. 852, 54 L. R. A. 333; Foore *v.* Simon Piano Co., 18 Idaho 167, 108 Pac. 1038. See *infra*, XII, F.

Filing and Notice Necessary.—Delivery to the occupant of a copy of the writ, or the posting of a copy upon the premises, as the case may be, and the filing of a copy with the recorder, together with a description of the property attached must be done before the lien of the attachment is perfected. Wheaton *v.* Neville, 19 Cal. 41.

Conveyance to Trustee Void.—Under a statute requiring a copy of the writ with the recorder and posting a copy on unoccupied premises, and also a notice to be given to any party in whose name the property stands of record other than the defendant, where the record shows upon its face that a conveyance to a certain person as a trustee is void and that the record title really stands in the name of the defendant, a notice to such trustee is not required, and a levy is made by recording and posting a copy of the writ. Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240.

By such a levy the plaintiff acquires a provisional lien, but before a valid judgment can be rendered by which the attachment lien is preserved and made effective, there must be proper service of the summons and the writ of attachment. Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4; Westervelt *v.* Hagge, 61 Neb. 647, 85 N. W. 852, 54 L. R. A. 333.

55. **As Notice to Third Persons.**—Where a statute requires that, in an attachment suit commenced at a place other than the county seat, a transcript of the levy of an attachment shall be sent to the clerk of the court at the county seat who shall enter the levy in the incumbrance book at the county seat, to give notice of an attachment of real estate in such a suit, as against a subsequent purchaser, the levy must be entered in the incumbrance book at the county seat. Benjamin *v.* Davis, 73 Iowa 715, 36 N. W. 717.

Being for the sole purpose of giving constructive notice, there may be a levy without it, and that by making a return. Collier *v.* French, 64 Iowa 577, 21 N. W. 90.

Location of Land.—Where the return upon a writ shows an attachment only in township sixty-eight, where-

c. *Description of Property.* — In some cases it has been held that a general reference to the land belonging to the attachment defendant as having been attached is sufficient to constitute a levy,[56] though the general rule seems to be that the land attached must be so described by the officer in the levy or return as to make it certain, and must con-

as the land in question is in township sixty-seven, and the entry in the incumbrance book shows a levy on land in township number sixty-seven, there is nothing to show a valid levy on land in township sixty-seven. Collier *v.* French, 64 Iowa 577, 21 N. W. 90.

Index.—Under a statute providing that "no levy of attachment on real estate shall be notice to a subsequent vendee or encumbrancer in good faith unless the sheriff making such levy shall have entered in a book, which shall be kept in the clerk's office of each county by the clerk thereof, and called an incumbrance book, a statement that the land, describing it, has been attached," etc., a record of a levy gives constructive notice without an index of the statement having been made, notwithstanding another statute provides that the clerk shall keep "a book in which an index of all liens in district circuit courts shall be kept." Blodgett *v.* Huiscamp, 64 Iowa 548, 21 N. W. 25.

Where the legal title is in another than the attachment defendant, the record of an attachment on such land as the property of the defendant does not impart constructive notice to a purchaser from the holder of the legal title. Bailey *v.* McGregor, 46 Iowa 667.

Neglect of Clerk.—The statute is not directory but mandatory, and the neglect of the clerk may defeat the lien. Benjamin *v.* Davis, 73 Iowa 715, 36 N. W. 717.

Notice in the Interest of Creditors. By Idaho Rev. Codes, §4304, the clerk must give notice of the issuance of the writ by posting it at the front door of the court house, and by publishing it in a newspaper two days after issuance and delivery to the officer.

56. "The land attached is described in the return as 'all the real estate with the appurtenances thereof, with the defendants' right in equity to redeem the same, situated in the said town of Wells and bounded as the said town is bounded.' Such an attachment by copy in the town clerk's office was sufficient to create a valid lien on all the rights and interests of Schiff and Leonard in the real estate covered by the first lease, since to that extent their ownership appeared by the record of land titles, to which reference could be had for the precise property, or property rights and interests, referred to in the return, upon the principle that that is sufficiently certain which can be made certain. Young *v.* Judd, Brayton, 151; Clemons *v.* Clemons, 69 Vt. 545, 38 Atl. 314. But no right or interest had by them in land outside of the limits of that lease under the verbal arrangement was apparent of record; hence, as to such rights and interests, the return was incapable of being reduced to a sufficient certainty, and no lien was created thereon. Hoy *v.* Wright, Brayton, 208. Nor did the attachment of 'all of the defendants' interest in the lease of the quarries in Wells,' even though this clause be construed as an intended attachment of defendants' interest in the premises covered by the lease, extend beyond the land described in the first lease; for the attachment of all the real estate, etc., situate in the town of Wells and bounded as the town is bounded, as the property of the defendants, relying upon the land records to aid in the description of the property intended to be attached, as above shown, indicate that the officer then had in mind the premises within the limits of the lease there recorded; and there is nothing in the case indicating that in specifying 'the lease' in the other clause of the return he intended any lease other than the one of record. Moreover, but one lease is referred to in this clause of the return, and, if it were held that the reference may be either to the premises covered by the verbal lease or to those within the lease recorded, such a holding would render that part of the attachment void for uncertainty. See Whitaker *v.* Sumner, 9 Pick. (Mass.) 308; Lam-

tain that certainty of description which would be sufficient in a deed of conveyance.[57]

6. On Personal Property in Particular. — a. *In General.* — In other cases than those in which provision is made by statute for special modes of levying writs of attachment,[58] to constitute a levy of an at-

bard *v.* Pike, 33 Me. 141; Porter *v.* Byrne, 10 Ind. 146, 71 Am. Dec. 305." Hughes *v.* Farmers' Nat. Bank, 83 Vt. 386, 76 Atl. 33.

An attachment of all the right, title and interest which the defendant has to any real estate in the county, is sufficient. Roberts *v.* Bourne, 23 Me. 165, 39 Am. Dec. 614; Veazie *v.* Parker, 23 Me. 170.

A return by the officer that he had attached all the right, title and interest of the debtor to any lands lying in a certain town, is sufficient, when it clearly embraces the land. Taylor *v.* Mixter, 11 Pick. (Mass.) 341.

General Words Limited by Particular Description.—Where an attachment was levied on all the real estate of the defendant, namely, on all the rignt and interest he owns in a grist-mill and stream, the general words of the attachment are limited by the particular description, and nothing is attached but the property specifically designated. Leadbetter *v.* Blethen, 18 Me. 327.

Where an attachment was laid on a **part of a tract,** without designating what part, this would be a defect of description unless certainty can be shown from other facts. Biggs *v.* Blue, 5 McLean 148, 3 Fed. Cas. No. 1,403.

A levy of an attachment upon an undivided part of the defendants property is irregular, but is cured by a conveyance from the debtor to another party of the portion left in severalty. Littlewood *v.* Wardwell, 67 Me. 212.

Identity of Property As a Question of Fact.—Where a tract of land is attached by a general description as the farm of the defendant, and no boundaries are named in the return, what tract of land constituted the farm is a fact which must be submitted to a jury to determine. Leadbetter *v.* Blethen, 18 Me. 327.

57. **U. S.**—Biggs *v.* Blue, 5 McLean, 148, 3 Fed. Cas. No. 1,403; **N. C.** Grier *v.* Rhyne, 67 N. C. 338. **Va.**—Clark *v.* Ward, 12 Gratt. 440.

But the extent or execution must be more particular, under a statute requiring the "metes and bounds" of the land to be set out. Howard *v.* Daniels, 2 N. H. 137.

Reference to Defendant's Deed.—Under a statute providing that "the sheriff shall describe it with sufficient certainty to identify it, and if he can do so he shall refer to the deed or title under which the defendant holds it," a return showing a levy upon the right title and interest of the defendant in the estate of a deceased person, conveyed in trust by such person by deed of a certain date, and recorded in a certain book, is sufficient. Price *v.* Taylor, 110 Ky. 589, 62 S. W. 270.

Town Lot Not Platted.—Robertson *v.* McClay, 19 Tex. Civ. App. 513, 48 S. W. 35.

Showing Identity of Property.—Hailey First Nat. Bank *v.* Sonnelitner, 6 Idaho 21, 51 Pac. 993.

As a Sheriff's Deed.—Henry *v.* Mitchell, 32 Mo. 512, holding that where a section of land owned by three tenants in common, who had divided it into blocks and lots, with streets dedicated to public use separating the blocks, and with some of the lots sold to third persons and occupied by them, a levy upon the undivided interest of one of the tenants in common in a distinct portion of the land originally held in common, by a description only appropriate to its original state, was not a valid levy. See also Hailey First Nat. Bank *v.* Sonnelitner, 6 Idaho 21, 51 Pac. 993, holding that parol evidence is not admissible to help out a defective description in the notice of levy required by the statute. But *compare* Price *v.* Taylor, 110 Ky. 589, 62 S. W. 270, holding that the officer need not attach with the particularity of description needed in an execution.

58. Railroad cars are for the purposes of attachment personal property,

tachment on personal property, the officer must reduce the property to actual possession and must maintain such custody and control exclusive of that of the owner as will give unequivocal notice thereof.[59] In the absence of statutory authority or regulation, a valid levy can-

and where statutes provide a special mode of attaching them, a compliance with the statute is sufficient. Hall *v.* Carney, 140 Mass. 131, 3 N. E. 14.

Funds of an estate in the hands of an administrator are not funds in court, although there is a suit pending in court to settle the estate, and a service of the attachment upon the clerk, as permitted in attaching a fund in court, will not create a lien in such case. Sanders *v.* Herndon, 122 Ky. 760, 93 S. W. 14, 121 Am. St. Rep. 493, 5 L. R. A. (N. S.) 1072.

Forest Products.—A statute requires forest products in transit to be attached by serving a copy of the attachment upon the corporation holding the same; and the right to so serve is not limited by the words following: "Who shall, from the time of such service, be deemed to hold the same both on their own behalf, and in behalf of said sheriff or other officer, to the extent of said attachment lien, until the same can be driven or sorted out; and when driven or sorted out, said sheriff or other officer may receive said products." Lake *v.* Pere Marquette R. Co., 132 Mich. 190, 93 N. W. 257.

Though animals ordinarily must be levied on by being taken into the actual possession and custody of the officer (Gardner *v.* Anthony, 57 Kan. 619, 47 Pac. 516; Fisher *v.* Cobb, 6 Vt. 622) there are statutes which prescribe a special mode of levy. Thus, an attachment of oxen was good when the officer went to the barn where they were kept, and then having the oxen under his control notified the owner that he attached them, and then proceeded to inventory them. Cooper *v.* Newman, 45 N. H. 339.

Where an officer, in attaching five cows, has given a list of the property attached in his return and has done all that the law requires by filing an attested copy of the process in the town clerk's office, a subsequent attaching officer cannot displace such levy and lien by attaching one of the cows and giving a more perfect description of the animal. Brooks *v.* Farr, 51 Vt. 396.

Range Stock.—By statute "range stock" may be attached "between the first day of November and the next succeeding fifteenth day of May," by filing certain copies and notices "with the recorder of the county wherein such property is running at large." Harmon *v.* Comstock Horse, etc., Co., 9 Mont. 243, 23 Pac. 470, holding that a filing of copies and notices in the office of the recorder at 10:30 p. m. on the night of the fourteenth of May is sufficient.

The officer is not restricted to such animals as are within his county at time of levy and sale. Gunter *v.* Cobb, 82 Tex. 598, 17 S. W. 848. See also Davis *v.* Dallas Nat. Bank, 7 Tex. Civ. App. 41, 26 S. W. 222.

Under the range levy act, it is necessary to gather such number of stock belonging to other owners as would do them some substantial injury or damage before the prohibition under the act against gathering other cattle would apply, and authorize the levy without actual seizure but simply by filing a paper in the office of the probate clerk. Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306.

59. **U. S.**—Pelham *v.* Rose, 9 Wall. 103, 19 L. ed. 602 (construing Act of Congress, 1862, relating to the seizure of the property of those in rebellion); Starr *v.* Taylor, 3 McLean 542, 22 Fed. Cas. No. 13,319. **Conn.**—Mills *v.* Camp, 14 Conn. 219, 36 Am. Dec. 488. **Ill.** Culver *v.* Rumsey, 6 Ill. App. 593. **Ky.**—Johnson *v.* Hatfield, 8 Ky. L. Rep. 427; Louisville, etc., R. Co. *v.* Spalding, 7 Ky. L. Rep. 211; Eastern Kentucky R. Co. *v.* Holbrook, 4 Ky. L. Rep. 730. **Mass.**—Hemmenway *v.* Wheeler, 14 Pick. 408, 25 Am. Dec. 411; Vinton *v.* Bradford, 13 Mass. 114, 7 Am. Dec. 119; Train *v.* Wellington, 12 Mass. 495; Lane *v.* Jackson, 5 Mass. 157. **Mo.**—Sams *v.* Armstrong, 8 Mo. App. 573. **N. H.**—Dunklee *v.* Fales, 5 N. H. 527. **Ohio.**—Davis *v.* Lewis, 16

not be made by leaving the property in possession of the debtor,[60] or of his known agent or servant,[61] but statutes in some jurisdictions provide for attachment liens to fasten upon property, notwithstanding it remains in possession of the debtor, as where a forthcoming bond is given.[62]

Ohio C. C. 138, 8 Ohio Cir. Dec. 772. Pa.—Pennsylvania R. Co. *v.* Pennock, 51 Pa. 244. Wis.—Mahon *v.* Kennedy, 87 Wis. 50, 57 N. W. 1108. See Gallum *v.* Weil, 116 Wis. 236, 92 N. W. 1091.

In Crawford *v.* Newell, 23 Iowa 453, the court said that to constitute a valid, operative attachment levy under the provisions of the statute, the officer should do that which would amount to a change of possession, or something that would be equivalent to a claim of dominion, coupled with a power to exercise it.

"If Accessible." — Westheimer *v.* Giller, 84 Mo. App. 122; Russell *v.* Major, 29 Mo. App. 167.

If there is no levy on personal property and it is not taken into possession by the officer, there is no foundation for the judgment. Gates *v.* Flint, 39 Miss. 365.

The word "levy" is required by the statute to be construed to mean actual seizure of property by the officer charged with the execution of the writ. Shanklin *v.* Francis, 67 Mo. App. 457.

Where the officer and the defendant had jointly occupied a room, and the officer, attaching the goods of the defendant, marked them attached, and assumed exclusive possession and locked the outer door, this constituted a sufficient levy. State *v.* Barker, 26 Vt. 647.

When the officer attached lumber where it was lying took possession of the lot, and watched the lumber and saw that no one interfered with it, and the owner had no control after the attachment was issued. Stout *v.* Brown, 64 Ark. 96, 40 S. W. 701.

A vessel upon the sea cannot be attached by an officer who is on land. Bradstreet *v.* Ingals, 84 Me. 276, 24 Atl. 858.

60. Waterhouse *v.* Smith, 22 Me. 337.

As Giving Debtor a False Credit. Knox *v.* Summers, 4 Yeates (Pa.) 477.

In the case of a portable engine, there has not been a sufficient levy by simply telling the owners that it is attached, leaving it in their hands, with full permission to work it as before, and asking a man who lives in the neighborhood to keep an eye on it that it is not removed, as such control must be maintained by the officer as will give notice to others. Sams *v.* Armstrong, 8 Mo. App. 573.

Obtaining Actual Possession After Filing Copy of Return.—When an officer has attached personal property on a writ and has filed an attested copy of his return in the office of the town clerk, as provided by statute, Rev. St. c. 83, §27, he does not thereby deprive himself of the right to gain actual possession of the property attached, and to remove it whenever necessary for its preservation. Kelley *v.* Tarbox, 102 Me. 119, 66 Atl. 9.

61. Russell *v.* Major, 29 Mo. App. 167; Root *v.* Columbus, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812.

62. Root *v.* Columbus, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812. See also the title "Forthcoming Bonds."

In Virginia, under §§ 7 and 8 of c. 148, Code 1873, it is held that a valid lien may be obtained without disturbing the debtors possession of the property levied on, or, at the option of the plaintiff, he may, at the time or after the institution of the suit, go a step further, and by giving bond, compel the officer to take actual physical possession and control of the property. Dorrier *v.* Masters, 83 Vt. 459, 2 S. E. 927, the court saying:

"The prime object in levying the attachment is to obtain pendente lite, a lien; or, in other words, to put the property in the custody of the law until by the judgment of the proper tribunal the plaintiff's claim is established, when the lien becomes effective as of the date of the levy, but must be enforced, not by virtue of the writ of attachment, but by the judgment of the court ordering a sale of the property which the attachment has simply held in waiting."

Property Within View of Officer. — From what has been said it follows that, generally, the property must be in view of the officer at the time of the levy.[63]

Officer a Trespasser but for Process. — To constitute a sufficient levy, the officer must not only have a view of the property, but he must assert his right to take and keep possession by such acts as would render him chargeable as a trespasser, but for the protection of the process.[64]

Constructive Seizure. — The seizure need not be actual and manual, however, in all cases, but must be such as the nature of the property will allow.[65] That is constructive possession which involves some act

63. **Ill.**—Culver *v.* Rumsey, 6 Ill. App. 598. **Me.**—Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713. **Mass.**—Train *v.* Wellington, 12 Mass. 495. **N. H.**—Huntington *v.* Blaisdell, 2 N. H. 317.

Where a horse was in a stable near by, at the time that the officer levied process on a wagon, harness and buffalo robe, and the officer assumed to attach the horse, the debtor assenting to and joining in an arrangement for its safekeeping for the officer, and the creditor acting as bailee, this was a valid attachment of the horse. Morse *v.* Smith, 47 N. H. 474.

If the levy can be made by leaving a copy of the process with the town clerk without any removal of the property, the officer need not go to the premises to see the property when the return specifically names the articles and describes their location. Fullam *v.* Stearns, 30 Vt. 443; Putnam *v.* Clark, 17 Vt. 82 (hay or grain).

64. **Ala.**—Abrams *v.* Johnson, 65 Ala. 465. **Dak.**—Powell *v.* McKechnie, 3 Dak. 319, 19 N. W. 410. **Ia.** Rix *v.* Silknitter, 57 Iowa 262, 10 N. W. 653; Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56. **Mo.**—Shanklin *v.* Francis, 67 Mo. App. 457. **N. Y.**—Rodgers *v.* Bonner, 45 N. Y. 379.

By Constructive Seizure.—Corniff *v.* Cook, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55.

In order to make the officer responsible as a trespasser, it is not essential that he should remove or touch the property; it is enough that having the property in view, and where he can control it, he does profess to levy and assume control of the property by virtue of the execution, and with the avowed purpose of holding the property to answer the exigencies of the writ. Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685.

65. **Kan.**—Throop *v.* Maiden, 52 Kan. 258, 34 Pac. 801. **Me.**—Nichols *v.* Patten, 18 Me. 231, 35 Am. Dec. 713. **Ohio.**—Root *v.* Columbus, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812. And see Pelham *v.* Rose, 9 Wall. (U. S.) 103, 19 L. ed. 602. **Pa.**—Paxton *v.* Steckel, 2 Pa. 93; Rice *v.* Walinszius, 12 Pa. Super. 329.

Constructive possession of a species of property which will admit of actual and exclusive possession is not a sufficient levy as against one who can obtain possession without committing a trespass or a fraud. Gardner *v.* Anthony Nat. Bank, 57 Kan. 619, 47 Pac. 516.

Every distinct article need not be taken hold of. Train *v.* Wellington, 12 Mass. 495; Huntington *v.* Blaisdell, 2 N. H. 317.

As on a Sale as Between Vendor and Vendee.—A constructive possession, which on a sale as between vendor and vendee would be sufficient, is not enough. Hollister *v.* Goodale, 8 Conn. 332, 21 Am. Dec. 674.

When no Fraud Is Put in Issue.—On an attachment of hewn stones, where the officer went to the place where the stones were and upon and among them, declaring that he attached them, and took a receipt from the creditor for them and directed him to take charge of them, the creditor's place of business being within sight of the property, the officer remained in constructive possession in such manner as to continue the attachment in force. Hemmenway *v.* Wheeler, 14 Pick. (Mass.) 408, 25 Am. Dec. 411.

Property which has been fraudulently transferred is subject to actual seizure, and an attempted levy by no-

which, in legal contemplation, is equivalent to the actual possession and custody of the property.[66] And this custody and possession must be taken and maintained by the officer or his servant or agent.[67] If the officer lock up a building in which the goods are and take the key into his possession, or place it in the hands of an agent with directions to keep the property for him, it is a sufficient taking possession as respects subsequent purchasers or incumbrancers,[68] especially after also declaring publicly that all the property therein was attached.[69]

Notoriety is not essential to the seizure, generally, if the officer's custody excludes acts of dominion over the property by others.[70]

Overt Act Unnecessary. —If personal property is already in the custody of the officer, he must perform no overt act in levying a second

tice creates no lien. Kessler *v.* Halff, 21 Tex. Civ. App. 91, 51 S. W. 48, the court saying: "Such a service of the writ is only applicable where the property is possessed by one entitled to its possession whose right is intended to be recognized. When made, it does not limit or impair such right, but leaves the possessor in the full enjoyment of it."

Freight Car Method.—In Seibels *v.* Northern Cent. R. Co., 80 S. C. 133, 61 S. E. 435, 16 L. R. A. (N. S.) 1026, "the sheriff's return states that he seized and took into his possession freight box car No. 14719 of the New York Central & Hudson River Railroad Company on March 1, 1906, while in possession of the Seaboard Air Line Railway, and that he delivered a notice of the attachment to the agent of the Seaboard Air Line Railway, and in his affidavit the sheriff states that he attached said car, took the number thereof, hunted up the yard master and informed him that he had attached the said car and that it must not be moved without direct orders from W. A. Duncan, agent of the Seaboard Air Line Railway Company, to which he fully agreed; that affiant went to said agent and completed the service by serving on him a certified copy of the warrant of attachment and the notice of attachment; that actual possession of the car was taken as fully as it was possible under the circumstances."

66. Gates *v.* Bushnell, 9 Conn. 530.

A constructive taking held sufficient was where an officer being in sight of the goods, informed the owner that he had attached them, and forbade him taking them unless the debt was paid. St. George *v.* O'Connell, 110 Mass. 475.

Knowledge of the former attachment by the creditor will not stand in lieu of a change of possession, or suffice to protect the property. Flanagan *v.* Wood, 33 Vt. 332. See also Bagley *v.* White, 4 Pick (Mass.) 395, 16 Am. Dec. 353, as to knowledge of officer.

67. Moore *v.* Brown, etc., Furniture Co., 107 Ga. 139, 32 S. E. 835; Burroughs *v.* Wright, 19 Vt. 510.

68. Newton *v.* Adams, 4 Vt. 437, holding further that if the officer fail to secure the property effectually, and the attorney or creditor, acting in his behalf, proceed to do so, before any subsequent attachment is made, his attachment is valid.

When another attaching officer or creditor knows that an officer has declared his intention to attach goods in a store and has locked the store and kept the key, such an attachment is good against the subsequent attempt. Gordon *v.* Jenney, 16 Mass. 465; Denny *v.* Warren, 16 Mass. 420.

69. Shephard *v.* Butterfield, 4 Cush. (Mass.) 425, 50 Am. Dec. 796.

A levy on hay in a barn by an officer within view of the hay, the officer declaring that he attached it and posting a notice to that effect on the barn door, is sufficient to create a lawful lien. Merrill *v.* Sawyer, 8 Pick. (Mass.) 397.

70. **Conn.**—Tomlinson *v.* Collins, 20 Conn. 364; Mills *v.* Camp, 14 Conn. 225, 36 Am. Dec. 488. **Pa.**—Pennsylvania R. Co. *v.* Pennock, 51 Pa. 244. **Va.**—Lyon *v.* Rood, 12 Vt. 233; Newton *v.* Adams, 4 Vt 437.

attachment. He can only treat the property as seized and make his return accordingly.[71]

Distinct parcels of goods cannot be attached as a whole by a levy upon part, but the seizure of a part of a certain thing will bind the whole when it comes to hand:[72]

"Capable of Manual Delivery." — To constitute and preserve an attachment of personal property,[73] capable of manual delivery, the offi-

71. German Sav. Bank *v.* Capital City Oatmeal Co., 108 Iowa 380, 79 N. W. 270.

72. Pennsylvania R. Co. *v.* Pennock, 51 Pa. 244.

Where a variety of articles is attached, and it requires considerable time to complete the process, if the officer, after he has begun it, continues in it, with no unnecessary delay, until he has secured all the goods, the taking is to be treated as but one act. Bishop *v.* Warner, 19 Conn. 460.

73. **Colo.**—Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664. **Mass.**—Bridge *v.* Wyman, 14 Mass. 190; Phillips *v.* Bridge, 11 Mass. 242; Knap *v.* Sprague, 9 Mass. 258, 6 Am. Dec. 64; Lane *v.* Jackson, 5 Mass. 157. **Miss.** Gates *v.* Flint, 39 Miss. 365; **Mo.** Shanklin *v.* Francis, 67 Mo. App. 457. **N. H.**—Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39. **N. Y.**—Robinson *v.* Columbia Spinning Co., 23 App. Div. 499, 49 N. Y. Supp. 4; Adams *v.* Speelman, 39 Hun 35; Smith *v.* Orser, 43 Barb. 187; Halben *v.* Reilly, 9 Daly 271. **N. C.**—Anonymous, 1 N. C. 161. **Ore.**—State *v.* Cornelius, 5 Ore. 46.

"And Not in the Possession of a Third Person."—Schneider *v.* Sears, 13 Ore. 69, 8 Pac. 841.

By Remaining Present or by a Seasonable Removal.—Huntington *v.* Blaisdell, 2 N. H. 317.

The whole theory of the law upon attachment is based upon the idea that the officer must obtain possession of the property attached; which possession is obtained in the case of real estate, and of personal property not capable of manual delivery, by complying with the provisions of the statute in relation thereto. But personal property capable of manual delivery must be taken into the actual possession of the officer, and he must have the same under his entire control. Caldwell *v.* Sibley, 3 Minn. 406.

A levy on property "susceptible of seizure and manual occupation," is required with reference to the nature of the property, and not to its circumstances, and whenever it cannot be seized because not to be found within the jurisdiction of the court, the effect of the process must and, unless it be constructively in possession of some person by reason of a fraudulent removal or concealment of it. Pennsylvania R. Co. *v.* Pennock, 51 Pa. 244.

As a Jurisdictional Matter.—See Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931; Perry *v.* Griefen, 99 Me. 420, 59 Atl. 601.

The "custody and holding" required in the case of property capable of manual delivery is actual and real, not ideal and constructive. Adler *v.* Roth, 5 Fed. 895, under an Arkansas statute, which provides that the officer shall execute the order of attachment "upon personal property, capable of manual delivery, by taking it into his custody and holding it, subject to the order of the court. Upon other personal property by delivering a copy of the order, with a notice specifying the property attached to the person holding the same."

A stock of goods is capable of manual delivery, and to make a valid levy thereon it is necessary for the officer to take the same into his custody, which must be actual possession and control, with power of removal. Meyer *v.* Missouri Glass Co., 65 Ark. 286, 45 S. W. 1062, 67 Am. St. Rep. 927, holding that the act of an officer, after being denied the use of the key, in stationing himself near the store and declaring that he had levied upon the goods in the store and that he would break and enter the store in the morning, is not sufficient.

Choses or Things in Action.—Under a statute which provides that personal property capable of manual delivery shall be attached by taking the same into the custody of the constable, and that debts, credits and other things in action which are not capable of man-

cer must take the property into custody, and continue in the actual possession of it by himself or an agent appointed by him for that purpose.

Removal Is For Prevention of Fraud. — The necessity for removal of the property as evidence of the sufficiency of the levy and the maintenance of the custody and control of the property by the officer or by some person for him, is governed somewhat by the situation or relation of the parties contesting the levy. Thus,[74] it has been held that

ual delivery shall be attached by leaving a copy of the writ, all chattels, that is, all tangible personal property, are capable of manual delivery, as distinguished from choses or things in action. Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664.

Carriages and other like vehicles are capable of manual delivery and must be attached by taking into custody. Gottlieb *v.* Barton, 13 Colo. App. 147, 57 Pac. 754, holding that where the officer found the property in the possession of the proprietor of a carriage shop, with a large number of other vehicles, and did not separate them or even touch them, nor have possession distinct from that of the proprietor of the shop, the mere appointment of the person in possession as custodian of the property was not a levy.

As to Bulky Articles.—In Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664, the court said: "The fact that the property to be attached consists of bulky articles, difficult of removal, does not excuse the failure of the officer to take possession. To do this it may not be necessary to remove the property from the place in which it is found. Nevertheless it is incumbent upon him to do whatever may be necessary to take the property into custody. After the levy of the process the possession of the property should be his. It should be subject to his dominion and control. His possession must be exclusive. His dominion cannot be shared with the defendant. The effect of the levy must be to place the property in custodia legis. It cannot be held adversely to the court or to the officer. The officer must be clothed with the indicia of ownership." But in Seibels *v.* Northern Cent. R. Co., 80 S. C. 133, 61 S. E. 435, 16 L. R. A. (N. S.) 1026, the court said: "From their nature and condition there are certain species of property which are absolutely incapable of manual delivery, and certain kinds of property so heavy and bulky as to be handled only in a particular manner not available to the officer by any practical means or expenditure, that may be regarded as incapable of manual delivery to the officer. In some states provision is made by statute for the seizure of bulky or immovable property, as in Massachusetts, where the officer is not required to take actual custody of railroad cars. Hall *v.* Carney, 140 Mass. 131, 3 N. E. 14; . . . The provisions of section 257 of our code are broad enough by a liberal construction to cover the execution of an attachment on any property 'incapable of manual delivery to the sheriff' by leaving with the individual holding such property a certified copy of the warrant with a notice showing the property levied on. This may well be construed to embrace such a bulky and unmanageable thing as a freight car which, while it may be deliverable to another carrier having track facilities, cannot be practically delivered to the officer having no such facilities unless at such an enormous expenditure as to render such seizure useless. To require the sheriff to chain the car to the track or otherwise physically obstruct its removal would often have the effect of preventing the railroad company from the necessary use of its track, a hardship to the carrier which, if possible, should be avoided. In such perplexing circumstances it is reasonable to hold that the method of seizure adopted by the sheriff was proper and legal."

74. Rogers *v.* Gilmore, 51 Cal. 309.

Removal of Lumber Short Distance. A removal of lumber in the mill yard belonging to third person from one to four rods is sufficient to constitute an attachment, and to make the officer liable to the debtor after the creditor's

where there have been acts of taking, but the property has not been actually removed and kept in the continued custody of the officer or his agent, the levy is sufficient against the party having knowledge of the attachment, though as against another attaching creditor or a purchaser from the defendant in good faith, there may not have been sufficient custody. It has also been said that the rule requiring a removal is a rule of policy, for the prevention of fraud, and does not apply when the possession is otherwise openly and notoriously changed.[75] And so, where the debtor is divested of his possession and control, and the officer or his agent is in the actual custody of the property, it may remain in the place where it is found,[76] and especially if actual removal of the property would be attended with great waste and expense, such removal may be dispensed with, and where the officer takes possession by the levy of his attachment, he may retain that possession, if there is no interference of the debtor, while the property remains where levied on.[77] If, however, a removal is necessary in order to retain possession, it is the duty of the officer to remove it, and the fact that the removal will be attended with some inconvenience does not furnish an excuse for a neglect to retain possession.[78]

Levy Prevented. — When the officer was prevented from making an actual levy on personal property capable of manual delivery, the plaintiff cannot be accorded by the court a technical legal standing as an attaching creditor, as where the levy was prevented by false statements made to the officer by the agent of the defendant that he has no such property in his possession,[79] or by the illegal acts of another officer in holding the property under illegal process.[80] But when

lien is gone. Fletcher *v.* Cole, 26 Vt. 170.

Removal to Another Town.—The officer may remove the property to another town for safekeeping. Carter *v.* Clark, 28 Conn. 512.

75. Pond *v.* Skidmore, 40 Conn. 213.

As against a mere trespasser, a levy of an attachment without removing any of the property is sufficient. Miller *v.* Fay, 40 Wis. 633.

76. **U. S.**—Adler *v.* Roth, 5 Fed. 895. **Dak.**—Powell *v.* McKechnie, 3 Dak. 319, 19 N. W. 410. **Ky.**—Howell *v.* Commercial Bank, 5 Bush 93. **N. H.** Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720.

In Massachusetts, it has been held that when personal property is attached by an officer, it is his duty, as soon as may be, to remove the property from the possession of the debtor and take it into his own immediate possession, and the permanent stationing of a keeper over the property is not a proper mode of proceeding, nor one warranted by law." Cutter *v.* Howe, 122 Mass. 541, reviewing the earlier cases. See also Baldwin *v.* Jackson, 12 Mass. 131.

77. Mills *v.* Camp, 14 Conn. 219, 36 Am. Dec. 488, holding that the continual presence of the officer, by himself or an agent, is not necessary, and it is sufficient if he uses due diligence to prevent its going out of his control.

Where property is of such a character that it cannot be removed immediately, and everything is done to constitute and to show an attachment, the property may be left in the place where taken and the attachment will continue effectual and valid, by filing in the clerk's office a copy of the return and a certificate of the facts prescribed in the statute. Darling *v.* Dodge, 36 Me. 370; Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720.

78. Adler *v.* Roth, 5 Fed. 895.

79. Robinson *v.* Columbia Spinning Co., 23 App. Div. 499, 49 N. Y. Supp. 4.

80. Gumbel *v.* Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. ed. 374, in which case the property was in possession of

an officer has been prevented by a person in possession from making the seizure, it has been held that a special return of the facts will hold the garnishee.[81]

b. *Property in Possession of Third Person.* — It has been held that an officer, unless specially ordered, is not bound to attach the goods of a debtor, out of his possession,[82] though generally he may do so, and may even be required to attach property so situated, under the circumstances and upon the conditions hereafter suggested.[83]

Property in possession of a bailee of the debtor must be reduced to possession by the officer when this can be done, or there is no attachment.[84]

When Capable of Manual Delivery.— If the property in possession of a third person is capable of manual delivery, the officer must take actual possession and control thereof,[85] unless such third person claims

a United States marshal, and holding further that such attaching creditor was properly allowed to intervene in the proceedings in the United States Circuit Court for the purpose of obtaining a constructive levy and asserting any right of priority.

81. Pennsylvania R. Co. *v.* Pennock, 51 Pac. 244.

82. Weld *v.* Chadbourne, 37 Me. 221.

In an action against an heir, where the praecipe directed an attachment of the moneys and interest of the defendant in the hands of the administrator and the writ followed the praecipe, and it appears that the administrator was not in possession of the lands of the deceased and no service was made on the occupants, the return also showing no attachment of lands or interest therein, the record fails to show an attachment or levy on the defendant's interest in lands. Roth's Appeal, 94 Pa. 186.

Where an attachment is levied on the interest of an heir, who is a non-resident, and a statute requires the officer to leave a copy of the process with the person who has charge or possession of the estate attached, the notice should be given to the administrator rather than a tenant; the statute intends to provide for notice to the person who presumptively has the greatest interest in defending the land from seizure by a creditor. Stone *v.* Hawkins, 56 Conn. 111, 14 Atl. 297.

83. See Walton *v.* Deignan, 2 Nott & M. (S. C.) 248.

An officer has a right to take possession of boxes left at a depot for transportation, and open the same, and take on his attachment, any attachable articles therein, but this must be done in reasonable manner, and must not remove the boxes from the depot unnecessarily. Peller *v.* Stebbins, 26 Vt. 644.

84. Barney *v.* Rockwell, 60 Vt. 444, 15 Atl. 163.

The giving of a bailee of property notice that it has been attached is not such taking of possession as will prevent the subsequent attachment of the same by other creditors. Shanklin *v.* Francis, 67 Mo. App. 457. To the same effect, see Blake *v.* Hatch, 25 Vt. 555.

Where property fraudulently conveyed to a third party for the benefit of the defendant is by him deposited with a bailee, it is not necessary to give notice of attachment to the former before levying on the property in the bailee's hands. Greenleaf *v.* Mumford, 30 How. Pr. (N. Y.) 30, 19 Abb. Pr. 469.

85. **Pa.**—Pennsylvania R. Co. *v.* Pennock, 51 Pa. 244. **Utah.**—Kiesel *v.* Union Pac. R. Co., 6 Utah 128, 21 Pac. 499. **Wis.**—Libby *v.* Murray, 51 Wis. 371, 8 N. W. 238.

Under a New York statute, section 655, C. C. P., which provides that in executing an attachment, the sheriff may maintain an action or special proceeding in his own name or in the name of the defendant, to reduce to his actual possession an article of personal property capable of manual delivery, but of which he has been un-

an independent interest in the property attached,[86] or unless a statute

able to obtain possession, no authority is given to order a person holding property of an attached debtor to deliver it to the sheriff, on motion of the attaching creditor, but the action or proceeding for that purpose must be instituted by the sheriff, either in his own name or that of the debtor. Hall *v.* Brooks, 89 N. Y. 33, 2 Civ. Proc. 198, *reversing* 25 Hun 577.

Where an officer went on board a ship with a writ, in order to attach goods as the property of a consignee, and the goods being in a lower hold covered up with other goods, he did not go below or see the goods, but paid the freight to the master, and left a keeper to take charge of the goods as attached, who continued on board several days and took possession of the goods when they were hoisted from the hold, it seems that the proceedings of the officer while he was on board constituted a valid attachment of the goods. Naylor *v.* Dennie, 8 Pick. (Mass.) 198, 19 Am. Dec. 319.

In Vermont it is held that where the goods attached are in the hands of a third person, no visible change of possession is required, provided the creditor gives notice of his attachment, as the possession of another than the attachment defendant puts other persons on notice. Flanagan *v.* Wood, 33 Vt. 332.

But when the known servant of debtor is in possession, there is nothing to put another on notice as to the purpose of his possession or upon inquiry as to the levy of an attachment. Flanagan *v.* Wood, 33 Vt. 332.

86. **In serving attachments either foreign or domestic,** the sheriff has no authority to take goods out of the possession of one who claims property in them. Moore *v.* Byne, 1 Rich. L. (S. C.) 94.

By Giving Notice.—Sutton *v.* Gregory (Tex.), 45 S. W. 932; Sutton *v.* Simon, 91 Tex. 638, 45 S. W. 559.

Where a creditor is in possession of property, service of the writ must be made to bind the property. Bethune *v.* Gibson, 2 Brev. (S. C.) 501.

Raw Material Delivered Under Contract for Manufacture.—If an officer attach logs which have been delivered by the debtor at a saw-mill, under a contract for their manufacture, of which the sawyer claims the benefit, and are actually in the progress of manufacture, it is not an abuse of process to suffer them to remain, and to suffer the sawyer to retain a part for his compensation, in conformity with a previous arrangement with the debtor. Smith *v.* Moore, 17 N. H. 380.

Under a Missouri statute, providing that "when goods and chattels, money or evidences of debt are to be attached, the officer shall take the same, and keep them in his custody, if accessible; and if not accessible, he shall declare to the person in possession thereof, that he attaches the same in his hands, and summon such person as garnishee," personal property in possession of a third party claiming some right or interest in it, is not so accessible as to prevent a legal garnishment. Westheimer *v.* Giller, 84 Mo. App. 122, the court saying: "It does not follow in such case that an attachment by actual seizure would be illegal. The execution of the writ in either way would be valid."

Also a Similar Massachusetts Statute.—See also Burlingame *v.* Bell, 16 Mass. 318.

Notice to Claimant in Possession To Try Right to Property.—Where statutes provide that a party claiming property seized by virtue of an execution or writ of attachment may file the complaint with the justice issuing the writ, and try the right of property, or he may bring an independent action in replevin; but if, before he brings an independent action, he is served with the statutory notice by the officer holding the writ, he must appear, and institute proceedings under the act, or he will be barred from maintaining any action against the officer or the purchaser of the property, the fact that a claimant has actual notice of an attachment does not dispense with the giving of the notice required by the statute. Patterson *v.* Snow, 24 Ind. App. 572, 57 N. E. 286.

Under a New York statute, regulating the attachment of personal property, capable of manual delivery, and providing that the officer "must thereupon, without delay, deliver to the person from whose possession the property

has provided a special method by which property in the hands of a third person may be attached.[87]

When Incapable of Manual Delivery. — Property in the possession of a third person and incapable of manual delivery may be attached by complying with statutory provisions regulating such cases, as that a copy of the writ and notice showing the property attached must be given to the person in possession,[88] or by depositing a copy of the writ

is taken, if any, a copy of the warrant and of the affidavit upon which it was granted," is directory merely, and a failure to comply therewith is a mere irregularity, which does not destroy the effect of a levy, if otherwise valid. Adams *v.* Speelman, 39 Hun (N. Y.) 35, the court saying: "Had the language been to the effect that the levy shall be made by taking the property into the actual custody of the sheriff and by his delivering a copy, etc., the case would have been different." See also Adams *v.* Speelman, 57 Hun 585, 10 N. Y. Supp. 364, *affirmed*, 124 N. Y. 666, 27 N. E. 854.

That the person with whom the sheriff left the certified copy of the warrant and a notice showing the property attached, was not the person holding the property, is immaterial when he was appointed agent to hold the property and to receive service of the attachment. Lowenthal *v.* Hodge, 120 App. Div. 304, 105 N. Y. Supp. 120.

Where the debtor's property is in the possession of a pledgee, and the officer did not take possession of the pledged property, but left with the pledgee certified copies of the warrants of attachment, and notices showing the property attached, this is sufficient. Lane *v.* Wheelwright, 69 Hun 180, 23 N. Y. Supp. 576, *affirmed*, 143 N. Y. 634, 37 N. E. 826.

87. **Service of the Writ on Person in Control.**—Grieff *v.* Betterton, 18 La. Ann. 349; Renneker *v.* Davis, 10 Rich. Eq. (S. C.) 289.

The statute requires the officer to serve a copy of the writ and inventory upon the defendant, if he can be found within the country, and only allows service upon the person in whose possession the property is found, when the defendant cannot be found in the county, or when he has no last place of residence in the county. Nicolls *v.* Lawrence, 30 Mich. 395.

Serving Scire Facias.—Barney *v.* Patterson, 6 Har. & J. (Md.) 182.

Under an Oregon statute, a sheriff, in the execution of a writ of attachment, is not authorized to take personal property into his custody where it is in the possession of a third person; in such case he can only attach the property by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same. Lewis *v.* Birdsey, 19 Ore. 164, 26 Pac. 623.

Under a statute providing that in order to attach property in the hands of a third person, a certified copy of the writ and a notice specifying the property attached must be left with such third person, a writ attaching "all debts, property, moneys, rights, dues, credits," of the attachment defendant in the hands of such third person sufficiently describes such property. Carter *v.* Koshland, 12 Ore. 492, 8 Pac. 556.

88. Courtney *v.* Eighth Ward Bank, 14 Misc. 386, 25 Civ. Proc. 156, 35 N. Y. Supp. 1049.

Upon a Debt.—Clark *v.* Warren, 7 Lans. (N. Y.) 180; McGinn *v.* Ross, 53 N. Y. Super. 346. See also the title "Garnishment."

In Possession of Another Corporation.—If the property is not capable of manual delivery, under the statute in order to effect its attachment it is necessary to serve a copy of the writ of attachment, and a notice that the property was attached in pursuance thereof, upon the president, or other head of that corporation, or its secretary, cashier or other managing agent thereof. Blanc *v.* Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149, holding that one employed as a clerk in a store belonging to the corporation is not a "cashier" or a "managing agent."

Leaving the attachment with a man in the store, of the person to be served, furnishes no evidence that it ever came to the knowledge of such person.

and return in the town clerk's office, the property being still in use.[89]

c. *Property Under Lock and Key.* — Notwithstanding property may be stored or locked up, as against third persons, the officer must obtain actual possession. And therefore, when goods are within a building locked up, a levy is made not by standing at the door or by placing a guard on the premises, but only by effecting an entrance into the building and taking actual possession of the goods.[90]

Contents of Safe. — A levy upon a safe, and taking and maintaining control of it, is a sufficient attachment of books of account and other contents therein, as well as of the safe itself.[91]

Orser *v.* Grossman, 4 E. D. Smith (N. Y.) 443, 11 How. Pr. 520.

A general notice by the officer that he attaches all property in the possession or under the control of the individual served, is sufficient without a particular description of the property and debts supposed to be in possession of or owing by him. O'Brien *v.* Mechanics', etc., F. Ins. Co., 56 N. Y. 52, *reversing* 45 How. Pr. 453, 14 Abb. Pr. (N. S.) 314. See Clarke *v.* Goodridge, 41 N. Y. 210; Kelly *v.* Roberts, 40 N. Y. 432; Drake *v.* Goodridge, 54 Barb. (N. Y.) 78; Greenleaf *v.* Mumford, 19 Abb. Pr. (N. Y.) 469; Wilson *v.* Duncan, 11 Abb. Pr. (N. Y.) 3; Kuhlman *v.* Orser, 5 Duer (N. Y.) 242. See also, *infra*, XII, F, 4.

Mistake as to Name of Debtor. — Under a statute providing that property not capable of manual delivery may be attached by leaving with the person holding the same or, if it consists of a demand other than a bond, promissory note or other instrument for the payment of money, with the person against whom it exists, a certified copy of the warrant of attachment and a notice showing the property attached, where the sheriff left a bank a certified copy of the warrant and a notice specifying that the property attached was money or other property in possession of the bank belonging to G. H. Loker, this was insufficient to attach money due G. H. Loker & Brother, and this though the bank officials knew what was intended by the notice. Hayden *v.* State Nat. Bank, 130 N. Y. 146, 29 N. E. 143, *affirming* 54 Hun 636, mem., 7 N. Y. Supp. 551.

Unless the officer wishes to limit his levy by specifying specific property, a general notice is sufficient. O'Brien *v.* Mechanics', etc., F. Ins. Co., 46 How. Pr. (N. Y.) 429, 15 Abb. Pr. (N. S.) 222.

89. **Heavy iron lathes and planers** are within a statute authorizing an officer levying thereon to leave them in the owner's possession and to preserve the attachment by depositing a copy of the writ and return in the town clerk's office. Higgins *v.* Drennan, 157 Mass. 384, 32 N. E. 354.

90. Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610; Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. 714, 9 Am. St. Rep. 497. See also Bickler *v.* Kendall, 66 Iowa 703, 24 N. W. 518; Rix *v.* Silknitter, 57 Iowa 262, 10 N. W. 653. See *supra*, XII, D, 3.

Where a mule belonging to the defendant was in a barn belonging to a third person, which was locked, and the officer, attempting to make a levy, looked through the cracks and picked out the defendant's mule from the others, a promise by the wife of the owner of the premises to hold the mule for the officer is not sufficient to aid the officer in making a valid levy as she was not in law or in fact in possession of the mule. Evans *v.* Higdon, 1 Baxt. (Tenn.) 245.

91. Dodson *v.* Wightman, 6 Kan. App. 835, 49 Pac. 790.

In Elliott *v.* Bowman, 17 Mo. App. 693, the court said: "This is in conformity with the definition of the word 'levy' as used in our statute relating to executions, which shall be considered to mean the actual seizure of property by the officer charged with the execution of the writ."

An order directing the sheriff to take into his possession the books of account, will not justify breaking open safes and destroying property. Krooks *v.* L. & C. Wise Co., 31 Abb. N. C. 46, 28 N. Y. Supp. 641.

d. *Filing of Writ and Return.* — In some jurisdictions, statutes make an attachment of personal property effectual if a copy of the writ and return be duly filed, and when the property by reason of its bulk or other cause cannot be immediately removed.[92] This is independent of the attachment, and is a statutory mode of preserving the attachment,[93] and, the sole object of the provision being to give notice to subsequent purchasers and attaching creditors,[94] a compliance with the statutory conditions is required.[95] If the copy of the return filed

92. **With the Recorder.**—Steinfield *v.* Menager, 6 Ariz. 141, 53 Pac. 495.

In the Town Clerk's Office.—Me.—Kelly *v.* Tarbox, 102 Me. 119, 66 Atl. 9. **Mass.**—Reed *v.* Howard, 2 Met. 36. **Vt.**—West River Bank *v.* Gorham, 38 Vt. 649.

Instances of Property Within the Statute.—Hay and Grain in the Straw. Wentworth *v.* Sawyer, 76 Me. 434; Putnam *v.* Clark, 17 Vt. 82. See also, *infra*, under XII, D, 6, k.

Machinery—Fullam *v.* Stearns, 30 Vt. 443.

Tobacco Stored in Barns, Hanging on Poles, in Process of Curing.—Cheshire Nat. Bank *v.* Jewett, 119 Mass. 241, wherein the court said: "It is true the only reason here given for not removing the tobacco at the time of the attachment is, that it could not be then removed without great damage. But that is one way of stating that the property was not in a condition for immediate removal within the fair meaning of the statute. In determining that question, the liability of the property to injury, as well as the expense and difficulty attending its removal, are to be considered."

Cord Wood and Charcoal in Large Quantity.—Reed *v.* Howard, 2 Met. (Mass.) 36.

Fifty Tons of Pig Iron in the Furnace.—Scoville *v.* Root, 10 Allen (Mass.) 414.

Glass plates, part in boxes and the balance standing up against the walls of the factory or in the ovens, may be so levied on. Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329.

Prior to the enactment of this statute, in order to perfect and preserve an attachment of such personal property, it was the duty of the officer, either by himself, or by a keeper appointed by him for that purpose, to take and retain possession and control of the property attached, or have the power to take immediate control. Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131; Wentworth *v.* Sawyer, 76 Me. 434.

93. Kelley *v.* Tarbox, 102 Me. 119, 66 Atl. 9 (construing Me. Rev. St. c. 83, §27); Parker *v.* Williams, 77 Me. 418, 1 Atl. 138; Wentworth *v.* Sawyer, 76 Me. 434.

Knowledge of Levy.—Being intended as a means of preserving an attachment lien already created, when such copy is not sufficient to give notice to subsequent attaching creditors and purchasers, the lien is not preserved as against them, though they may have had actual knowledge in fact of the levy of the attachment. Bryant *v.* Osgood, 52 N. H. 182.

Distinguished From Case of Real Property.—The provision for filing a copy of the return in the town clerk's office is for relief of the officer, and his special property still continues with right to resume actual possession. Perry *v.* Griefen, 99 Me. 420, 59 Atl. 601.

So errors in the return filed do not affect the lien of the levy. Perry *v.* Griefen, 99 Me. 420, 59 Atl. 601.

94. Coffin *v.* Ray, 1 Met. (Mass.) 212; Arper *v.* Baze, 9 Minn. 108.

95. **Time To File.**—The day of the attachment is to be excluded in computing the three days allowed by statute for depositing the copy of the writ in the clerk's office. Bemis *v.* Leonard, 118 Mass. 502, 19 Am. Rep. 470.

Sundays and fractions of days are to be excluded. Hannum *v.* Tourtellott, 10 Allen (Mass.) 494.

On Property in Unincorporated Place.—The statute provides that "when the attachment is made in an unincorporated place," the copy of the officer's return of attachment "shall be filed and recorded in the office of the clerk of the oldest adjoining town in the county," and the record is not sufficient when the return is filed in a town which does not adjoin the township in which the attach-

does not specifically and clearly indicate the property levied on so that it can be readily identified, no lien is created.[96]

Where only part of the property can be and is removed it is necessary to file a copy of the return only as to the articles which cannot be removed.[97]

Officer May Resume Actual Possession. — The recording by the officer under the statute, is for his relief as to keeping possession once taken, substituting public notice in certain cases for visible retention of possession, and thereunder the officer retains his special property in the goods attached with the right to resume actual possession.[98]

e. *Mortgaged Personal Property.*—If the officer divests the defendant of possession and assumes exclusive possession of the property as against everyone but a mortgagee, the levy is good so far as the defendant is concerned.[99] where statutes prescribe the conditions on which exclusive possession of mortgaged personal property may be taken under an attachment, such conditions must be complied with, as where payment or tender of the amount due to the mortgagee is re-

ment was made. Grant *v.* Albee, 89 Me. 299, 36 Atl. 397.

When a de facto organization existed, though there may have been defects and irregularities in the incorporation, the return should have been filed with the clerk of the town, and filing the return with the clerk of the oldest adjoining town in the county, did not preserve the lien. Cookson *v.* Parker, 93 Me. 488, 45 Atl. 505.

A statute provides that personal property held by a lessee may be attached as the property of the lessor, and a valid lien created by delivering to the lessee a true and attested copy of the process, "with the return of the officer thereon, describing such property," and as to such property as may be attached by copy in the town-clerk's office, there is the same requirement as to the endorsement of the return, and as it provides a method of attachment without taking possession, it must be substantially complied with. Pond *v.* Baker, 55 Vt. 400.

On making a range levy on cattle, a statutory provision requiring a copy of the notice that has been served on the owner, herder, or agent, of such levy, attached to the writ, to be filed with the recorder, is not complied with by and filing a copy of the levy with the recorder. Steinfeld *v.* Menager, 6 Ariz. 141, 53 Pac. 495.

Neglect of Clerk.—Where the statute requires the clerk to note the time received and to file and enter it on the attachment, but does not make the validity of the attachment depend on the performance of these acts, when the officer has filed the writ or copy the lien attaches and the failure of the clerk to make the proper records will not defeat the attachment. Sykes *v.* Keating, 118 Mass. 517.

The mistake of a clerk in recording will not invalidate it. The validity of the attachment does not depend upon the doings of the clerk, but upon the doings of the officer. Lewiston Steam Mill Co. *v.* Foss, 81 Me. 593, 18 Atl. 288.

96. West River Bank *v.* Gorham, 38 Vt. 649; Rogers *v.* Fairfield, 36 Vt. 641; Paul *v.* Burton, 32 Vt. 148.

In an action against two defendants, the service of the writ was held to be sufficient notice to both defendants, though the whole property attached, in fact, belonged to one of them, and if the description of the property in the return was too defective to create a lien upon it, the service might bind the party as a notice. Fullam *v.* Stearns, 30 Vt. 443.

97. Arnold *v.* Stevens, 11 Met. (Mass.) 258.

98. Perry *v.* Griefen, 99 Me. 420, 59 Atl. 601; Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131.

99. Myers *v.* Cole, 32 Kan. 138, 4 Pac. 169. See the title "**Chattel Mortgages.**"

quired.[1] The provisions of the statute requiring the tender of payment into the hands of the county clerk or treasurer of the amount of the debt secured by chattel mortgage before levy can be made, measure the power of the officer in making a legal attachment.[2] Without such tender or payment, an attachment of the property can be made only when it can be effected without depriving the mortgagee of the right to take immediate possession.[3]

f. *Rights Under Contracts.*—A claim which is not capable of manual delivery, may be levied upon in the manner provided for by statute for levy on such property by serving notice upon the party holding the claim.[4] But under a statute providing that the "right, title and interest which any person has, by virtue of a contract to a deed of conveyance of real estate, on specified conditions, may be attached on mesne process, and the same lien thereon shall be thereby created by such attachment, as if they were tangible property," the right of a person under a contract for the purchase of property is attachable as if it "were tangible property."[5]

Insurance. — A policy of life insurance, which is not yet matured, but which has a cash surrender value, cannot be attached, it has been held.

1. Barrows *v.* Turner, 50 Me. 127; Deering *v.* Lord, 45 Me. 293; Barker *v.* Chase, 24 Me. 230; Wolfe *v.* Dorr, 24 Me. 104; Hefflin *v.* Bell, 30 Vt. 134.

2. Souza *v.* Lucas (Cal. App.), 100 Pac. 115, where it was said further that where these conditions are not observed the writ affords no justification, and the officer becomes a wrongdoer.

An attachment so levied is, as against the mortgage, a conversion of the property by the officer (Sousa *v.* Lucas, 156 Cal. 460, 105 Pac. 413; Irvine *v.* McDowell, 91 Cal. 119, 27 Pac. 601); even though the property is not moved but is put in charge of a keeper (Rider *v.* Edgar, 54 Cal. 127).

When a statement of the debt secured by the mortgage is sufficiently intelligible. Belknap *v.* Wendell, 21 N. H. 175.

Attaching Creditor and Mortgagee the Same Person.—Statutory provisions requiring the payment or tender to the mortgagee of the amount of the mortgage debt and interest on the deposit of the amount with the county treasurer, payable to the order of the mortgagee, are not applicable when the attaching creditor and the mortgagee are one and the same person. Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

To What Property Applicable.—An Oklahoma statute providing that before mortgaged personal property can be taken on attachment, the officer must pay or tender to the mortgagee the amount of the mortgage debt, has reference only to chattel mortgages executed on property located in the jurisdiction at the time of giving the same, and has no application to mortgages executed on property located in another state or territory, and subsequently brought into the jurisdiction. Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249.

3. Paul *v.* Hayford, 22 Me. 234.

4. Naser *v.* New York First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077; McGinn *v.* Ross, 11 Abb. Pr. N. S. (N. Y.) 20; Andrews *v.* Glenville Woolen Co., 11 Abb. Pr. N. S. (N. Y.) 78.

Judgment.—The only way to subject a judgment to attachment for the payment of a debt due to the plaintiff therein is to serve the warrant upon the judgment debtor. Service upon the attorney who procured the judgment will not do. Lehmann *v.* Rivers, 110 La. 1079, 35 So. 296. In re Flandrow, 84 N. Y. 1; *Ex parte* Flandrow, 20 Hun (N. Y.) 36.

Service on the clerk who is custodian of the records is not enough. Woodworth *v.* Lemmerman, 9 La. Ann. 524; Daley *v.* Cunningham, 3 La. Ann. 55.

5. Whitmore *v.* Woodward, 28 Me. 392.

by being taken into the actual custody of the officer, but may be levied on, under a statute, by serving a copy of the warrant of attachment and notice showing the property attached upon the insurance company.[6] Actual possession, however, of a policy of insurance must be taken, to obtain a valid levy, when, in the case of life insurance, the policy has matured,[7] and when, in the case of fire insurance, there has been a fire and the loss has been adjusted.[8]

Promissory Notes and Bonds. — Under statute in some states bonds, promissory notes, and other instruments for the payment of money are to be taken into the custody of the officer, and a levy of attachment thereupon is to be deemed a levy upon the debt represented thereby.[9] Under such statute a levy is ineffective that is attempted to be made by serving a copy of the warrant without taking actual possession of the instruments.[10] But the interest of a pledgor of such paper is personal property incapable of delivery.[11]

6. Kratzenstein *v.* Lehman, 19 App. Div. 228, 46 N. Y. Supp. 71, *affirming* 17 Misc. 64, 39 N. Y. Supp. 838, 18 Misc. 590, 43 N. Y. Supp. 237, 19 Misc. 600, 44 N. Y. Supp. 369. See, *supra*, VI, C, 10.

A certificate of membership in a benevolent association is not an instrument for the payment of money within the meaning of a statute providing that a warrant of attachment must be made "upon personal property, capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, by taking the same into the sheriff's actual custody," and therefore may be attached by leaving a certified copy of the warrant and notice with the association. Hankinson *v.* Page, 31 Fed. 184 (under a New York statute). See also Commercial Travelers' Assoc. *v.* Newkirk, 16 N. Y. Supp. 177.

7. Hankinson *v.* Page, 31 Fed. 184 (under a New York statute); Hankinson *v.* Page, 12 Civ. Proc. 279, 8 N. Y. St. 899, 19 Abb. N. Cas. 274.

8. Trepagnier *v.* Rose, 155 N. Y. 637, 49 N. E. 1105, *affirming* 18 App. Div. 393, 46 N. Y. Supp. 397.

9. See N. Y. Code Civ. Proc. §§648, 649, and McFadden *v.* Innes, 60 Misc. 543, 112 N. Y. Supp. 912; Coffin *v.* Northwestern Constr. Co., 13 Civ. Proc. (N. Y.) 9; Casper *v.* Wallace, 18 Jones & S. 147 (as to a check).

In Nordyke *v.* Charlton, 108 Iowa 414, 79 N. W. 136, it was held that promissory notes should be levied on by taking actual possession where that can be done, under a statute providing two modes of attaching such property, first, that if the property is capable of manual delivery, the sheriff must take it into his custody if it can be found, and second, that debts due the defendant, or property of his held by third persons, and which cannot be found, or the title to which is doubtful, are attached by garnishment.

A debt secured by bond and mortgage cannot be levied upon as an existing obligation, irrespective of the bond and mortgage, and under code section 649(2) a bond which is collaterally secured by a mortgage must be levied on by being taken into the actual custody of the sheriff. Fiske *v.* Parke, 77 App. Div. 422, 79 N. Y. Supp. 327, *affirming* 39 Misc. 157, 79 N. Y. Supp. 138.

State railroad bonds are personal property "capable" of manual delivery, and must be attached by being taken into the custody of the officer, under a statute proving that "personal property capable of manual delivery to the sheriff, must be attached by taking it into his custody." Caldwell *v.* Sibley, 3 Minn. 406.

10. McFadden *v.* Innes, 60 Misc. 543, 112 N. Y. Supp. 912.

11. Warner *v.* New York Fourth Nat. Bank, 115 N. Y. 251, 22 N. E. 172, *reversing* 44 Hun 374, 9 N. Y. St. 373.

Notwithstanding section 649 of the code, providing that a levy of attachment shall be made "upon the personal property capable of manual delivery, including a bond, a promissory note, . . . by taking the same into

g. *Shares of Stock.* — Because shares of stock are not debts due by the corporation which may be collected by the stockholders at will, it has been held that they cannot be subjected to attachment without specific legislation providing in substance all necessary procedure.[12] On the other hand such shares have been held to be property incapable of manual delivery and within a statute prescribing how such property may be levied on.[13]

Stock certificates of a foreign corporation may be attached within the state for the debt of a non-resident owner by serving statutory notice upon the person in whose possession they are, whether he be a pledgee who has advanced money,[14] or one who holds temporarily under an escrow or pooling agreement.[15] In several jurisdictions[16] there are spe-

the sheriff's actual custody," a promissory note in the hands of a pledgee may be levied on by leaving a copy of the warrant with the pledgee, and the fact that the levy is stated to be made upon the note and not upon the intangible interest of the pledgor is immaterial. Hardon *v.* Dixon, 91 App. Div. 109, 86 N. Y. Supp. 346.

12. VanNorman *v.* Circuit Judge, 45 Mich. 204, 7 N. W. 796; Foster *v.* Potter, 37 Mo. 525.

13. Mechanics', etc., Bank *v.* Dakin, 33 How. Pr. (N. Y.) 316; Pardee *v.* Leitch, 6 Lans. (N. Y.) 303. See, *supra*, XII, C.

The officer need not take the certificates of stock into his actual possession. Lowenthal *v.* Hodge, 120 App. Div. 304, 105 N. Y. Supp. 120.

14. Simpson *v.* New Jersey Contracting Co., 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796, *affirming* 47 App. Div. 17, 61 N. Y. Supp. 1033.

15. Lowenthal *v.* Hodge, 120 App. Div. 304, 105 N. Y. Supp. 120.

In Plimpton *v.* Bigelow, 63 How. Pr. (N. Y.) 484, *affirmed*, 93 N. Y. 592, *reversing* 3 Civ. Proc. 182, 29 Hun 362, it was held that in an action by a non-resident against a non-resident, shares of stock of a foreign corporation owned by the defendant and the certificate of which were in his possession at his place of domicile, could not be attached by causing the sheriff to make a levy upon an officer of the corporation within the state.

16. **Ala.**—Abels *v.* Planters', etc., Ins. Co., 92 Ala. 382, 9 So. 423. **Ark.** Scott *v.* Houpt, 73 Ark. 78, 83 S. W. 1057; Deutschman *v.* Byrne, 64 Ark. 111, 40 S. W. 780. **Conn.**—Stamford Bank *v.* Ferris, 17 Conn. 259. **N. H.**—Abbott *v.* Kimball, 68 N. H. 303, 38 Atl. 1051.

In the recent case of Fowler *v.* Dickson (Del.), 74 Atl. 601, it was held that "the statute of the state of Delaware regarding the procedure of attaching stock did not contemplate the summoning of the corporation, the stock of which is sought to be attached, either as a garnishee under chapter 90, vol. 14, Laws Del. 1871, or by service under section 6, c. 70, of the Revised Code, when in force, or under section 48 of the general corporation laws now in force. It appears to the court that, because of the peculiar character of shares of stock as property, the General Assembly has devised a particular manner of subjecting that property to the satisfaction of the holder's debts, and that this proceeding, as shown by sections 13 to 17 of chapter 70 of the Revised Code, being a special act with respect to a particular procedure, is not repealed or otherwise altered by the general provisions of the general corporation laws relating generally to service of legal process. It is, therefore, held that, as a certified copy of the process in this case was not left by the sheriff with the president, cashier, or treasurer of the corporation, in strict conformity with the provisions of the statute giving the right and providing the method of attaching shares of stock, and as the statute provides no substituted procedure in the event of the non-residence or absence of the officers named, the writ was improperly executed." Judge Wooley said further: "By the laws of other states the process employed is attachment, though the procedure is similar to that

cific statutory provisions prescribing the manner of levying an attachment on corporate stock, and such provisions should be substantially followed.

h. *Machinery.* — In the absence of a statute, directing any particular method in the attachment of machinery, it is essential to a valid attachment that such property should be taken into the possession or placed under the control of the officer.[17] In such case, where the property can be easily disconnected, an attachment is incomplete without removal of the machines or giving notice of the attachment by

of levy. The states having laws similar in all essentials to the law of Delaware in this particular are Iowa (Code 1897, §3894), Alabama (Code 1907, §3474), Connecticut (Gen. St. 1902, §833). Colorado (Rev. St. 1908, §§3617-3619), Illinois (Union Nat. Bank *v.* Byram, 131 Ill. 92, 22 N. E. 842; Rhea *v.* Powell, 24 Ill. App. 77). Neither the laws of these states nor the principle of the proceedings under them require that service of process be made upon the corporation, nor that the corporation be garnisheed; the requirement being that notice of the attachment of the stock as intangible things shall be given an officer whose position brings him in touch with the stock and fiduciary affairs of the corporation."

On Defendant or Upon Corporation. Where a statute requires notice to defendant of an attachment of property held by third persons and then provides for modes of levy upon different classes and kinds of property, including a provision for notice unto an officer of the company when stock is attached, an attachment of stock is invalid when notice was not served either on the defendant or upon the corporation. Commercial Nat. Bank *v.* Farmers', etc., Nat. Bank, 82 Iowa 192, 47 N. W. 1080.

Leaving Copy of Writ With Officer De Facto.—Where a statute provides that stock may be attached by leaving a copy of the writ with certain designated officers of the company, such copy must be served upon one who is acting as officer of the corporation and who is recognized by the corporation itself, and is in possession of his office, and a dispute as to title to the office cannot be tried on an issue raised in an attachment proceeding on a question of due service of the writ. Barthell *v.* Hencke, 99 Wis. 660, 75 N. W. 952.

Special Provision Superseding General Statute.—Where a statute incorporating an insurance company prescribed a particular manner in which the shares of members in stock were to be attached and sold on execution, such provision supersedes the general provision on the same subject contained in a previous statute. Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326.

As Under Execution.—Under a statutory rule that seizure under execution shall be conformed to in levying an attachment, shares or interest of a stockholder will be considered as seized under a writ of attachment when the officer has levied in the same method as that prescribed by a statute in regard to judgments, which provides that the share or interest of a stockholder shall be considered as seized on execution, when an attested copy of the execution is left with the officer named in the statute. Union Nat. Bank *v.* Byram, 131 Ill. 92, 22 N. E. 842.

On Domestic Corporation Only.—A *Missouri* statute in regard to the sale of shares of stock under attachment has been held to apply to domestic corporations only, as it points out a specific mode by which the levy and sale must be made, which cannot be pursued in the case of stock in a foreign corporation. Armour Bros. Banking Co. *v.* St. Louis Nat. Bank, 113 Mo. 12, 20 S. W. 690, 35 Am. St. Rep. 691.

17. Grey *v.* Sheridan Electric Light Co., 19 Abb. N. Cas. (N. Y.) 152. See also Scott *v.* Manchester Print Work, 44 N. H. 507, holding that a statute providing that the officer attaching machinery "may leave an attested copy of the writ and of his return of such attachment thereon as in the attachment of real estate," does not authorize a levy, as in the case of real estate, by leaving a copy, but merely provides a mode of preserving attachments.

placing them in the custody of a keeper.[18] Under statutory authority to attach machinery in a shop, mill or factory by leaving in the town clerk's office an attested copy of the writ with the officer's return thereon specifically describing the machinery attached, such property may be thus attached although the officer does not, previous to the attachment, either see the property or go near the building containing it.[19]

i. *Farm Produce.* — In the case of a growing crop, it is held under statutes authorizing a levy by constructive possession, that such property may be thus attached,[20] otherwise, a growing crop must be levied on by actually taking it into possession by some overt act and properly guarding it,[21] and crops which are ready for harvest can be attached only by taking actual possession and by severing from the freehold.[22]

Hay, or grain in the straw, must be levied on by taking actual possession, unless a constructive levy is authorized by statute.[23]

E. Inventory and Appraisal. — 1. **In General.** — Statutes which provide that the attaching officer shall make an inventory of the property attached and appraise its value, must, of course, be complied with,[24] though when the statute prescribes the particular cases in

18. Gale *v.* Ward, 14 Mass. 352, 7 Am. Dec. 223.

In making a levy upon machinery bolted to a building it is not necessary that the officer should detach and remove the property from the building, but it is sufficient that the officer seize and take possession of the property and place his deputy in charge of it. Patch *v.* Wessels, 46 Mich. 249, 9 N. W. 269.

In removing a lathe, an officer may remove a platform and a partition to secure the shavings, in a proper manner if found necessary, and without material injury to the mill or the machinery itself. Fullam *v.* Stearns, 30 Vt. 443.

19. Fullam *v.* Stearns, 30 Vt. 443.

20. Grover *v.* Buck, 34 Mich. 519.

A growing crop is personal property not capable of manual delivery, and may be properly attached when in the possession of the defendant in the attachment proceedings by compliance with the statute requiring a copy of the writ and notice to be served upon the defendant or person in possession. Rudolph *v.* Saunders, 111 Cal. 233, 43 Pac. 619; Raventas *v.* Green, 57 Cal. 254.

21. Emmett *v.* Crawford, 10 Lea (Tenn.) 21.

22. Heard *v.* Fairbanks, 5 Met. (Mass.) 111, 38 Am. Dec. 394, as to standing corn and potatoes.

A levy on corn in the field which had ceased to grow but which was not dry enough to crib, by a mere delivery of a copy of the order to the defendant, is not a sufficient levy as against a subsequent lienee. Throop *v.* Maiden, 52 Kan. 258, 34 Pac. 801.

23. **A levy upon an unthreshed crop** of wheat, standing in the field, and leaving the wheat on the farm of the defendant without placing it in charge of anyone, and doing nothing to indicate that the wheat had passed from the possession of the owners, does not create a valid attachment. Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664.

In Coffrin *v.* Smith, 51 Vt. 140, it was held that hay or grain in the straw is property that may be attached under a statute, by the officer's leaving a copy of the writ of attachment in the town clerk's office of the town where the property is situated. See also Putnam *v.* Clark, 17 Vt. 82. And see, *supra*, under XII, D, 5.

Duty of Officer to Thresh Grain. — When the officer has attached grain in the straw, it is his duty, in order to preserve it, to thresh it. Briggs *v.* Taylor, 35 Vt. 57.

24. **In the absence of "waiver of**

which an appraisement must be made, this negatives a conclusion that it is required in other cases.[25] A statute requiring the officer to make an inventory of all the property and estate of the defendant attached includes real as well as personal estate attached,[26] and property not inventoried is not under the lien.[27] The requirement of service of a copy of the inventory of the property seized is jurisdictional.[28] But the service is sufficient if made within a reasonable time.[29] The attachment is not invalidated by the fact that the appraisal was not made until after the undertaking was given.[30] If the statute requires

appraisement in the written contract on which the judgment is rendered, and from the journal entry of such judgment, the statute prescribes that the officer shall have the property valued, and that the property shall not be sold for less than two-thirds of the value returned, and when this does not appear, a confirmation of sale will be reversed. Moore *v.* Cutler, 19 Kan. 187.

For Benefit of Creditor.—In McGinn *v.* Ross, 1 Jones & S. (N. Y.) 346, the court said: "The omission of the sheriff to make and return an inventory would not, probably, of itself, invalidate the levy, if it was otherwise sufficient, as the provision requiring an inventory is for the benefit of the creditor, and can be enforced only by him."

25. Smith *v.* Coopers, 9 Iowa 376; Moulton *v.* Chadborne, 31 Me. 152.

Of Property Exempt.—Although a statute forbids any seizure or taking by virtue of any civil process of goods exempt to the value of two hundred dollars, an officer has a right to seize the goods of the debtor and to hold them until an inventory and appraisement can be made according to law. Bonnel *v.* Dunn, 29 N. J. L. 435.

Stating Value of Personal Property Only.—Under a statute providing that an inventory of all property shall be made, stating therein the estimated value of the several articles of personal property, and enumerating such of them as are perishable, the estimated value of the real property is not required. Rodgers *v.* Bonner, 45 N. Y. 379, wherein the court said: "This distinction was made for the reason that possession of personal property was to be taken by the officer, and he made responsible for its safe custody, while he had no right to interfere with the possession of the latter [real property], and was not charged with any responsibility after due service of the process thereon."

26. Tomlinson *v.* Stiles, 28 N. J. L. 201.

Articles too numerous to endorse on levy should be listed in a separate statement and filed with the process. Toulmin *v.* Lesesne, 2 Ala. 359.

Goods need not be removed before the schedule is made. Com. *v.* Middleby, 187 Mass. 342, 73 N. E. 208.

Officer cannot hold as against a mortgagee while he finishes his inventory. Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. 630. See also Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823.

27. Tomlinson *v.* Stiles, 29 N. J. L. 426.

The power of amendment cures omission through inability or inadvertence to mention an amount due the defendant when the attachment and notice were broad enough in their terms to cover such indebtedness. Dunn *v.* Arkenburgh, 48 App. Div. 518, 31 Civ. Proc. 67, 62 N. Y. Supp. 861, *affirmed*, 165 N. Y. 669, 166 N. Y. 600, 59 N. E. 1122.

28. White *v.* Prior, 88 Mich. 647, 50 N. W. 655; Langtry *v.* Wayne Circuit Judges, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352.

By Same Officer.—Cary *v.* Everett, 107 Mich. 654, 65 N. W. 566.

29. **Kan.**—Dodson *v.* Wightman, 6 Kan. App. 835, 49 Pac. 790. **N. Y.** Greenleaf *v.* Mumford, 30 How. Pr. 30, 19 Abb. Pr. 469. **Pa.**—Simon *v.* Johnson, 7 Kulp 168; Wilson *v.* Shapiro, 12 Pa. Co. Ct. 466, 2 Pa. Dist. 367.

30. Shelden *v.* Sharpless, 2 Ohio Dec. (Reprint) 1, 1 West. L. J. 42.

If a bond to dissolve the attachment is accepted and acted upon without first having an appraisal of the attached property under the statute, the

notice of appraisal, and the property of several persons is attached, all are entitled to notice, and as to one who is not notified, the attachment is as if there had been no notice.[31] There need not be a second appraisal after judgment and before sale.[32]

2. The Appraisers. — The statute must be closely followed as to the condition and description of the persons whom it allows to be employed as appraisers; as, for example, credible householders,[33] or disinterested persons.[34] And different persons may be called to assist the officer in levying upon and appraising different pieces of property when the statute does not prohibit this practice.[35]

3. Oath of Appraisers. — Appraisers need not be sworn unless the statute requires it.[36] If an oath is required, any justice of the peace,[37] or a deputy sheriff who is serving the papers may administer it.[38]

4. Description of Property. — In the inventory a reasonably brief and certain description or naming of the property is sufficient,[39] though an appraisement given as a part of the return is fatally defective, which attempts to describe certain premises by excepting therefrom a tract of which only two sides are given.[40]

5. Signing. — The failure of the officer and the appraisers to sign the inventory and appraisal, as required by statute, is but an irregu-

obligors waive the requirement for an ascertainment of the value of the land and substitute the amount of the final judgment for the appraised value. Berry *v.* Wasserman, 179 Mass. 537, 61 N. E. 228, *citing* Com. *v.* Costillo, 120 Mass. 358.

31. Gassett *v.* Sargeant, 26 Vt. 424. **Where a second attaching creditor,** as "attorney" for a first attaching creditor, requested an appraisement and sale of the attached property, under the statute, he is not entitled to formal notice of the appraisement. Wheeler *v.* Raymond, 130 Mass. 247.

32. Donely *v.* McGrann, 1 Harr. (Del.) 453.

33. McNamara *v.* Ellis, 14 Ind. 516; Leach *v.* Swann, 8 Blackf. (Ind.) 68. **Question for Court.**—Whether property has been appraised with "the assistance of a disinterested and credible householder" of the proper county, is a question for the decision of the court, in determining whether an ordinary judgment only, should be rendered for the plaintiff, or whether attached property should be ordered to be sold. Foster *v.* Dryfus, 16 Ind. 158.

34. Newberry Bank *v.* Eastman, 44 N. H. 431. **A brother of the attaching creditor** is not disinterested. McGough *v.* Wellington, 6 Allen (Mass.) 505. **For Protection of Defendant.—Collateral Attack.**—The provision requiring that the appraisal shall be by disinterested freeholders is for the protection of the defendant, and when the sheriff's return states that the appraisers were disinterested freeholders and this was not disputed in the attachment suit, the objection cannot be considered on a collateral attack. Grover *v.* Buck, 34 Mich. 519.

35. Will *v.* Whitney, 15 Ind. 194. **Where two parcels of land are attached** they may be appraised by different persons, and though the return shows that the property was appraised by A, B and C, the appraisals being referred to and attached to the return and showing that one parcel was appraised by A and B and the other by B and C must be considered in connection therewith. Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109.

36. Will *v.* Whitney, 15 Ind. 194.

37. **That one of the appraisers, who happened to be a magistrate,** administered the oath, and before or afterwards took the oath before some other magistrate, is not objectionable. Barnard *v.* Fisher, 7 Mass. 71.

38. Dunlap *v.* McFarland, 25 Kan. 488.

39. Silver Bow Min. Co. *v.* Lowry, 5 Mont. 618, 6 Pac. 62.

40. Stevenson *v.* Fuller, 75 Me. 324.

larity in the intermediate proceedings.[41] The signature may be supplied by amendment on proper application.[42]

6. Valuation of Property. — Where a statute requires a magistrate to appoint appraisers to value attached property when there is an application to give bond to dissolve the attachment, and there is no provision for any further hearing except upon an issue of the approval of the sureties, the report of the appraisers is conclusive upon the magistrate, and he cannot himself hear further evidence and either increase or diminish the value which they have fixed.[43] Appraisers cannot deduct from the value of the land attached the supposed amount of a previous and pending attachment.[44]

Of Distinct Pieces of or Separate Interests in Property. — There may be one estimate where separate pieces of land[45] on separate interests in the same land have been levied on,[46] and though it would be better to state the value of each article in the schedule of the goods, it is not fatally objectionable that this has not been done.[47] And where a full appraisement cannot be made because part of the property is locked in a safe attached, but otherwise the appraisement is proper, the levy is sufficient.[48]

F. Service and Notice of Process or Levy. — **1. In General.** — Service of the attachment process or notice of the levy of the attachment is not required in the absence of statutory provision therefor,[49]

41. Mitchell *v.* Eyster, 7 Ohio (pt. i.) 257, where the judgment and sale were held not invalidated.

If the failure of the officer to participate with the appraisers in determining the valuation of the property attached, and the signing by him of the return of the appraisers for the purpose of identification only, is error it is immaterial when no substantial rights were affected. Emerson *v.* Thatcher, 6 Kan. App. 325, 51 Pac. 50.

42. Hopkins *v.* Landton, 31 Wis. 379.

43. Hawkins *v.* Farley, 191 Mass. 236, 77 N. E. 319.

44. Barnard *v.* Fisher, 7 Mass. 71.

In Chase *v.* Bradley, 26 Me. 531, it was held that when a levy on real estate is made on land previously attached, the estate is appraised at its value at that time and not at the time it was previously attached.

Value of Property as Distinguished From Interest of Debtor.—Under a Massachusetts statute, R. L. c. 167, section 121, it is the value of the attached property, not merely of the interest therein held by the owner of the record title, which is to be appraised, differing in this respect from R. L. c. 197, 328. Hawkins *v.* Farley, 191 Mass. 236, 77 N. E. 319.

45. Bond *v.* Bond, 2 Pick. (Mass.) 382; Barnard *v.* Fisher, 7 Mass. 71.

46. Peabody *v.* Minot, 24 Pick. (Mass.) 329.

47. Wheeler *v.* Raymond, 130 Mass. 247, on an appraisement and sale pending the attachment.

48. Dodson *v.* Wightman, 6 Kan. App. 835, 49 Pac. 790.

49. Hoffman *v.* Ines, 13 Mont. 428, 34 Pac. 728, under a statute authorizing an attachment "unless the defendant give good and sufficient security to secure the payment of said judgment."

"It is undeniable that a state may authorize the seizure and sale by means of appropriate judicial proceedings of property of non-residents within the jurisdiction for the payment of their debts. There must be notice and an opportunity to be heard, either actual or constructive, in such way and form as the law may prescribe." Douglass *v.* Phenix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118.

In Paine *v.* Mooreland, 15 Ohio 435, 45 Am. Dec. 585, the court said: "The

but conditions as to such service and notice which are required by statute must be complied with,[50] though only in the particular cases prescribed by statute.[51]

process in attachment is the writ authorizing and directing a seizure of the property. No process is issued against the person; because the proceeding is *in rem*. The statute, however, regards it but just that notice should be given to the debtor, not for the purpose of giving the court jurisdiction over the subject-matter, but to permit the debtor to have an opportunity to protect his rights, and directs that the writ shall be quashed if it be not given. The distinction is between a lack of power or want of jurisdiction in the court, and a wrongful or defective execution of the power. In the first instance, all acts of the court not having jurisdiction or power, are void, in the latter, voidable only.'' And see Freeman *v.* Thompson, 53 Mo. 183.

Judgment *in personam* cannot be rendered without notice. Edwards *v.* Toomer, 14 Smed. & M. (Miss.) 75; Holzman *v.* Martinez, 2 N. M. 271.

Not being a matter affecting the jurisdiction, the failure to serve cannot be raised collaterally by a third party. Elliott *v.* Colorado Springs First Nat. Bank, 2 Colo. App. 164, 30 Pac. 53.

In Georgia, though there is no statute requiring notice, it is held, as to necessity for notice on attaching land, that a notice must be given by an official act which will affect the owner with constructive notice of the seizure of the property. Baker *v.* Aultman & Co., 107 Ga. 339, 33 S. E. 423, 74 Am. St. Rep. 132, holding further that a statement of the attorney to the defendant, a non-resident, is not such an official act as will give the court jurisdiction. And see Harris *v.* Kittle, 119 Ga. 29, 45 S. E. 729; McCrory *v.* Hall, 104 Ga. 666, 30 S. E. 881; Smith *v.* Brown, 96 Ga. 274, 23 S. E. 849. See also Haymond *v.* Camden, 22 W. Va. 180.

50. **Conn.**—Davenport *v.* Lacon, 17 Conn. 278, actual notice. **Md.**—Brent *v.* Taylor, 6 Md. 58. **R. I.**—Whitaker *v.* Jenckes, 9 R. I. 391.

Where a person in possession of the property taken by attachment is not summoned or returned as garnishee, his failure to give the defendant notice of the attachment does not render the proceedings void. Regester *v.* Woodward Iron Co., 82 Md. 645, 33 Atl. 320.

In a federal court, service of notice is sufficient if it conforms with the state law (Boston, etc., R. Co. *v.* Goskey, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. ed. 1002, *affirming* 149 Fed. 42, 79 C. C. A. 64, 9 Ann. Cas. 384), as construed by the state court (Montgomery *v.* McDermott, 103 Fed. 801, 43 C. C. A. 348, *affirming* 99 Fed. 502).

''Copy'' means a certified or attested copy. Cady *v.* Gay, 31 Conn. 395, under a statute relating to attaching the estate of non-residents and serving agent or attorney.

In New York the statute (Code Civ. Proc. §649) provides for attachment of property not capable of manual delivery ''by leaving a certified copy and a notice,'' etc. Courtney *v.* Eighth Ward Bank, 154 N. Y. 688, 49 N. E. 64 (*reversing* 14 Misc. 386, 35 N. Y. Supp. 1049); Weil *v.* Gallun, 75 App. Div. 439, 78 N. Y. Supp. 300.

A Formal Defect.—The want of such a certificate is a formal defect and immaterial. Leonard *v.* Woodward, 34 Mich. 514.

Requirement of a certified copy of the attachment and inventory is not satisfied by serving the latter. Stearns *v.* Taylor, 27 Mich. 88.

A copy of the affidavit need not be served. Cicero *v.* Bates, 2 Mich. N. P. 25. See, however, Simpson *v.* Oldham, 2 Pin. (Wis.) 461, 2 Chand. 129.

Copy of officers' return under a statute providing a method for attaching church pews. Sargent *v.* Peirce, 2 Met. (Mass.) 80.

51. **Ala.**—Letondal *v.* Huguenin, 26 Ala. 552, as authorizing a judgment by default. **N. Y.**—Rodgers *v.* Bonner, 55 Barb. 9, where a statute requiring service only when the levy is upon shares of stock, or debts due the judgment debtor, and which are incapable of manual delivery, did not cover real estate. **S. C.**—Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272, where a statute referring to property incapable of

Notice of Issuance of Attachment.— A statute requiring a "notice of attachment" to be given to the defendant has been held to mean notice of the levy and not simply notice of its issuance.[52]

In Writing.— Under a statute requiring the defendant, if found within the county, and also the person keeping or in possession of the property, if it is in the hands of a third person, to be given notice of the attachment, a notice must be in writing.[53]

Several Defendants. — A statute providing that a copy of the attachment and a list of the articles attached shall be delivered to the party whose goods or chattels are so attached, requires that where there are several defendants, each shall be entitled to a copy of the attachment and list of the articles attached,[54] and so, where an attachment is sued out against two or more non-residents, there must be as many copies of the writs and lists of articles attached under a statute providing that a copy of the attachment and a list of the articles attached shall be left with the known agent or attorney of such a defendant, and for want thereof, at the place where such goods were attached.[55]

Waiver. — Defects which are not jurisdictional and which consist in mere failure to observe provisions intended for the benefit and protection of the defendant, may be waived by him;[56] as, for example, by appearing and taking a change of venue.[57] But, while the defendant may waive mere irregularities, which do not affect the substantial rights of other creditors, he cannot, as against junior attaching creditors, waive a substantial departure from the mode prescribed by law for giving effect to the attachment, nor can he waive defects which prejudice the substantial rights of such creditors.[58]

manual delivery was held not to require service of a levy on property capable of manual seizure.

52. Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592.

53. Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592; Sioux Val. State Bank *v.* Kellog, 81 Iowa 124, 46 N. W. 859; Moore *v.* Marshalltown Opera House Co., 81 Iowa 45, 46 N. W. 750.

54. Smilie *v.* Runnels, 1 Vt. 148.

55. Hill *v.* Warren, 54 Vt. 73.

56. **Conn.**—Hatstat *v.* Balkeslee, 4 Conn. 301. **Ia.**—Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592. **Mass.** Richardson *v.* Smith, 11 Allen 134. **Vt.**—Barron *v.* Smith, 63 Vt. 121, 21 Atl. 269.

A statutory condition subsequent to the acquisition of jurisdiction may be dispensed with or waived; especially where such statute is for the benefit of the party waiving the same, and no public right or policy is thereby invalid. Thomas *v.* Richards, 69 Wis. 671, 35 N. W. 42, holding further that by absconding from the county and state, a defendant in attachment may waive such service.

Where the defendant filed a counterclaim based upon a wrongful levy of the attachment, and the sheriff had in fact taken manual possession of the property and continued to hold it down to the time of trial, he should not be heard to say that there was no valid levy for want of notice of the attachment being served upon him. Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263.

57. Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399.

58. Deere *v.* Eagle Mfg. Co., 49 Neb. 385, 68 N. W. 504.

A waiver of illegality of service by a confession of judgment does not relate back to and cure such defect so as to defeat rights later acquired. Gardner *v.* Hust, 2 Rich. L. (S. C.) 60, as to another attachment regularly served.

2. Notice Without Levy. — It has been held that legal notice is all that is necessary for the purpose of trial, and that though no levy of the attachment may have been made so as to bind property, due service of the process and return thereof may be good to hold the defendant to answer,[59] though, on the other hand, service of attachment process is not the equivalent to personal service of ordinary process.[60]

3. Who Must Serve. — Under a rule that the execution of the writ cannot be entrusted partly to one officer, and the further execution to another, it has been held that a copy of the attachment and inventory must be served on the defendant or left at his last place of residence by the same officer who attached and seized the property,[61] and that when the property attached and the defendant are in different towns, the constable who levies upon the property may go to the town of residence of the defendant and leave a copy of the writ with the defendant.[62]

4. Description of Property. — Some cases hold sufficient a notice giving a general description of the property attached without specifying its precise nature and amount,[63] while other cases hold, under similar statutes, that the notice should specify the property levied on.[64]

59. Embra *v.* Sillman, 1 Root (Conn.) 128; Seers *v.* Blakesly, 1 Root (Conn.) 54; Sanderson *v.* Taylor, 64 N. H. 97, 7 Atl. 115; Chase *v.* Kent, 61 N. H. 76.

60. Richardson *v.* Whitfield, 1 McCord (S. C.) 403, holding that a statute making a copy writ, left at the residence of the defendant, equivalent to personal service, does not include writs of attachment.

Distinction Between Circuit Court and Justice's Writs.—In a case commenced before a justice of the peace and under a statute by which the writ contains no summons clause, it was held that an attachment does not operate as a summons, and service of it personally is not sufficient without service on property and service of inventory. Langtry *v.* Wayne Circuit Judges, 68 Mich. 451, 36 N. W. 211, the court saying that the statute concerning attachment proceedings in circuit courts differs from that relating to justices of the peace by giving a form containing a summons clause, to be served and returned like other writs, whereas the statute governing the process from a justice of the peace declares that personal service is only to be made after levy and inventory, and by service of a copy of that with the writ.

61. Cary *v.* Everett, 107 Mich. 654, 65 N. W. 566. *Compare* Pemigewasset Bank *v.* Burnham, 5 N. H. 275, holding that where an attachment of real estate is to be completed by leaving copies of the writ and the return with the town clerk, and the case is not one in which the sheriff must state the precise time, but it is sufficient if the return state that the copies were left with the clerk on a particular day, it is not essential that the copies should be left by the sheriff himself.

62. Tomlinson *v.* Collins, 20 Conn. 364. But *compare* Arnold *v.* Tourtellot, 13 Pick. (Mass.) 172, holding insufficient a notice by a constable out of his precinct.

63. Hayden *v.* National Bank, 130 N. Y. 146, 29 N. E. 143; Drake *v.* Goodridge, 54 Barb. (N. Y.) 78; Greenleaf *v.* Mumford, 30 How. Pr. (N. Y.) 30, 19 Abb. Pr. 469; McGinn *v.* Ross, 1 Jones *v.* S. (N. Y.) 346.

Where property incapable of manual delivery is levied on, a notice by the officer that he attaches all property, debts and effects and all rights and shares of stock in the possession or under the control of the individual served, sufficiently informs him. O'Brien *v.* Mechanics', etc., F. Ins. Co., 56 N. Y. 52, *reversing* 44 How. Pr. 213.

Amendment is allowable to insert a description of one lot omitted inadvertently. Vanderheyden *v.* Gary, 38 How. Pr. (N. Y.) 367.

64. Ireland *v.* Adair, 12 N. D. 29, 94

5. Time of Service. — The writ or warrant or notice of the service of the levy must be served within the time designated by the statute,[65] and it is sufficient if a copy of the attachment be left by the officer with the debtor at any time before the legal service upon the writ expires.[66] The writ may not only be issued but served before the summons in the main action is served, the summons having been made out and placed in proper hands with a *bona fide* intent to serve,[67] and on attaching real estate, the fact that a notice was served the day preceding the levy will not defeat the attachment.[68]

6. On Officer or Agent of Corporation.—When property of a defendant corporation is levied upon, notice is given by serving an officer of the defendant.[69]

As to a foreign corporation doing business properly within the state, service may be made upon the resident or managing agent.[70]

7. Serving Notice on Defendant or Leaving Copy at Defendant's Residence. — Statutes provide for serving a copy of the writ of attachment, or notice of the levy, upon the defendant,[71] or require such

N. W. 766, 102 Am. St. Rep. 561, holding that a levy was invalid when the notice failed to show that the officer attached or levied upon a particular indebtedness.

A notice by publication should, in some way, describe the property attached, and if real estate is taken it should be described in such manner as to identify it. Wescott *v.* Archer, 12 Neb. 345, 11 N. W. 491, 577.

65. Rice *v.* Clements, 57 Ala. 191; Tunningly *v.* Butcher, 106 Mich. 35, 63 N. W. 994 ("at least six days before the return"); Hubbell *v.* Rhinesmith, 85 Mich. 30, 48 N. W. 178 (holding seven days before the return insufficient); Nicolls *v.* Lawrence, 30 Mich. 395.

But substituted service more than six days before the return day does not invalidate the service, if the officer retains the writ and continues to search for the defendant. Davidson *v.* Fox, 120 Mich. 385, 79 N. W. 1106.

Within Reasonable Time.—Cummings *v.* Tabor, 61 Wis. 185, 21 N. W. 72, holding one year unreasonable.

In Iowa "a reasonable time" is all that is required whether the property attached be real or personal. Schoonover *v.* Osborne, 73 N. W. 372; Chicago Nat. Bank *v.* Converse, 101 Iowa 307, 70 N. W. 200.

"The same promptness in giving notice of a levy on real estate is not demanded as of that on personalty. Delay will seldom occasion expense to the debtor, while costs are continually accumulating when personal property is held." Schoonover *v.* Osborne, 111 Iowa 140, 82 N. W. 505, 82 Am. St. Rep. 496. See also Stickley *v.* Widle, 122 Iowa 400, 98 N. W. 135, holding that notice served two days after the defendant was found in the county and eleven days after the levy was sufficient.

66. Putnam *v.* Clark, 17 Vt. 82.

67. Bell *v.* Olmsted, 18 Wis. 69.

68. Kilham *v.* Western Bank, etc., Co., 30 Colo. 365, 70 Pac. 409.

69. Mechanics' Nat. Bank *v.* Miners' Bank, 13 W. N. C. (Pa.) 515.

Receiver.—Merchants' Nat Bank *v.* Binder, 6 Pa. Dist. 633.

70. Kieley *v.* Central Complete Combustion Mfg. Co., 13 Misc. 85, 25 Civ. Proc. 48, 34 N. Y. Supp. 106.

This requirement is not met by serving an officer or agent who is only casually within the state. St. Clair *v.* Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222.

Jurisdiction in personam is conferred by such statute. St. Clair *v.* Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222; Showen *v.* J. L. Owens Co., 158 Mich. 321, 122 N. W. 640, 133 Am. St. Rep. 376; Davidson *v.* Fox, 120 Mich. 386, 79 N. W. 1106.

71. "**This provision of the statute is simply a declaration** of that principle always maintained by the courts, that a person cannot be prejudiced or his rights of person or property affected

copy or notice to be left at the defendant's residence.[72] Where such a

without notice, either actual or constructive. So zealous have the people been of the maintenance of this principle that it has been engrafted into both the federal and state constitutions, and that constitutional requirement of due process of law extends to all proceedings, judicial and administrative." Great Western Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

Real Estate.—Both Service and Filing With Recorder.—Under a statute providing that real property standing upon the records of the county in the name of the defendant is attached by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and by serving a copy of the writ upon the defendant in person, in the absence of a general appearance by defendant, an attachment lien does not become valid and effective and enforceable until the attachment writ is properly and completely served, and proper service includes delivery of a copy of the writ to the attachment defendant, and filing a copy with the recorders. Thompson *v.* White, 25 Colo. 226, 54 Pac. 718.

Property Capable of Manual Delivery.—"Two things are essential to the attachment of personal property in the possession of the defendant, which is capable of manual delivery. It must be taken into the custody of the officer who serves the writ, and a written notice of the attachment must be given the defendant if found within the county. It is clear that the notice is designed to be for the benefit of the defendant, while the taking of possession by the office is notice of the attachment to third parties." Citizens' Nat. Bank *v.* Converse, 101 Iowa 307, 70 N W. 200.

Property Incapable of Manual Delivery.—A statute provides that property capable of manual delivery shall be attached by being taken into custody, and "other personal property, by leaving a certified copy of the writ and a notice specifying the property attached." See Schneider *v.* Sears, 13 Ore. 69, 8 Pac. 841.

Notice by Mail.—An entry by the officer on the attachment that he had levied the same upon the land and had notified the defendant by mail, does not show a compliance with a statutory requirement that the defendant in attachment should have notice of the proceeding. Smith *v.* Brown, 96 Ga. 274, 23 S. E. 849.

Defendant Out of State at Commencement of Suit.—"An attested copy of the writ" was required by statute to be served upon a defendant who at the commencement of the suit was out of the state. Hayward *v.* Hartshorn, 3 N. H. 198.

Defendant Not in County.—Where a statute requires that notice of levy must be given the defendant "if found within the county," the time for serving such a notice is when the levy is made, and when on an attachment against a non-resident a levy was made on October 4, and the defendant was not in the county until October 11, the levy was valid without giving notice of levy to the defendant. Hicks *v.* Swan, 97 Iowa 556, 66 N. W. 762.

Under an Iowa statute, requiring notice of the attachment to be given to the defendant, if found within the county, on an attachment of personal property, the taking of the property is essential to jurisdiction over the property, though notice in such case is not necessary to the creation of the lien but is an incident to its preservation and protection. Schoonover *v.* Osborne, (Iowa), 79 N. W. 372.

On real estate, a lien attaches when the officer indorses the fact of making the levy on the writ of attachment, and service of notice on the defendant is only essential in order to complete the levy. Schoonover *v.* Osborne, 111 Iowa 140, 82 N. W. 505, 82 Am. St. Rep. 496.

72. **At the Usual or Last Place.**—Sheldon *v.* Comstock, 3 R. I. 84.

At the Dwelling House, or Other Last Place of Abode.—Dudley *v.* Staples, 15 Johns. (N. Y.) 196.

Return To Show Copy Left at Residence.—Where the officer returned that he could not find any one of the defendants named in the writ in the county, but does not return that he had left a copy of the writ at the last place of residence of any of the defendants in the county, or that there was no such last place of residence,

statute, upon the personal service of the writ, requires the sheriff to read the process to the defendant or to deliver to him a copy thereof, a service is not sufficient in which the sheriff substituted his own language for that of the writ, or culled from the writ such facts as he believed to be material for the information of the defendant;[73] and substituted service, by leaving a copy of the writ at the defendant's residence, will sustain an attachment only when it appears that diligent search has been made for the defendant during the whole time within which personal service might lawfully be made.[74]

8. Service on Occupants of Property. — Statutes in some jurisdictions require a copy of the attachment to be served upon the occupants of the property levied on or that such copy shall be posted thereon, and such statutes must be complied with.[75] When the statute requires

there is a fatal defect. Adams *v.* Abram, 38 Mich. 302, 304.

Service by Publication.—On an attachment issued against an absconding debtor, a service of the attachment by leaving a true copy thereof at the usual place of abode of the defendant with a free person over the age of fifteen years thereat residing, is sufficient, and service by publication is not required. Spiegelberg *v.* Sullivan, 1 N. M. 575.

73. Crary *v.* Barber, 1 Colo. 172.

74. Lake *v.* Pere Marquette R. Co., 132 Mich. 190, 93 N. W. 257; Reynolds *v.* Marquette Circuit Judge, 125 Mich. 445, 84 N. W. 628; Farr *v.* Kilgour, 117 Mich. 227, 75 N. W. 457; Matthews *v.* Forslund, 113 Mich. 416, 71 N. W. 854.

A certificate by the officer that he used due diligence in trying to get service is not equal to a certificate that the defendant could not be found, and a court is not justified in drawing that inference from such a certificate. White *v.* Prior, 88 Mich. 647, 50 N. W. 655.

75. Siling *v.* Hendrickson, 193 Mo. 365, 92 S. W. 105, as to a statute requiring that where the defendant is a non-resident and there is no service by publication, the officer shall give notice to the tenant in possession at least ten days before the return day of the writ. See also Walter *v.* Scofield, 167 Mo. 537, 67 S. W. 276.

In Wilkins *v.* Tourtellot, 28 Kan. 825, the court said: "Now if the attachment was properly issued, and the officer in fact took possession of the property, we are inclined to think that the failure to leave with the occupant or on the place, a copy of the order, is a mere irregularity, and not a fatal defect. At any rate, if the officer did in fact so leave the order, the return may be so amended as to state the fact, and thus all question removed as to the regularity of the service."

"Holding Under the Defendant."—In Hayes *v.* Gillespie, 35 Pa. 155, it was held that where the defendant inherits the land subject to a curtesy estate, the tenant by the curtesy does not hold under him in any proper sense, and a service on such tenant is invalid.

As Well as Sending Copy by Mail to Defendant.—Where a statute relating to the attachment of real estate provides that when the defendant has no place of abode within the precinct of the officer, the officer shall send a copy of the writ by mail to the defendant, and also leave a copy with the person, if any, in possession of the real estate, the latter condition is as necessary as the former to the validity of the levy. Richmond *v.* Brookings, 48 Fed. 241, under a Rhode Island statute, the court saying that it could not be presumed that no person was in the possession of the real estate.

Or Returning That Property Is Unoccupied.—It was the duty of the marshal to have served the *scire facias* in the attachment on the person or persons found in possession of the property attached, and to have certified such service, or if the property was unoccupied, to have made a corresponding return. Barney *v.* Patterson, 6 Har. & J. (Md.) 182.

Not Applicable to Real Estate.—A provision of the code requiring the service of an attachment to be made upon

a leaving by the officer of a copy of the process and declaration or complaint, together with a return describing the estate attached, with him who has charge or possession of the estate attached, the statute is not complied with by leaving a copy of the writ "at the last usual place of abode of the defendant."[76] It is sufficient if the copy is left with the person found actually occupying the property at the time of levying the writ.[77]

Where there has been personal notice of the proceeding given to the defendant, a levy by endorsement on the writ is sufficient without giving notice of the levy to the tenant,[78] though it has been held that the fact that the tenant had actual notice of the pendency of the suit prior to the rendition of the judgment, does not meet the requirements of the statute, as such requirements are mandatory.[79]

Objection by third persons that no notice was served on the tenants in possession does not call for action.[80]

property therein specified, by leaving a certified copy of the warrant of attachment with the persons specified in that statute, has no application to a levy on real estate. Rodgers *v.* Bonner, 45 N. Y. 379.

76. Munger *v.* Doolan, 75 Conn. 656, 55 Atl. 169.

77. Westervelt *v.* Hagge, 61 Neb. 647, 85 N. W. 852, 54 L. R. A. 333, wherein the court said that where the person occupying the premises as tenant was absent from the county, and the person to whom a copy of the order was delivered was occupying the premises with the tenant, and had the apparent control and possession, and had the actual possession of the premises at the time of the levy, this is sufficient, as the law does not require the officer to determine who may be the lessee and legal tenant of the owner.

A statute providing for service upon the occupant must intend that the occupant shall be easily discoverable and visibly occupying the property, so that when the officer visits the property for the purpose of completing the levy, he can determine then by what he can see whether he shall serve the copies by leaving with an occupant, or by posting, and does not refer to one in the actual possession of the property but who may be absent at the time of the levy. Davis *v.* Baker, 72 Cal. 494, 14 Pac. 102.

78. Lackey *v.* Seibert, 23 Mo. 85, wherein the court said: "It is to be observed that this notice is not required to be given at the time the attachment is levied, and does not seem to be part of the ceremony required to constitute a levy of the attachment, and adopted in order to give public notice of the fact, but was intended for the benefit of the debtor, by providing another security, where the proceeding might be without personal notice, against his land being taken from him by a judicial proceeding, of which he had no notice in fact."

In Remington *v.* Benoit, 19 R. I. 698, 36 Atl. 718, it was held that where a statute requires a copy of the writ to be left with the person in possession of real estate when the defendant has no usual and last place of abode within the precinct of the officer, and when he is required to send a copy of the writ by mail to the defendant if his address be known or can be ascertained, a copy need not be left with the person in possession when the officer making the attachment summoned the defendant, who resided in another precinct, by leaving a copy of the writ with his doings thereon with the defendant personally.

79. Siling *v.* Hendrickson, 193 Mo. 365, 92 S. W. 105.

80. Mercantile Realty Co. *v.* Stetson, 120 Iowa 324, 94 N. W. 859.

When the person in possession of property attached had actual notice of the levy, and receipted for the property, he is not in a position to dispute the validity of the levy. Foster *v.* Davenport, 109 Iowa 329, 80 N. W. 404.

9. Posting. — And so, under such statutes, where there has been no service upon the occupant of the property attached, a copy of the writ or warrant must be posted on the property or no lien is created.[81] Such other acts as may be required by the statute must also be performed, as the filing of a copy of the writ with the recorder,[82] or leaving a copy with the defendant.[83] And the requisite acts must be performed in the order in which they are named in the statutes, that is to say, the service on the occupant or the posting on the premises must precede the filing of a copy with the recorder, which latter act is intended to give notice to third persons dealing with the property that it had been attached.[84]

Several separate and distinct parcels of land cannot be attached by posting up a copy of the writ on only one of them,[85] but where several lots constitute one tract or farm, the statute requires posting only upon the one whole.[86]

Posting at Court-house. — Statutes requiring copies of the attachment writ to be posted at the court-house, under the prescribed conditions, must be strictly complied with.[87]

81. Davis *v.* Baker, 72 Cal. 494, 14 Pac. 102 (as to temporary absence); Schwartz *v.* Cowell, 71 Cal. 306, 12 Pac. 252; Watt *v.* Wright, 66 Cal. 202, 5 Pac. 91; Sharp *v.* Baird, 43 Cal. 577; Colfax Bank *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

Posting a "notice" instead of copy of attachment is not complying with the statute. Sharp *v.* Baird, 43 Cal. 577.

"A conspicuous place" does not mean "the most" conspicuous place. Davis *v.* Baker, 88 Cal. 106, 25 Pac. 1108.

Premises Occupied.—If the premises are occupied, substituted service is not permissible. Shoemaker *v.* Harvey, 43 Neb. 75, 61 N. W. 109. And see Mickey *v.* Stratton, 5 Sawy. 475, 17 Fed. Cas. No. 9,530.

Knowledge of defendant of the attachment and what property was attached, makes immaterial the failure to serve or post. Dunlap *v.* McFarland, 25 Kan. 488. But in Williams *v.* Olden, 7 Idaho 146, 61 Pac. 517, 97 Am. St. Rep. 250, it was held, under a statute providing that real property must be attached by filing with the recorder a copy of the writ together with a description of the property attached, and by leaving a similar copy of the writ, description and notice with an occupant of the property, if there is one, if not, then by posting the same in a conspicuous place on the property attached, that a personal service of a copy of the writ on the defendant, who is not an occupant of the land sought to be attached, is not equivalent to the posting of such copies in a conspicuous place on the land.

82. Main *v.* Tappener, 43 Cal. 206; Wheaton *v.* Neville, 19 Cal. 41.

83. Hannon *v.* Bramley, 65 Conn. 193, 32 Atl. 336, holding also that the failure to recite the posting in such copy may be corrected by amendment in the return.

84. Main *v.* Tappener, 43 Cal. 206.

85. Ky.—Hatcher *v.* Wagner, 120 Ky. 603, 87 S. W. 778. N. J.—Tomlinson *v.* Stiles, 29 N. J. L. 426. Ore.—Hall *v.* Stevenson, 19 Ore. 153, 23 Pac. 887, 20 Am. St. Rep. 803.

86. Blake *v.* Rider, 36 Kan. 693, 14 Pac. 280; Tomlinson *v.* Stiles, 29 N. J. L. 426.

87. Levy *v.* Millman, 7 Ga. 167; Connell *v.* Medlock, 24 La. Ann. 512.

These formalities stand in the place of citation served on the defendant, and must be strictly complied with. Connell *v.* Medlock, 24 La. Ann. 512, under a judgment confirming a default.

The filing of the short note and sending a copy of it with the attachment, to be put up at the court house door, as a means of notice to the debtor, is indispensable under certain statutes, and the objection is not obviated by the

10. Notice by Publication. — Notice by publication must be given as required by statute,[88] where there has been no personal service,[89] and a statute authorizing service of notice of the attachment by publication on a nonresident defendant, has reference, where there are several defendants, one of whom is a nonresident, not only to a case in which nonresidence is made the ground for suing out the attachment, but also to an attachment based on any of the other statutory grounds.[90] Where, however, there are several defendants, it has been held that publication is only required when no defendant can be found,[91] and when the defendant has replevied the goods and obligated himself to appear "and to abide by, and perform the order and judgment" of the court, the failure to advertise the levy does not invalidate the proceedings under the attachment.[92]

Collateral Attack. — A judgment rendered in the exercise of jurisdiction acquired by the issuance of the writ cannot be impeached collaterally on the ground that there was no publication of notice.[93]

XIII. THE RETURN. — **A. In General.** — The return of a writ of attachment is the report in writing of the officer of what he did under it.[94] A return of the writ is ordinarily essential,[95] though as against the defendant the lien of the attaching creditor depends, not

fact that the party appeared voluntarily; the want of the short note is fatal to the proceedings. Brent *v.* Taylor, 6 Md. 58.

On Bulletin Board.—A requirement of posting on the court house door is complied with by posting on a movable bulletin board used for the posting of sheriff's notices. Connell *v.* Meddock, 25 La. Ann. 590.

88. **An attempt to follow a rule of chancery practice** as to service on nonresidents will not do. Wilmerding *v.* Corbin Banking Co., 126 Ala. 268, 28 So. 640.

An affidavit must have been filed that publication of service had been duly made, or the judgment rendered on the attachment is void. Savidge *v.* Ottawa Circuit Judge, 105 Mich. 257, 63 N. W. 295.

89. Wescott *v.* Archer, 12 Neb. 345, 11 N. W. 491, 577.

90. Dollins *v.* Pollock, 89 Ala. 351, 7 So. 904.

91. Smith *v.* Runnells, 94 Mich. 617, 54 N. W. 375.

92. Reynolds *v.* Jordan, 19 Ga. 436.

93. Paine *v.* Mooreland, 15 Ohio 435, 45 Am. Dec. 585.

94. Westphal *v.* Sherwood, 69 Iowa 364, 28 N. W. 640; Rock *v.* Singmaster, 62 Iowa 511, 17 N. W. 744.

95. Rock *v.* Singmaster, 62 Iowa 511, 17 N. W. 744; Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

For many purposes the return may be regarded as made when it is endorsed upon the writ and signed; and where action is to be taken by the attorney upon the basis of the return, it may be proper, to leave the writ and return with him, instead of handing them to the clerk. Watson *v.* Toms, 42 Mich. 561, 4 N. W. 304.

Officer as a Trespasser Ab Initio.— William *v.* Ives, 25 Conn. 568. And see **Mass.**—Williams *v.* Babbitt, 14 Gray 141, 74 Am. Dec. 670; Russ *v.* Butterfield, 6 Cush. 242, 244. **N. H.**—Munroe *v.* St. Germain, 69 N. H. 200, 42 Atl. 900, where it was held, under Pub. St. c. 220, §36, that the failure to return the writ to the court dissolves the attachment. **Vt.**—Clark &. Freeman *v.* Patterson, 58 Vt. 676, 5 Atl. 564.

In Wilder *v.* Holden, 24 Pick. (Mass.) 8, it was held that the written return of the officer on a writ is competent evidence to prove an attachment of property, notwithstanding the writ may have never been returned to the court to which it was returnable. *Compare* Williams *v.* Babbitt, 14 Gray (Mass.) 141, 74 Am. Dec. 670.

Attachments in Hands of State and Federal Officers.—When writs issue from state and federal courts against

upon the return, but upon the levy.[96] No return need be made if there is no service and the suit is to every intent and purpose abandoned,[97] or if the suit is settled.[98]

The jurisdiction of the court does not rest upon the filing of the return of the officer, but it becomes complete when the officer has made a valid levy and seizure under a lawful writ of attachment.[99]

Presumption. — From the fact that a bond has been taken to release the property the court will presume that there was a return, where by statute a bond can be taken only after the return.[1]

B. To What Court Return To Be Made. — A return should be made to the court having jurisdiction of the attachment suit,[2] unless, in particular cases, or as to certain matters, a statute has made special provision.[3]

the same property, the officer first obtaining possession, on being notified that a state court officer has a writ against the same property, should offer such officer all reasonable facilities to make a full return, and the officer holding the property should show in his return whatever was done by such state court officer. Bates *v.* Days, 17 Fed. 167.

An order to compel return, or extending the time therefor, should be made on application, where the officer has neglected or refused to make one. McLaughlin *v.* Jackson Circuit Judge, 147 Mich. 379, 110 N. W. 1079; Hibbard *v.* Pettibone, 8 Wis. 270.

Under the power to amend the court may order a return *nunc pro tunc.* Bancroft *v.* Sinclair, 12 Rich. L. (S. C.) 617.

96. Brusie *v.* Gates, 80 Cal. 462, 22 Pac. 284; Woldert *v.* Nedderhut Pack. Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378.

In the latter case, the appellant cited the cases of Main *v.* Tappener, 43 Cal. 206; Wheaton *v.* Neville, 19 Cal. 42, and Davis Sewing Mach. Co. *v.* Whitney, 61 Mich. 518, 28 N. W. 674, but the court said: "The decisions relied on by the appellant were based on a statute which required the filing of the notice as an essential part of the levy itself."

97. Atwell *v.* Wigderson, 80 Wis. 424, 50 N. W. 347. So a return was held unnecessary, and the fact that some property was not mentioned in the return unimportant where by stipulation of the parties and consent of the court, property attached was surrendered on the understanding that the rights of the parties were to be observed by the adjudication as though the lien had not been abandoned. Central Trust Co. *v.* Worcester Cycle Mfg. Co., 128 Fed. 483.

In Baldwin *v.* Wright, 3 Gill (Md.) 241, it was held that it cannot be assumed, from the neglect or failure of a sheriff to return an attachment, that there has been no service of it.

98. Wilder *v.* Holden, 24 Pick. (Mass.) 8.

99. Southern California Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345. See also Murphy *v.* Orgill (Miss), 23 So. 305.

Attacking Absence of Return Collaterally.—Rodgers *v.* Bonner, 55 Barb. (N. Y.) 9.

1. Morrison *v.* Alphin, 23 Ark. 136.

2. *In re* Fitch, 2 Wend. (N. Y.) 298; Isaacks *v.* Edwards, 7 Humph. (Tenn.) 465, 46 Am. Dec. 86.

3. **A Georgia statute,** §3272 of the code, declaring that an attachment against a non-resident of the state, where the debt sworn to exceeds one hundred dollars, may be made returnable to the superior court of any county, construed in the light of §3270, seems to mean that such an attachment may be made returnable to the superior court of any county, without respect to whether or not the debtor has effects therein, either in the form of property subject to levy, or of credits subject to garnishment. Nashville, etc., R. Co. *v.* Cleghorn, 94 Ga. 413, 21 S. E. 227.

Under a Kentucky statute, providing that where the debt is not over fifty dollars, an attachment may be directed to "all constables and sheriffs in the commonwealth," any of whom may

C. By Whom Return To Be Made. — A return must be made by the officer to whom the writ issued and who made the levy,[4] unless a statute directs otherwise.[5]

D. Time To Make Return. — Particular statutory provisions regulating the time for making and filing a return of attachment should, of course, be observed,[6] though it has been held in a number of cases

serve and levy the same wherever the property may be found, such an attachment is returnable before the justice who issued it, or before some other justice, and the justice before whom it is returnable need not reside in the county in which it issued, if property has been levied on in such other county. Smith *v.* Terrill, 14 B. Mon. (Ky.) 256.

A Texas statute (Rev. St. §4829), requires, where the writ was issued from the district court for one county and levied in another, the original writ to be returned to the county from which it issued, but requires that the officer making the levy shall return the claim, bond and a copy of the writ to the court of the county in which the levy is made, having jurisdiction to adjudicate the claim. Still *v.* Focke, 66 Tex. 715, 2 S. W. 59.

Under a statute requiring a copy of a writ levied upon land, together with a copy of the return, to be recorded in the county in which the land is situated, and providing also that when land levied upon is in a county other than the one in which the suit is pending, then, in the case of failure to record, the attachment lien shall not be valid against subsequent purchasers for value and without notice, the failure to record a writ and return when the land is situated in the name county in which the proceedings are had will not defeat the lien. Davis *v.* John V. Farwell Co. (Tex. Civ. App.), 49 S. W. 656.

4. Person Specially Appointed To Serve Process.—Return depends upon the validity of the appointment. Currens *v.* Ratcliffe, 9 Iowa 309.

A return by one not an officer of the court is not ground for dismissing the suit, nor for refusing an alias writ. Foote *v.* John E. Hall Commission Co., 84 Miss. 445, 36 So. 533.

Leaving Copy With Town Clerk.— Not necessarily by the officer in person. Pemigewasset Bank *v.* Burnham, 5 N. H. 275.

The levying officer's successor in office may make the return, the duty being official. Carter *v.* O'Bryan, 105 Ala. 305, 16 So. 894.

5. **When service is by constable, a return by the sheriff** is required by some statutes. Tucker *v.* Byars, 46 Miss. 549. And see Spangler *v.* O'Shea, 65 Miss. 75, 3 So. 378, holding that the failure of the sheriff to endorse the date of its receipt from the constable does not affect the levy made, nor deprive the court of jurisdiction.

By Sheriff Having an Interest.—Nor does an indorsement that it had been received by the sheriff, one of the plaintiffs, invalidate the return. Hart *v.* Forbes, 60 Miss. 745.

Return by Constable—Alias Writ.— A return by a constable is of no effect, but the issuance of an *alias* writ, as authorized by statute, and its execution by serving the constable as garnishee, and a return by the sheriff, would give the court jurisdiction. Barnett *v.* Ring, 55 Miss. 97.

6. **When Writ Fully Executed or Discharged.**—*Under a Minnesota statute,* which nowhere requires the return of the writ until it has been fully executed or discharged, a return is not a preliminary or a condition to a proper trial of the case upon the issues, or to an entry of judgment for want of answer. Cousins *v.* Alworth, 44 Minn. 505, 47 N. W. 169, 10 L. R. A. 504.

Under an Oregon statute, providing that when the writ of attachment shall be fully executed or discharged, the sheriff shall return the same, with his proceedings indorsed thereon, to the clerk of the court where the action was commenced, the writ is fully executed when the sheriff has attached all the property of the defendant in his county, not exempt from execution, or so much as may be sufficient to satisfy the plaintiff's demand, and as soon as this is done he must return his writ. Gerdes *v.* Sears, 13 Ore. 358, 10 Pac. 631, the court saying: "The property in the hands of the sheriff is *in custodia legis*, and it is not necessary that the writ should remain in his

that a delay in filing the return does not affect the lien of the attachment,[7] nor furnish ground for quashing the attachment.[8]

Premature Return. — Where, under a statute, the officer, levying a writ of attachment upon property and unable to find the defendant, has until the return day to enable him to make personal service of the writ, an actual return before that day is premature.[9]

hands in order to hold the property."

One Day Before Return Day.—A service of the summons and order of attachment are good though they were returned one day before the return day thereof. Dunlap *v.* McFarland, 25 Kan. 488.

When Attachment Vacated or Annulled.—Where under statutory provisions the officer must file his return when the attachment has been vacated or annulled, a return by the officer when the attachment has not been vacated or annulled is unauthorized by law, and the court may make an order directing the officer to take the attachment from the files and cancel the return. Tuck *v.* Manning, 63 Hun 345, 22 Civ. Proc. 94, 17 N. Y. Supp 915, *affirmed*, 137 N. Y. 630, 33 N. E. 745.

To Term and Not to Rule Day.—Grinberg *v.* Singerman, 90 Va. 645, 19 S. E. 161; Craig *v.* Williams, 90 Va. 500, 18 S. E. 899, 44 Am. St. Rep. 934.

An Iowa statute, providing that "such return must be made immediately after he shall have attached sufficient property, or all that he can find, or, at latest, on the first day of the first term at which defendant is notified to appear," refers to a time after the writ has been executed, and until the writ has been executed there can be no return. Westphal *v.* Sherwood, 69 Iowa 364, 28 N. W. 640.

Service having been made upon one of two joint debtors of a writ of attachment on which their joint property had been seized, and jurisdiction thereby obtained, it is not a valid ground of objection to the introduction in evidence of the attachment proceedings, judgment, execution and levy, that the writ of attachment was prematurely returned as to the other joint debtor, who was not served. Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254.

Presumption of Due Return.—Where the writ was made returnable on the third Tuesday in the month instead of the day the term began, namely, on the first Tuesday, it must presumptively be taken that the officer followed the mandate in his return of the attachment. Wason *v.* Martel, 68 N. H. 560, 39 Atl. 438. See also Anderson *v.* Graff, 41 Md. 601.

The return of a second attaching creditor need not be to the same term of court as that of the first. Lodge *v.* Lodge, 5 Mason 407, 5 Fed. Cas. No. 8,460.

7. **Ill.**—Hogue *v.* Corbit, 156 Ill. 540, 51 N. E. 219, 47 Am. St. Rep. 232. **Mont.**—A. M. Holter Hdw. Co. *v.* Ontario Min. Co., 24 Mont. 184, 61 Pac. 3. **Tex.**—City Nat. Bank *v.* Cupp & Co., 59 Tex. 268.

The fact that the return was not filed until after the judgment was rendered was not sufficient to deprive the court of jurisdiction, though the return should be made before the rendition of the judgment. Southern California Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345.

Fault of Sheriff.—Where there was delay in returning the writ, and the attorneys for plaintiff made repeated efforts to have it returned by the sheriff, and the plaintiff and purchaser under a subsequent writ had notice of the prior levy, the lien was not lost. Riordan *v.* Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37.

No Action Taken Until Return Filed. That the return was not made until after the next day after the return day does not release the lien of the attachment, when no action was in fact taken until the return was actually filed. Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109.

8. Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23; Willis *v.* Mooring, 63 Tex. 340.

9. Holmes *v.* King, 158 Mich. 445, 123 N. W. 1; Hitchcock *v.* Hahn, 60 Mich. 459, 27 N. W. 600; Paddock *v.* Smith, 2 Mich. N. P. 114; Scudder *v.* Wilcox, 2 Mich. N. P. 35.

Three Days Before Return Day.—Drew *v.* Claypool, 61 Mich. 233, 28 N. W. 78.

Amendments have been allowed as to the date of the return.[10]

E. Sufficiency of Return. — 1. In General.—a. *The Return Must Be Full and Intelligible.* — A return must be intelligible; if its purport cannot be determined by applying it to the actual state of defendant's property, the court will not attempt to aid it by conjecture.[11] A full return should be made, stating correctly the names of the parties,[12] the court to which the process is returnable,[13] what property has been attached under the writ,[14] the date on which the levy

Where the return shows substituted service made one day before the return day of the writ, this is a fatal defect, as the statute only allows substituted service when defendant cannot be found. Reynolds *v.* Marquette Circuit Judge, 125 Mich. 445, 84 N. W. 628. See Scudder *v.* Wilcox, 2 Mich. N. P. 35.

10. Johnson *v.* Day, 17 Pick. (Mass.) 106; Haven *v.* Snow, 14 Pick. (Mass.) 28; Kidd *v.* Dougherty, 59 Mich. 240, 26 N. W. 510.

Where the records have been mutilated by some unknown person, by changing the date of the return, of register's minutes thereon, and of the record of attachment, the officer may be permitted to restore the true date of his return. Weston *v.* Mt. Desert, etc., Land Co., 88 Me. 306, 34 Atl. 159.

A lien is effected when the officer files a copy of the writ and his return with the clerk, and it is not lost by the act of the officer in withdrawing the copy of the writ from the office and erasing from the return thereon the attachment of the real estate, and substituting an attachment of personal property. Braly *v.* French, 28 Vt. 546.

11. Stearns *v.* Silsby, 74 Vt. 68, 52 Atl. 115.

Courts will give effect to the returns made by officers, although informally made, when the intention is sufficiently disclosed by the language used to be clearly discernible; when the obscurity is so great, that the purpose cannot be ascertained, they will not attempt to make the return effectual by a construction merely conjectural. Hathaway *v.* Larrabee, 27 Me. 449.

12. McDowell *v.* Parry, 45 Ore. 99, 76 Pac. 1081, as to defendant's name.

Initials of Plaintiffs Name Sufficient. Poor *v.* Chapin, 97 Me. 295, 54 Atl. 753.

Against Partnership Name Only.— Fleischman *v.* Bowser, 62 Fed. 259, 23 U. S. App. 494, 10 C. C. A. 370.

Immaterial Defect.—In Reynolds *v.* Smith, 7 Mackey (D. C.) 27, it was held that a return of an attachment against the Columbia National Bank of Washington City as having been made against the Columbia National Bank, and omitting the words "of Washington City," was an immaterial defect.

13. Lincoln *v.* Strickland, 51 Me. 321, holding that where the statute requires the officer to state "the court to which the writ is returnable," a return "S. J. C., August Term, Kennebec County, 1856," is a substantial compliance.

14. Sanford *v.* Pond, 37 Conn. 588; Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399.

Property of Defendant.—The return need not state that the property was levied on as the property of the defendant. McLane *v.* Kirby & Smith (Tex. Civ. App.), 116 S. W. 118, stating the contrary rule of Meuley *v.* Zeigler, 23 Tex. 88, is no longer the law in Texas.

All Property of Defendant.—It is not necessary that the return should show that all the property of the defendant in the county was attached. Dronillard *v.* Whistler, 29 Ind. 552.

Valuation of Property.—Unless required by statute, the return of the officer need not state the valuation of the property attached. Barton *v.* Ferguson, 1 Ind. Ter. 263, 37 S. W. 49, holding further that, the valuation by the officer of the property taken is an official act, done in the performance of his legal obligation, and may properly be incorporated in his return. See *supra,* XII, E.

Though in the return the officer greatly underestimates the quantity of property attached, when he attached the whole, and the error was one of judgment, this will not invalidate the attachment. Parker *v.* Williams, 77 Me. 418, 1 Atl. 138.

Amendable Defect.—Stout *v.* Brown, 64 Ark. 96, 40 S. W. 701.

was made,[15] and the names of the persons in whose presence the writ was executed, if the levy should be made in that fashion.[16]

Waiver of Defects in Return. — A failure to make the full return required by the statute is waived by general appearance.[17]

Estoppel. — If objecting parties have alleged a levy in their pleadings, the failure of the return to show an actual levy will not be noticed.[18]

b. *Amendments.* — Amendment is allowable to conform the return to the facts of levy and service,[19] but not to affect rights of third persons, such as bona fide purchasers without notice or other attaching creditors, which have intervened since the return of the writ,[20] unless sufficient appears by the return to give third persons notice that all the requirements of the law have been complied with and that by amendment the return may be perfected.[21] Where such rights have

15. Newton *v.* Strang, 48 Mo. App. 538.

It is in the discretion of the court to allow an amendment to show the date of the levy. McLane *v.* Kirby (Tex. Civ. App.), 116 S. W. 118.

16. Cabeen *v.* Douglass, 1 Mo. 336.

As between the plaintiff and an interpleader, to make a valid seizure of personal property under a writ of attachment, the officer must go to the place where the property is situate, and there declare in the presence of a citizen of the county, that he attaches it; and he must also take the property into possession, and this must be shown by the return. Gibson *v.* Wilson, 5 Ark. 422.

17. Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 48 N. W. 421, *affirming*, 79 Wis. 269, 45 N. W. 810.

18. Young *v.* South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752.

19. **U. S.**—Cushing *v.* Laird, 4 Ben. 70, 6 Fed. Cas. No. 3,508. **Ark.**—McKnight *v.* Strong, 25 Ark. 212. **Colo.**—Bishop *v.* Poundstone, 11 Colo. App. 73, 52 Pac. 222. **Ia.**—Foster *v.* Davenport, 109 Iowa 329, 80 N. W. 404. **N. J.**—Cord *v.* Newlin, 71 N. J. L. 438, 59 Atl. 22. **Pa.**—Layman *v.* Beam, 6 Whart. 181.

As to Proof of Service Which Was in Fact Made.—Wilkins *v.* Tourtellott, 28 Kan. 825.

To Show an Attachment of Property of All Defendants.—Swift *v.* Hawkens, 103 Me. 371, 69 Atl. 620.

Something on File To Amend By.—Wendell *v.* Mugridge, 19 N. H. 109.

Is a Common Law Right.—Main *v.* Lynch, 54 Md. 658.

That an action is pending against the officer based on the return is no objection to granting an amendment of the return. Jeffries *v.* Rudloff, 73 Iowa 60, 34 N. W. 756, 5 Am. St. Rep. 654.

20. **U. S.**—Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 29 U. S. App. 227, 14 C. C. A. 166, *affirming* 55 Fed. 738. **Ala.**—Clarke *v.* Gary, 11 Ala. 98. **Conn.**—Palmer *v.* Thayer, 28 Conn. 237. **Ky.**—Hatcher *v.* Wagner, 120 Ky. 603, 87 S. W. 778, as to the description of the property. **Me.**—Fairfield *v.* Paine, 23 Me. 498, 41 Am. Dec. 357; Berry *v.* Spear, 13 Me. 187. **Md.**—Main *v.* Lynch, 54 Md. 658. **Mass.**—Emerson *v.* Upton, 9 Pick. 167; William *v.* Brackitt, 8 Mass. 240 (to include other lands in a suit between other parties).

An assignee for the benefit of creditors represents his assignor, the debtor, and an amendment may be allowed as against him. Pond *v.* Campbell, 56 Vt. 674.

21. Bessey *v.* Vose, 73 Me. 217; Milliken *v.* Bailey, 61 Me. 316.

In Hovey *v.* Wait, 17 Pick. (Mass.) 196, it was held that an amendment will not be allowed after a title has been acquired by a third party who had no connection with the writ in the original suit, upon the expiration of several years after the transaction and when there is no original minute of the officer, made at the time, to amend by.

As to a mistake in the date of the return, when the mistake was manifest

intervened, an order allowing an amendment may be reviewed in an appellate court.[22]

Time of Making Amendments.— It has been said that a mistake in a return may be corrected at any time;[23] and so, it has been held that a return may be amended after the return term,[24] during the trial and before the jury retire,[25] after the verdict has been returned and before a judgment has been rendered,[26] or even after judgment.[27]

It is a general rule that an amendment of the return may be allowed after the officer's term has expired,[28] though the contrary has been held.[29]

upon the face of the record, an amendment may be made to affect third persons. Johnson *v.* Day, 17 Pick. (Mass.) 106.

Where the same attorney represented the plaintiffs in both attachments, the plaintiff in the second attachment had constructive notice of the mistake in the date of the first attachment. Haven *v.* Snow, 14 Pick. (Mass.) 28.

Where a return was informal as to a description of the property levied on, an amendment of the return in this respect relates back to the date of the return, and a purchaser under the attachment sale takes a title superior to that of a purchaser from the attachment defendant after the filing of the return but before the amendment. Kitchen *v.* Reinsky, 42 Mo. 427.

To Show Posting At Court House.— A return may be amended though a motion by subsequent attaching creditors is pending to suspend a judgment. Wilson *v.* Ray, T. U. P. Charlt. (Ga.) 109.

22. Pond *v.* Campbell, 56 Vt. 674.

23. Ritter *v.* Scannell, 11 Cal. 238, 70 Am. Dec. 775, as to the date of the return.

24. Hutchins *v.* Brown, 4 Har. & M. (Md.) 498. See Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646.

Essential amendments will not be allowed after the term, unless application be made for that purpose within a reasonable time. Wilkie *v.* Hall, 15 Conn. 32, holding that an amendment should not be allowed when nearly five years had elapsed.

25. Main *v.* Lynch, 54 Md. 658.

26. **Especially as to matters which have occurred after the entry** of the writ. Harding *v.* Riley, 181 Mass. 334, 63 N. E. 883, to add fees for care of the property.

27. **U. S.**—Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 29 U. S. App. 227, 14 C. C. A. 166, *affirming* 55 Fed. 738. **Conn.**—Palmer *v.* Thayer, 28 Conn. 237, holding that an amendment may be then allowed as against an assignee for the benefit of creditors. **Ky.**—Mason *v.* Anderson, 3 T. B. Mon. 293. **S. D.**—Chaffee *v.* Runkel, 11 S. D. 333, 77 N. W. 583.

But in Hatton *v.* Stillwell, 10 Mart. (La.) 91, the court said that after the final determination of the cause the officer ought not to be allowed to amend the return, and held that a suit brought on the attachment bond is not a continuation of the original suit, and the return to the writ cannot then be amended.

In the exercise of the discretion reposed in the courts, they must be governed by the circumstances of each particular case, and the time within which a return can be amended cannot be limited. Jeffries *v.* Rudloff, 73 Iowa 60, 34 N. W. 756, 5 Am. St. Rep. 654, holding that where less than fifteen months had elapsed since the rendition of judgment, the discretion in the court had not been abused.

In support of the judgment, an amendment may be permitted after final judgment at a subsequent term, and on a proper state of facts. Magrew *v.* Foster, 54 Mo. 258.

28. **U. S.**—Cushing *v.* Laird, 4 Ben. 70, 6 Fed. Cas. No. 3,508. **Conn.**—Palmer *v.* Thayer, 28 Conn. 237. **Ga.**—Wilson *v.* Ray, T. U. P. Charlt. 109. **Ill.**—Morris *v.* School Trustees, 15 Ill. 266. **Ia.**—Jeffries *v.* Rudloff, 73 Iowa 60, 34 N. W. 756, 5 Am. St. Rep. 654.

An Additional Return.—Wilson *v.* Ray, T. U. P. Charlt. (Ga.) 109.

29. Cole *v.* Dugger, 41 Miss. 557.

Whenever made it must be under the

Leave of court to amend the return is not necessary before filing,[30] but after the return has been filed, it can be amended only upon leave of court properly obtained.[31]

Notice of Application to Amend.— Upon the idea that an amendment of the return should be allowed as a matter of course, and that an officer is liable for making a false return, it has been held that notice to the parties to be affected of an application to amend is not necessary,[32] though generally notice of a motion to amend seems to be required[33] when the record does not furnish the data and extrinsic evidence is necessary,[34]

To Show Facts at Time of Return.—The amendment or correction should be made only with reference to the state of facts as they existed at the time of the return.[35]

sanctions and penalties of the law. Palmer *v.* Thayer, 28 Conn. 237.

Must Be Preliminary Process or Notice.—Wilkie *v.* Hall, 15 Conn. 32.

But in Morris *v.* School Trustees, 15 Ill. 266, it was held that without notice of the application, an officer may be allowed to amend a return after his term has expired.

30. Cochrane *v.* Johnson, 95 Mich. 67, 54 N. W. 707. Watson *v.* Toms, 42 Mich. 561, 4 N. W. 304.

31. Sanford *v.* Pond, 37 Conn. 588; Myers *v.* Prosser, 40 Mich. 644.

Process as Part of the Record.—Palmer *v.* Thayer, 28 Conn. 237.

On Motion Accompanied by the Affidavit of the Sheriff.—McKnight *v.* Strong, 25 Ark. 212; McClure *v.* Smith, 14 Colo. 297, 23 Pac. 786.

Without a showing, it is irregular practice for the court to allow the officer to amend a return showing property attached so as to release the property attached. Griffith *v.* Short, 14 Neb. 259, 15 N. W. 335.

In an action against a sheriff for failure safely to keep and deliver attached property, it was error to permit the jury to consider the sheriff's return to the attachment writ as amended to conform to his testimony that he did not seize the amount of property therein recited; no application having been made to amend the return, or showing made upon that subject in the expectation that the court would pass upon its sufficiency. Standard Wine Co. *v.* Chipman, 135 Mich. 273, 97 N. W. 679, 106 Am. St. Rep. 394.

An application should be denied when the officer trusts merely to memory, and after the lapse of considerable time, asks to change the whole effect of his proceedings by adding to his return a statement which, if untrue, can not be disproved, and as to a fact which is not likely to have impressed his memory. Gregor Grocer Co. *v.* Carlson, 67 Mo. App. 179.

The Court Cannot Force the Officer to Amend.—Maris *v.* Schermerhorn, 3 Whart. (Pa.) 13.

An appellate court cannot grant leave to amend a return. People *v.* Judges, 1 Dougl. (Mich.) 417.

32. Morris *v.* School Trustees, 15 Ill. 266; Kitchen *v.* Reinsky, 42 Mo. 427 (after judgment).

33. Richmond *v.* Brookings, 48 Fed. 241; McClure *v.* Smith, 14 Colo. 297, 23 Pac. 786.

After Suit Discontinued.—Haynes *v.* Knowles, 36 Mich. 407.

When Defendant Could Not Be Found.—Kidd *v.* Dougherty, 59 Mich. 240, 26 N. W. 510, under which circumstances an amendment as to date of the return was allowed.

34. Cochrane *v.* Johnson, 95 Mich. 67, 54 N. W. 707.

35. Major *v.* People, 40 Ill. App. 323, wherein the court said: "When an officer returns a writ, he has no further power over it, and can in no manner change his return, unless in a proper case and by proper leave he alters a misstatement or supplies an omission in the return to make it conform to the truth. But it is the facts as they really were, at the time of the return, that he will be permitted to state by way of alteration or correction of the return. Circumstances taking place after the return could have no effect and would not be allowed to alter it."

And an ineffectual amendment will not be allowed.[36]

Effect of Amendment. — When a return has been amended, the error against which the amendment is made is cured, and the return as amended relates back to the time when the original return was made,[37] and must, for the purposes of the action, be taken as true,[38] and if leave to amend a return be improperly or erroneously granted, it is a mere irregularity or error, which cannot be called in question in a collateral action.[39]

c. *Presumptions.* — It will be intended, to sustain the return,[40] that the return is truthful in the facts which it asserts,[41] that it was levied within the territorial jurisdiction of the officer,[42] that only the property specified in the return was levied on,[43] and that the goods attached are of the value commanded in the writ.[44]

Property of Defendant. — If the return shows that certain property has been attached but without calling it the property of the defendant, it will be presumed, according to some courts, that the property levied on belongs to the defendant.[45] In other jurisdictions, however, the

See also Downs *v.* Flanders, 150 Mass. 92, 22 N. E. 585.

36. Reynolds *v.* Marquette Circuit Judge, 125 Mich. 445, 84 N. W. 628; Sheldon *v.* Comstock, 3 R. I. 84.

Omission To Serve by Publication.—Ford *v.* Wilson, Tapp. (Ohio) 274.

Copy Left With Town Clerk Defective.—Taylor *v.* Emery, 16 N. H. 359.

37. **U. S.**—Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 29 U. S. App. 227, 14 C. C. A. 166, *affirming* 55 Fed. 738. **Ia.**—Jeffries *v.* Rudloff, 73 Iowa 60, 34 N. W. 756, 5 Am. St. Rep. 654. **Mo.**—Buller *v.* Woods, 43 Mo. App. 494.

The first and the amended return are to be taken as one. Layman *v.* Beam, 6 Whart. (Pa.) 181.

38. North West Bank *v.* Taylor, 16 Wis. 609.

39. Buller *v.* Woods, 43 Mo. App. 494.

40. Crosby *v.* Allyn, 5 Me. 453; Prather *v.* Chase, 3 Brewst. (Pa.) 206.

After judgment, a return, with such reasonable intendments as the court is bound to make, may be regarded as sufficient to create a lien, though the return might not have been good upon a plea in abatement. Fletcher *v.* Cole, 26 Vt. 170. See also Thompson *v.* Owen, 8 Kulp (Pa.) 36.

41. Main *v.* Lynch, 54 Md. 658.

42. **Ga.**—Connolly *v.* Atlantic Contracting Co., 120 Ga. 213, 47 S. E. 575. **Mich.**—Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109. **Va.**—Guarantee Co. *v.* Lynchburg Nat. Bank, 95 Va. 480, 28 S. E. 909.

43. Kelley *v.* Tarbox, 102 Me. 119, 66 Atl. 9; Phillips *v.* Harvey, 50 Miss. 489.

44. Childs *v.* Ham, 23 Me. 74.

45. **Ala.**—Thornton *v.* Winter, 9 Ala. 613; Fleming *v.* Burge, 6 Ala. 373; Miller *v.* McMillan, 4 Ala. 527; Kirksey *v.* Bates, 1 Ala. 303; Bickerstaff *v.* Patterson, 8 Port. 245. **Cal.**—Porter *v.* Pico, 55 Cal. 165. **Ia.**—Rowan *v.* Lamb, 4 Greene 468, *overruling* Tiffany *v.* Glover, 3 Greene 387. **Mich.**—Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109. **Miss.**—Saunders *v.* Columbia L., etc., Co., 43 Miss. 583. **N. Y.**—Johnson *v.* Moss, 20 Wend. 145. **Ore.**—Colfax Bank *v.* Richardson, 34 Ore. 578, 54 Pac. 359, 75 Am. St. Rep. 664. **Tex.**—Willis & Bro. *v.* Mooring & Blanchard, 63 Tex. 340; Stoddart *v.* McMahan, 35 Tex. 267; McLane *v.* Kirby & Smith (Tex. Civ. App.), 116 S. W. 118 (pointing out that Menley *v.* Zeigler, 23 Tex. 88, has been overruled). **Vt.**—Bucklin *v.* Crampton, 20 Vt. 261, where the property was described as "thirty tons of hay in the barn on the premises."

Jurisdiction Dependent on Levy and Not on Return.—"A levy being a vital jurisdictional fact, a court could not properly resort to presumption alone to establish the fact of a levy; but as that fact is fully established by the sheriff's return, without the aid even of presumption, and as the court was thus invested with jurisdiction, it

return must show that the property levied on was the property of the defendant.[46]

Observance of Statute.—If the return alleges a levy, but does not state the method of it, it will be presumed in the absence of anything to the contrary, that the officer observed all the requirements of the

might call in the aid of presumption to support a mere detail or incident connected with the levy. The essential fact being established that the levy was made, it will be presumed that the sheriff obeyed the directions of the law in making that levy.'' Rowan *v.* Lamb, 4 Greene (Iowa) 468.

Property in Possession of Third Person.—King *v.* Bucks, 11 Ala. 217; Lucas *v.* Godwin, 6 Ala. 831.

Proceeds of Property Held in Trust for Wife.—Where property attached is described in the return and inventory as ''of all the property and estate of Cortland Yardley [defendant], to wit, nine hundred dollars, being the proceeds of a house and lot sold, which Cortland Yardley held in trust for Hannah Yardley, his wife,'' it is an averment that the nine hundred dollars belonged to the husband and not to the wife. Yardley *v.* Yardley, 32 N. J. L. 215.

Several Defendants.—All the Interest of Either.—In an action against two non-resident defendants, in which the writ commanded the officer to attach the lands of the defendants, copartners, and the officer levied on land of one and returned that he had seized the land as the property of the other, it was held that the presumption would be indulged that all the interest of either defendant in the land was attached. Robertson *v.* Kinkhead, 26 Wis. 560.

Where the officer returns land attached as ''supposed'' to be the property of the defendant, the lien is not impaired by the use of the qualifying term, when the land in fact is the property of the debtor. Banister *v.* Higginson, 15 Me. 73, 32 Am. Dec. 134.

46. **Ga.**—Tuells *v.* Torras, 113 Ga. 691, 39 S. E. 455; New England Mfg. Security Co. *v.* Watson, 99 Ga. 733, 27 S. E. 160. **Ill.**—Reitz *v.* People, 77 Ill. 518; Foster *v.* Illinski, 3 Ill. App. 345. **Kan.**—Repine *v.* McPherson, 2 Kan. 340. **Ky.**—Mason *v.* Anderson, 3 T. B. Mon. 293. **Mo.**—Anderson *v.* Scott, 2 Mo. 15, 22 Am. Dec. 433; Newton *v.* Strang, 48 Mo. App. 538. **Va.**—Offtendinger *v.* Ford, 86 Va. 917, 12 S. E. 1; Robertson *v.* Hoge, 83 Va. 124, 1 S. E. 667.

Whether Property Be Real or Personal.—Albright-Pryor Co. *v.* Pacific Selling Co., 126 Ga. 498, 55 S. E. 251, 115 Am. St. Rep. 108.

By the statute the sheriff is required to attach the real estate of the defendant, and it would seem to be necessary that he should make return accordingly that he attached the same as the property of the defendant. Robertson *v.* Hoge, 83 Va. 124, 1 S. E. 667.

Generally as ''Property of the Defendants.''—A return that the officer attached the ''property'' as the ''property of the defendants,'' is sufficient though the statute requires a return of an attachment of ''the rights and credits, moneys and effects, lands and tenements of the defendants.'' Morrel *v.* Buckley, 20 N. J. L. 667.

''As the Property Of.''—Cousins *v.* Alworth, 44 Minn. 505, 47 N. W. 169, 10 L. A. R. 504.

On an attachment against several defendants, in order for the levy to be good as against all of them, it must appear in the return that there has been a valid seizure of property belonging to each and all of them, and when the levy fails to show that any of the property levied on belongs to some of the parties, it should be dismissed as to him. Connolly *v.* Atlantic Contracting Co., 120 Ga. 213, 47 S. E. 575.

As against interpleaders the return must contain the allegation. Doane *v.* Glenn, 1 Colo. 495.

Where an attachment is issued against two persons and levied on property to satisfy debts for the payment of which both are liable, the fact that the sheriff returned the writ as that of only one of the defendants, does not invalidate the writ. Buck-Reiner Co. *v.* McCoy, 85 Iowa 577, 52 N. W. 514.

Not Subject to Attack Collaterally.—Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232.

statute. This presumption, however, is disputable.[47] So a general return cannot stand against a subsequent attachment when a statute requires a special return to be made.[48] But it has been held that a material fact cannot be supplied by presumption.[49] In other jurisdictions it is held to be the duty of the officer, in his return, to give his doings under the writ, so that the court can judge of their sufficiency, and the conclusion of the officer that he attached the property cannot be considered as it is a conclusion and not a statement of the facts.[50] But when the return is special, and sets forth facts with respect to the levy and service, it must be assumed that the officer stated all that he

47. **U. S.**—Griffin *v.* American Gold Min. Co., 136 Fed. 69, 68 C. C. A. 637. **Cal.**—Porter *v.* Pico, 55 Cal. 165. **Kan.** Wilkins *v.* Tourtellott, 42 Kan. 176, 22 Pac. 11; Dunlap *v.* McFarland, 25 Kan. 488. **Me.**—Childs *v.* Ham, 23 Me. 74; Crosby *v.* Allyn, 5 Me. 453. **Miss.** Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583; Bryan *v.* Lashley, 13 Smed. & M. 284; Baldwin *v.* Conger, 9 Smed. & M. 516; Redus *v.* Wofford, 4 Smed. & M. 579. **Mo.**—Newton *v.* Strang, 48 Mo. App. 538. **N. J.**—Dodge *v.* Butler, 42 N. J. L. 370; Thompson *v.* Eastham, 16 N. J. L. 100. **Pa.** Prather *v.* Chase, 3 Brewst. 206. **Tex.** Deware *v.* Wichita Val. Mill Co., 17 Tex. Civ. App. 394, 43 S. W. 1047.

The statute does not require any special mode of return, and an officer's return in general terms that he has duly served the writ, accompanied by an inventory and appraisement, is, standing alone and uncontradicted, a valid service. Boyd *v.* King, 36 N. J. L. 134. See also Morrel *v.* Buckley, 20 N. J. L. 667. But *compare* Crisman *v.* Swisher, 28 N. J. L. 149.

That Notice to Defendant Was in Writing.—Fears *v.* Thompson, 82 Ala. 294, 2 So. 719.

Residence in County.—McAbee *v.* Parker, 78 Ala. 573.

That the officer took possession of property capable of manual delivery. Smith *v.* Smith, 24 Me. 555.

Notice to Tenant.—**Ga.**—Hiles Carver Co. *v.* King, 109 Ga. 180, 34 S. E. 353. **Kan.**—Wilkins *v.* Tourtellott, 42 Kan. 176, 22 Pac. 11; Dunlap *v.* McFarland, 25 Kan. 488. **Ky.**—Anderson *v.* Sutton, 2 Duv. 480. See also Thomas *v.* Malone, 9 Bush 111, 119 holding that there is a presumption that the person named in the return as having been served with levy was the occupant of the land.

No Occupant.—When the writ is posted on the premises it will be presumed that there is no occupant to serve, when the return does not state whether or not there was such an occupant. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911.

"Conspicuous Place." — Lewis *v.* Quinker, 2 Met. (Ky.) 284.

Writ Returned by Sheriff and Not by Constable.—Spangler *v.* O'Shea, 65 Miss. 75, 3 So. 378.

48. Owen *v.* Neveau, 128 Mass. 427.

With respect to amendable defects this does not apply. Fleischner *v.* Pacific Postal Tel. Cable Co., 55 Fed. 738, under statutes of Washington.

49. **Material Fact or Circumstance.** The presumption that an officer has done his duty is not sufficient to supply a material fact or circumstance which does not appear in his return. **U. S.**—Mickey *v.* Stratton, 5 Sawy. 475, 17 Fed. Cas. No. 9,530. **Ill.**—Gaty *v.* Pittman, 11 Ill. 20, filing certificates of levy. **Miss.**—Cantrell *v.* Letwinger, 44 Miss. 437.

True Copy Left With Town Clerk. Kittredge *v.* Bellows, 47 N. H. 424.

Showing Effort to Find and Serve Defendant Up to Return Day.—Millard *v.* Hayward, 107 Mich. 219, 65 N. W. 104. *Compare* Hitchcock *v.* Hahn, 60 Mich. 459, 27 N. W. 600.

50. **Ark.**—Gibson *v.* Wilson, 5 Ark. 422. **Ia.**—Anderson *v.* Moline Plow Co., 101 Iowa 747, 69 N. W. 1028, 63 Am. St. Rep. 424. **La.**—Stockton *v.* Downey, 6 La. Ann. 531; Page *v.* Generes, 6 La. Ann. 549. **Mass.**—Merrill *v.* Sawyer, 8 Pick. 397.

"Duly served" not sufficient. Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. 989.

Attached according to law not sufficient. Kilbourne *v.* Frellsen, 22 La. Ann. 207.

did toward making the service, and if the return does not state all the acts required, there has not been a valid levy.[51]

2. As to Personal Property in Particular. — When an officer attaches personal property, he should make a true and particular return of his doings,[52] and must show actual seizure of the property,[53] and a compliance with the statutory conditions to be followed to preserve a lien when, by reason of the nature or condition of the property, removal or retention of actual possession may be dispensed with,[54] and though a return may erroneously describe the particular location of personal property attached, the levy is sufficient as against one who has notice of the attachment,[55] and when a purchaser of attached property sued the officer in trespass for taking the property, and the suit was brought before the writ of attachment was returnable, such purchaser cannot take advantage of any defect in the return.[56]

Description. — The return of a seizure of personal property should

51. **Cal.**—Brusie *v.* Gates, 80 Cal. 462, 22 Pac. 284, (holding, however, that this may be aided by other evidence); Sharp *v.* Baird, 43 Cal. 577. **Miss.** Bryan *v.* Lashley, 13 Smed. &. M. 284. **N. D.**—Ireland *v.* Adair, 12 N. D. 29, 94 N. W. 766.

Not a Nullity.—Glover *v.* Rawson, 3 Pin. (Wis.) 226, 3 Chand. 249.

52. Haynes *v.* Small, 22 Me. 14.

A return does not negative the possession of the defendant in attachment by stating that the property was seized at a specified railroad depot. Moore *v.* Brewer, 94 Ga. 260, 21 S. E. 460.

53. Newton *v.* Strang, 48 Mo. App. 538, holding that where a statute provides that "when goods and chattels . . . are to be attached, the officer shall take the same and keep them in his custody, if accessible," a return which does not show the seizing of the goods themselves, but only a levy on the right, title and interest of the defendant in certain chattels, the attachment is invalid.

"Levied."—When the return of the officer upon the writ shows that he "levied" the writ, this can mean only a legal levy, which includes a seizure of the property. Baldwin *v.* Conger, 9 Smed. & M. (Miss.) 516.

54. Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653, holding that a return: "Came to hand . . . and executed . . . by attaching all of the cattle owned by . . . in the following brand . . . and various marks, supposed to be about four hundred head, and leaving same on the range," while not full in that it fails to show just how the levy was made, was held not to show on its face a void levy.

After Filing Copy of Return With Town Clerk.—As to property too bulky for immediate removal, the statute requires the officer to file with the town clerk not a full copy of his return upon the writ, but "so much of his return on the writ as relates to the attachment, with the value of the defendant's property which he is thereby commanded to attach, the names of the parties, the date of the writ, and the court to which it is returnable," and it need not contain a statement that the property by reason of bulk could not be removed as the statute does not require this. Brogan *v.* McEachern, 103 Me. 198, 68 Atl. 822.

On attaching machinery and placing a keeper in possession, it is not necessary to the validity of the attachment that a reason should be given in the return why the property was not removed. Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611.

"It would, however, have been much better practice to have stated the circumstances which justified the officer in not removing the hay." Davis *v.* Seary, 177 Mass. 526, 59 N. E. 191, as to hay attached by depositing with the town clerk a certified copy of the writ and of the return.

55. Smart *v.* Batchelder, 57 N. H. 140.

56. Judd *v.* Langdon, 5 Vt. 231.

specify the articles attached, either in the return itself,[57] or by reference to an inventory and appraisement attached thereto, where an inventory is required by statute.[58] The description, to be sufficient, should generally have reference to the quantity[59] and location of the

57. Bruce *v.* Pettengill, 12 N. H. 341.

But in Green *v.* Pyne, 1 Ala. 235, it was held that an attachment ought not to be quashed, because the articles of personal property levied on, are not specifically described in the sheriff's return.

An indefinite description of the property in the return is not sufficient. Mills *v.* Waller, Dall. (Tex.) 416.

Contents of Barrels.—A description of property as barrels and half barrels, will be treated as a levy upon the barrels and contents. Parham & Co. *v.* Potts-Thompson Liquor Co., 127 Iowa 303, 56 S. E. 460.

Part of Property Specifically Described.—Where a return states that the officer attached certain specifically described goods and attached also at the same time and place certain other goods of which he gives no detailed description, and no identification save that they were goods of the defendant in a designated building, and that thereafter the officer released from attachment the goods not specifically described, the return discloses a valid attachment as to the property described. Smith *v.* Wenz, 187 Mass. 421, 73 N. E. 651.

Amendment Allowed. — Baxter *v.* Rice, 21 Pick. (Mass.) 197.

58. Wagstaff *v.* Noser, 8 Kan. App. 855, 55 Pac. 554.

Necessity for Schedule.—Desha *v.* Baker, 3 Ark. 509.

When an Inventory Was Not Required.—A description of property in a return as "a lot of dry goods, groceries, hats, boots, shoes, drugs, and flour, and an iron safe, situated in a store house occupied by" the attachment defendants was held to be sufficient. Hilliard *v.* Wilson, 76 Tex. 180, 13 S. W. 25. See also Sweetser *v.* Sparks, 3 Tex. Civ. App. 33, 21 S. W. 724.

Description should be sufficient to distinguish it from other similar property. Sweetser *v.* Sparks, 3 Tex. Civ. App. 33, 21 S. W. 724.

Amendment by Attaching Inventory. Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 29 U. S. App. 227, 14 C. C. A. 16, *affirming* 55 Fed. 738. And see Chaffee *v.* Runkel, 11 S. D. 333, 77 N. W. 583.

59. Bryant *v.* Osgood, 52 N. H. 182.

Stock in a Mill.—A return of all the "stock of every kind," in a woolen factory, particularly described, specifying the stock as a "lot of dye-wood, and dye-stuffs," "lot of clean wool," "sixteen pieces of black, Oxford-mixed cassimere," "twenty-five pieces doeskins and tweeds," "fifty-one pieces of unfinished cloth," "lot of cotton wool," "cotton wool, oils," etc., "in said woolen factory," is sufficient. Ela *v.* Shepard, 32 N. H. 277, the court saying: "It was, perhaps, more general than desirable."

All Such Property as Defendant Owned.—A return that the officer had attached as the property of the defendant two horses and surrey was held to be sufficient, when offered in connection with the fact that the two horses and surrey were the only horses and surrey that the defendant then owned. Stearns *v.* Silsby, 74 Vt. 68, 52 Atl. 115.

In the above case the court referred to Keniston *v.* Stevens, 66 Vt. 351, 29 Atl. 312, and said that it did not appear in that case that the five cows stated as having been bought of one person and one bought of another, were the only cows bought from such persons, it appearing that the debtor had more cows than those attached.

More or Less.—In making a range levy on cattle, which was made on the whole number of cattle in all the brands specified, the use of "more or less" in connection with the number designated, was held not to introduce an element of uncertainty but rather to show that all the cattle in the given brands were included in the levy. Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653.

All goods in defendant's store on a certain street is not sufficient. Ahern *v.* Purnell, 62 Conn. 21, 25 Atl. 393.

property,[60] although the question of identity, to support a lien, may be settled upon parol evidence.[61]

Where the officer already has possession of the property under a previous attachment, a return of a levy under a second attachment that he had attached the right, title, and interest of the defendant in the property, the same being then in his possession, is sufficient.[62]

For jurisdictional purposes, it has been pointed out that a return is sufficient though it is not definite as to quantity and location of the goods and although it is not sufficient to protect the officer in proceedings against him, if it shows that goods of the defendant were attached on the writ in the state.[63]

3. As to Real Property in Particular. — The return must show any levy on real estate that has in fact been made,[64] and the intention to

60. Keniston *v.* Stevens, 66 Vt. 351, 29 Atl. 312, holding that, an attempted attachment by leaving a copy of the writ at the town clerk's office creates no lien when the property is described "six cows, five of said cows are the same bought of Byron Davis of Greensboro, and one bought of McClary of Greensboro," the court saying: "This return does not describe the property sought to be attached as situated upon any farm or in any place, or in any person's possession. It does not even say, except inferentially, that it was in the town of Greensboro."

Wood and Coal on Certain Land. Reed *v.* Howard, 2 Met. (Mass.) 36.

Situated on Defendant's Farm.—Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164; Briggs *v.* Taylor, 35 Vt. 57. See also Barron *v.* Smith, 63 Vt. 121, 21 Atl. 269, holding that where part of the defendant's farm was occupied by another person, a description of a certain number of sheep situated on defendant's farm is sufficient though they may have occupied the other person's barn when it appears that such other person was caring for them as the servant of the defendant, and that a description including a certain number of barrels of cider "situated in defendant's cellar," when there was another house on the farm, did not include that amount of cider in the cellar of the other house.

Describing hay and grain as situated in defendant's barn is sufficient. Stanton *v.* Hodges, 6 Vt. 64.

All property of the kind in the town is wholly inoperative. West River Bank *v.* Gorham, 38 Vt. 649. Rogers *v.* Fairfield, 36 Vt. 641. See also Bryant *v.* Osgood, 52 N. H. 132, under a statute authorizing an attachment of bulky property by making a public record of the return of the property attached.

61. Darling *v.* Dodge, 36 Me. 370, holding that parol evidence is competent to show that the property attached and that in dispute is identical.

In an action against an officer for wrongful seizure under attachment of goods, parol evidence is competent to identify the goods attached with the goods described in the mortgage. Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. 754.

A description of "six head of cattle, with different brands," is not so faulty as to be a nullity. Silver Bow Min., etc., Co. *v.* Lowry, 5 Mont. 618, 6 Pac. 62.

A return of "sixty cords of soft wood more or less" is sufficient to hold a lien. Darling *v.* Dodge, 36 Me. 370.

62. O'Connor *v.* Blake, 29 Cal. 312.

Property "not attached on previous attachments" was held sufficient in Clement *v.* Little, 42 N. H. 563.

63. Perry *v.* Griefen, 99 Me. 420, 59 Atl. 601, holding further that if more definiteness and detail are wanted for other purposes, the return is amendable to that extent.

64. Robertson *v.* Hoge, 83 Va. 124, 1 S. E. 667, the court saying: "It is not necessary, under our statute, for the officer to go upon the land, nor in its vicinity, or to see it, or to do any other act than make return upon the writ that he has attached it. In such an attachment no such precision is required as in an attachment of personalty when the property is divested. Any words which clearly indicate that

attach must appear from the return itself and must be disclosed by the language used, but the whole return may be examined to discover its meaning.[65]

Description of Property. — The rule as to the sufficiency in the description of real property to hold a levy of an attachment thereon is variously stated in the different jurisdictions, many cases in terms or in effect stating that the description in the return of real property levied on is sufficient if it is such as would pass title in a deed,[66] and it may be aided by parol evidence.[67] Other cases hold, however, that

the property has been attached would be held sufficient.''

Filing Copy With Register of Deeds. Where a statute provides that no attachment of real estate shall be considered as creating any lien on such estate unless the officer shall file in the office of the register of deeds an attested copy of so much of the return as relates to the attachment, a return which does not show a compliance with the essential requirements of the statute creates no lien. It must state that the ''attested copy'' required by the statute to be left in the office of the register of deeds, has been so left. Carleton *v.* Ryerson, 59 Me. 438.

The fact that a return showed that an officer did not find any personal property, but did not disclose that search had been made for personal property, does not furnish a reason for quashing the writ of attachment. Dickensheets *v.* Kaufman, 28 Ind. 251.

The return should show, where real estate has been attached, that the defendant had no personal property subject to attachment, or that if any was found and attached that it was not sufficient to satisfy the plaintiff's claim, under a statute providing that ''the defendant's personal property shall be first taken under the attachment.'' Willets *v.* Ridgway, 9 Ind. 367.

65. Bryant *v.* Knapp, 103 Me. 139, 68 Atl. 640.

66. Marston *v.* Stickney, 58 N. H. 609; Howard *v.* Daniels, 2 N. H. 137.

As a Sheriff's Deed.—Henry *v.* Mitchell, 32 Mo. 512.

All debtor's lands in a certain town is sufficient. Taylor *v.* Mixter, 11 Pick (Mass.) 341. See also Lambard *v.* Pike, 33 Me. 141, (the court saying that this might be too uncertain in a conveyance); Moore *v.* Kidder, 55 N. H. 488.

An attachment of ''the homestead farm of the within named Appollos Dean, together with the buildings thereon standing, containing about thirty acres, be the same more or less, situated in'' a certain town, is sufficient, though the farm in fact, contained 150 acres, as the number of acres may be considered as inconsistent with the more general description, and may be rejected as a mistake in the officer. Bacon *v.* Leonard, 4 Pick. (Mass.) 277.

A return describing the property attached as the debtor's, as all the real estate in the town, with the appurtenances thereof, and the debtor's right in equity to redeem the same, is good to hold all the land in the town owned by the defendant, as appears of record. Clemons *v.* Clemons' Estate, 69 Vt. 545, 38 Atl. 314.

Several Defendants.—Uncertain as to Which.—A return of an attachment of ''all the right, title and interest the defendant has in and to any real estate in the country,'' is void for uncertainty, when there are three defendants. Hathaway *v.* Larrabee, 27 Me. 449.

An evident mistake in a name in the return will not invalidate the attachment when the property attached can otherwise be understood. Frost *v.* Paine, 12 Me. 111.

67. Whitaker *v.* Sumner, 9 Pick. (Mass.) 308, holding that an attachment of all the right, title and interest in a piece of land situated on a certain street, is sufficient if the defendant owned but one piece of land on that street, and parol evidence may be received to identify it, but if the defendant had been the owner of two pieces of land on the same street, the description would not be sufficient, and parol evidence could not be received to show which of the two was intended to be attached.

By Witnesses in Whose Presence Land Attached.—If the description will not enable every person to identify the

the return must contain such a general description of the land, and with such substantial accuracy, as will connect it with the sale when made, so that purchasers may know the land, or interests therein, to be sold, and be able to form some estimate of its value, and that the levy should describe the land with such precision that it may be easily identified, when conveyed, by looking alone to the levy, without the aid of extrinsic evidence.[68]

land, the witnesses in whose presence the attachment was levied can be resorted to, to ascertain it. Hays *v.* Bouthalier, 1 Mo. 346.

Amendment to limit attachment to lands shown to be subject thereto. Connelly *v.* Lerche, 56 N. J. L. 95, 28 Atl. 430.

68. Raub *v.* Otterback, 92 Va. 517, 23 S. E. 883, *citing* Waters *v.* Duvall, 11 Gill & J. (Md.) 37, 33 Am. Dec. 693; Brown *v.* Dickson, 2 Humph. (Tenn.) 395, 37 Am. Dec. 560. In the Virginia case above cited the estate was described as "a contingent interest in the real estate of P. O., deceased, lying in said county," and the return, "executed upon the tract of land within mentioned" was too vague and uncertain. The Virginia statute (Code 1904, §2967) provides that the return shall be to the following effect: "Levied on the following real estate of the defendant A. B. (or A. B. and C. D.) to-wit: (Here describe the estate.) This the .... day of ....."

Precision in return of levy of execution is not required, but the following is wholly insufficient: "Building and land, $80,000, lot about 25 ft. by 75 ft." Green *v.* Colt, 81 Ohio St. 280, 287, 90 N. E. 794. And see White *v.* O'Bannon, 86 Ky. 93, 5 S. W. 346.

As Against a Purchase From Defendant Without Actual Notice.—Menley *v.* Zeigler, 23 Tex. 88.

Reference to deed is sufficient. Duty *v.* Sprenkle, 64 W. Va. 39, 60 S. E. 882.

In Richardson *v.* Hoskins Lumb. Co. (Va.), 69 S. E. 935, the following return was held sufficient: " 'Executed on the 17th day of December, 1908, within the county of Mathews, by levying the within attachment on the following real estate of the defendant, the J. S. Hoskins Lumber Company, located in the county of Mathews, in the Piankitank magisterial district of said county, containing about three hundred and sixty acres, being the same land conveyed to said company by L. C. Garnett, Esq., special commissioner of Mathews county circuit court, by deed recorded in Deed Book 15, pp. 58, 59. . . . .' "

Reference to Another Case.—The return itself must show what property is attached and it will not do simply to refer to some other court or some other case for a description of the property attached. Harding *v.* Guaranty L. & T. Co., 3 Kan. App. 519, 43 Pac. 835.

Necessity for Schedule.—A return which is strictly in accordance with the law, and contains a specific description of the land attached, is sufficient. Pearce *v.* Baldridge, 7 Ark. 413, the court saying: "A schedule is necessary where the property consists of numerous articles, in which case the officer is authorized to give a general description of the property attached in his return accompanying the same with a schedule containing a specific inventory of the articles so attached. But where the sheriff gives a specific description and statement of the property attached in his return, a schedule reiterating the same facts is wholly useless and unnecessary."

General Reference to Interest of Heir.—Drew *v.* Dequindre, 2 Dougl. (Mich.) 93.

Under a *Kentucky* statute, Civ. Code Prac., §217, requiring that the sheriff's return on an attachment shall describe real property attached with sufficient certainty to identify it, a return that the attachment has been levied on defendant's interest in the estate of T., deceased, conveyed in trust to L. by a certain deed, creates no lien on defendant's interest in the land conveyed, even if the return and deed be construed together as the deed contains no description of the land; and an amended petition describing that part of the land allotted to defendant after the levy gives no validity

4. As to Statutory Requirements of Service of Process or Notice. — Under the rule that where the law prescribes any particular forms or proceedings in the service of process, the return of the officer should show that they were specifically[69] or substantially complied with.[70] The return must allege personal,[71] or sufficient substituted serv-

to the levy. Price *v.* Taylor, 108 Ky. 558, 57 S. W. 255.

69. Newton *v.* Strang, 48 Mo. App. 538.

The mere statement of legal conclusion, by way of return to the process, as that the writ was "executed by serving the within attachment, personally, . . . and levying on" certain property, is not such "a full return of his proceedings thereon" as the law requires. Rankin *v.* Dulaney, 43 Miss. 197.

In Pomeroy *v.* Rand, McNally & Co., 157 Ill. 176, 41 N. E. 636, attachment against a non-resident, the return was that copies were posted at three public places in the neighborhood of the justice as was required in the statute. The court pointed out that the officer had done all that the statute made it his duty to do, and that the defect, if any there was, was in failing to show how he performed the statutory duty, that is to say, by particularly naming the places. The return was good.

Collateral Attack.—Loughbridge *v.* Bowland, 52 Miss. 546.

70. Thompson *v.* Eastburn, 16 N. J. L. 100. See also Proctor *v.* Whitcher, 15 App. Div. 227, 44 N. Y. Supp. 190, holding that the manner of service of the writ must be stated substantially in the terms of the statute.

Statute as to Boats and Vessels. Miller *v.* Galland, 4 Greene (Iowa) 131.

"Reputable" as applied in the return to an appraiser is equivalent to "credible." Dronillard *v.* Whistler, 29 Ind. 552.

71. Gustavus *v.* Marx, 44 Miss. 446.

"Summoned," but not stating the manner in which defendant was summoned will not sustain a default. Tucker *v.* Byars, 46 Miss. 549.

Diligent "search" is not equivalent to diligent inquiry. Thomas *v.* Morasco, 5 Pa. Dist. 133.

Where there are several defendants, the return must show that a copy was left for each defendant. Smilie *v.* Runnels, 1 Vt. 148.

Time of Service.—Talcott *v.* Rosenberg, 8 Abb. Pr. N. S. (N. Y.) 287.

A return that defendant "ran away" so that the officer could not deliver a copy to him, will not sustain a default. Holden *v.* Ranney, 45 Mich. 399, 8 N. W. 78.

A return, where personal property is attached, that the officer delivered to the defendant a copy of the attachment and a list of the articles attached, is sufficient. Strickland *v.* Martin, 23 Vt. 484. See also Swetland *v.* Stevens, 6 Vt. 577.

Under a Log Lien Law.—Watson *v.* Dingman, 120 Mich. 443, 79 N. W. 639.

As a Mere Irregularity.—Even if it be a defect to fail to state that the officer served a copy of the writ and of his return on the defendant, or that the defendant could not be found in the county, the failure is a mere irregularity which does not go to the jurisdiction. Schweigel *v.* L. A. Shakman Co., 78 Minn. 142, 80 N. W. 871.

As Fatal to Jurisdiction.—If the statute prescribes that the return must state, among other things, the reason for a failure to make personal service upon the defendant, an omission to state this is fatal to the jurisdiction of the court, upon default, and the omission is not supplied by reference to the warrant or some other paper. Silverman *v.* Davis, 45 Misc. 417, 90 N. Y. Supp. 405.

Under a statute requiring the sheriff to "serve said writ upon the defendant therein if he can be found, by reading the same to him or delivering a copy thereof," it is the design of the law that a defendant in attachment shall have personal notice of the proceeding, whenever that is practicable, and the plaintiff cannot properly proceed to judgment until a return of the writ as to such service is made. Morris *v.* School Trustees, 15 Ill. 266.

Relief by Action for False Return. Where a motion is made to vacate an attachment on the ground that the officer attached property without having made any proper effort to serve the defendant, and the issue raised is as

ice,[72] notice to the person in possession,[73] posting at the courthouse

to the truth or falsity of the return, the proper course is to allow the return to stand, and leave the officer to justify it in an action against him for a false return. Harriman *v.* Rockaway Beach Pier Co., 5 Fed. 461.

Defect Waived by General Appearance.—First Nat. Bank *v.* Greenwood, 79 Wis. 269, 48 N. W. 421.

72. **Leaving Copies at Usual Place of Abode.**—See Jones *v.* Walker, 15 Gray (Mass.) 353, (holding sufficient a return that the officer left "the summons of this writ at his last and usual place of abode known to me as such"); Sheldon *v.* Comstock, 3 R. I. 84.

Posting "on the front door of each of their dwelling houses," was held on direct attack upon appeal not to be equivalent to "usual place of abode." Lewis *v.* Botkin, 4 W. Va. 533. See also Willard *v.* Sperry, 16 Johns. (N. Y.) 121.

"Out of Precinct."—Arnold *v.* Tourtellott, 13 Pick. (Mass.) 172.

By Publication.—That Defendants Could Not Be Found.—Under a statute providing that "if it appear by the return of such writ that any property has been attached thereon, and that neither of the defendants could be found, the plaintiff shall, within thirty days after such return, unless the defendants or some of them sooner appear in the suit, cause a notice to be published" (How. Stat. §8003), unless a return shows that the defendants could not be found, substituted service by publication does not bring the defendants into court. Cochrane *v.* Johnson, 95 Mich. 67, 54 N. W. 707.

Mailing Notice.—Where a statute requires that a notice of the attachment be mailed to the defendant at his residence, if the same is stated in the affidavit, and that the certificate of the clerk of such mailing shall be prima facie evidence of the fact, the court is without jurisdiction when the paper purporting to be such certificate is unsigned by the clerk and simply has the file mark on the back thereof. Star Brewery *v.* Otto, 63 Ill. App. 40.

73. Gustavus *v.* Marx, 44 Miss. 446.

In Green *v.* Colt, 81 Ohio St. 280, 90 N. E. 794, the return was held insufficient. "It shows that there was an attempt to levy the writ on real property, but does not show that any copy of the order was either left with the occupant of the property or posted in a conspicuous place thereon; nor does it even show whether the property was occupied or not. These are absolute requirements of the statute, intended to show to the world, as far as practicable, that the property has been seized in attachment and is subject to the control of the court in which the plaintiff's petition has been filed."

That Defendant Has no Place of Residence.—Though the return does not affirmatively state that the defendant had no place of residence in the county, as required by the statute as a reason for delivering the papers to the person in possession of the attached property, this will not invalidate the attachment when it appears upon the face of the attachment proceedings that the defendant is not a resident of the state. Bell *v.* Moran, 25 App. Div. 461, 50 N. Y. Supp. 982.

"Holding Under the Defendant."—Lambert *v.* Challis, 35 Pa. 156, note; Hayes *v.* Gillespie, 35 Pa. 155.

Stating Name of Occupant.—White *v.* Ladd, 41 Ore. 324, 68 Pac. 739, 93 Am. St. Rep. 732.

As to Wild and Unimproved Lands. A return of lands attached as in possession of no person, "the same being wild and unimproved lands," if, according to the fact, is sufficient if the attachment contained the usual clause of *scire facias*. Manton *v.* Hoyt, 43 Md. 254. See also Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583.

As a Mere Irregularity.—Barney *v.* Patterson, 6 Har. & J. (Md.) 182.

Instance of Return Held Sufficient. "Executed by delivering a true copy to W. H. Etham, party residing upon said property," was held sufficient when the petition specifically described the land. Norfleet *v.* Logan, 21 Ky. L. Rep. 1200, 54 S. W. 713.

"Levied and Attached" Without Notice.—Where statutes require that attachments shall be levied "by giving the defendant in the action, if found within the county, and also the person occupying or in possession of the property, if it be in the hands of a third person, notice of attachment," and that

door,[74] or in a conspicuous place upon the property,[75] or the leaving a copy of the process and return with the town clerk.[76]

5. Signature and Verification. — A return to be complete requires the signature of the officer authenticating the statement of facts made in it.[77]

Verification. — If a statute does not require oath to the truth of the facts stated by the officer, the return need not be verified.[78]

"the sheriff shall return upon every attachment what he has done under it," a return that the officer has "levied and attached" the land, without showing notice insufficient, though the supposed levy is entered in the incumbrance book. Anderson *v.* Moline Plow Co., 101 Iowa 747, 69 N. W. 1028, 63 Am. St. Rep. 424.

Omission as a Mere Irregularity. Wagstaff *v.* Moser, 8 Kan. App. 855, 55 Pac. 554; Huxley *v.* Harrold, 62 Mo. 516, (holding the notice not a part of the levy under the statute).

Question Must Be Raised on Trial. Buffington *v.* Mosby (Ky.), 34 S. W. 704.

Subsequent Attaching Creditor Obtaining Priority.—Where, upon a levy upon land, the writ contains an endorsement of a levy on the land and service of a copy of the writ upon the defendant, but the return does not state that the officer went upon the lands or other house or person in whose possession they were and there declared the levy of the writ, nor that the defendant was notified that a levy had been made, and judgment by confession was taken thereon, a subsequent attaching creditor may set up the defect in the return and obtain a priority. People's Bank *v.* West, 67 Miss. 729, 7 So. 513, 8 L. R. A. 727.

74. Wooldridge *v.* Monteuse, 27 La. Ann. 79.

Omission Fatally Defective Unless Amended.—Wilson *v.* Ray, T. U. P. Charlt. (Ga.) 109.

75. Watt *v.* Wright, 66 Cal. 202; Lewis *v.* Quinker, 2 Met. (Ky.) 284.

Front of the dwelling house, without stating that it was the property to be attached, or that it was "a conspicuous place," is insufficient. Hall *v.* Stevenson, 19 Ore. 153, 23 Pac. 887, 20 Am. St. Rep. 803.

"No occupant on the premises" is sufficient, and so cannot be taken as meaning the temporary absence of an occupant. Colfax Bank *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

The particular place on the property need not be stated; "conspicuous place" is good as against a collateral attack. Colfax Bank *v.* Richardson, *supra.*

"Posting" instead of "leaving," the statutory word, is good when attacked collaterally. Colfax Bank *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664. *Compare* Lewis *v.* Botkin, 4 W. Va. 533, where the statute required to "leave a copy posted at the front door," and it was held not sufficient to return "posting an office copy on the front door."

"Notice" posted is not the same as posting a copy of the attachment. Sharp *v.* Baird, 43 Cal. 577.

As a mere irregularity and not fatal on collateral attack; if attacked in the attachment action, it is amendable. Stillman *v.* Hamer, 70 Kan. 469, 78 Pac. 836, 109 Am. St. Rep. 465. See also Wilkins *v.* Tourtellott, 28 Kan. 825.

76. Kelley *v.* Barker, 63 N. H. 70.

Amendment Allowed To Show Deposit. Downs *v.* Flanders, 150 Mass. 92, 22 N. E. 585.

77. Clymore *v.* Williams, 77 Ill. 618.

The absence of signature does not affect the fact of service but simply the evidence of it, and so the omission may be supplied by amendment. Ga. Connolly *v.* Atlantic Contracting Co., 120 Ga. 213, 47 S. E. 575. Kan.—Wilkins *v.* Tourtellott, 28 Kan. 825. Mass. Childs *v.* Barrows, 9 Met. 413.

In Equity.—It has been held, however, on an attachment bill in an equity proceeding, where the property is described in the bill and in the writ of attachment, and the court has proper evidence of the levy, the failure of the sheriff to sign the return does not invalidate the levy. Lea *v.* Maxwell, 1 Head (Tenn.) 365.

78. Mechanics Nat. Bank *v.* Miners' Bank, 13 W. N. C. (Pa.) 515.

6. Aider by Extrinsic Evidence. — The written return of an officer is not the only evidence of the fact that the writ was properly served, and if the return simply omits to state any fact necessary to a valid service, such fact may be supplied by parol or other evidence, so long as the facts stated in the return are not varied or contradicted in such way as to affect vested rights,[79] and also such evidence may be received to show that certain property was in fact attached though it is not mentioned in the return,[80] though, where the return is allowed to be supplemented, the evidence must be clear and satisfactory.[81]

F. RETURN AS EVIDENCE. — **1. In General.** — The return of an officer on a writ of attachment, as to the matters therein stated, is evidence only of what can properly be embraced in a return.[82] Such

"**The court should be satisfied by proper evidence** that the writ has been legally served, and although the oath of the party serving the process is the usual and proper mode of proving the service, yet we know of no law rendering such oath indispensable." Edmonds *v.* Buel, 23 Conn. 242.

79. Davis *v.* Baker, 72 Cal. 494, 14 Pac. 102; Porter *v.* Pico, 55 Cal. 165; Ritter *v.* Scannell, 11 Cal. 238, 70 Am. Dec. 775; Connolly *v.* Atlantic Contracting Co., 120 Ga. 213, 47 S. E. 575.

Exact Time of Attachment.—Garity *v.* Gigie, 130 Mass. 184. See also Williams *v.* Cheesebrough, 4 Conn. 356; Brown *v.* Elmendorf (Tex. Civ. App.), 25 S. W. 145.

Date of Surrender to Defendant.—State *v.* Cowell, 125 Mo. App. 348, 102 S. W. 573.

80. Smith *v.* Moore, 17 N. H. 380 (where it was held that in such a case the officer was not a trespasser *ab initio*); Brown *v.* Elmendorf (Tex. Civ. App.), 25 S. W. 145.

Vagueness of the return as to the property levied on may be helped out by evidence. National Wall Paper Co. *v.* Fourth Nat. Bank (Tenn. Ch.), 15 S. W. 1002.

Property described in appraisement referred to in, and returned with, the writ. Grebe *v.* Jones, 15 Neb. 312, 18 N. W. 81.

In action for malicious prosecution, in causing the plaintiff to be arrested and bound over on a charge of larceny in taking attached goods, the defendant may show by oral evidence that the officer had in fact, attached the goods, though they were not enumerated in his return. Whiteside *v.* Lowney, 171 Mass. 431, 50 N. E. 931.

The officer cannot testify in another suit between other parties, to his having attached other property not mentioned in the return, and so leave the evidence of the proceedings had on the writ to rest partly in writing and partly in parol. But he may amend the return. Sanford *v.* Pond, 37 Conn. 588.

A replevin bond is no part of the record and cannot be looked to to explain or contradict the sheriff's return. Kirksey *v.* Bates, 1 Ala. 303.

81. Brusie *v.* Gates, 80 Cal. 462, 22 Pac. 284, where it was said by Judge Works that the lien of an attaching creditor does not depend upon the return of the officer, but upon the levy made by him, and if he has made the proper levy, and fails to make a proper return, the party in whose favor the writ is issued cannot be deprived of his rights under the same, but may, by other evidence, show that a valid levy was made.

82. Citizens' Nat. Bank *v.* Loomis, 100 Iowa 266, 69 N. W. 443, 62 Am. St. Rep. 571.

In Favor of Officer.—A statement in a return cannot be used by the officer as evidence when such statement was not one which it was obligatory on him to make in the return. Messer *v.* Bailey, 31 N. H. 9.

Sufficiency as Evidence of the Fact. A return by a marshal on an attachment "that he had executed the writ by seizing in the hands of A. all sums of money, rights, credits, and property belonging to the defendant, to an amount sufficient to satisfy the debt," etc., is alone no evidence that anything was actually seized, and is not evidence against the garnishee. Poole *v.* Brocks, 12 Rob. (La.) 484.

return is competent evidence of the validity of the attachment,[83] to show that there has been proper levy and service,[84] that the property enumerated therein was attached,[85] and that it was within the county at the time of the attachment,[86] and was of the kind subject to the mode of levy followed,[87] to identify the property,[88] and of the value of the goods attached.[89]

2. Conclusiveness. — Some cases, contrary to the common law, hold that the return is only *prima facie* evidence of the facts stated in it, and that it may be collaterally as well as directly inquired into and denied.[90] Generally, however, all who are parties or privies to the proceeding or bear any official relation thereto, are concluded by the return, unless proper proceedings have been taken to procure an amendment; but the rule which excludes parol evidence, to vary or contradict a record, does not apply to an offer to show that after the return was made by the officer, there was a material alteration, apparent on the writ of attachment, and a material erasure of a part of the return of the sheriff.[91]

Upon appeal, the validity of an attachment is to be decided by the statements of the record, and the officer's return of service is to be taken as true.[92]

83. Dolan *v.* Wilkerson, 57 Kan. 758, 48 Pac. 23 (notwithstanding there is endorsed thereon a memorandum of a previous ineffectual levy); Lathrop *v.* Blake, 23 N. H. 46.

Notwithstanding the Writ May Never Have Been Returned to Court.—Wilder *v.* Holden, 24 Pick. (Mass.) 8.

The fact that no levy was endorsed on the attachment is immaterial, when the return upon the writ recites a levy, and is accompanied by the appraisal. Grover *v.* Buck, 34 Mich. 519.

84. Foster *v.* Dryfus, 16 Ind. 158.

As Against Principal and Sureties on Forthcoming Bond.—Dodd *v.* Butler, 7 Mo. App. 583.

Removal of Property.—Riley *v.* Tolman, 181 Mass. 335, 63 N. E. 892.

Service on Defendants.—Jones *v.* Gilbert, 13 Conn. 507.

Leaving Copy With Town Clerk. Angier *v.* Ash, 26 N. H. 99.

85. Kelley *v.* Tarbox, 102 Me. 119, 66 Atl. 9.

86. Marnine *v.* Murphy, 8 Ind. 272.

87. Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329.

88. Pocahotas Wholesale Grocery Co. *v.* Gillespie, 63 W. Va. 578, 60 S. E. 597.

89. Hayden Saddlery Hdw. Co. *v.* Ramsay, 14 Tex Civ. App. 185, 36 S. W. 595.

90. **Conn.**—Palmer *v.* Thayer, 28 Conn. 237. **Ia.**—Kingsbury *v.* Buchanan, 11 Iowa 387. **Me.**—Kelley *v.* Tarbox, 102 Me. 119, 66 Atl. 9.

More particularly is this true, when the officer avails himself of his own return in his favor. Wilkie *v.* Hall, 15 Conn. 32; Waterhouse *v.* Smith, 22 Me. 337.

When the validity of the attachment is not involved, oral evidence may be received showing the amount of property attached though this may not conform to the officer's return. La Follett *v.* Mitchell, 42 Ore. 465, 69 Pac. 916, 95 Am. St. Rep. 780.

Contradicted by certificate filed in proper office. Dutton *v.* Simmons, 65 Me. 583, 30 Am. Rep. 729.

A Rhode Island statute provides that a return that the body of the defendant cannot be found within his precinct or within the state "shall be *prima facie* evidence only of such fact." See Nason *v.* Esten, 2 R. I. 337.

91. Hensley *v.* Rose, 76 Ala. 373.

92. Smith *v.* Wenz, 187 Mass. 421, 73 N. E. 651, holding that if the return is false in fact, the defendant's remedy is by an action against the officer for a false return.

As to the Parties. — By the rules of the common law, the return of an officer, of matters material and proper to be returned upon attachment process, is conclusive between parties and privies.[93] Thus in a suit for damages brought by the owner of property against a plaintiff in attachment for wrongful seizure, the return of the officer is conclusive as to the fact of seizure and articles seized,[94] and the defendant is concluded as to the fact of the attachment of certain goods,[95] and cannot show that lands attached do not belong to him.[96] It has been held, however, that the return is not conclusive against the parties as to the amount of the goods seized,[97] or as to the service as stated in the return,[98] nor as to the value of the attached property,[99] and that the defendant, in support of a motion to discharge the property, may show that the officer obtained possession illegally outside of his jurisdiction and brought the property within his county for the purpose of levying the writ.[1]

As to the Officer. — An officer cannot be permitted to falsify his return. In any controversy arising between him and any of the parties or their privies, he is estopped from denying the truth of his return as to all matters material to be returned.[2] If he returns that

93. Hensley *v.* Rose, 76 Ala. 373; Messer *v.* Bailey, 31 N. H. 9. To the contrary, see Mott *v.* Smith, 2 Cranch C. C. 33, 17 Fed. Cas. No. 9,882, Cranch, Chief Judge, *dissenting*.

Importing Absolute Verity as a Record.—State *v.* Penner, 27 Minn. 269, 6 N. E. 790.

In Absence of Fraud.—Bailey *v.* Kimball, 26 N. H. 351.

A mortgagee who replevied the property attached is a privy and so concluded. Dickinson *v.* Lovell, 35 N. H. 9.

In an Action on an Attachment Bond. State *v.* Goodhue, 74 Mo. App. 162.

A Rhode Island statute providing that a return that the body of the defendant cannot be found within his precinct or within the state "shall be *prima facie* evidence only of such fact," was applied as between the parties to the attachment suit, in Nason *v.* Esten, 2 R. I. 337.

94. Stinson *v.* Hawkins, 13 Fed. 833. In Buckingham *v.* Osborne, 44 Conn. 133, the officer had undertaken to serve the process by leaving a true and attested copy at the usual place of abode of the defendant, but the officer mistook the place of abode, and the return was contradicted in the attachment suit and the court abated the process.

95. Morse *v.* Smith, 47 N. H. 474.

Return of appraisal by two disinterested freeholders. Hewitt *v.* Durant, 78 Mich. 186, 44 N. W. 318.

Replevin bond is not part of the record and cannot be looked to. Kirksey *v.* Bates, 1 Ala. 303.

96. Magrew *v.* Foster, 54 Mo. 258.

97. Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386.

In Carpenter *v.* Scott, 86 Iowa 563, 53 N. W. 328, it was held that in an action for the wrongful taking of property under a writ of attachment, while the return of the officer may be the only competent evidence as to what was seized under the writ, it is not conclusive upon the plaintiff that none other of his property was taken, the action being not for a wrongful taking of what was seized under the writ, but for a wrongful taking of his entire stock.

98. Lewis *v.* Rasp, 14 Okla. 69, 76 Pac. 142.

99. Eisenbud *v.* Gellert, 26 Misc. 367, 55 N. Y. Supp. 952.

1. Pomroy *v.* Parmlee, 9 Iowa, 140, 74 Am. Dec. 328.

2. Hensley *v.* Rose, 76 Ala. 373; State *v.* Penner, 27 Minn. 269, 6 N. W. 790 (holding that if the return is erroneous, the remedy is to get it amended according to the facts).

But to excuse himself for not levying upon certain property, the officer may show that the property belonged to a third person. Haynes *v.* Small, 22

he has attached certain property, describing it, he cannot be permitted to say that he never did attach such property,[3] and if the writ commands him to attach to a certain amount, and he returns that he has done so, without particularizing what he had attached, he cannot be permitted to deny that he has attached the amount commanded,[4] though he may show additional facts[5] and that a sheriff who has returned a writ of foreign attachment duly endorsed thereon that he had taken the goods of the defendant in the attachment, is not thereby estopped in an action by the attachment plaintiff for permitting the attached goods to be taken from him, from defending on the ground that the attachment defendant had no property in the goods so taken, but that they belonged at the time to another person.[6]

As to third persons the return is not conclusive,[7] either as to the fact of a proper levy or service,[8] or as to a due return having been made.[9]

Me. 14; Denny *v.* Willard, 11 Pick. (Mass.) 519, 22 Am. Dec. 389; Boynton *v.* Willard, 10 Pick. (Mass.) 166.

Conclusive on Officer Unless Amendment Allowed.—Governor *v.* Baneroft, 16 Ala. 605. See also Clarke *v.* Gary, 11 Ala. 98.

3. **Colo.**—Bishop *v.* Poundstone, 11 Colo. App. 73, 52 Pac. 222. Me. Haynes *v.* Small, 22 Me. 14. Mass. Canada *v.* Southwick, 16 Pick. 556.

4. Canada *v.* Southwick, 16 Pick. Mass.) 556.

5. Townsend *v.* Newell, 14 Pick. (Mass.) 332, holding that the officer may show that the attached goods were subject to a lien.

Consent to Release of Attached Property.—Melhop *v.* Seaton, 77 Iowa 151, 41 N. W. 600.

Where a receipt is attached to the return, the officer may introduce evidence to show that at the time the property was levied upon, the attorney for the attachment plaintiff directed the officer to place the goods in the hands of a certain person as receiptor, and that this was done. Citizens' Nat. Bank *v.* Loomis, 100 Iowa 266, 69 N. W. 443, 62 Am. St. Rep. 571.

6. State *v.* Ogle, 2 Houst. (Del) 371.

7. Brown *v.* Davis, 9 N. H. 76.

Where a return does not show that the levy was made subject to mortgage, which, because not registered in the proper office, was void as against creditors, the return cannot be contradicted by the mortgagee, in an action of replevin brought by him. Wallen *v.* Rossman, 45 Mich. 333, 7 N. W. 901.

8. Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. 378.

Person in Possession Claiming to Own Property.—Where an officer returned that he had served notice of a levy on a stock of goods on "the person in charge of the within-described property, and in the said building," and such person had procured the key to let the officer in and subsequently claimed to own the property, the fact of service and the return were in the nature of admissions, only, and subject to explanation like other similar evidence. Jordan *v.* Crickett, 123 Iowa 576, 99 N. W. 163.

Where two officers made successive attachments of the same chattel, the return of each was *prima facia* evidence of the attachment made by him, but to give the second attachment priority it may be shown by other evidence that the first attaching officer was not in possession of the chattel at the time when the second attachment was made. Bruce *v.* Holden, 21 Pick. (Mass.) 187.

In Merrill *v.* Sawyer, 8 Pick. (Mass.) 397, it was shown that the officer under the first attachment had either failed originally to seize the property or to give publicity to the attachment, or had relinquished his possession.

9. **As to Date of Return.**—Warren *v.* Kimball, 59 Me. 264, the court saying: "It would be a very different matter if the fraudulently attaching creditor had conveyed the land levied upon to a *bona fide* grantee, who should make his purchase relying upon the title disclosed by the record."

XIV. HOW THE PROPERTY MUST BE KEPT AND DISPOSED OF. — A. ACCOUNTABILITY OF OFFICER IN GENERAL. — If the property attached has not been receipted for,[10] or released upon a forthcoming[11] or security bond, to prevent a dissolution of the attachment, the goods must be constantly retained under the absolute dominion of the officer or his agent,[12] and he must be responsible therefor.[13] There must be continued actual or constructive possession of the chattels attached,[14] until the suit is disposed of or the attachment is dis-

10. **Receiptor.**—See McDonald *v.* Loewen, 145 Mo. App. 49, 130 S. W. 52.

11. Litfle *v.* Seymour, 6 Mo. 166.

12. Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39.

Delivery by Constable to Sheriff. Under statutes providing, in cases of attachment issued by justices of the peace for an amount exceeding the jurisdiction of the justice, and not more than the amount of the constable's bond, that the justice may, by indorsement of the process, "direct that it be executed by the constable of the precinct, who shall return the same to the court to which it is returnable," and authorizing the sheriff to sell the property and retain the proceeds, property levied on in such a case should be delivered by the constable to the sheriff, and when so delivered it is in his possession as sheriff and not as a mere bailee to the constable. Joseph *v.* Henderson, 95 Ala. 213, 10 So. 843.

Examination of Books and Papers. The sheriff is not obliged to let either party examine books attached by him. McCartan *v.* Von Syckel, 10 Bosw. (N. Y.) 694. See also Brooke *v.* Foster, 20 Alb. N. C. (N. Y.) 200, holding that, by leave of court, plaintiff may examine books and papers attached.

13. Rowley *v.* Painter, 69 Iowa 432, 29 N. W. 401; Kelley *v.* Tarbox, 102 Me. 119, 66 Atl. 9.

Where the property attached was destroyed by fire without the fault of the sheriff, and it is found that no foundation for the attachment existed, the plaintiff is liable to the attachment defendant. Stanley *v.* Carey, 89 Wis. 410, 62 N. W. 188.

Death of Stock.—Where the sheriff levied on a horse, and the horse died while in possession of the sheriff, due to his negligence, the plaintiff cannot be held liable unless the attachment was wrongfully sued out. McFaddin *v.* Sims, 42 Tex. Civ. App. 598, 97 S. W. 335.

When an officer attaches the debtor's cattle, the debtor is bound to support them, after notice to him by the officer that they are attached; if he neglects to do it, and they perish from that cause, the loss will be his. The officer who attaches them is answerable to the creditor for them; and his apprehension of incurring expense in their maintenance furnishes no excuse for his neglect. Sewall *v.* Mattoon, 9 Mass. 535.

Where the sheriff has misappropriated the property attached and has absconded, the loss must fall upon the plaintiff, and the plaintiff should take his remedy against the sheriff upon his official bond. *In re* Dawson, 110 N. Y. 114, 17 N. E. 668, 6 Am. St. Rep. 346, *affirming* 20 Abb. N. C. 188, 13 Civ. Proc. 142.

Leaving Property Seized in Another's House.—The officer has no right to use the house of one person as a storehouse for the goods of another for a longer time than is necessary to remove them. Williams *v.* Powell, 101 Mass. 467, 3 Am. Rep. 396, holding that what is a reasonable time, when depending on undisputed facts, is a question of law. See also Rowley *v.* Rice, 11 Met. (Mass.) 337.

14. Eldridge *v.* Lancy, 17 Pick. (Mass.) 352.

The attachment law does not impose any duty on the sheriff to administer the property coming into his custody under a writ, as the law limits his duty to taking charge and keeping possession; differing in this respect from the duty of the officer taking property under a writ of sequestration, or of a *fieri facias*. American Nat. Bank *v.* Childs, 49 La. Ann. 1359, 22 So. 384.

By no proceeding at law can a third person interfere with the possession of

solved,[15] or there has been a levy and sale by execution,[16] or until the statutory time after judgment within which special execution must be levied on the attached property.[17]

Bailee. — The officer may maintain his custody and possession through the agency of a bailee, who acts voluntarily as the officer's agent,[18] and who may be the one in possession of the goods at the time of the levy,[19] or even the wife of the defendant,[20] or the plaintiff.[21]

The rule that in levying an attachment upon personal property the officer must take actual possession of the property levied on and main-

property after an attachment has been ordered by the Chancellor, and the property taken into custody. Stemmons *v.* King, 8 B. Mon. (Ky.) 559.

15. Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133; Hennessey First Nat. Bank *v.* Hesser, 14 Okla. 115, 77 Pac. 36.

Though the suit has gone down, the sheriff will nevertheless hold the property under the writ until notified of the discontinuance. Vanneter *v.* Crossman, 39 Mich. 610.

Reasonable Time.—Where a third person claimed money attached, and the plaintiff signed an agreement that the sheriff might retain for a reasonable time as security against the claimant all moneys that may come into his hands by reason of the attachment, the "reasonable time" is to be considered with reference to the time that may be required by the plaintiff to establish his claim. Scherr *v.* Little, 60 Cal. 614.

16. Wentworth *v.* Sawyer, 76 Me. 434; Hennessey First Nat. Bank *v.* Hesser, 14 Okla. 115, 77 Pac. 36.

The officer is accountable to both the debtor and the creditor. Blake *v.* Shaw, 7 Mass. 505.

Neither the alteration of the writ by the attorney after service, nor the want of legal service, will excuse the officer from the performance of the duty of keeping the property safely, that it may be applied to satisfy the judgment obtained by the plaintiff, or returned to the defendant if he should be entitled to it. Childs *v.* Ham, 23 Me. 74.

17. Smith *v.* Bodfish, 39 Me. 136; Phillips *v.* Bridge, 11 Mass. 242.

18. **Ia.**—Rowley *v.* Painter, 69 Iowa 432, 29 N. W. 401. **La.**—Whann *v.* Hufty, 12 La. Ann. 280; Myers *v.* *v.* Myers, 8 La. Ann. 369, 58 Am. Dec. 689. **Mass.**—Gibbs *v.* Chase, 10 Mass. 125, timber frozen in the ice. **Ohio.** Root *v.* Columbus, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812.

Receipt from agent not necessary. Phelps *v.* Gilchrist, 28 N. H. 266; Batchelder *v.* Frank, 49 Vt. 90.

From Agent to Agent.—The property cannot be handed over from one agent to another indefinitely. Connor *v.* Parker, 114 Mass. 331.

The owner of property who consents that the officer may place attached goods thereon on an agreement that the former is not responsible for safe keeping, is not a bailee. Marshall *v.* Town, 28 Vt. 14.

19. Howell *v.* Commercial Bank, 5 Bush (Ky.) 93, where instead of closing a store the goods were, by an arrangement with the plaintiff, left in the possession of one whom the officer found there.

The fact that the defendant was allowed access to the office, and to use the office furniture, and because of some misunderstanding as to what was levied upon sold some property outside the building, did not divest the officer of his custody of the other goods levied upon. Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592.

20. Farrington *v.* Edgerley, 13 Allen (Mass.) 453.

21. Tomlinson *v.* Collins, 20 Conn. 364; Gordon *v.* Johnston, 4 La. 304.

Plaintiff Negligently Surrendering Possession.—Whann *v.* Hufty, 12 La. Ann. 280.

Lien Not Affected.—Gallum *v.* Weil, 116 Wis. 236, 92 N. W. 1091, modifying opinion in Mahon *v.* Kennedy, 87 Wis. 50, 57 N. W. 1108.

tain exclusive control and custody,[22] is in favor of third persons rather than of the defendant in the attachment.[23] And so the fact that the property is left with the debtor under an agreement that the lien shall stand is not proof of collusion or of fraud, and does not affect the rights of the parties,[24] or of third persons with notice of the levy.[25]

Compensation of Bailee. — One in whose care the officer places property may recover from the officer for his services,[26] and not from any one else in the absence of express contract,[27] though in some cases it is held that the officer is personally liable only upon express contract.[28]

Payment of Money Into Court. — Money paid to the clerk by a sheriff is "paid into court" within the meaning of a statute requiring a sheriff to pay into court money held officially by him and which has

22. Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664.

23. Under a statute providing for the retention of property by the debtor upon giving a receipt to the officer (Tyler *v.* Winslow, 46 Me. 348; Pillsbury *v.* Small, 19 Me. 435), the officer may demand surrender to him if there is danger of defeating the attachment (Carr *v.* Farley, 12 Me. 328; Bond *v.* Padelford, 13 Mass. 394).

As against another officer attempting to levy in admiralty it was held that the owner never surrendered certain timber to the officer by merely pointing out the boom and offering to count the sticks and report, in Fountain *v.* 624 Pieces of Timber, 140 Fed. 381.

24. Purdy *v.* Woolson-Spice Co., 15 Ky. L. Rep. 367; Burkhardt *v.* Maddox Co., 9 Ky. L. Rep. 442. See Bowman *v.* Gove, 11 N. H. 265

Range Levy on Cattle.—Donald *v.* Carpenter, 8 Tex. Civ. App. 321, 27 S. W. 1053.

25. Cooper *v.* Newman, 45 N. H. 339.

Retaining Certain Property on Security as Against Purchaser Without Notice.—A Maine statute, providing when hay or stock was attached, and was allowed to remain in possession of the debtor on giving security, that it should not be subject to a second attachment to the prejudice of the first attachment, was held to require a broad construction, and it was held under it that a purchaser of such property, from a debtor who had given security under the statute, purchased subject to the attachment though the purchase was for a valuable consideration and without notice. Woodman *v.* Trafton, 7 Me. 178. See also Carr *v.* Farley, 12 Me. 328.

26. Rowley *v.* Painter, 69 Iowa 432, 29 N. W. 401. See also Lawrenson *v.* McDonald, 9 S. D. 440, 69 N. W. 586 (holding that the custodian may recover from the officer for his services from the time of his appointment until notice of the release of the attachment is served upon him). And see *infra*, XIV, B.

So When the Debtor Is Himself the Receiptor. Tyler *v.* Winslow, 46 Me. 348.

When property mortgaged to the debtor. Tyler *v.* Winslow, 46 Me. 348.

The Validity of the Levy Is Immaterial.—Lawrenson *v.* McDonald, 9 S. D. 440, 69 N. W. 536.

Claim by sister of debtor to whom a pretended sale of the farm was made soon after the attachment cannot be allowed for the care and feeding of the stock left with the debtor. McCormick *v.* Exchange Bank, 17 Ky. L. Rep. 847, 32 S. W. 932.

Sheriff was liable by acquiescence for wages of a custodian appointed by his deputy, in Chenowith *v.* Cameron, 4 Idaho 515, 42 Pac. 503.

27. Hurd *v.* Ladner, 110 Iowa 263, 81 N. W. 470; Allen *v.* Ingalls (Nev.), 111 Pac. 34.

28. Hawley *v.* Dawson, 16 Ore. 344, 18 Pac. 592.

This right does not depend upon the right of the officer to recover from someone else. Stowe *v.* Buttrick, 125 Mass. 449. But one who agrees to keep without compensation cannot transfer to another so as to give the latter a right to recover. Connor *v.* Parker, 114 Mass. 331.

been attached,[29] and it has been held that in the absence of proof that the sheriff and his deputies are irresponsible, he cannot be required to deposit proceeds of property sold by him in a depository designated by the court, where a statute requires him to keep the property seized or the proceeds thereof.[30]

Succession in Office. — Under statutes providing that a sheriff shall turn over to his successor any process "unexecuted in whole or in part" at the time of the expiration of his term, he makes a proper disposition of property held under a pending attachment when he hands it over to his successor in office.[31]

Profits and Rents. — When interest has been made by investment of the proceeds of the sale of property pending the attachment, the party to whom the proceeds are finally adjudged is entitled to such interest.[32]

Rents. — On an attachment of real property the officer takes no interest in the property, and must therefore account for rents and income.[33] Frequently the court, by order, provides for the collection and disposition of rents.[34]

B. Expense of Care and Sale. — An officer is entitled to be allowed for his necessary expenses for keeping attached property,[35] but

29. Warren *v.* Matthews, 96 Ala. 183, 11 So. 285, holding further that an order of court, assuming control of money so paid in is not necessary.

30. Dodge *v.* Porter, 13 Alb. Pr. (N. Y.) 253.

"The court issuing the order of attachment is without authority to require any part of the property or money held by an officer under process of the court, whose officer he is, paid into court issuing the order of attachment until a final adjudication by the court having custody of the funds. No bond could be required of such officer because the extent of the debtor's interest cannot be known until a final adjudication by the court having custody of the funds." Orlopp *v.* Schueller, 26 Ohio C. C. 127.

31. Wood *v.* Lowden, 117 Cal. 232, 49 Pac. 132. And see Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

32. Richmond *v.* Collamer, 38 Vt. 68.

33. Ala.—Phillips *v.* Ash, 63 Ala. 414. Kan.—Kothman *v.* Markson, 34 Kan. 542, 9 Pac. 218. Vt.—Braley *v.* French, 28 Vt. 546.

Where possession of the property was given to the plaintiff, he must account for the use and profits to be set off against the amount adjudged.

Rents collected by plaintiff to be set off against the judgment. Moore *v.* Simpson, 5 Litt. (Ky.) 49.

Attachment Follows the Rule in Execution.—In Munroe *v.* Luke, 1 Met. (Mass.) 459, the court said: "It has long been held, as the settled law of the Commonwealth, that the levy of an execution, pursuant to statute, vests in the creditor an actual seizure and possession, so that, from the time of delivery of seizure by the the sheriff, the creditor may exercise all the rights and powers incident to actual ownership and possession, and may maintain an action of trespass, or a real action, either against the former owner or any other person." See also Stockton *v.* Hyde, 5 La. Ann. 300, holding that if the attaching creditor obtains judgment he may recover the rents and profits in a direct action against the tenant, if he has not paid the rents to the sheriff.

34. Chemical Nat. Bank *v.* Kellogg, 70 N. J. L. 602, 57 Atl. 149; Fitzgerald *v.* Blake, 28 How. Pr (N. Y.) 109 (applying surplus to encumbrances).

In Shaffer *v.* Raymond, 1 Phila. (Pa.) 91, 7 Leg. Int. 166, the sheriff was directed to collect rents and to account for the same to the prevailing party.

35. Nisbet *v.* Clio Min. Co., 2 Cal. App. 436, 83 Pac. 1077.

In Samples *v.* Rogers (Ky.), 119 S. W.

not ordinarily for his mere personal care which is compensated by his statutory fees and salary.[36]

As a Matter of Costs.— Such necessary extra expense falls upon the unsuccessful party.[37]

As a Lien Upon the Property. — When the plaintiff is found not entitled to recover, the expenses of keeping the property and of a sale, if a sale has been made, do not constitute a lien on the property or the proceeds,[38] but when a judgment has been rendered for the plaintiff, the charges for keeping the attached property constitute a lien which must be satisfied before the proceeds of the sale of the property are applied upon the execution,[39] and it is not necessary to preserve this

199, it was held that the statutory provision for allowance relates only to cases where the property is taken into the possession of the officer.

Expense of keeper not allowed when unnecessary (Cutter *v.* Howe, 122 Mass. 541), or if levy tortious (Gardner *v.* Hust, 2 Rich. L. (S. C.) 601).

Storage on Property of Third Person. Where the officer, attaching property in possession of a third person, appoints an agent as keeper and permits it to remain on the property of such third person, the law implies a promise to pay for the storage what the same is reasonably worth. Fitchburg R. Co. *v.* Freeman, 12 Gray (Mass.) 401, 74 Am. Dec. 600.

Release after settlement between debtor and auditor only if keeper's fees are paid. Robinett *v.* Connelly, 76 Cal. 56, 18 Pac. 130.

Under a statute providing that an officer is entitled to compensation for his trouble and expense in seizing and preserving the property, and that in fixing the amount of this compensation the officer issuing the attachment can take into account every responsibility assumed, every service rendered and every expense incurred; and if he sells the property he may have poundage for that; an officer is not entitled to poundage in case of the subsequent settlement of plaintiff's claim before sale of the property. German-American Bank *v.* Pittston, etc., Coal Co., 68 N. Y. 585, *reversing* 9 Hun. 205.

36. King *v.* Shepherd, 68 Iowa 215, 26 N. W. 82.

37. **Ia.**—Hard *v.* Ladner, 110 Iowa 263, 81 N. W. 470, holding, however, that there is no priority between the custodian appointed by the sheriff and the plaintiff in the action. **Mo.**—Snead *v.* Wegman, 27 Mo. 176, taxed as costs. **Ore.**—Hawley *v.* Dawson, 16 Ore. 344, 18 Pac. 592 (taxed as any other disbursement); Schneider *v.* Sears, 13 Ore 69, 8 Pac. 841.

And so a motion for allowance under the statute can be made properly only upon notice to the defendant who is to be charged. Beeman & Cashin Merc. Co. *v.* Sorenson, 15 Wyo. 450, 89 Pac. 745. And see Harris *v.* Hill, 11 B. Mon (Ky.) 199; Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

In Genesee County Sav. Bank *v.* Ottawa Circuit Judge, 54 Mich. 305, 20 N. W. 53, the court said that it is doubtful if such expenses are taxable as costs.

Under a statute providing that when it is the duty of an officer to appoint a custodian to take charge of property levied upon the court shall allow compensation to be taxed as costs, the compensation is not recoverable from the losing party unless it is taxed as costs in that suit. Edinger *v.* Thomas, 9 Colo. App. 151, 47 Pac. 847; Rowley *v.* Painter, 69 Iowa 432, 29 N. W. 401.

Officer may keep himself or hire another. Jones *v.* Thomas, 14 Ind. 474.

38. Snead *v.* Wegman, 27 Mo. 176.

39. **U. S.**—Starr *v.* Taylor, 3 McLean 542, 22 Fed. Cas. No. 13,319, as to live stock. **Me.**—Twombly *v.* Hunewell, 2 Me. 221. **Ore.**—Schneider *v.* Sears, 13 Ore. 69, 8 Pac. 841.

See also Baldwin *v.* Hatch, 54 Me. 167, holding that for the expense of keeping and selling attached goods, if enough has not been allowed by taxation of fees, the officer has the right to deduct from the funds in his hands a further sum sufficient to afford him reasonable compensation, but this should be done before he proceeds to satisfy the executions in his hands.

After Release of Property on Super-

lien that the charges should be taxed as costs and included in the execution.[40]

This priority of lien extends only to the avails of the property itself, which is so kept, and the officer cannot apply to the satisfaction of such untaxed charges, in preference to the payment of the execution, money which he receives from one who has become recognized to the plaintiff for costs.[41]

Between Officer and Parties. — In some cases the right of the officer to recover the expense of stationing a keeper over property attached has been recognized as a matter of contract between the officer and either the plaintiff or the defendant,[42] but an attorney cannot bind his client to the payment of an illegal charge.[43]

Amount of Allowance. — The amount should be limited to expenses that are reasonably necessary,[44] of which the court in which the attachment

sedeas.—Whether expenses touching attached property are a lien on the property after the release of the property by a supersedeas bond, quaere. Genesee County Sav. Bank *v.* Ottawa Circuit Judge, 54 Mich. 305, 20 N. W. 53.

40. McNeil *v.* Bean, 32 Vt. 429.

41. McNeil *v.* Bean, 32 Vt. 429.

42. Cutter *v.* Howe, 122 Mass. 541. See Brown *v.* Cooper, 65 How. Pr. (N. Y.) 126.

Under a statute providing that the sheriff shall be entitled to receive "all such necessary expenses incurred in taking possession of any goods or chattels, and preserving the same, as shall be just and reasonable in the opinion of the court," an officer who has taken possession of and cared for property attached at the request of the plaintiff, after which possession is surrendered to the defendant, is entitled to recover from the plaintiff what his time and services were reasonably worth. Addington *v.* Sexton, 17 Wis. 327, 84 Am. Dec. 745.

By dismissing the suit, an attachment plaintiff cannot relieve himself from liability for the expenses incurred by the officer in keeping the property until he can find some person representing the owner to whom he can deliver it at the risk and cost of the owner. Roberts *v.* Randolph, 17 Ark. 435.

A plaintiff who agrees to release the levy on the property attached, and to give an order to the sheriff for its restoration to the defendants, and if any have been sold, to deliver the proceeds also to the defendants, and performs this agreement, does not guaranty the good conduct of the sheriff; and is not liable for the expenses incurred in taking care of the property. McPherson *v.* Harris, 59 Ala. 620.

Without Express Promise To Indemnify.—Expenses incurred by an officer in supporting animals, attached upon mesne process by order of a plaintiff, may be recovered of such plaintiff, in case judgment is given in favor of the defendant, without an express promise by the plaintiff to indemnify the officer. Phelps *v.* Campbell, 1 Pick. (Mass.) 59.

43. King *v.* Shepherd, 68 Iowa 215, 26 N. W. 82.

Where the officer, at the request of the attorney for the attaching creditor, hired a certain person as custodian of the attached property, and the creditor knew of and made partial compensation for such employment, such creditor cannot resist a claim by the officer for the balance due on the expense. McDermott *v.* Murphy, 11 Mont. 122, 27 Pac. 334.

44. Seeman *v.* Tiedeman, 58 App. Div. 615, 68 N. Y. Supp. 401; Schneider *v.* Sears, 13 Ore. 69, 8 Pac. 841.

Statutory fees and expenses and costs of keeping. Ridlon *v.* Flanigan, 12 Hun (N. Y.) 115.

Four dollars a day were allowed for the services of a keeper of property remote from habitation and consisting of mines, mining machinery, tramway, store building and merchandise, houses, and supplies. Hood *v.* Hampton Plains Exploration Co., 108 Fed. 196.

If a horse is used by the officer enough to pay for his keep, no charge can be made. Dean *v.* Bailey, 12 Vt.

suit is pending should be the judge and not the officer.[45]

C. Surrender on Receiving Security. — Statutes generally provide for the release of the property upon the giving of security usually denominated a "forthcoming" or "delivery" bond. The directions of the statute must be followed,[46] though when the defendant has given

142. See also Patton *v.* Harris, 15 B. Mon. (Ky.) 607, holding that there should be an accounting for the reasonable hire of slaves levied upon.

45. Edinger *v.* Thomas, 9 Colo. App. 151, 47 Pac. 847; Schneider *v.* Sears, 13 Ore. 69, 8 Pac. 841. See also Irvin *v.* Real-Estate Bank, 5 Ark. 30, holding that the circuit judge, having all the facts before him, and the question not involving any principle of law, the appellate court was not at liberty to disturb the decision of the circuit judge.

The return of such officer on the writ, in which he adds to his fees a claim of the bailee for storage, is admissible for the purpose of showing that he was aware of the claim and admitted it, but not evidence of the amount due therefor. Fitchburg R. Co. *v.* Freeman, 12 Gray (Mass.) 401, 74 Am. Dec. 600.

Statutory Limit as to Time and Amount.—Where a statute limits the length of time for which a keeper might be retained and the price which may be paid, without a special order of court, an officer cannot charge a greater compensation or for a longer period than that prescribed by statute, in the absence of written consent or special order of the court. Leach *v.* Eastman, 182 Mass. 144, 65 N. E. 60.

46. Upton *v.* Philips, 11 Heisk. (Tenn.) 215, pointing out that the statute gives the defendant the option of giving a bond in double the amount of the demand or in double the value of the property attached.

Delivery Receipt.—Lannen *v.* Cimenera (Coun.), 80 Atl. 156.

"A bond given to release property from attachment may, according to its tenor or the circumstances, be one which in legal contemplation takes the place of the attachment lien, or one which is substituted for the property attached. Perry *v.* Post, 45 Conn. 354, 357. In the one case the attachment lien no longer exists; while in the other it does, and the bond is subject to its influence. 'Forthcoming' or 'delivery' bonds are, for obvious reasons, held to belong to the latter class. Schultz *v.* Grimwood, 27 R. I. 137, 141, 60 Atl. 1065, 114 Am. St. Rep. 33; Woodman *v.* Trafton, 7 Me. 178, 179; Hilton *v.* Ross, 9 Neb. 406, 410, 2 N. W. 862. In Perry *v.* Post, 45 Conn. 354, 357, we held that our statutory bond, given pursuant to the statute, also belongs to this class. The bond in that case, it will be observed, does not obligate the surety to pay the judgment, not exceeding a specified amount, in the event of the defendant's failure to do so, but to pay to the officer upon execution the actual value of the plaintiff's interest in the attached property at the time of the attachment, not exceeding the amount of the recognizance. General Statutes 1902, §853." Schunack *v.* Art Metal Novelty Co. (Conn.), 80 Atl. 290, 292, *per* Prentice, J.

Such a contract is not contrary to the policy of the law when under statute it is necessary for the debtor to give bond for the payment of the debt within thirty days after final judgment, in order to protect himself against the institution of proceedings in insolvency, in case he has other creditors. Hayes *v.* Kyle, 8 Allen (Mass.) 300.

When separate attachments have been issued against tenants in common, each owning an undivided half or the property attached, upon one of the tenants giving to the officer the amount of the appraisal of the property, the officer may deliver the property to such tenant. Gassett *v.* Sargeant, 26 Vt. 424.

If the interest of one joint owner of a ship is attached, and the other owners desire to send her upon a voyage, they may be compelled to give security for the lien acquired by the attachment, as well as for any other interest. Buddington *v.* Stewart, 14 Conn. 404.

A good consideration is stated, when the bond contains an acknowledgment by the defendants that they have received of the plaintiff certain property which was under attachment by him on a writ, and, in consideration of his having delivered the property to them,

bond under the statutory permission, immaterial defects therein may be disregarded.[47]

As a Common Law Bond.— A bond with conditions not strictly in the form or on the conditions required by statute and which is consequently invalid as a statutory bond when it is voluntarily given upon

they agree to pay such amount as may be recovered in the suit, within thirty days from final judgment. Hayes *v.* Kyle, 8 Allen (Mass.)) 300.

Deposit of Money in Lieu of Bond.— Under a statute providing that the defendant may give a bond to perform the judgment of the court, the officer is not authorized to receive money in lieu of such bond, and, the money not being a substitute for the bond prescribed by statute, the officer is liable to the plaintiff for damages suffered by reason of the return of the property. Fondren *v.* Norton, 86 Ark. 410, 111 S. W. 647. But in Solomon *v.* Saly, 6 Colo. App. 170, 40 Pac. 150, it was held that in order to obtain the release of property attached, the defendant may turn over to the officer sufficient money to satisfy the claim and costs, and have it subjected to the writ to abide the decision upon the attachment.

A promissory note given to an officer to induce him to relinquish or forbear making an attachment of personal property of a third person, on a writ against such third person, is founded on a sufficient and not illegal consideration. Foster *v.* Clark, 19 Pick. (Mass.) 329.

47. Troy *v.* Rogers, 116 Ala. 255, 22 So. 486, 67 Am. St. Rep. 110 (where the bond recited an execution); Phillips-Buttorff Mfg. Co. *v.* Williams (Tenn.), 63 S. W. 185. See also Upton *v.* Philips, 11 Heisk. (Tenn.) 215.

Form.—"We, Geo. W. Stewart, principal, and John Tucker, surety, acknowledge ourselves indebted to Phillips-Buttorff Mfg. Co. and others, complainants in the cause of Phillips-Buttorff Mfg. Co. et al. vs. E. L. Williams et al., in chancery court at Smithville, Tennessee, in the sum of $2,800; but if, in the event said Geo. W. Stewart is cast in said suit wherein a stock of goods in storehouse on Wolf Creek in 16th civil district of Dekalb county has been attached, valued at $1,350, he, said Geo. W. Stewart, shall have the stock of goods and property forthcoming upon the final hearing of said cause, or pay the debts, interest, and costs sued for and recovered against G. W. Stewart, and also such decree as said goods may be held liable for, then this bond, which is given for the forthcoming and replevy of said goods attached in said cause, is to become void. This, Oct. 24, 1899. G. W. Stewart. John Tucker." Phillips- Buttorff Mfg. Co. *v.* Williams (Tenn.), 63 S. W. 185, 187.

Where the penalty of the bond is a few dollars more than double the amount of the plaintiff's demand, with a condition that the defendant shall abide by and perform and satisfy the judgment of the court, this must be considered as a bond in double the plaintiff's demand, conditioned to pay the same, if the plaintiffs recover, and if the defendant executed a bond covering the demand when in reality the property attached was only of half value sufficient to pay it, in the absence of fraud or other equitable defense, there can be no relief. Upton *v.* Philips, 11 Heisk. (Tenn.) 215.

Where the replevy bond omitted seventy-four cents in describing the attachment, this is an immaterial variance and the identity of the attachment may be shown by parol proof. Mitchell *v.* Ingram, 38 Ala. 395.

It is too late to object to the sufficiency of a replevy bond on a motion for a new trial, when the bond is not void. Willis *v.* Thompson, 85 Tex. 301, 20 S. W. 155.

Certificate and Endorsement of Writ on Giving Bond.—After the case has been certified to the Common Pleas Division for jury trial, and before final judgment has been rendered, bond may be given and the clerk of the District Court may issue a certificate copy of the writ, under the statute with endorsement that bond has been accepted and personal property released from the attachment. Stone *v.* People's Sav. Bank, 20 R. I. 427, 39 Atl. 753.

sufficient consideration to secure a redelivery or release of the property attached, is good as a common law bond.[48]

Giving an appeal bond does not impair the lien of attachment,[49] or destroy a bond given to prevent attachment.[50]

The time within which the security may be given is dependent upon the statute.[51]

Effect of Giving Security.[52] — **In General.** — The bond stands in place of the property released from the attachment,[53] and where the attach-

48. **Cal.**—Bailey *v.* Aetna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416. **Okla.** Blanchard *v.* Anderson, 113 Pac. 717, where the statute provided for the return of attached property to the person in whose possession it was found, while the bond sued upon provided for delivery to another claimant who had intervened in the original suit to establish ownership. **Tex.**—Colorado Nat. Bank *v.* Lester, 73 Tex. 542, 11 S. W. 626.

49. Magill *v.* Sauer, 20 Gratt. (Va.) 540.

50. Such bond is not within a statute providing that "the lien continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, in which case the lien of the judgment, and any lien by virtue of an attachment that has been issued and levied in the action, ceases." Ayres *v.* Burr, 132 Cal. 125, 64 Pac. 120.

51. Hesser *v.* Rowley, 139 Cal. 410, 73 Pac. 156, holding that under the statute, the sheriff, in his official character, has no authority to release real estate from attachment, except while the writ of attachment under which the levy has been made, remains in his possession, and before it is returned.

"It is the duty of the officer levying the attachment to take the bond, if tendered, at any time before he has made sale of the property or return of the process, and, in case bond is tendered, to fix the value of the attached property and judge of the sufficiency of the security. Mill. & V. Code, §4251; Shannon's Code, §5270. The bond, if given to the officer levying the attachment, is to be returned by him with the attachment; and, whether given to such officer, or to the clerk of the court issuing the attachment, or to the justice of the peace issuing it, the bond becomes a part of the record in the case. Mill. & V. Code, §§4254, 4257; Shannon's Code, §§5273, 5276." Phillips-Buttorff Mfg. Co. *v.* Williams (Tenn.), 63 S. W. 185, 190.

After Return Day.—Smith *v.* Packard, 98 Fed. 793, 39 C. C. A. 294, under an Illinois statute.

52. See *infra*, XVIII, and the title "Bonds."

53. **U. S.**—Pacific Nat. Bank *v.* Mixter, 124 U. S. 721, 8 Sup. Ct. 718, 31 L. ed. 567; Inbusch *v.* Farwell, 1 Black 566, 17 L. ed. 188. **Mich.**—Reynolds *v.* Marquette Circuit Judge, 125 Mich. 445, 84 N. W. 628. **Tenn.**—Phillips-Buttorff Mfg. Co. *v.* Williams, 63 S. W. 185.

Fixing Liability of Surety.—A bond given by a defendant under the statute, is in most respects, similar to an appeal bond, and upon non-payment of the proper judgment in the attachment suit, its condition will have been broken, but it does not make the surety a party to the proceedings then in progress, or authorize the court to render a judgment against the surety in that suit. Brayton *v.* Freese, 1 Ind. 121. See the title "Principal and Surety."

Lien Destroyed.—In Rosenthal *v.* Perkins, 123 Cal. 240, 55 Pac. 804, the court said: "Our statute and the inferences which follow from the decisions of this court seem to put that question at rest. Upon the execution of the bond, such as was given by defendants, 'an order may be made releasing from the operation of the attachment any or all of the attached property (Code Civ. Proc., §554); it is impossible that property can be 'released from the operation of the attachment' if it yet remains subject to the attachment lien. It was assumed in Mullally *v.* Townsend, 119 Cal. 47, that the debtor who had obtained the release of property under this section could, by mortgaging it, create a lien which would be superior to the execution in the attachment suit; and in Metrovich

v. Jovovich, 58 Cal. 341, that he could sell it; and in Risdon Iron, etc., Works *v.* Citizens' Traction Co., 122 Cal. 94, it was held that when property is released by order of court as exempt from levy, a dissolution of the attachment is, as to that property, accomplished. The decisions in other states where the practice allows a just analogy to be drawn with the case at bar confirm this view. (Waterman *v.* Treat, 49 Me. 309; 77 Am. Dec. 261; Waterhouse *v.* Bird, 37 Me. 326; Robinson *v.* Mansfield, 13 Pick. 139; Lawrence *v.* Rice, 12 Met. 538; Drake on Attachment, secs. 344, 357. See also, Schuyler *v.* Sylvester, 28 N. J. L. 487; Bunneman *v.* Wagner, 16 Ore. 433, 8 Am. St. Rep. 306). In some jurisdictions the action in which chattels are attached has been regarded as one *in rem* as to those goods; as in Gass *v.* Williams, 46 Ind. 253, one of the cases most relied on by defendants; and in Bell *v.* Pearce, 1 B. Mon. 73. In that view of the nature of the action, there may be ground for holding that the property continues in the custody of the court by virtue of the action against it, even though the debtor lawfully regains possession."

Lien Not Destroyed.—Under Colorado Code, §§111, 112, though the property be released the lien is not destroyed. In Chittenden *v.* Nichols, 31 Colo. 202, 72 Pac. 53, the court, after *citing* Stevenson *v.* Palmer, 14 Colo. 565, 24 Pac. 5, 20 Am. St. Rep. 295; Edwards *v.* Pomeroy, 8 Colo. 254, 6 Pac. 829; Schneider *v.* Wallingford, 4 Colo. App. 150, 34 Pac. 1109, said: "In the Edwards case, although the question was not directly involved, the court, speaking by Beck, C. J., construed them to mean that the giving of the bond releases the property attached, but does not discharge the attachment. This statement of their meaning was germane to the question then before the court, and was the enunciation of a principle by which it seems to have been guided in its decision of the cause. Stevenson *v.* Palmer arose out of an attachment proceeding in a justice's court, and the bond was given under section 2015 of the General Statutes of 1883. The language of that statute is not literally the same as the code provision under consideration, but quite similar. But the court discusses generally what effect should be given to so-called forthcoming or redelivery bonds, and does not limit its decision to a case arising upon a bond given under the justice's act; and, after stating that there was an irreconcilable conflict in the authorities, concluded that the weight of authority was that in an attachment proceeding the giving of a so-called redelivery bond, though it operates as a withdrawal or release of the property from the custody of the officer, does not displace or dissolve the lien of the attachment. The Court of Appeals, in Schneider *v.* Wallingford, without extended discussion, came to the same conclusion, basing it upon the decisions of the Supreme Court. If we considered the question *res nova* in this jurisdiction, it might be that we should find ourselves not united as to which line of decisions should be followed. But we are of opinion that the question is *stare decisis*. There is one consideration which weighs strongly with us in adhering to the former conclusion of this court, which is that the language of the code provisions which it is now said should be otherwise construed is the same as it was when that instrument was first enacted in 1877, and has remained the same throughout its successive revisions." And see Lee *v.* Newton, 27 Ky. L. Rep. 1004, 87 S. W. 789. So under Miss. Rev. Code, 1892, §147. C. D. Smith & Co. *v.* Lacey, 86 Miss. 295, 38 So. 311, 109 Am. St. Rep. 707.

"The lien, so-called, arises upon the making of the levy (that is, the seizure), and continues so long as the property remains in the custody of the law. For that purpose a forthcoming bond takes the place of the possession of the officer; and in this case, the forthcoming bond having been taken, it is of no significance that the officer wrote upon the writ a release of the levy. The levy had served its purpose of bringing the property into legal custody,—which is the whole essence of the lien,—and the bond operated to continue that custody, as anyone reading the entire return was bound to know; and the covenant of the plaintiff in error was that the property should be so held by the attachment defendants, to whose possession the sheriff, by reason of the execution of the bond should redeliver it. Indeed, it has been held that the taking of the bond is equivalent to a seizure (Jayne *v.*

ment has been levied on both real and personal property, the replevin bond will be regarded as applying to the personal property only.[54] Defects in the service are not waived,[55] and the court cannot appoint a receiver and take the property out of the hands of the claimant,[56] and has no power to make an order charging the defendant as garnishee.[57] The officer is not bound to return the property to the place from which he removed it under a statute which provides that he shall "surrender" it,[58] and it has been held that while the replevin action is pending the property cannot be seized under another attachment either at the suit of the same plaintiff[59] or of any other person.[60] Property not included in the appraisal should not be delivered to the debtor,[61] and when judgment against one only of two attachment defendants is obtained, a bond that the sureties "will pay whatever judgment may be rendered against said defendants" must be read by the light of the statute, and interpreted according to the meaning and intention of the parties, and is security for the judgment obtained against the single defendant.[62]

As an Appearance. — In some cases it is held that where the recognizance entered into by the defendant and his sureties is in conformity to the statute and is taken and approved by the court, and the order dissolving the attachment is duly entered, the character of the suit as a proceeding *in rem* is thereby completely changed, and the suit thereupon becomes a proceeding *in personam*,[63] while other cases hold that the giving of a bond for security is not an appearance in the case and has not the effect of subjecting the defendant to a personal judgment.[64]

Dillon, 28 Miss. 283; Walker *v.* Shotwell, 13 Smedes & M. 549; Pugh *v.* Calloway, 10 Ohio St. 488; Roebuck *v.* Thornton, 19 Ga. 149), and will preclude the officer, in an action of trespass, from denying the fact of seizure (Portis *v.* Parker, 8 Tex. 23). We find nothing inconsistent with our view of this question in Sherraden *v.* Parker, 24 Iowa 28, or Lumsden *v.* Leonard, 55 Ga. 374." Smith *v.* Packard, 98 Fed. 793, 798, 39 C. C. A. 294.

54. Miles *v.* Davis, 36 Tex. 690.

55. Reynolds *v.* Marquette Circuit Judges, 125 Mich. 445, 84 N. W. 628.

56. Phillips-Buttorff Mfg. Co. *v.* Williams (Tenn.), 63 S. W. 185; Jones *v.* Stewart (Tenn.), 61 S. W. 105. See the title "Receivers."

57. Stone *v.* People's Sav. Bank, 20 R. I. 427, 39 Atl. 753.

58. Clark *v.* Wilson, 14 R. I. 13.

59. Shull *v.* Barton, 56 Neb. 716, 77 N. W. 132, 71 Am. St. Rep. 698, wherein the court said: "The party then who has attached property, if it be replevied from him or from the officer who executed his writ of attachment, must follow the replevin action to final judgment, and if successful satisfy his claim by an execution upon the judgment and, failing in that, look to the replevin bond, failing in this, to the negligence or bad faith of the officer in taking an insufficient replevin bond, if such were the facts."

60. Bates County Nat. Bank *v.* Owen, 79 Mo. 429.

61. Snow *v.* Cunningham, 36 Me. 161, holding that, on the attachment of a vessel on the stocks, when the bond was given by the debtor without an appraisal of the spars and rigging, which were not fitted or attached to the vessel, and they with the vessel were delivered to the debtor, the spars and rigging were subject to a subsequent attachment.

62. Heyneman *v.* Eder, 17 Cal. 433.

63. **Ill.**—Hill *v.* Harding, 93 Ill. 77; Hughes *v.* Foreman, 78 Ill. App. 460. **Ind.**—Brayton *v.* Freese, 1 Ind. 121; Jones *v.* Gresham, 6 Blackf. 291. **Pa.**—Brenner *v.* Moyer, 98 Pa. 274.

64. Reynolds *v.* Marquette Circuit Judge, 125 Mich. 445, 84 N. W. 628.

D. Sale. — **1. The Right To Sell.** — The writ of attachment confers no right to sell the property except in special cases when ordered by the court.[65] An order after judgment for sale is a protection to the officer and it is his duty to execute it.[66] If part of the debt be not due the sheriff, on the final process, can sell no more of the property than may be required to pay the amount due including costs,[67] but the fact that the officer sold more than was needed to satisfy the attachment did not render the sale illegal, when the last article to be sold was indivisible.[68]

After Property Surrendered on Bond. — Where property attached has been replevied, an order of sale of the property made after judgment is not proper.[69]

After Attachment Dissolved. — After an attachment has been dissolved, the court has no authority to direct that the property which had been attached be sold.[70]

Real Estate. — Some statutes provide that attached real estate shall not be sold or ordered to be sold until the personal assets have been subjected or it has been ascertained that there are none,[71] and where

See also Hilton *v.* Consumers' Can Co., 103 Va. 255, 48 S. E. 899, wherein the court said: "If the judgment of the court had been to sustain the attachment, then the bond stood as a security in lieu of the property upon which the attachment had been levied. But the court abated the attachment, the very ground-work of the whole proceeding, and with it the bond fell, and became of no effect."

65. Culver *v.* Rumsey, 6 Ill. App. 598; Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012.

Sale under a void judgment is unlawful. Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012.

66. State *v.* Manly, 11 Lea (Tenn.) 636.

Such an order is a final judgment beyond which the officer is not required to look (State *v.* Manly, 15 Ind. 8), and he cannot refuse because the plaintiff has refused to give a bond of indemnity (State *v.* Manly, 11 Lea [Tenn.] 636).

When property attached is by the court ordered sold as perishable, or on an appraisement of the property, the officer is bound to make sale thereof. Kennedy *v.* Pike, 43 Me. 423. See also **Mass.**—Pollard *v.* Baker, 101 Mass. 259. **Mo.**—Oeters *v.* Aehle, 31 Mo. 380. **N. H.**—York *v.* Sanborn, 47 N. H. 403.

67. Dronillard *v.* Whistler, 29 Ind. 552.

68. Wheeler *v.* Raymond, 130 Mass. 247.

69. Weathers *v.* Mudd, 12 B. Mon. (Ky.) 112. It has been held, however, that where a bond given is for a return of the property as distinguished from one merely to perform the judgment of the court, the court has not lost its power over the attached property, and may order it to be sold as perishable pending the attachment proceedings. Lee *v.* Newton, 27 Ky. L. Rep. 1004, 87 S. W. 789.

70. Ah Lep *v.* Gong Choy, 13 Ore. 205, 9 Pac. 483.

But the mere act of dissolving the attachment on one article appraised would not make the sale of the remainder of the property invalid, when the debtor did not require the goods to be delivered to him, and offer to deposit the money or give the bond. Wheeler *v.* Raymond, 130 Mass. 247, the court saying that the debtor did not require the goods to be delivered to him, and offer to deposit the money or give the bond.

71. See Davidson *v.* Simmons, 11 Bush (Ky.) 330; Camden *v.* Haymond, 9 W. Va. 680.

Necessity for Affidavit.—No order for the sale of real property attached of an absent defendant can be made unless an affidavit be filed that the defendant has no personal property, or not sufficient to satisfy the demands in the state known to the plaintiff; the making of such order of sale without the affidavit is an error of the court,

the attachment is of the interest of only one co-tenant, the sale of the whole is wrongful.[72]

Describing Property in Order of Sale.—It has been held that the judgment and order of sale are the sources of power in an officer selling under a decree foreclosing the attachment, and when these direct the sale of property not identified by either, directly or by reference, the sale is a nullity for want of description of the thing sold.[73]

Restitution Bond.—Statutes in some jurisdictions require a restitution bond or a bond of indemnity to be executed to the defendant in the attachment, before his property be sold, where the defendant is a non-resident or there has been substituted service. In such case, when this has not been done, a sale is invalid,[74] and the execution of a bond at a subsequent term to that at which the decree was rendered does not cure the error committed by the court in rendering the decree before

not a clerical error. Payne *v.* Witherspoon, 14 B. Mon. (Ky.) 270.

The affidavit required by statute of the non-existence of personal property before an order for sale of attached lands can be made, is not required where a constable has levied an attachment on land and certified that the defendant has no personal property. Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550.

Before Judgment.—The failure of the plaintiff to file the affidavit before judgment for sale of the real estate does not render the judgment void, nor in anyway operate to annul the lien acquired by the levy of the attachment. Fremd *v.* Ireland, 17 Ky. L. Rep. 1140, 33 S. W. 89, in which case there was a showing that defendant had no personal property in the state known to affiant, or not enough to satisfy the plaintiff's demand.

72. Thompson *v.* Baker, 74 Me. 48.

73. McDonald *v.* Red River County Bank, 74 Tex. 539, 12 S. W. 235, the court saying that, had an ordinary execution issued and been levied on the property in controversy a sale made thereunder might have passed title to the property, although there was no proper decree of foreclosure.

Whether property has been duly attached and appraised, are questions for the decision of the court, in determining whether an ordinary judgment only should be rendered for the plaintiff, or whether the attached property should be ordered to be sold. Foster *v.* Dryfus, 16 Ind. 158.

On an attachment suit in the county court, where a simple judgment was entered, a sale is not invalid because made upon a motion for an order of sale to sell the attached property and an order of sale issued at the following term of court, as the same strictness is not required of courts of inferior jurisdiction as of courts of general jurisdiction. Cozine *v.* Hatch, 17 Neb. 694, 24 N. W. 389.

74. **Ky.**—Harris *v.* Adams, 2 Duv. 141. **Miss.**—Hiller *v.* Lamkin, 54 Miss. 14. **W. Va.**—Hall *v.* Lowther, 22 W. Va. 570.

In Bush *v.* Visant, 40 Ark. 124, it was held that a statute providing that "no sale (of the land attached) shall be made until the plaintiff shall execute bond to the defendant in the manner now prescribed by law," has reference to the bond required where the defendant has been constructively summoned, and has not appeared, and who is allowed the right to a retrial at anytime within five years after judgment.

It has been held that such bond should be executed, according to the statutory requirements, before the order of sale is made (Harris *v.* Adams, 2 Duv. [Ky.] 141) before the execution issues (Carter *v.* Brandy, 71 Miss. 240, 15 So. 790, holding further that the fact that the decree included a direction for a special writ does not make applicable the rule denying the assailability collaterally of a decree) or before the sale (Fitch *v.* Ross, 4 Serg. & R. [Pa.] 557).

The plaintiff is entitled to a judgment of condemnation, with the right of execution on compliance with the

the execution of the bond.[75] But when the time of redemption by the defendant has passed, the plaintiff is not required to give the bond.[76]

2. Perishable Property. — Statutes generally provide for the sale of attached personal property pending the attachment proceedings and before judgment, when the property is perishable.[77] It has been held that the court cannot order,[78] nor the sheriff compel, a sale of perishables except under express statutory authority.[79] On the other hand, a rule has been laid down that even in the absence of statutory regulation, where an officer levies an attachment upon perishable property,

statute. Dawson *v.* Contee, 22 Md. 27; Walters *v.* Munroe, 17 Md. 505.

75. Calk *v.* Francis, 2 B. Mon. (Ky.) 42.

76. Wallace *v.* Forrest, 2 Har. & M. (Md.) 261.

77. Before a sheriff sells attached property as perishable he must have an order from the court, which must be predicated upon a sworn statement by the sheriff showing the character of the property claimed to be perishable and the amount thereof. Work *v.* Kinney, 5 Idaho 716, 51 Pac. 745.

Withdrawing Application for Sale.—An attaching creditor may withdraw his application to sell under the statute, and direct the officer to continue to hold the property, and the attachment remains valid. Smith *v.* Wenz, 187 Mass. 421, 73 N. E. 651.

Conclusiveness of Determination as to Necessity of Sale.—When property has been ordered to be sold as in its nature perishable, or by reason of the cost of keeping it, it will be presumed that the evidence fully authorizes the sale in the absence of anything showing the contrary when the evidence upon which the court acted is not required to be in writing and incorporated in the record. Dunn *v.* Salter, 1 Duv. (Ky.) 342; Miller *v.* McCrory, 3 Ky. L. Rep. 774.

Under a statute vesting power in the court to make an order to sell attached property when likely to depreciate in value, to be exercised in the discretion of the court whenever the facts specified in the statute exist, where facts were made to appear by sworn affidavits upon which an order of sale was made, whether such affidavits were true or false cannot affect the order, on motion to set it aside made months after defendant must have known of its existence, and after the proceedings under it were practically concluded (Shakman *v.* Koch, 93 Wis. 595, 675, 67 N. W. 925). But when there is nothing to show that there was any proof heard on the motion or that the securities on the forthcoming bond were insolvent, there is error in directing a sale (Lee *v.* Newton, 27 Ky. L. Rep. 1004, 87 S. W. 789). And by some statutes the determination of appraisers that the property is such or so conditioned, as to be the subject of sale under the statute, is made conclusive (Kennedy *v.* Pike, 43 Me. 423; Crocker *v.* Baker, 18 Pick. (Mass.) 407). In any event, the validity of the order cannot be drawn in question collaterally (McCreery *v.* Berney Nat. Bank, 116 Ala. 224, 22 So. 577, 67 Am. St. Rep. 105). But a sale will be set aside where the levy was made after the return day of the writ and after it had been actually returned into court, and after default had been entered (Osborn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413).

Notice.—Where an order for the sale of attached property was made by a justice of the peace, without previous notice of intention to apply for the order, because it was impracticable to have such notice perfected, it was not essential to the validity of the order that it should state the facts showing why the notice was not given. Moore *v.* Smith, 96 Ga. 763, 22 S. E. 297.

Part of Property Perishable.—Davis *v.* Ainsworth, 14 How. Pr. (N. Y.) 346.

A writ of error and supersedeas does not prevent a sale of property conceded to be perishable in its nature. State *v.* Hull, 37 Fla. 579, 20 So. 762.

78. Rich *v.* Bell, 16 Mass. 294; Mosher *v.* Bay Circuit Judge, 108 Mich. 579, 66 N. W. 478. See Henisler *v.* Friedman, 1 Phila. 290, 9 Leg. Int. 11, 5 Pa. L. J. 147, 4 Am. L. J. 355.

79. Work *v.* Kinney, 5 Idaho 716, 51 Pac. 745.

it is his duty, as the custodian of that property, not to permit it to become worthless by natural decay, but to sell the same and account only for the net proceeds.[80]

Consent. — Where there has been a lawful attachment, an agreement of parties to sell and apply the proceeds to the payment of the debt is valid, whether the statutory provisions for that purpose have been strictly pursued or not.[81]

Rights of Claimants of the Property. — On a sale of perishable property by order of the court, a person claiming to be the real owner of the property and not being the defendant in the attachment, and having lost his title to the property, may either pursue the proceeds while held in the custody of the law,[82] or may sue the sheriff.[83]

80. Cilley *v.* Jenness, 2 N. H. 87. See also Young *v.* Kellar, 94 Mo. 581, 7 S. W. 293, 4 Am. St. Rep. 405.

81. Kendallville First Nat. Bank *v.* Stanley, 4 Ind. App. 213, 30 N. E. 799. Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720.

Consent of only part of the attaching creditors will not confer authority (Rich *v.* Bell, 16 Mass. 294). And where, with the consent of all the creditors who had sued out attachments as well as of the debtor, the attached effects were sold by order of the court, and the proceeds paid, pursuant to that order, to the clerk, creditors who did not obtain judgments until after such consent order was made, cannot be heard to object to the manner in which the property was originally seized and brought into court, and made subject to its orders (Walter *v.* Bickham, 122 U. S. 320, 7 Sup. Ct. 1197, 30 L. ed. 1185). But on an agreement made by attaching creditors, in which a claimant joined, that the officer might sell the attached property, such agreement was not a consent by the claimant to apply the proceeds of the sale in payment of any debt or in satisfaction of any judgment (Sartwell *v.* Moses, 62 N. H. 355).

Estoppel To Set Up Want of Consent in Writing.—Where several creditors attach the property of their debtor, and he and they consent in writing to the sale thereof, and on the day appoint by the officer for the sale, other creditors cause him to attach the same property, and forbid him to pay the proceeds thereof to the first attaching creditors, but orally consent that he may proceed in the sale, they cannot be permitted, in a suit by them against the officer for not paying to them the proceeds of the sale, to allege that the sale was made without the written consent of the debtor and of all the attaching creditors. Eastman *v.* Eveleth, 4 Met. (Mass.)) 137.

82. Thalheimer *v.* Hayes, 14 Civ. Proc. 232, 15 N. Y. St. 662. See also Meyer *v.* Sligh, 81 Tex. 336, 16 S. W. 1022, holding that the fact that the proceeds had been already paid over by the clerk to the attaching creditor could make no difference; the court has control over its judgment until adjournment, and if it should appear that the money had been wrongly paid over to the planitiff in the suit, it would be proper for the court to direct the plaintiff to whom it had been so paid to refund it and to award judgment against him therefor.

An order of sale providing that the sheriff should "hold the proceeds subject to the ultimate decision of this cause," does not change the nature of the fund, nor deprive a claimant of the right to appear in the suit and assert title to the property. Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303.

It is too late to intervene in attachment proceedings to obtain a reversal of interlocutory orders for the sale of perishable property after the order has been granted and the proceedings fully complied with. State *v.* King, 46 La. Ann. 1421, 16 So. 310.

83. Megee *v.* Beirne, 39 Pa. 50; Meyer *v.* Sligh, 81 Tex. 336, 16 S. W. 1022.

In construing the word "perishable" some courts hold that the waste and decay to which the statute applies is that arising from the inherent nature and quality of the goods,[84] and not property which by extraordinary exposure may be liable to loss or destruction, if so situated that its safety can be provided for by the attaching officer,[85] while other cases hold that the term is not limited to property which is in its own nature subject to decay, but that the sale is authorized when, because either of its perishable nature or of the expense of keeping it until the termination of the litigation, it will prove or be likely to prove fruitless to the creditor.[86]

A leasehold interest in lands is not perishable property within the meaning of the statute,[87] nor is hay,[88] or cotton ginned and baled of a class of chattels expensive to keep or perishable in its nature.[89] But it has been held that a stock of groceries deteriorating,[90] a horse and carriage,[91] hogs,[92] and slaves, were properly ordered sold under the statute,[93] and so as to woolen goods such as fashionable tailors use to make up clothing the value of which would depreciate largely if not sold at once.[94]

84. Goodman *v.* Moss, 64 Miss. 303, 1 So. 241; Newman *v.* Kane, 9 Nev. 234. See Witherspoon *v.* Cross, 135 Cal. 96, 67 Pac. 18, wherein the court said that ordinarily, the word "perishable" means subject to speedy and natural decay, and quoted Black's Law Dictionary that "where the time is necessarily long, the term may embrace property liable merely to material depreciation in value from other causes than such decay."

In Schumann *v.* Davis, *supra*, the court said: "Our statute (Code §656) provides that if property attached, 'other than a vessel,' is perishable, it may by order of the court be sold. This special exception is significant. Excepting a vessel from the term 'perishable' property implies that, but for the exception, a vessel might be sold as perishable property. The language certainly indicates that the term 'perishable' property was to receive a liberal, and not a literal, technical, or narrow, construction."

85. Oneida Nat. Bank *v.* Paldi, 2 Mich. N. P. 221.

86. McCreery *v.* Berney Nat. Bank, 116 Ala. 224, 22 So. 577, 67 Am. St. Rep. 105; State *v.* Hull, 37 Fla. 579, 20 So. 762.

Mere danger of fire is immaterial and does not require that such property as lumber and shingles (Mosher *v.* Bay Circuit Judge, 108 Mich. 579, 66 N. W. 478), or cross-ties should be sold as perishable (Goodman *v.* Moss, 64 Miss. 303, 1 So. 241).

87. Birmingham First Nat. Bank *v.* Consolidated Electric Light Co., 97 Ala. 465, 12 So. 71.

88. Newman *v.* Kane, 9 Nev. 234, in which case the jury found that for its preservation baling was necessary.

89. Weis *v.* Basket, 71 Miss. 771, 15 So. 659.

90. Martin *v.* Malseed, 1 W. N. C. (Pa.) 82.

91. Anonymous, 18 N. J. L. 26. See also Zimmerman *v.* Fischer, 13 Civ. Proc. (N. Y.) 224; Southern R. Co. *v.* Sheppard, 42 S. C. 543, 20 S. E. 481 (as to horses).

92. Kendallville First Nat. Bank *v.* Stanley, 4 Ind. App. 213, 30 N. E. 799.

93. Millard *v.* Hall, 24 Ala. 209.

94. Schumann *v.* Davis, 26 Abb. N. C. 125, 19 Civ. Proc. 348, 13 N. Y. Supp. 575, *disapproving* Fisk *v.* Spring, 25 Hun (N. Y.) 367, holding that to procure an order of sale under this statute, it must be shown that the property is inherently liable to deterioration and decay, and *approving* Webster *v.* Peck, 31 Conn. 495, holding that where, in the case of a levy upon personalty, the time before a sale can be made is necessarily long, a sale may be directed of property liable to material depreciation in value from other causes than delay.

In Fisk *v.* Spring, 25 Hun (N. Y.) 367, 62 How. Pr. 510, 1 Civ. Proc. 378, referred to above, it was held that

3. Conduct of Sale. — a. *Compliance With Law.* — An officer cannot make a sale of the property which will bind the owner, without a strict compliance with the law.[95]

b. *Time of Sale.* — The time at which a sale under attachment may take place depends upon the circumstances of the sale and the statutory authority,[96] or upon the order of the court.[97]

c. *Notice.* — An order of court directing the sheriff to "proceed to sell" certain property in his hands, which he had attached, and "pay the proceeds into court," is a sufficient authority to him to make the sale, without any process or copy of the order from the clerk.[98] The

underwear, neckties, shirts, jewelry and umbrellas, could not be sold as perishable though their value would depreciate by change of fashions, but that kid gloves may be sold as they are inherently perishable. See the title "Shipping."

A statute authorizing the sale of perishable articles does not apply to attachments against vessels and steamboats, authorized by other statutory provisions. Bryan *v.* The Enterprise, 53 N. C. 260.

95. Kirby *v.* Coldwell, 26 Miss. 103. See also McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782, wherein the court said: "The sale made was neither void nor voidable, but passed title to the defendant at the price which he bid, and if there were irregularities in connection with it, it is the sheriff that is responsible and not the defendant."

A sale of property by the bailee not made in pursuance of the statute and not authorized by the parties operates to dissolve the attachment. Eldridge *v.* Lancy, 17 Pick. (Mass.) 352.

Officer a trespasser if he sells chattels without pursuing the statutory provisions, and the defendant prevails. Wallis *v.* Truesdell, 6 Pick. (Mass.) 455.

Private Sale Not Authorized.—Culver *v.* Rumsey, 6 Ill. App. 598.

96. **Not Less Than Four Days From Appraisement.**—Knight *v.* Herrin, 48 Me. 533, the court saying that before appraisal, the officer holds the property by attachment on a writ; after, it is liable to seizure as on execution, and is to be sold in the same manner as if so seized. See also Sumner *v.* Crawford, 45 N. H. 416, holding that the statute means four days from time of seizure and not from a certificate of examiners.

Before the service of the writ is completed, by the delivery of a copy of it to the defendant, property attached may be sold upon mesne process, in pursuance of the statute. Marshall *v.* Town, 28 Vt. 14.

After Return of Writ.—An order for the sale of property as perishable cannot be made until the court has jurisdiction by a return of the writ and service by publication. McLaughlin *v.* Jackson Circuit Judge, 147 Mich. 379, 110 N. W. 1079, 13 Detroit Leg. N. 1038.

In Eastman *v.* Eveleth, 4 Met. (Mass.) 137, it was held that a statute authorizing a sale of attached property when the debtor and all attaching creditors consent in writing, contemplates a sale as well after the return of the writ as before.

The statute fixing the day for all sheriff's sales applies to sales of personal property ordered pending an attachment. Bayly *v.* Weil, 28 La. Ann. 264.

97. Oeters *v.* Aehle, 31 Mo. 380.

98. Millard *v.* Hall, 24 Ala. 209. See also Wilson *v.* Garrick, 72 Ga. 660, holding that an order of sale issued by a justice of the peace is not invalid because it does not fully recite the facts authorizing the sale and that the defendant had the requisite notice of the same, as strictness of pleadings is not required in justices' courts.

Issued by Clerk of Unconstitutional Court.—Where two attachments were issued on the same cause of action, one out of the district court and the other out of the civil and criminal court, and the judge of the district court ordered the property to be sold, the purchaser obtained a good title, though the clerk, who was officer for both courts, issued an order as clerk of the civil and criminal court, which was afterwards declared to be an unconstitutional court, as the issue of a writ or formal tran-

statutory requirements as to notice must be complied with, both as to appraisal and sale[99] and time of sale,[1] but the law not making provision for notice to a mortgagee or other trustee on a sale of perishable property, such person is not entitled to notice.[2]

d. *Employment of Auctioneer.* — It has been held that a sheriff has no right to employ an auctioneer at the expense of the parties interested in the property,[3] but that an order appointing a commissioner to sell the attached property instead of adding to the judgment for the debt an order to the sheriff to sell the attached property, in the nature of a *renditioni exponas*, as provided by statute, is harmless, as the owner has the right to object to the sale by the commissioner if the property does not bring a fair price.[4]

e. *Cash or Credit.* — A sale may be made on a credit when a cash sale is not required by statute,[5] and where the statute requires a sale

script of the order by the clerk was unnecessary. Texarkana Clothing Co. *v.* Bisco (Tex.), 40 S. W. 559.

99. Witherspoon *v.* Cross, 135 Cal. 96, 67 Pac. 18 (as to sale of perishable property); Sawyer *v.* Wilson, 61 Me. 529.

Sufficiency of Actual Notice.—Where the statute requires written notice to be given by the officer to the other party, a sale of perishable property without such written notice is invalid though the owner may have had verbal notice and was present when the property was sold. Walker *v.* Wilmarth, 37 Vt. 289.

In Wheeler *v.* Raymond, 130 Mass. 247, however, it was held that notice of appraisal and sale to a second attaching creditor is for his benefit, and may be waived by him, and where he had actual notice, a formal notice is unnecessary.

Notice to Non-Resident Mortgagee.—Where on a sale of a stock of goods under an attachment, a warning order was not made on a non-resident mortgagee until the day of sale, and sale was made to the prejudice of the rights of the mortgagee, a re-sale was ordered. Simper *v.* Stein-Vogeler Drug Co., 18 Ky. L. Rep. 565, 37 S. W. 258.

Where property belonging to tenants in common has been attached upon the debt of both tenants, and an order of sale of the property has been made, all the parties to the attachments would be entitled to notice of the appraisal. Gasset *v.* Sargeant, 26 Vt. 424.

"Postponement" of Sale as a Notice.—When the officer had not given the required notice and had no authority to sell on the day designated, a mere "postponement" of the sale does not cure the defect in the original notice, and will not make a sale thereunder valid. Sawyer *v.* Wilson, 61 Me. 529.

It has been held that a statute does not contemplate successive notices in the course of the several stages of the disposition of perishable property, and that when notice was given to the owner that application for a sale had been made, and that appraisal at a certain time and sale thereunder would be made, a further notice of the appraisal having been made in point of fact, and of the sum for which the property was appraised, need not be given. Abbott *v.* Kimball, 23 Vt. 542.

1. Hewitt *v.* Durant, 78 Mich. 186, 42 N. W. 318, holding that where the sale could only take place in the day time between nine o'clock in the forenoon and the setting of the sun on that day, a notice of sale to take place at one o'clock in the forenoon instead of one o'clock in the afternoon is a mistake which could mislead no one.

2. Jackson *v.* Colcord, 114 Mass. 60.

3. Griffin *v.* Helmbold, 72 N. Y. 437.

4. Lemly *v.* Ellis, 143 N. C. 200, 55 S. E. 629.

5. Crocker *v.* Baker, 18 Pick. (Mass.) 407.

When the terms of credit are prescribed by the statute, they must be followed. Dunn *v.* Salter, 1 Duv. (Ky.) 342.

The officer can take, for the deferred purchase price, bonds in the nature of

for cash, the officer will be held responsible for the purchase price.[6]

f. *Sales En Masse.* — A sale of several tracts of land as a whole, that might conveniently and reasonably have been sold separately, and where a sale of part would have been sufficient to satisfy the debts of the plaintiff and the applying creditors, is void.[7]

4. Return and Confirmation. — When confirmation by the court of a sale under an attachment is required by the statute, a sale is not final and complete without such a confirmation.[8]

5. Resale and Redemption. — A resale need not be ordered on the ground of inadequacy of price, on motion of a junior attaching creditor, when such property is only part of that attached, and it appears that there is enough attached property to satisfy his claim, but if the application had been made by the debtor himself the case would have been different.[9]

The right of redemption which a statute gives for one year in case of a technical execution sale has been held to apply in the case of a sale under a judgment in a suit in which an attachment has been issued.[10]

6. Rights of Purchaser. — The title of a purchaser under a judgment and execution in an attachment proceeding dates from the time the property was attached,[11] and, while he takes subject to a lien

judgments, only when authorized by statute. Leavitt *v.* Goggin, 11 B. Mon. (Ky.) 229, holding that when not so taken, the payment of the bond can be enforced by the court by rule and attachment, or the parties may be remitted to their legal remedy by an action at law upon it.

A statute authorizing such bonds in sales under execution has no reference to sales under attachments. Levin *v.* De Lacey, 26 La. Ann. 270.

6. Appleton *v.* Bancroft, 10 Met. (Mass.) 231.

7. Johnson *v.* Garrett, 16 N. J. Eq. 31.

8. Greer *v.* Powell, 3 Met. (Ky.) 124.

Until the bid of the purchaser is accepted by the court, the purchaser cannot be compelled to comply with the terms of sale by payment of the purchase money. Freeman *v.* Watkins, 52 Ark. 446, 13 S. W. 79.

A return of the sale has been held not to be absolutely essential to its validity nor required to preserve the attachment, in the case of a sale by consent of all the parties as provided for by statute. Eastman *v.* Eveleth, 4 Met. (Mass.) 137.

The sale being void, it may be set aside without tendering the amount bid at the sale. Osborn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413.

9. Levi *v.* Goldberg, 76 App. Div. 210, 78 N. Y. Supp. 367.

10. Beard *v.* Wilson, 52 Ark. 290, 12 S. W. 567.

11. Howard *v.* Traer, 47 Iowa 702.

Interest Acquired by Defendant Since Original Levy.—"An order of sale under a foreclosure relates back and passes such interest as was subject to the lien foreclosed when it originated, and should in my judgment have the additional force of an execution against such interest as the judgment debtor has in the particular property at the time of the sale as was not reached by the original levy and foreclosure." *Per* William, J., in Willis *v.* Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715.

On Purchase of Part of Property by a Creditor.—Where property was attached at the suit of several creditors and sold under the statute, and it was subsequently agreed between the debtor and creditors that the actions should not be entered but that the proceeds of the sale should be applied by the officer to the payment of the claims of such creditors in the order of their respective attachments, it was held that the officer, who had paid the claims of some such creditors, could not recover of another of them the price of some of the property purchased by such

prior to the attachment lien,[12] the purchaser obtains a good title as against intermediate purchasers or incumbrancers.[13]

A deed may be made to an assignee of the purchaser.[14]

Perishable Property. -- The purchaser of perishable property sold under the statute takes a title good against all the world,[15] including third persons who claim to be owners[16] and free from prior liens.[17] While the purchaser is not obliged to account to the true owners of the property purchased,[18] the court should make such order as will protect the rights of the real owner in the proceeds.[19]

7. Disposition of Proceeds. -- a. *General Rules.* — It has been held that where there is only one attaching creditor, and sale of the attached property has been made under a judgment obtained by him, the money may take the same course as in an ordinary case of money collected on an execution, that is, the order need not direct the money to be paid into court, but it may be paid direct to the plaintiff.[20] But the fact that the proceeds have been paid to the plaintiff does not cut off the right of one thereafter intervening where no statute authorizes such payment

creditor at the sale, it appearing that the claim of the creditor exceeded such price. Ball *v.* Divoll, 17 Pick. (Mass.) 143, the court saying that any interference of the officer after such dissolution, without any new authority or writ, and without any claim for services and keeping and attaching, would be without right.

12. Betterton *v.* Eppstein, 78 Tex. 443, 14 S. W. 861; Riordan *v.* Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37.

13. Grigg *v.* Banks, 59 Ala. 311, holding that other creditors are entitled to any sum remaining in the hands of the purchasing creditor, as proceeds of the sale of the stock of goods in question, over and above the sum of his own debt against the attachment defendant, together with his proper expenditures in connection with the management and sale of the stock and the sum paid to the marshal in satisfaction of his bid.

No rule of law or public policy forbids a purchaser under an unrecorded deed and an attachment creditor whose attachment has priority over such deed, to agree on the purchase of the property at the attachment sale as against a purchaser of the property whose deed was recorded before the former one, but after the attachment. Robertson *v.* McClay, 19 Tex. Civ. App. 513, 48 S. W. 35.

14. Hall *v.* Hall, 12 W. Va. 1.

15. Young *v.* Keller, 94 Mo. 581, 78 S. W. 293, 4 Am. St. Rep. 406; Chambers *v.* Kelly, 12 Mo. 514.

Reason of the Rule.—"Such sales are made for the conservation of the rights or interests of every person owning or having claim upon the property which might be lost pending litigation from natural decay, waste, or deterioration in value. By the seizure under the attachment the custody of the property became that of the state, or as it is sometimes expressed, the custody of the law; and as a legal custodian it had the power to do whatever was necessary to preserve the property, which in law is the value of the thing, even though to do so it became necessary to change its form from goods to money." Betterton *v.* Eppstein, 78 Tex. 443, 14 S. W. 861.

16. Megee *v.* Beirne, 39 Pa. 50.

An order of court, made under the statute, authorizing a sale of perishable property attached, can only protect the officer so far as the sale under the order is concerned, but can not affect the original taking, or the question as to the right of property in the goods attached. Sterling *v.* Ripley, 3 Pin. (Wis.) 155.

17. Betterton *v.* Eppstein, 78 Tex. 443, 14 S. W. 861.

18. Meyer *v.* Sligh, 81 Tex. 336, 16 S. W. 1022.

19. Young *v.* Kellar, 94 Mo. 581, 7 S. W. 293, 4 Am. St. Rep. 406.

20. People *v.* Judges, 1 Dougl. (Mich.) 417.

and no notice is given of the application for the order to make such payment.[21]

Claim of Officer. — Where goods are attached and sold on mesne process, and the purchaser pays the price to the creditor, who recovers a judgment for an amount sufficient to absorb the whole, and the officer has no other claim upon the purchaser than as trustee for such creditor, a bill in equity will lie to compel an application of the amount so paid to the claim of the officer.[22] And where personal property is sold under the statute without the defendant's consent, and the defendant prevails, it has been held that the charges of the sale cannot be recovered from the officer who served the writ.[23]

A proper disposition of the property sold is shown by the certificate of appraisers upon the back of the writ, together with the return of the officer adopting such certificate as part of his return.[24]

Proceeds of Perishable Property. — When property has been sold before judgment, under statutory authority, because it was perishable or expensive to keep, the lien of the attachment is transferred from the property to the proceeds,[25] and the rule is the same where such property is sold by the officer or his agent with the consent of the owner

21. Simmons Clothing Co. *v.* Davis, 3 Ind. Ter. 379, 58 S. W. 655, where the court was held to have no authority to turn the money over without determining the question of ownership.

Where several independent attachments were sued out against one defendant, and interpleas were filed in each case, and the plaintiffs united in an application for an order of sale, the trial of an issue raised by an interplea in one of the cases resulting in a judgment for the intervener did not adjudicate any of the issues raised by the other interpleas, and the proceeds of the sale could not, pending those interpleas, be adjudged to the prevailing intervener in the one case. State *v.* Hockady, 132 Mo. 227, 33 S. W. 812.

Payment to Plaintiff on Indemnity Bond.—Payment of the proceeds to the plaintiff, by order of court, on his giving bond to indemnify the defendants, and all other persons, in case the suit should be decided against him, does not change the nature of the fund, nor prevent a claimant from appearing and asserting title to the property, nor does the fact that the claimant is prosecuting another suit in the same court for the same cause, prevent his appearing and asserting title to the property in the attachment case. Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303.

When other property had been attached in which other persons had acquired an interest, the proceeds of the sale of the perishable property is to be first applied. Forbush *v.* Willard, 16 Pick. (Mass.) 42.

On an Injunction Against Sale.— Where in violation of an injunction a plaintiff in attachment stood by and saw the officer sell attached property, the court may fine the plaintiff the amount for which the property was sold and order the amount of the fine to take the place of the property. Blood *v.* Martin, 21 Ga. 127.

22. Barker *v.* Barker, 47 N. H. 341.

23. Pollard *v.* Baker, 101 Mass. 259.

It has also been held, that the officer is accountable for the whole proceeds of the sale and cannot retain any part for his expenses in selling York *v.* Sanborn, 47 N. H. 403.

24. Kennedy *v.* Pike, 43 Me. 423.

25. Welsh *v.* Lewis, 71 Ga. 387.

Bonds taken by the sheriff for the purchase price of property sold as perishable, belong to the defendant in the attachment and not to the sheriff. Hoy *v.* Eaton, 26 La. Ann. 169.

The lien of an unforeclosed mortgage will attach to the money. Welsh *v.* Lewis, 71 Ga. 387.

Where, under a void attachment of perishable property, the property has been sold, the levy and sale are a tres-

and the attaching creditors.[26] The court has no authority to order the fund in the hands of the levying officer to be paid over to the plaintiff before there has been a final judgment on the attachment,[27] but may order the proceeds to be paid by the sheriff to his successor in office without notice to a second attaching creditor.[28]

In a case of excessive levy the surplus arising from the sale should be restored to the defendant,[29] or may be paid to another lienor.[30]

When the attachment is dissolved the proceeds should be restored to the defendant.[31]

Order Vacated on Appeal. — If a party has acquired the possession of property under orders which have been vacated on appeal, he may be required to return the proceeds into court, in order that it may be properly disposed of.[32]

Bond for Release of Proceeds. — The proceeds, taking the place of the property, are still subject to the right of the defendant to bond,[33] and such bond must be for such an amount, and be so conditioned, as though the property were still in the hands of the officer, in strict compliance

pass, and the proceeds of the sale in the hands of the clerk are not subject to the satisfaction of a judgment in the case in which the defendant personally appeared, and the attachment defendant may sue in tort or take the proceeds. Goldsmith *v.* Stetson, 39 Ala. 183.

26. Kendallville First Nat. Bank *v.* Stanley, 4 Ind. App. 213, 30 N. E. 799.

27. Lambert Hoisting Engine Co. *v.* Bray, 117 Ga. 4, 43 S. E. 371.

28. Tennett Strippling Shoe Co. *v.* Magill, 91 Mo. App. 570.

29. **N. Y.**—*In re* Randall, 1 Caines 513. **Vt.**—Marshall *v.* Town, 28 Vt. 14. **Wash.**—McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782.

Where an attaching creditor has security for his debt in the way of a chattel mortgage, though the creditor has the right to the issue of an attachment any party interested is entitled, upon his own motion, to have so much of the property, not embraced in the chattel mortgage, discharged from the attachment as is not needed for the payment of the claim. State Bank *v.* Mottin, 47 Kan. 455, 28 Pac. 200.

Where the action is based in part upon contract and in part upon tort, and the part in tort will not support an attachment, an attachment will not be discharged altogether, but if more property has been attached than could properly be attached upon that part of the claim which is based on contract, and if it is practicable to release it without releasing any part of that which may properly be held, the officer on a proper motion may be directed to make such release. Moses *v.* Arnold, 43 Iowa 187, 22 Am. Rep. 239.

30. Hurt *v.* Redd, 64 Ala. 85, holding that the surplus will go to the mortgagee under a mortgage recorded subsequent to the levy of the senior attachment but before the levy of a junior attachment.

31. Littlefield *v.* Davis, 62 N. H. 492; Petty *v.* Lang, 81 Tex. 238, 16 S. W. 999. And see *In re* Jones, 2 Kulp (Pa.) 126.

32. Baum *v.* Corsicana Nat. Bank, 32 Tex. Civ. App. 531, 75 S. W. 863, holding further that when he has been adjudged not to have a lien upon the property, such person cannot complain that the court has ordered the property to be subjected to the claim of another person.

33. State *v.* Richardson, 37 La. Ann. 261.

But this is not so if the property is sold on an agreement by attaching creditors and the defendant that "the proceeds of the sale shall remain in the hands of the sheriff, subject to the claims, rights and liens of the various alleged creditors." State *v.* Young, 40 La. Ann. 203, 3 So. 722.

with the statute, and cannot be limited to an amount equal to the proceeds of sale in the hands of the officer.[34]

b. *Different Creditors.* — Different attaching creditors take the proceeds under the rules of priorities applicable to successive attachments upon the property itself,[35] and where property was sold on the application of a junior attaching creditor, the lien of the senior attaching creditor on the property was not affected, and such junior creditor was not entitled to the proceeds of the sale.[36] And so, it has been held that where an interpleader recovers judgment, the costs and expenses of the attachment and sale are not properly chargeable against the fund arising from such sale.[37]

Notice of Motion or Order. — Where there are conflicting claims between several attaching creditors, the application of one of them to compel the officer to pay over the proceeds may be made by motion, and the officer should see that the other attaching creditors have notice if he wishes the decision to bind them,[38] and on a decree for the payment of proceeds to the attaching creditor it is proper for the defendant or his counsel to be notified of such order, that he may resist it or supersede it by appeal.[39]

34. State *v.* Judge, 44 La. Ann. 87, 10 So. 405.

35. Garrison *v.* Webb, 107 Ala. 499, 18 So. 297, on sale of the property as perishable.

On Sale by Consent of All But One Attaching Creditor.—Where several attachments were sued out and the property was sold by consent of all but the last attaching creditor, and the proceeds were not sufficient to pay the judgment upon the claim of the first attaching creditor, the officer is not liable to the last attaching creditor for such property. Munger *v.* Fletcher, 2 Vt. 524.

On Right Also to General Judgment. An attaching creditor who has by notice upon the defendant become entitled also to a general judgment, has the right to distribution of the proceeds of the sale of attached property according to the levy of his attachment. Atlantic, etc., R. Co. *v.* Florida Constr. Co., 51 Ga. 241.

Statutes providing for the pro rata distribution of the proceeds of attached property among different attachment creditors or among attachment and general execution creditors apply to the proceeds of perishable property as to other property. Donk *v.* Alexander, 117 Ill. 330, 7 N. E. 672.

An order of the court directing the clerk to make an estimate of the several amounts due the attaching or judgment creditors, is unnecessary, under a statute providing that the court shall direct the clerk to make an assessment of the several amounts each attaching or judgment creditor will be entitled to, when the judgments are rendered in a court in which the judge is ex officio clerk thereof. Rawles *v.* People, 2 Colo. App. 501, 31 Pac. 941.

When, after a sale of property under attachments and distribution of the proceeds, an attachment judgment creditor redeems and resells the attached property, other creditors whose attachments were returned to the same term with the redeeming creditor, are not entitled to share in the proceeds. Maloney *v.* Grimes, 1 Colo. 111.

36. Taylor *v.* Thurman (Tex.), 12 S. W. 614.

Where two attachments, issued from different courts, were levied upon personal property by the same officer, and the court issuing the junior attachment ordered the property to be sold under the statute, this could not interfere with the lien of the prior attachment. Weaver *v.* Wood, 49 Cal. 297.

37. Haywood *v.* Hardie, 76 N. C. 384.

38. Dixey *v.* Pollock, 8 Cal. 570, *citing* Learned *v.* Vandenburgh, 8 How. Pr. (N. Y.) 77.

39. Morrow *v.* Smith, 4 B. Mon. (Ky.) 99.

E. Actions For Interference With Possession. — By Attaching Officer. — An attachment gives to the officer the legal possession and the right to the possession of property attached, so that for illegally taking and detaining the property or for the conversion of it, the officer may maintain replevin,[40] or an action of trespass or trover,[41] and the officer may sue for a wrongful replevin.[42]

The possession of a deputy sheriff constitutes such a special property as to enable him to maintain trespass or trover against any one who unlawfully invades it,[43] and this against a subsequent attaching officer.[44] The officer's action will lie against the defendant,[45] or a receiptor as well as against a stranger.[46] The action cannot be main-

40. Kayser *v.* Bauer, 5 Kan. 202, holding that where an officer has obtained a judgment in a replevin suit for a return of the property to him, he can retake it and hold it under his original levy.

The officer may maintain an action for the property so long as he continues liable either to the attaching creditor for the same, or to the owner for its return upon a dissolution of the atachment. Collins *v.* Smith, 16 Vt. 9. See the title "Replevin."

41. La.—Paul *v.* Hoss, 28 La. Ann. 852. Nev.—Foulks *v.* Pegg, 6 Nev. 136. N. H.—Rochester Lumb. Co. *v.* Locke, 72 N. H. 22, 54 Atl. 705; Johnson *v.* Grand Trunk R. Co., 44 N. H. 626; Lathrop *v.* Blake, 23 N. H. 46. N. Y.—Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 539. Vt.—Fletcher *v.* Cole, 26 Vt. 170. See the titles "Trespass," and "Trover and Conversion."

Any act whatever which deprives the officer or his keeper of the control or removes any portion of the property from the place where he chose to have it deposited, will subject the trespasser to an action for such property. Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713.

If one of two joint owners of personal property forcibly take it from the officer who has taken it on legal process against the joint owner, the officer may maintain trespass therefor. Whitney *v.* Ladd, 10 Vt. 165.

Though the goods have been taken into another state, the officer may maintain trespass and recover damages for interfering with the possession of the bailee. Brownell *v.* Manchester, 1 Pick. (Mass.) 232.

Whether Property Exempt From Attachment.—In an action of trespass brought by the sheriff, the defendant cannot show that the property was exempt from attachment, as it lies alone with the debtor to make this objection as the right to enforce the exemption is personal to himself. Earl *v.* Camp, 16 Wend. (N. Y.) 562.

42. Merchants' Nat. Bank *v.* McDonald, 63 Neb. 363, 88 N. W. 492, rehearing denied, 63 Neb. 377, 89 N. W. 770.

43. Brownell *v.* Manchester, 1 Pick. (Mass.) 232; Gibbs *v.* Chase, 10 Mass. 125; Stanton *v.* Hodges, 6 Vt. 64.

An executor of the deputy may maintain such an action. Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

Relation of Officer and Deputies.—A deputy sheriff may maintain an action against the sheriff for the act of another deputy in wrongfully dispossessing him of attached property, under a rule that deputies of the same sheriff are separate officers, with distinct rights. Robinson *v.* Ensign, 6 Gray (Mass.) 305. See also Gordon *v.* Jenney, 16 Mass. 465; Thompson *v.* Marsh, 14 Mass. 269. But *compare* Perley *v.* Foster, 9 Mass. 112, holding that disputes between deputies of the same sheriff, respecting property attached by them, should be adjusted by the sheriff, and not by actions between the deputies.

44. Mills *v.* Camp, 14 Conn. 219, 36 Am. Dec. 488.

45. Blodgett *v.* Adams, 24 Vt. 23.

46. Carr *v.* Farley, 12 Me. 328, holding that the officer may, by action in trover recover possession from the receiptor before judgment has been obtained in the suit, where for any reason the officer may become liable to the creditor, without indemnity.

tained against a bona fide purchaser if the attachment was invalid,[47] or when the property was released at the direction of the creditors.[48]

Property Not Removed.— If the nature of the property is such that no lien is acquired without a removal, and it is not removed, the officer cannot maintain trespass against the general owner.[49] But though the property was not actually removed, yet, if the attachment was in conformity to the statutory provisions in the particular case, the officer acquires a sufficient possession to maintain such an action for any wrongful taking or conversion of it.[50]

By a Bailee or Receiptor.— And where the attaching officer delivers personal chattels to a third person for safe keeping, such third person is but the servant of the officer and has no such property in the chattels as will enable him to maintain trover[51] or replevin.[52]

Receiptor. — The cases are conflicting as to the right of a receiptor to maintain such an action, the difference apparently resulting from different conceptions as to the nature of the receiptor's possession. Thus it has been held in one case that a receiptor is a mere agent or servant of the officer, and cannot maintain trover in his own name,[53] while another case holds that such a person may sue in trover or trespass but cannot maintain replevin,[54] though still other cases, recognizing a receiptor as more than a mere naked bailee, hold that a receiptor may maintain actions of trover or trespass,[55] and of replevin.[56]

By a Party to the Suit. — The plaintiff in the attachment cannot sue for the property wrongfully taken from the officer, as the officer alone has the right to possession pending the attachment,[57] but when possession

47. Whitney *v.* Brunette, 3 Wis. 621, as to an attachment levied on property which had previously been sold to a *bona fide* purchaser, an action in trespass cannot be maintained by the officer. See also Dennie *v.* Harris, 9 Pick. (Mass.) 364, as to an attachment that was attempted to be made on goods upon which there was a lien for the payment of duties, and following the ruling as to the invalidity of the attachment in Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 683, *reversed* 5 Pick. (Mass.) 120.

48. Dickey *v.* Bates, 13 Misc. 489, 35 N. Y. Supp. 525.

49. Collins *v.* Smith, 16 Vt. 9.

50. Blodgett *v.* Adams, 24 Vt. 23; Lowry *v.* Walker, 4 Vt. 76, 5 Vt. 181.

51. Ludden *v.* Leavitt, 9 Mass. 104, 6 Am. Dec. 45.

52. Eastman *v.* Avery, 23 Me. 248; Waren *v.* Leland, 9 Mass. 265; Perley *v.* Foster, 9 Mass. 112.

Keeper.—Ill.—Hanchett *v.* Ives, 33 Ill. App. 471. **Mass.**—Brownell *v.* Manchester, 1 Pick. 232. **Vt.**—Stanton *v.* Hodges, 6 Vt. 64.

53. Dillenback *v.* Jerome, 7 Cow. (N. Y.) 294.

54. Waterman *v.* Robinson, 5 Mass. 303.

55. **A receiptor, who has given the actual custody of the property to another,** is in the constructive possession and may maintain trespass for its violation. Burrows *v.* Stoddard, 3 Conn. 160.

56. Peters *v.* Stewart, 45 Conn. 103, 29 Am. Rep. 663.

57. **Ind.**—Dufour *v.* Anderson, 95 Ind. 302. **Nev.**—Foulks *v.* Pegg, 6 Nev. 136. **N. H.**—Baker *v.* Beers, 64 N. H. 102, 6 Atl. 35. **N. J.**—Austin *v.* Wade, 3 N. J. L. 997. **Vt.**—Blake *v.* Hatch, 25 Vt 555.

The plaintiff's remedy in such a case is against the officer (Dobbins *v.* Hanchett, 20 Ill. App. 396), unless under special statute (Scott *v.* Morgan, 94 N. Y. 508).

had been given to the plaintiff, it has been held that he may sue for its invasion.[58]

The defendant in the attachment, with whom the officer has left the property, may, it has been held, maintain trespass or trover for the taking or conversion of the property.[59]

XV. THE LIEN. — A. NATURE OF LIEN. — The lien acquired by the attachment is a specific lien on the property attached,[60] though it is generally held that it is an inchoate or imperfect lien, dependent upon its levy without unnecessary delay,[61] and contingent or conditional until judgment is obtained upon the demand confirming the attachment.[62]

58. Kentucky Bank *v.* Shier, 4 Rich. (S. C.) 233.

An attachment creditor who receives the goods attached in satisfaction of his debt, may maintain trover for a seizure of them under a subsequent attachment. Fosgate *v.* Mahon, 16 Johns. (N. Y.) 162.

59. Mussey *v.* Perkins, 36 Vt. 690, 86 Am. Dec. 688.

On the other hand, it has been held that when property attached has been receipted for and left in possession of the defendant, and has been attached by another officer on another writ, the owner cannot, either as bailee of the first officer or as receiptor to him for the property, replevy the property from the second attaching officer. Brown *v.* Crockett, 22 Me. 537.

60. **Ark.**—Frellson *v.* Green, 19 Ark. 376. **Colo.**—Emery *v.* Yount, 7 Colo. 107, 1 Pac. 686. **Tenn.**—Snell *v.* Allen, 1 Swan 208.

The lien of the plaintiff is a vested right or interest of which he cannot be divested without his authority, or having his day in court, and a subsequent decree rendered in a court of another state, to which the attachment plaintiff was not a party adjudging the title to the property to be in another than the attachment defendant does not affect the attachment lien. McBride *v.* Harn, 48 Iowa 151; Hervey *v.* Champion, 11 Humph. (Tenn.) 569 (under a registry act giving priority to an attachment over an unregistered deed).

61. Goddard-Peck Grocery Co. *v.* Adler-Goldman Com. Co., 67 Ark. 359, 55 S. W. 136; Fuller *v.* Hasbrouck, 46 Mich. 78, 8 N. W. 697.

"The lien by attachment process is wholly dependent upon the subsequent recovery of a judgment on said attachment process in accordance with the provisions of the statute, and upon execution sued out on such judgment the same may be levied upon property so attached, and the lien of and execution goes back, and holds said property as of the date of said attachment." Reynolds *v.* Howell, 1 Marv. (Del.) 52, 31 Atl. 875.

Merely Conditional or Hypothetical Lien.—Green *v.* Dougherty, 55 Mo. App. 217.

62. **U. S.**—*Ex parte* Foster, 2 Story 131, 9 Fed. Cas. No. 4,960. **Ala.**—Scarborough *v.* Malone, 67 Ala. 570. **La.** Eyman *v.* Lawrence, 8 La. 38. **Md.** May *v.* Buckhannon River Lumb. Co., 70 Md. 448, 17 Atl. 274.

An attachment on mesne process, though in general terms, is sufficient to bind real property afterwards levied on, "provided it was followed up by a valid judgment, and an execution seasonably levied, by a specific and full description sufficient to identify the estate." Pratt *v.* Wheeler, 6 Gray (Mass.) 520.

When the defendant interposes by his plea an insuperable obstacle to any judgment upon the plaintiffs demand in his favor, this inchoate lien must necessarily be at an end in the judgment that will be rendered upon such plea. Lamb *v.* Belden, 16 Ark. 539. See also Reynolds *v.* Nesbitt, 196 Pa. 636, 46 Atl. 841, 79 Am. St. Rep. 736.

As against subsequent attachments, the rendition of a judgment in due form and course of law, is as necessary as the attachment itself, and "so is also, the issuing of an execution on that judgment, and duly charging the property therewith." Brandon Iron Co. *v.* Gleason, 24 Vt. 228.

On Real Estate.—Necessity for Service.—By the levy before the service thereof, a plaintiff acquires a provision-

Not a Right of Property. — The lien of an attachment is not a right of property, but is a simple preference or priority, created by law, to subject the property, by sale, to the satisfaction of the execution, or other process issuing on the judgment in the attachment suit, if the plaintiff

al lien upon the property levied on; but, before a valid judgment can be rendered by which the attachment lien is preserved and made effective, there must be proper service of the summons and the writ of attachment. Reynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4. See *supra*, XII.

Discussion as to Nature of Lien.— On holding that before obtaining a judgment, an attaching creditor has not a right to attack a prior judgment as having been confessed in fraud of creditors, the court, in Melville *v.* Brown, 16 N. J. L. 363, said: "The service of an attachment gives the plaintiff no lien in any proper or legal sense of the term. Goods when properly attached, are strictly in custody of the law. They are not in the custody, or subject to the control, of the plaintiff in attachment. . . . It is true, the defendant in attachment cannot recover the possession and control of the property, without satisfying or securing the plaintiff; not, however, because the plaintiff has a lien; but because the statute has impounded the goods for the double purpose of compelling an appearance by the defendant; and ultimately, satisfying the plaintiff, if anything is due to him." *Compare Ex parte* Foster, 2 Story 131, 9 Fed. Cas. No. 4,960; and Kittredge *v.* Warren, 14 N. H. 509.

In Shirk *v.* Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 331, the court said: "In strictness, neither a judgment nor an attachment is a lien upon land; both are simply charges against land existing by virtue of statute. . . . But usage has, perhaps, justified the employment of the term 'lien' as denoting a charge upon property created by statute, yet it is not to be supposed that such a charge is equal in dignity or force to that of a mortgage or of a lien created by equity; on the contrary, it is intrinsically nothing more than such a general charge as the statute creates."

"The levy, from its date, creates a lien—a right to charge the property levied upon, with the payment of the judgment rendered, in priority of any subsequent alienations the defendant may make, or of any subsequent incumbrances he may create, or of subsequent liens arising by operation of law, in favor of other creditors. The lien differs from the lien of an execution, as it now exists, or the lien of a judgment on lands, as it formerly existed. It operates only on the particular property which is the subject of the levy, and is incipient, inchoate, and conditional. It begins with the levy, and depends upon the condition, that the plaintiff in the suit obtains judgment, upon which process may issue authorizing a sale of the property attached. The lien terminates, if such judgment is not obtained. In its very nature, the lien is, consequently, less stringent, frailer, and more uncertain, than the lien of an execution." Phillips *v.* Ash's Heirs, 63 Ala. 414. See also Willing *v.* Bleeker, 2 Serg. & R. (Pa.) 221.

Having Quality of Mortgagee's, Mechanics' or Vendor's Lien.—In attachment liens, the right grows from and inheres in the law, and the act of the plaintiff in bringing suit properly, and the clerk in issuing the writ, and the sheriff in levying it on defendant's property as the law directs. These acts being performed, the lien, though inchoate, is perfect and substantial; as much so as the lien of a mortgage when properly executed, acknowledged and recorded; as much so as a mechanic's lien, when the work is done, and the lien proven and filed in the clerk's office, as the law directs; as perfect as a vendor's lien, where the purchase money is unpaid for real estate. Harrison *v.* Trader, 29 Ark. 85.

"In so far as the action of attachment enforces the lien, it is remedial; but in so far as it creates it, it is the foundation of a right against the debtor which is vested in the plaintiff from the time of the levy, and is as sacred and inviolable as the lien of a mortgage voluntarily put upon the property by the defendant himself." Mc-

succeeds in recovering judgment.[63] The title to the property remains unchanged[64] until a levy and sale by execution.[65]

Rights of Officer. — When goods are attached, the special property is in the sheriff, the general property being in abeyance, defeasible by the plaintiff's failing in his action, or by his not suing out his execution in time, or by defendant's satisfying the judgment before sale of the goods.[66] An attachment of real estate, however, gives the officer who served the writ no right of property nor right to take the issues or profits.[67]

Fadden *v.* Blocker, 2 Ind. Ter. 260, 48 S. W. 1043, 58 L. R. A. 878.

63. Ware's Admr. *v.* Russell, 70 Ala. 174, 45 Am. Rep. 82.

An attaching creditor has no property in the attached goods, general or special, and no right to the possession of them. **Ill.**—Dobbins *v.* Hanchett, 20 Ill. App. 396. **Mass.**—Richardson *v.* Reed, 4 Gray 441, 64 Am. Dec. 77. **N. H.**—Goddard *v.* Perkins, 9 N. H. 488.

An attachment brings the property under control of the court, not of the plaintiff. Atkins *v.* Swope, 38 Ark. 528.

Assignment of Debt.—"It is true, that the lien, acquired by an attaching creditor, is not an interest in land; and that it cannot, as an interest in land, separate from the debt, be conveyed or assigned; but like the lien or interest of a mortgagee, a transfer of the debt, on which the attachment issued, would also carry with it the lien; and the purchaser of the debt, by pursuing the suit to judgment, and levying the execution on the land, would acquire all the rights of the original creditor." Lyon *v.* Sandford, 5 Conn. 544.

64. **Ark.**—Merrick *v.* Hutt, 15 Ark. 331. **Me.**—Crocker *v.* Pierce, 31 Me. 177. **Md.**—Davidson *v.* Beatty, 3 Har. & M. 594; Owings *v.* Norwood, 2 Har. & J. 96. **Tenn.**—Snell *v.* Allen, 1 Swan 208.

Personal Property.—Snell *v.* Allen, 1 Swan (Tenn.) 208.

The defendant may sell it subject to the attachment. Starr *v.* Moore, 3 McLean, 354, 22 Fed. Cas. No. 13,315.

65. Blake *v.* Shaw, 7 Mass. 505.

The title of one in possession of property is not affected by an attachment which was not prosecuted to judgment. Rosencranz *v.* Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445, 97 Am. St. Rep. 609.

The legal title to lands, condemned under an attachment, cannot be acquired without a *fieri facias* and sale of the lands so condemned. Owings *v.* Norwood, 2 Har. & J. (Md.) 96. See also Davidson *v.* Beatty, 3 Har. & M. (Md.) 594.

66. **Ala.**—Phillips *v.* Ash, 63 Ala. 414; Woolfolk *v.* Ingram, 53 Atl. 11. **Mass.**—Grant *v.* Lyman, 4 Met. 470; Ladd *v.* North, 2 Mass. 514. **N. H.** See Goddard *v.* Perkins, 9 N. H. 488. **Vt.**—Braley *v.* French, 28 Vt. 546; Johnson *v.* Edson, 2 Aik. 302.

Under a statute providing that property is attachable "as security for the satisfaction of such judgment as the plaintiff's may recover," the effect of the levy of an attachment is, to vest in the sheriff a special property in the goods attached, and a special property in the proceeds of the goods when they are converted into money. Wheaton *v.* Thompson, 20 Minn. 196.

Only a special interest measured by the amount necessary to pay the debts constituting the foundation for the attachment proceedings. Kerr *v.* Drew, 90 Mo. 147, 2 S. W. 1361.

67. **Ala.**—Phillips *v.* Ash, 63 Ala. 414. **Mass.**—Taylor *v.* Mixter, 11 Pick. 341. **N. H.**—Scott *v.* Manchester Print Wks., 44 N. H. 507. **Vt.**—Braley *v.* French, 28 Vt. 546.

And see dissenting opinion of Hoke, J., in Coffin *v.* Harris, 141 N. C. 707, 54 S. E. 437.

The only effect of such a levy is to create a lien upon the real property in favor of the party suing out the attachment from the time of the levy. State *v.* Cornelius, 5 Ore. 46.

In Louisiana, the officer must take possession. The statute does not impose any duty on the officer to ad-

As Satisfaction of Debt or Judgment. — It seems to be the general rule that a levy upon property under an attachment does not operate as a satisfaction of the debt,[68] nor of the judgment afterwards obtained.[69]

B. When Lien Attaches. — The lien of an attachment is acquired by the writ and not by the judgment,[70] and when judgment has been obtained the lien relates back to the time when the attachment was levied[71] and will defeat any subsequent conveyance made prior to the

minister the property coming into his custody under the writ. The law seems to have limited his duty to taking charge and keeping possession. He cannot cultivate the plantation and charge the loss of such a venture as costs against the plaintiff. American Nat. Bank *v.* Childs, 49 La. Ann. 1359, 22 So. 384.

68. McBride *v.* Farmers' Bank, 28 Barb. (N. Y.) 476, 7 Abb. Pr. 347; Cravens *v.* Wilson, 48 Tex. 324.

"The attachment of sufficient property is, like an execution levied, satisfaction of the debt, and may be so pleaded. . . . Proceedings under a deed of trust, and by attachment on other property, were concurrent remedies, and could proceed *pari passu.*" When the creditor has collected the whole amount of the debt secured by a deed of trust, by execution, this is an election to depend upon the attachment proceedings. Yourt *v.* Hopkins, 24 Ill. 326.

69. Pearl *v.* Wellman, 8 Ill. 311.

Such a seizure is made for the purpose of security, and if the property is retained in the possession of the sheriff, he will be held responsible for the exercise of ordinary care for its preservation. Maxwell *v.* Stewart, 22 Wall. (U. S.) 77, 22 L. ed. 564. *Compare* Starr *v.* Moore, 3 McLean 354, 22 Fed. Cas. No. 13,315.

The attachment of sufficient personal property to satisfy the creditor's demand does not operate to discharge the judgment he may obtain, and when real property was also attached, the fact that sufficient personal property was attached does give a mortgagee of the real property a priority over the attachment. Dickson *v.* Back, 32 Ore. 217, 51 Pac. 727.

70. Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675; Stephen *v.* Thayer, 2 Bay (S. C.) 272.

And so when **persons claiming** a special ownership **bring replevin against** the sheriff to recover possession, the attaching creditors are parties to be affected and should be permitted to defend. Wafer *v.* Harvey County Bank, 36 Kan. 292, 13 Pac. 209.

"A levy attempted to be made before entry constitutes a lien upon the equitable estate acquired by a pre-emption upon final entry made after the attempted levy and before judgment in the attachment suit." McMillen *v.* Gerstle, 19 Colo. 98, 34 Pac. 681.

71. Western Nat. Bank *v.* National Union Bank, 91 Md. 613, 46 Atl. 960. And see, Low *v.* Adams, 6 Cal. 277.

Under statute, if a "judgment is recovered and execution levied, the whole title acquired by the attachment and levy must be considered as taking effect at the time of the attachment. The subsequent proceedings relate back to that time. The attachment creates a lien or charge upon the land, which constitutes a complete title, if perfected by a subsequent judgment recovered in the same suit, and a seasonable levy of the execution issued on it." Coffin *v.* Ray, 1 Met. (Mass.) 212.

When Affidavit Made.—The commencement of the attachment was when the affidavit was made. Witbeck *v.* Marshall-Wells Hardware Co., 88 Ill. App. 101, 188 Ill. 154, 58 N. E. 929.

"**The attached effects constitute a fund, subject to the order** and disposition of the court. It is by order of the court paid to the attaching creditors in the order of precedence which they have acquire by the service of their several writs. . . . When the attached funds are distributed, the judgment is *functus officio.* It operates no lien, no execution can be taken out on it, and it creates no personal obligation." Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675, holding further, that an order of the court granting leave to renew a judgment originally *in rem,* and which had become *functus*

rendition of the judgment in the attachment suit.[71]

A second attachment upon a second affidavit stating a second ground of attachment, does not, for lien, relate back to the commencement of the lien of the first attachment,[73] and, when property is already in possession of an officer under a writ of attachment, the delivery of another writ to the officer against the same defendant, operates *per se* as an attachment of it.[74]

On Land. — According to the practice in the different jurisdictions, following the common law rule as to the levy of an execution or governed by the varying statutes, the lien of an attachment on land commences when the writ or warrant is placed in the officer's hands;[75] from the time of the levy of the writ;[76] or from the time of filing or entering

officio, could not make such judgment a judgment *in personam* with the attributes of a lien upon the property of the defendant.

"**A sheriff's deed** executed in pursuance of an execution sale under a judgment in an attachment suit takes effect from the date of the attachment, if the levy is such as to create a lien." Riely *v.* Nance, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315. See also Tyrell *v.* Rountree, 1 McLean 95, 24 Fed. Cas. No. 14,313; Nason *v.* Grant, 21 Me. 160.

72. Striplin *v.* Cooper, 80 Ala. 256; Grigg *v.* Banks, 59 Ala. 311.

73. Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

Under a statute providing that where one writ has been issued, other creditors may proceed against the same defendant under such writ, and that it shall not be dismissed as to those so proceeding, in any given case, the commencement of the attachment lien must be as early at least, as the levying of the writ, as to the claim upon which it is issued and as to each subsequent claim, at least, as early as the filing of it. Ziegenhager *v.* Doe, 1 Ind. 296.

As Affecting Priority.—Where the stock in a building association was claimed by the plaintiff under an assignment and by the defendants under an attachment issued prior to the assignment, and the attachment was dissolved and a second attachment issued which was subsequent to the date of the assignment, the validity of the assignment was the vital question. McConnel *v.* Dilworth, 18 Pa. Super. Ct. 114.

74. Fifield *v.* Wooster, 21 Vt. 215. See, *supra*, XII, C, 3.

75. Shirk *v.* Wilson, 13 Ind. 129 (as to the statutory terms: "From the time of its delivery to the sheriff, in the same manner as an execution"); Thompson *v.* Callings, 1 Ky. L. Rep. 402. See Ziegenhager *v.* Doe, 1 Ind. 296.

Before the code, a writ of attachment was not a lien on property until levied upon it, but now a statute makes it a lien "from the time of the delivery of the order to the sheriff." Bergman *v.* Sells, 39 Ark. 97.

76. **Me.**—Gilbert *v.* Merrill, 8 Me. 295. **Md.**—Cockey *v.* Milne, 16 Md. 200. **Mass.**—Norton *v.* Babcock, 2 Met. 510. **Miss.**—Redus *v.* Wofford, 4 Smed. & M. 579; Mears *v.* Winslow, Smed. & M. Ch. 449. **Mo.**—Ensworth *v.* King, 50 Mo. 477. **N. J.**—Lummis *v.* Boon, 3 N. J. L. 734. **N. Y.**—Birkhardt *v.* McClellan, 15 Abb. Pr. 243 note; Wilson *v.* Forsyth, 24 Barb. 105; American Exch. Bank *v.* Morris Canal, etc., Co., 6 Hill 362. **Tenn.**—Campbell *v.* Atwood, 47 S. W. 168. **Tex.**—Riordan *v.* Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37; Walton *v.* Cope, 3 Tex. Civ. App. 499, 22 S. W. 765. **Wis.**—Robertson *v.* Kinkhead, 26 Wis. 560.

See, *supra*, XII, D, 5.

Where the statute provides that when "the certificate of attachment is filed the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment," the effect of the levy of the attachment is to create a lien upon the real property, in favor of the attaching creditor, from the date of the levy. California Bank *v.* Conway, 61 Fed. 871.

Time Attachment Made.—A title obtained by levy takes effect by relation

the writ or abstract of the levy in the office of the recorder or register.[77]

at the time when the attachment was made, and it operates as a statute conveyance made at that time. Brown *v.* Williams, 31 Me. 403.

From the time of making an indorsement upon the writ must be dated the lien acquired upon the property. Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. 378.

An attachment will be considered as having been made at the time the return bears date, although a memorandum only was then made of it. Almy *v.* Wolcott, 13 Mass. 73.

The time a levy is endorsed on a memorandum attached to the writ, is the time a lien attaches on land, and not the time that it is afterwards fully written out on the return. McMillan *v.* Gaylor (Tenn), 35 S. W. 453.

"From the Time of Service."—Moore *v.* Fedawa, 13 Neb. 379, 14 N. W. 170; Wright *v.* Smith, 11 Neb. 341, 7 N. W. 537.

"If the attachment and levy are both valid, then the creditor's title will relate back to the attachment and take date from that time. If the levy is valid and the attachment void, then the creditor's title will take date from the time of the levy." Brackett *v.* Ridlon, 54 Me. 426.

When Followed by Judgment.—The attachment is a lien from the date of the levy only when followed by a judgment, and the latter can never be properly rendered without due notice. Haywood *v.* Collins, 60 Ill. 328.

The title of a person buying in land dated back to the date of the levy of his attachment. Broches *v.* Carroll, 2 Posey Unrep. Cas. 143.

When no levy was made upon land, no lien was obtained thereon until judgment was rendered. Goddard-Peck Grocery Co. *v.* Adler-Goldman Commission Co., 67 Ark. 359, 55 S. W. 136, wherein the court said that while, under statute, an order of attachment binds the defendant's property in the county, which might be seized under an execution against him, from the time of the delivery of the order to the sheriff, yet after its return it ceases to be a lien upon any property except that upon which it has been levied.

Under Statute Requiring Judgments To Be Pro-Rated.—Under a statute providing that where several judgments against the same attachment defendant are rendered at the same term, they "shall share *pro rata*, according to the amount of the several judgments, in the proceeds of the property attached, either in the hands of the garnishee, or otherwise," the lien on property, or appropriation by the law of the indebtedness, as to each and all of the several judgments, has relation back to the date of the levy on the first attachment writ. Smith *v.* Clinton Bridge Co., 13 Ill. App. 572.

Under the rule that an attachment creditor is not a bona fide purchaser, and "that an attachment levy upon real estate only gives the creditor a lien on the debtor's attachable interest in the lands, and in no way interferes with the previously acquired rights of third persons" under an unrecorded mortgage, it was held in Campbell *v.* Keys, 130 Mich. 127, 89 N. W. 720, that when the levy by attachment is followed by an execution levy, the latter does not relate back so as to give a lien upon the title as it stood of record when the attachment levy was made.

77. **Ill.**—Hall *v.* Gould, 79 Ill. 16 (written notice not sufficient); Gaty *v.* Pittman, 11 Ill. 20. **Mo.**—Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399; Stanton *v.* Boschert, 104 Mo. 393, 16 S. W. 393. **Neb.**—Adams *v.* Boulware, 1 Neb. 470. **Tenn.**—Vinson *v.* Huddleston, Cooke 254. **Tex.** See Walton *v.* Cope, 3 Tex. Civ. App. 499, 22 S. W. 765.

Before a lien on land is perfected, the two acts prescribed by statute must be done "the delivery to the occupant of a copy of the writ, or the posting of a copy upon the premises, as the case may be, and the filing of a copy with the recorder, together with a description of the property attached." Wheaton *v.* Neville, 19 Cal. 11. See *supra*, XII.

On Filing Certificate of Levy in Office of Recorder.—Hall *v.* Gould, 79 Ill. 16.

When perfected by sale on the execution, and recording of the sheriff's deed, the title will have relation back to the levy of the attachment. Martin *v.* Dryden, 6 Ill. 187.

As to personal property, the general rule seems to be that the lien of an attachment commences from the time of service or levy of the writ or warrant.[78]

Deposit of Copy With Description of Property.—Cal.—Ritter *v.* Scannell, 11 Cal. 238, 70 Am. Dec. 775. Colo. Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4. Minn.—Cousins *v.* Alworth, 44 Minn. 505, 47 N. W. 169, 10 L. R. A. 504.

A mere clerical error by the clerk in copying the certificate into the record will not defeat the lien. Schlosser *v.* Beemer, 40 Ore. 412, 67 Pac. 299.

The defendant need not be notified before a lien can be created. Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4.

As to the operation of a statute of limitations, the action commences, not from the time of the levy of the attachment on the property, but from the time of service of the notice upon the defendant. Sanford *v.* Dick, 17 Conn. 213.

78. Colo.—Breene *v.* Merchants', ets., Bank, 11 Colo. 97, 17 Pac. 280. Ia.—Citizens' Nat. Bank *v.* Converse, 101 Iowa 307, 70 N. W. 200; Kuhn *v.* Graves, 9 Iowa 303. Kan.—R. I. Davis Mill Co. *v.* Bangs, 6 Kan. App. 38, 49 Pac. 628. La.—Harvis *v.* Andrews, 20 La. Ann. 561; Cochran *v.* Walker, 10 La. Ann. 431. Me.—Perry *v.* Griefen, 99 Me. 420, 59 Atl. 601. Md.—Cockey *v.* Milne, 16 Md. 200. Miss.—Peck *v.* Webber, 7 How. 658. N. Y.—Gillig *v.* George C. Treadwell Co., 11 Misc. 237, 32 N. Y. Supp. 974; Wilson *v.* Forsyth, 24 Barb. 105. W. Va.—Bowlby *v.* DeWitt, 47 W. Va. 323, 34 S. E. 919.

The Moment of Service.—Fitch *v.* Waite, 5 Conn. 117.

Acceptance of Service.—Phelps *v.* Ratcliffe, 3 Bush (Ky.) 334.

Actual Custody.—Under a statute declaring that a levy must be made "by taking the same into the sheriff's actual custody," when one who has possession of a promissory note attempted to be attached refuses to surrender it, and he is subsequently directed by order of court to deliver it, the lien attached when the officer obtained the actual custody. Anthony *v.* Wood, 96 N. Y. 180, 67 How. Pr. 424, 14 Abb. N. C. 383. 6 Civ. Proc. 164, *reversing* 29 Hun 239.

In the case of personal property capable of manual delivery, the taking of the property into the possession of the officer places it within the jurisdiction of the court, and the lien thus acquired dates from the actual taking of the property, and will be effectual as a lien until the expiration of reasonable time within which to give the notice of attachment required by the statute. Citizens' Nat. Bank *v.* Converse, 101 Iowa 307, 70 N. W. 200.

The making of an inventory of the goods by the officer under a writ of attachment, with a view to the appraisement of them, as required by statute, constitutes a taking of them. Stockley *v.* Wadman, 1 Houst. (Del.) 350, distinguishing an execution as a lien upon the goods of the defendant from the time it comes to the hands of the sheriff.

An execution attachment on a debtor's stock in a corporation dates from the date of the service on the corporation. Jacobson *v.* Monongahela Nat. Bank, 35 Fed. 395.

A levy upon an iron safe and its contents operates from the date when the sheriff seized the safe and took it into his possession, and not from the date when he succeeded in getting the safe open and making himself acquainted with its contents. Elliott *v.* Bowman, 17 Mo. App. 693.

As against a bona fide purchaser, personal property is only bound by an attachment from the time of an actual levy. Kuhlman *v.* Orser, 5 Duer (N. Y.) 242.

As against a non-resident, who is not served, the seizure of the property creates the lien. Owens *v.* Atlanta Trust, etc., Co., 119 Ga. 924, 47 S. E. 215.

Delivery of Writ to Sheriff.—Dreisbach *v.* Mechanics' Nat. Bank, 113 Pa. 554, 6 Atl. 147; Rice *v.* Walsinszius, 12 Pa. Super. 329.

Insurance taken out on the attached property after levy is not subject to the lien. Donnell *v.* Donnell, 86 Me. 518, 30 Atl. 67.

Where the attached property was insured by a receiver to whom the attachment creditor maintained an attitude of hostility, the lien of the at-

Effect of Amendments. — *Of Complaint.* — An amendment of a petition which merely perfects a defective statement of a cause of action and does not present a new cause of action relates back to the filing of the petition and preserves the lien of the attachment,[79] but the lien is not preserved as of the time it originally attached so as to affect intervening rights when an entirely new cause of action is set up,[80] or when the amendment adds to the amount of the demand.[81]

As to a new party, the lien dates only from the time of filing the amended petition,[82] and it has been held that where an attachment has been issued, executed and returned without making a certain person a party, and the complaint is afterwards amended and such person brought in without additional steps being taken to perfect the lien, no lien is acquired under the statute as to such person.[83]

tachment did not fasten upon the proceeds of insurance on the building destroyed upon which the attachment had been levied. McLaughlin *v.* Park City Bank, 22 Utah 473, 63 Pac. 589, 54 L. R. A. 343.

79. Hammon *v.* Starr, 79 Cal. 556, 21 Pac. 971; Suksdorff *v.* Bigham, 13 Ore. 369, 12 Pac. 818.

An amendment to a complaint, "which causes no increase in the amount to be recovered, and introduces no new cause of action, will not dissolve an attachment." Barton *v.* South Jordan Co-operative Mercantile, etc., Inst., 10 Utah 346, 37 Pac. 576.

Even as Against Intervening Claims. Bamberger *v.* Moayon, 91 Ky. 517, 16 S. W. 276; Mendes *v.* Freiters, 16 Nev. 388.

80. **Ky.**—Stone *v.* Connelly, 1 Met. 652, 71 Am. Dec. 499. **Mass.**—Freeman *v.* Creech, 112 Mass. 180; Willis *v.* Crooker, 1 Pick. 204. **Tex.**—Parks *v.* Young, 75 Tex. 278, 12 S. W. 986; Lutterloh *v.* McIlhenny Co., 74 Tex. 73, 11 S. W. 1063.

In Nagle *v.* Omaha First Nat Bank, 57 Neb. 552, 77 N. W. 1074, is was held that though an amendment of an attachment petition substantially changes the cause of action, this does not result in postponing the attachment to a mortgage executed between the levy, and the time of amendment, when the attachment was held to be regular and to have continued effect notiwthstanding the amendment.

Subjecting Additional Property.—A plaintiff cannot, by amending his petition, tack to his original suit and attachment, property not included in the original, and such additional property can be subjected only by a further attachment. Phelps *v.* Ratcliffe, 3 Bush (Ky.) 334.

81. Tilton *v.* Cofield, 2 Colo. 392.

In Suksdorff *v.* Bigham, 13 Ore. 369, 12 Pac. 818, it was held upon a rehearing, that as it did not clearly appear that the difference between the sum claimed in the original complaint and that claimed in the amended complaint was the result of a mere clerical error, the lien of the attachment would extend only to the sum claimed in the original complaint.

82. Bauer *v.* Deane, 33 Neb. 487, 50 N. W. 431, Lillard *v.* Porter, 2 Head (Tenn.) 176.

Change From Partnership to Individual Partner. — Amendments from suits against a partnership to those against an individual partner, and treating the attached property as the separate estate of such partner, could only be made as subject to any existing valid attachment upon it as separate estate. Moody *v.* Lucier, 62 N. H. 584.

Mere Irregularity.—Where an action was commenced in the name of a partnership, and after the levy of the attachment a clerical error in the name of one partner was amended and the name of another partner was added, "the defect was a mere irregularity, which was, and ought to have been, cured by amendment," and was too slight to affect or postpone the lien. Henderson *v.* Stetter, 31 Kan. 56, 2 Pac. 849.

83. Collins *v.* Montgomery, 16 Cal. 398.

Bringing in Additional Partner.— Partnership property was attached in

Of Affidavit. — The lien of an attachment is not postponed to an intervening claim, by an amendment to the affidavit upon which the attachment was issued when the amendment merely states a further ground for the attachment,[84] or when it cures such defects as could not have been attached in a collateral proceeding.[85]

C. How Long Lien Continues.— It has been said that an attachment being merely a creature of statute, its existence and operation in any case can continue no longer than the statute provides it may.[86] It is held in some cases, having apparently particular reference to attach-

the name of three only out of four surviving partners, and the next day the name of the fourth was inserted and a new attachment made upon the same property; but in the meantime another creditor had attached the property upon a writ against the four partners, it was held that the first attachment was vacated as against the second attaching creditor. Denny *v.* Ward, 3 Pick. (Mass.) 199. *Compare* Symms Grocer Co. *v.* Burnham, 6 Okla. 618, 52 Pac. 918, holding that by an amendment bringing in a third partner as a defendant, the priority of the attachment was not lost.

Bringing in Dormant Partner.—The right of priority of a creditor making the first attachment will not be defeated in consequence of another creditor having discovered that there was a dormant partner interested in the property attached, and having attached his interest. McGregor *v.* Barker, 12 La. Ann. 289.

84. Keith *v.* Ray, 231 Ill. 213, 83 N. E. 162, *affirming* 134 Ill. App. 119, See Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847, in which case the court was equally divided.

Under a Kentucky statute, providing "'That in any proceeding by attachment now pending, or hereafter to be commenced, the affidavit or grounds of attachment may be amended so as to embrace any grounds of attachment that may exist up to and until the final judgment upon the same. If the amendments embrace only grounds existing at the time of the commencement of said proceeding, the lien created by the suing out or levying the original attachment shall be held good,'" as between the original debtor and the attaching creditor, the lien created by the original attachment would be available, but cannot operate so as to postpone the liens of other creditors of the same debtor created by intermediate attachments. Bell *v.* Hall, 2 Duv. (Ky.) 288.

A plaintiff in attachment has no right to amend the affidavit so as to cure a defect, and thereby create a lien by the levy of the attachment, except by the authority of the statute which expressly declares that the lien created by an attachment based upon an amended affidavit shall not affect the lien created upon the same property by attachment or otherwise before the affidavit was amended, but subsequent to the levy of the attachment under the original affidavit. Bamberger *v.* Moayon, 91 Ky. 517, 16 S. W. 276.

Original Void.—A statute providing that "no suit shall be quashed on account of any defect in the affidavit on which the same issued; *Provided*, That the pliantiff, his agent or attorney shall, whenever objection may be made, file such affidavit as is required by law," does not authorize the filing of a new affidavit where the original affidavit was void. Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498.

85. Cook *v.* New York Corundum Min. Co. 114 N. C. 617, 19 S. E. 664.

Where an affidavit was defective when made by an attorney or agent in failing to state the absence of the principal from the county and that the affiant is agent or attorney, the lien acquired by an amended affidavit cannot affect the rights of persons who have in the meantime acquired rights. Northern Lake Ice Co. *v.* Orr, 102 Ky. 586, 44 S. W. 216.

86. Loveland *v.* Alwood Consol. Quartz Min. Co., 76 Cal. 564, 18 Pac. 682, holding that no provision is made for the detention by the officer of property pending an appeal from a judgment ren-

ments on land, that the duration of an attachment lien should be the duration of the judgment in which it is perfected, in the absence of statutory provision regulating the continuance of an attachment lien,[87] and a distinction has been made in this respect between real and personal property.[88] In other cases it has been held that an attachment lien continues after judgment until a reasonable time has elapsed for the issuing of an execution and levy thereunder,[89] or that it must be

dered in favor of the defendant in a justice's court.

87. Stillman *v.* Hamer, 70 Kan. 469, 78 Pac. 836, 109 Am. St. Rep. 465.

In an attachment on land, where the judgment is not made a lien, the lien of the attachment continues for the life of the judgment. Floyd *v.* Sellers, 7 Colo. App. 498, 44 Pac. 373, wherein the court said that when a transcript of the judgment is filed with the recorder, it becomes a lien upon all the real estate of the judgment defendant situated in the county, for the statutory time from the rendition of the judgment. The lien of the attachment becomes merged in that of the judgment, but its priority is preserved, and the lien of the judgment, in so far as the specific real estate is concerned, relates back to the lien of the attachment.

Merger of Lien in Judgment.—The lien of an attachment is not merged in the judgment until after the latter becomes a lien, and, if the judgment has not been docketed so as to become a lien, the lien of the attachment still remains upon the land. Weinreich *v.* Hensley, 121 Cal. 647, 54 Pac. 254. See also Emery *v.* Yount, 7 Colo. 107, 1 Pac. 686.

The attachment lien which is merely conditional or hypothetical, is merged in that of the judgment, and it does not revive on the expiration of the judgment lien. Green *v.* Dougherty, 55 Mo. App. 217.

"By the entry of the judgment and the issuance of an execution thereon, the attachment was merged in the execution. And upon the return by the sheriff of the execution wholly unsatisfied the right of the sheriff to retain any property under the attachment or the execution ceased." Peetsch *v.* Sommers, 31 App. Div. 255, 28 Civ. Proc. 124, 53 N. Y. Supp. 438.

Continued by Alias Writs.—Where a judgment was inadvertently rendered after levy of the attachment but without service of summons and the writ of attachment, the defect may be remedied and the lien of the attachment continued by recalling the executions, vacating the judgments, and by suing out and serving alias writs of summons and attachments. Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4.

In an ancillary proceeding, a lien is extinguished where judgment in the action is rendered nugatory. Hale *v.* Cummings, 3 Ala. 398.

With the expiration of the term of office of the justice who issued the writ, the proceedings did not die. Davis *v.* Ainsworth, 14 How. Pr. (N. Y.) 346.

88. In Floyd *v.* Sellers, 7 Colo. App. 498, 44 Pac. 373, the court said: "In the case of attachment of personal property, there are reasons why the attachment plaintiff should be held to some degree of diligence, after judgment, in subjecting the property attached to the payment of his claim, which have no force in the case of attachment of real property."

The statute of limitations for the lien of a judgment has no application to funds in the hands of the court, as the lien referred to in the statute refers to a lien on real estate and not to a fund in the custody of the court. State *v.* Hickman, 150 Mo. 626, 51 S. W. 680.

89. Avery *v.* Stephens, 48 Mich. 246, 12 N. W. 211.

The statute does not provide the length of time an attachment lien shall continue after the rendition of the judgment, and it must continue until the debt is paid, or sale is had under execution issue on the jugment, or until the judgment is satisfied, or the attachment discharged or vacated in some manner provided by law. Katz *v.* Obenchain, 48 Ore. 352, 85 Pac. 617, 120 Am. St. Rep. 821.

continued and kept alive by order of the court, made pursuant to law.[90]

Statutory Limit From Time of Judgment. — In some jurisdictions, statutes provide the length of time that property attached shall be held after final judgment, to be taken on execution, and that if the creditor fails to take the property on execution within that time, the attachment is avoided.[91] Under such a statute, an execution must be levied, as a mere notice to a person holding the proceeds is not enough,[92] and it has been held that notice of sale must be given within this time,[93] but that it is not necessary that the proceedings on the execution should be completed before the time has expired.[94]

In computing the statutory time from a judgment during which prop-

90. Meloy *v.* Orton, 42 Fed. 513.

No lien created by the issuing and levy of an attachment under the statute can exist or have any force or effect after judgment has been rendered in the cause, in aid of which it has been issued, unless there is a special judgment or order of sale of the property attached, and a special execution. Lowry *v.* McGee, 75 Ind. 508. See, *infra*, XV, F, 5.

A review, whether prosecuted by writ or order, is so far a new action that a judgment in it is not secured by an attachment made in the original suit. Camp *v.* Hilliard, 58 N. H. 42.

91. **Conn.**—Beardsley *v.* Beecher, 47 Conn. 408; Sanford *v.* Pond, 37 Conn. 588; Gates *v.* Bushnell, 9 Conn. 530; Parsons *v.* Phillips, 1 Root 481. **Me.**—Wheeler *v.* Fish, 12 Me. 241. **Mass.** Stackpole *v.* Hilton, 121 Mass. 449; Davis *v.* Blunt, 6 Mass. 487, 4 Am. Dec. 163; Clap *v.* Bell, 4 Mass. 99. **Vt.**—Paul *v.* Burton, 32 Vt. 148.

A judgment appealed from and reversed is not a final judgment within the meaning of the statute. Allen *v.* Adams, 17 Conn. 67.

When the attachment is made by one officer, and the execution is delivered to another, with directions to levy on the property of the one making the attachment. Ayer *v.* Jameson, 9 Vt. 363.

An attachment made by a deputy sheriff is the same as if made by the sheriff, and the lien is preserved by delivering the execution to the sheriff. Ayer *v.* Jameson, 9 Vt. 363.

Where land had been sold for partition pending the attachment, the attachment plaintiff must within the thirty days after judgment and by proper proceedings in court proceed to enforce his claim against the proceeds. Whittemore *v.* Swain, 198 Mass. 37, 84 N. E. 307.

92. Whittemore *v.* Swain, 198 Mass. 37, 84 N. E. 307.

93. Brown *v.* Allen, 92 Me. 378, 42 Atl. 793.

94. Heywood *v.* Hildreth, 9 Mass. 393.

Where an attachment was subject to a mortgage, but there was an excess over the amount due on the mortgage at a sale thereunder, the attachment creditor lost his right to recover proceeds of property attached by not taking out execution within the statutory time. Webber *v.* Foxboro Co-operative Bank, 198 Mass. 132, 84 N. E. 303.

Adjourning Sale.—If the officer finds it impracticable to have the property at the place appointed for the same, he has authority to adjourn the sale for a reasonable time. Warren *v.* Leland, 9 Mass. 265.

Under a Vermont statute, real estate attached on mesne process is "held five months after rendition of final judgment, and no longer," the sale must be completed within the five months to preserve the lien by attachment. Sowles *v.* Witters, 55 Fed. 159; Whipple *v.* Sheldon, 63 Vt. 197, 21 Atl. 271.

And on personal property, within thirty days after plaintiff was entitled to his execution. Paul *v.* Burton, 32 Vt. 148, beginning, it was held in this case, at the close of the term following a recess.

A delivery of the execution to the officer who made the attachment, or to another deputy of the same officer, is sufficient to sustain the lien. Bliss *v.* Stevens, 4 Vt. 88; Enos *v.* Brown, 1 D. Chip. (Vt.) 280.

erty attached is subject to the lien, the day after the last day of the term is the first,[95] though the last day falls on Sunday.[96]

If, on an appeal, judgment be rendered for the defendant, the attachment is *ipso facto* dissolved;[97] but, though "a failure of the attachment suit and subsequent judgment for the defendant are *prima facie* a discharge of the lien, yet if on appeal the judgment is reversed, the lien continues."[98]

D. To What the Lien Extends. — The lien extends, not to all the property of the defendant, but only to the property actually levied upon,[99] and, only to the title or interest which the debtor has in the property attached at the time of the levy,[1] unless the rights of the parties

95. **Portland Bank** *v.* Maine Bank, 11 **Mass.** 204.

96. Alderman *v.* Phelps, 15 Mass. 225.

97. Clap *v.* Bell, 4 Mass. 99. See Bingham *v.* Pepoon, 9 Mass. 239.

Under the Wisconsin statutes, if the plaintiff upon the rendition of judgment against him and before the property is delivered over by the sheriff, shall give immediate notice of appeal, and tender a proper bond, he may be entitled to an order continuing the attachment until the determination of the appeal, and requiring that the property be continued in the custody of the sheriff during the pendency of the appeal. Meloy *v.* Orton, 42 Fed. 513.

98. Dollins *v.* Pollock, 89 Ala. 351, 7 So. 904.

99. **U. S.**—Westervelt *v.* Lewis, 2 McLean 511, 29 Fed. Cas. No. 17,446. **Ill.**—People *v.* Cameron, 7 Ill. 468. **Md.** May *v.* Buckhannon River Lumb. Co., 70 Md. 448, 17 Atl. 274. **N. H.**—Kittredge *v.* Warren, 14 N. H. 509. **Ohio.** Humphrey *v.* Wood, Wright 566. **Tenn.**—Hervey *v.* Champion, 11 Humph. 569. **Utah.**—Thum *v.* Pingree, 21 Utah 348, 61 Pac. 18. **Wis.**—Atchison *v.* Rosalip, 3 Pin. 288, 4 Chand. 12; Glover *v.* Rawson, 2 Pin. 226, 3 Chand. 249.

Where a proceeding was *in rem* by attachment, and the judgment one of condemnation of the particular property, the lien of the judgment was a specific lien upon the property condemned, which related back to the time when the attachment was laid, and ripened into a perfect legal title by purchase under the execution. Cockey *v.* Milne, 16 Md. 200.

A different tract of land cannot be substituted for a tract actually attached. Steinmetz *v.* Nixon, 3 Yeates (Pa.) 285.

1. **U. S.**—Clarke *v.* Chase, 5 Fed. Cas. No. 2,845. **Cal.**—National Bank of the Pacific *v.* Western Pac. R. Co., 157 Cal. 573, 108 Pac. 676, *citing* earlier California cases. **Ill.**—Schweizer *v.* Tracy, 76 Ill. 345; Berz *v.* McCartney, 115 Ill. App. 66; Link *v.* Gibson, 93 Ill. App. 433; Locke *v.* Duncan, 53 Ill. App. 373. **Ia.**—Anderson *v.* Taylor, 131 Iowa 485, 108 N. W. 1051. **Ky.** R. C. Poage Mill. Co. *v.* Economy Fuel Co., 128 S. W. 311; H. A. Thierman Co. *v.* Laupheimer, 21 Ky L. Rep. 1631, 55 S. W. 925. **La.**—Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206. **Me.**—Crocker *v.* Pierce, 31 Me. 177; Bryant *v.* Tucker, 19 Me. 383. **Neb.**—Barnes *v.* Cox, 58 Neb. 675, 79 N. W. 550. **N. H.**—Richardson *v.* Bailey, 69 N. H. 384, 41 Atl. 263, 76 Am. St. Rep. 176. **N. J.**—Jamison *v.* Miller, 27 N. J. Eq. 586. **N. D.**—Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308. **Ore.**—Beezley *v.* Crossen, 14 Ore. 473, 13 Pac. 306; Oregon R., etc., Co. *v.* Gates, 10 Ore. 514.

There being no claim of fraudulent transfer the creditor by attachment of property which has been transferred by his debtor obtains only the rights which the debtor has in the property at the time, if any. Walsh, Boyle & Co. *v.* First Nat. Bank, 228 Ill. 446, 81 N. E. 1067. And see Pasquay *v.* Keithley, 139 Ill. App. 548 (real property).

In Samuel *v.* Agnew, 80 Ill. 553, the court, reversing previous cases, as to the effect of a judgment, said: "And we understand the more reasonable doctrine to be, that proceedings in attachment are against the interest

are affected by fraud or collusion.[2] This doctrine, however, must be understood as qualified in those jurisdictions which hold that, under recording statutes, an attaching creditor is entitled to a prior satisfaction, out of the real estate attached, if he has not, at the time of the

of the defendant in the attachment, and those claiming under him, in the thing attached; and that a person whose goods have been seized improperly, and who is no party to the suit, is not concluded by the judgment."

A writ of attachment is effectual to change the title of personal property, only from the time of levy. Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610.

If the defendant have no interest in the property, it cannot be held upon the attachment, and the title is not affected thereby. **Ia.**—Manny *v.* Adams, 32 Iowa 165. **Neb.**—Chicago, etc., R. Co. *v.* Omaha First Nat. Bank, 58 Neb. 548, 78 N. W. 1064, *affirmed*, 59 Neb. 348, 10 N. W. 1039. **Tenn.**—Wood *v.* Thomas, 2 Head 160.

Where property had been obtained by means of a fraudulent purchase, an attaching creditor obtains no better right than the fraudulent vendee as against his vendor. Schweizer *v.* Tracy, 76 Ill. 345; La Salle Pressed Brick Co. *v.* Coe, 65 Ill. App. 619. See *supra*, VI, C, 8.

Subject to Equities.—An attaching creditor gets no greater right as gainst holders of equities upon the attached property than the debtor himself then had. Kentucky Refining Co. *v.* Morilton Bank, 28 Ky. L. Rep. 486, 89 S. W. 492. See also De Celis *v.* Porter, 59 Cal. 464.

An attachment of an equity of redemption creates a lien upon the estate, in favor of the attaching creditor, which entitles him to redeem. Lyon *v.* Sanford, 5 Conn. 544.

An attachment upon a writ against a mortgagor, of the lands mortgaged, is effectural to hold the mortgagor's equity of redemption. Bryant *v.* Morrison, 44 N. H. 288.

Right of Redemption From Tax Sale. An attachment levied upon land, which has been struck off to the state for non-payment of taxes, only binds such interest as the owner had at the time, which is the right of redemption within two years. Merrick *v.* Hutt, 15 Ark. 331.

A seizure of the interest of an heir by levy of an attachment, could have no effect on the executor's right to convey under the will. Smyth *v.* Anderson, 31 Ohio St. 144.

Where property has been taken by guardians of the poor under a statute authorizing them to take and seize the property of one who has deserted his wife and children, leaving them a charge on the public, this does not prevent an attachment of the property for a debt created before seizure by the guardians. Thomas *v.* McCready, 5 Serg. & R. (Pa.) 387.

2. **Ia.**—Rogers *v.* Higland, 69 Iowa 504, 29 N. W. 429, 58 Am. St. Rep. 230. **Va.**—Seward *v.* Miller, 106 Va. 309, 55 S. E. 681. **W. Va.**—Lipscomb *v.* Condon, 56 W. Va. 416, 49 S. E. 392, 107 Am. St. Rep. 392, 67 L. R. A. 670.

In National Bank of the Pacific *v.* Western Pac. R. Co., 157 Cal. 573, 108 Pac. 676, Shaw, J., said: "Where a statute declares a previous transfer of title void as to creditors of the transferror, there is an exception to this rule. The exception is, of course, founded upon the theory that as the law makes the transfer void as to the creditor, there is, as to him, no transfer at all, and the title to the property, for his benefit, remains in the debtor, notwithstanding a previous legal transfer good as against all other parties. Examples of this are found in the case of transfers tainted with actual fraud and transfers of personal property in good faith not followed by immediate delivery and actual and continued change of possession. The latter are conclusively presumed to be fraudulent. All such transfers are expressly declared to be void as to the creditors of the person making the transfer. Civ. Code, §§3439, 3440. Another example is that of a chattel mortgage not executed and recorded in the prescribed mode, which the statute declares to be absolutely void as against other creditors of the mortgagor, regardless of the good faith of the transaction. Civ. Code §2957. The contention of the defendant is that the pro-

attachment, any notice of a prior unrecorded deed or contract.[3] And as between the attaching creditor and other creditors, when there has been no personal service or appearance by the defendant, the lien at-

visions in section 324, declaring that a transfer of corporate stock is not valid, except as to the parties, until it is duly entered on the corporation books, is intended for the benefit of the creditors of stockholders, and, therefore, that its effect is to make an unregistered transfer absolutely void, and subject to any attachment or execution against the previous owner. If this doctrine is correct, the logical result would be that knowledge of the attaching creditor or execution purchaser, at the time of the levy or execution sale, that there had been a prior unregistered transfer for value, would be an immaterial circumstance which would neither protect the holder of the stock, nor vitiate or affect the lien of the attachment, or the title conveyed by the execution sale. If the attempted transfer by indorsement and delivery of the certificate, without entry thereof on the books of the company, is wholly void as to the attaching creditor, the levy would create a lien superior to the title of the indorsee. It would operate as if there had been no previous transfer of the certificate by the record holder, and a registration after the levy, or a subsequent notice, would be of no avail to the indorsee. This rule prevails in the case of a levy on goods, after a sale which is void as against creditors, under section 3440, Civ. Code. Notice to the creditor, or to an intending purchaser, in such a case, that the third person holds the title, whether given before or after the levy, does not affect the attachment, nor invalidate the title of the execution purchaser. The defendant does not contend that this strict rule applies to corporate stock, but is willing to concede that a holder thereof for value, by a previous unregistered transfer in good faith, would prevail against an attaching creditor or execution purchaser with notice of the transfer. The decisions in this state on this point uniformly hold that the law is in accordance with this concession. Weston *v.* Bear River, etc., Co., 6 Cal. 425; People *ex rel.* Mead *v.* Elmore, 35 Cal. 653; Farmers' National Gold Bank *v.* Wilson, 58 Cal. 600; Blakeman *v.* Puget S. I. Co., 72 Cal. 321, 13 Pac. 872; Spreckels *v.* Nevada Bank, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348."

Liens or privileges existing on the property must be respected unless fraud or collusion be shown. Frazier *v.* Wilcox, 4 Rob. (La.) 517. See also Gates Iron Wks. *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667.

3. See *infra*, XV, E. See also **U. S.** United States *v.* Canal Bank, 3 Story 79, 25 Fed. Cas. No. 14,715. **Colo.**—Gates Iron Wks. *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667. **La.**—Ft. Pitt Nat. Bank *v.* Williams, 43 La. Ann. 418, 9 So. 117.

In Goddard *v.* Prentice, 17 Conn. 546, the court said: "But it is said, the law will presume that credit was given to [the attachment debtor], in consequence of his apparent ownership of the property. If it does, it will not give the creditor a specific lien upon it, unless he has acquired it, by some act of his. Had he attached the property, or taken a mortgage of it, without fraud and without knowledge of any trust, his title would prevail in equity, as well as at law. But having omitted to take any lien upon property, either by attachment or in any other manner, until he was informed of the true condition of [the debtor's] title, he stands in the same situation as a purchaser with notice at the time of the attachment. Had he attached with knowledge that the property had been conveyed to the plaintiffs, and their deed not recorded, the attachment could not, as against them, prevail." But in Campbell *v.* Keys, 130 Mich. 127, 89 N. W. 720, holding that an attachment creditor cannot obtain any greater interest in the property levied upon than was owned by the attachment debtor, the court said that recording acts do not help him.

Until a sale has been made under an attachment, the lien acquired is subject to all prior unrecorded deeds and equities existing against the land. Hope *v.* Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366.

An attaching creditor may acquire greater and better rights to mortgaged

taches for and is limited to the amount stated in the writ and affidavit,[4] and cannot be enlarged by the amount included in the judgment for the costs,[5] though the rule is otherwise when personal service is had upon the defendant in the action, and the judgment rendered upon the merits, and the interests of third parties are not affected thereby.[6] Under these latter conditions, the attachment creates a lien and places the property in the custody of the law to respond to the judgment and execution that shall be obtained thereon.[7]

E. PRIORITIES. — **1. In General.** — It has been said, and the proposition is supported generally by the authorities, that the right of plaintiff in attachment to condemnation of the property seized under his writ cannot be affected by any subsequent proceeding with respect to it, to which, at least, he is not a regularly made party.[8]

Pledged Property. — The lien obtained by attachment is subject to a lien previously obtained by a pledgee,[9] but a mere executory agreement

personal property belonging to his debtor than the debtor himself could claim at the time the attachment is levied. Holt *v.* Lucas, 77 Kan. 710, 96 Pac. 30, 127 Am. St. Rep. 459, 17 L. R. A. (N. S.) 203, saying that, for example, a chattel mortgage unrecorded is good between the parties, but absolutely void as against an attaching creditor of the mortgagor, where at the time of the levy the mortgagee is not in the actual possession of the property. See Implement Co. *v.* Parlin & Orendorff Co., 51 Kan. 566, 33 Pac. 363.

See the title "Chattel Mortgages."

4. Glendale Fruit Co. *v.* Hirst, 6 Ariz. 428, 59 Pac. 103.

With Accruing Interest.—Tilton *v.* Cofield, 2 Colo. 392.

And for All Costs.—Rhodes *v.* Samuels, 67 Neb. 1, 93 N. W. 148.

5. Hubbell *v.* Kingman, 52 Conn. 17.

6. Glendale Fruit Co. *v.* Hirst, 6 Ariz. 428, 59 Pac. 103.

An attachment creates a lien upon the whole property for which it could be legally held by the attachment, "as security to satisfy the judgment for damages and costs, which the plaintiff may recover," or for which it could be taken on execution to satisfy the final judgment, and is not limited to the amount specified in the writ. Searle *v.* Preston, 33 Me. 214.

7. Miller *v.* James, 86 Iowa 242, 53 N. W. 227; Brandon Iron Co. *v.* Gleason, 24 Vt. 228.

8. Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105, 129.

As between foreign and domestic attachments the court, on the question of evidence, will lean in favor of the latter. Shipman *v.* Woodbury, 2 Miles (Pa.) 67.

An assignee of stock, by assignment and delivery of the certificate, and notice to the company, has a superior right to that of a subsequent attaching creditor of the assignor, although there is a by-law that the stock is only transferable on the books of the company on surrender of the certificate, the charter containing no provision on the subject. State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100.

See the titles "Banks and Banking," and "Stocks and Stockholders."

An attachment about which there is uncertainty as to when it was made must give place to an attachment about which there is no uncertainty. Berry *v.* Spear, 13 Me. 187.

9. **Cal.**—Waldie *v.* Doll, 29 Cal. 555. **Ga.**—Printup *v.* Johnson, 19 Ga. 73. **N. H.**—Chapman *v.* Gale, 32 N. H. 141. Briggs *v.* Walker, 21 N. H. 72; Hudson *v.* Hunt, 5 N. H. 538. **Ore.**—Dean *v.* Lawham, 7 Ore. 422. **Tex.**—Schmick *v.* Bateman, 77 Tex. 326, 14 S. W. 22; Merchants Nat. Bank *v.* Baker, 8 Tex. Civ. App. 332, 28 S. W. 698; Sanger *v.* Henderson, 1 Tex. Civ. App. 412, 21 S. W. 114. **Va.**—Parkersburg Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408. See also *supra*, VI, D, 5.

One holding property for the payment of owner's debt is entitled to hold

for a pledge with authority to sell, without possession of the property, has no effect as against an attachment.[10]

Homestead Right.— An attachment levied upon the unoccupied land of a debtor creates a lien upon the land which is not defeated when the debtor afterwards moves upon the land and occupies it as a homestead.[11] And attachment will prevail over a subsequent conveyance of the homestead, in due form, in pursuance of an agreement previously entered into by the husband alone.[12]

Goods on Consignment. — Since an attaching creditor of a consignor of goods takes only such rights as the defendant has at the time of the attachment,[13] if property has been delivered to a creditor either for the purpose of sale or in payment of the indebtedness, the property may be held by such creditor against the levy of an attachment at the suit of another creditor,[14] and the payee and indorsee of a draft drawn by a consignor is entitled to priority over an attachment creditor of the consignor who levied upon the property after it had been delivered to the consignee.[15]

2. Several Attachments. — a. *In General.* — Where there are several attachments against the same defendant, the creditor having the first attachment has the prior lien,[16] and the rights will be ascertained

against an attachment creditor of the owner. Coe *v.* Bicknell, 44 Me. 163.

One who takes negotiable paper as collateral security for a pre-existing debt, will hold it subject to all the equities existing between the original parties, and absolutely as against an attaching creditor of the payee. Davis *v.* Carson, 69 Mo. 609.

On Attachment Also by Pledgee.— Waiver of Pledge.—Where a pledgee holds goods to secure his own claim and claims of certain other creditors of the pledgor, and another creditor of the pledgor attached the property, subject to the lien created by the pledge, and also by the pledgee for the purpose of further securing his debt, but with no intention of affecting the pledge, and the pledgee continued in possession of the goods, the officer claiming only what interest might be attached subject to the lien, the lien of the pledgee was not thereby waived. Danforth *v.* Denny, 25 N. H. 155.

Though a mortgage debt is barred, a delivery of the goods to the mortgagee constitutes a pledge, and the pledgee may hold against a subsequent attachment. Hudson *v.* Wilkinson, 61 Tex. 606.

Though the mortgage of goods was fraudulent, a pledge of the goods by a delivery to the mortgagee on a distinct agreement, with no element of fraud in the transaction, gives to the pledgee a lien superior to that of a subsequent attaching creditor. Pettee *v.* Dustin, 58 N. H. 309.

10. Rowell *v.* Claggett, 69 N. H. 201, 41 Atl. 173, *citing* Wolcott *v.* Keith, 22 N. H. 209.

11. Hiatt *v.* Bullene, 20 Kan. 557; Bullene *v.* Hiatt, 12 Kan. 98; Baird *v.* Trice, 51 Tex. 555, *overruling* Stone *v.* Darnell, 20 Tex. 11.

12. Striplin *v.* Cooper, 80 Ala. 256.

13. Deloach *v.* Jones, 18 La. 447.

14. Fair *v.* Jones, 3 Head (Tenn.) 308.

15. **Ill.**—Peters *v.* Elliott, 78 Ill. 321. **Ky.**—Petitt *v.* Memphis First Nat. Bank, 4 Bush 334. **Me.**—Walcott *v.* Richman, 94 Me. 364, 47 Atl. 901.

One who discounts a draft and takes a transfer of the bill of lading, becomes entitled to the possession of the goods which cannot be taken from his possession under a writ of attachment. Leinkauf Banking Co. *v.* Grell, 62 App. Div. 275, 70 N. Y. Supp. 1083.

16. **La.**—Emerson *v.* Fox, 3 La. 178; Scholefield *v.* Bradlee, 8 Mart. 495. **Tenn.**—Arledge *v.* White, 1 Head 241. **W. Va.**—Miller *v.* White, 46 W.

as they existed at the time when the attachments were made and not when the judgments were rendered.[17] The fact that the debt upon

Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

An actual and visible change of possession of personal property is necessary (Flanagan *v.* Wood, 33 Vt. 332), but a removal is not always necessary, for the rule requiring a removal is a rule of policy, for the prevention of fraud, and does not apply when the possession is otherwise openly and notoriously changed (Pond *v.* Skidmore, 40 Conn. 213). See Flanagan *v.* Wood, 33 Vt. 332, holding notice sufficient where chattels are in the hands of a third person.

Private Creditor and United States. The rights of a prior attaching creditor prevail though the United States sues out a subsequent attachment. Prince *v.* Bartlett, 8 Cranch (U. S.) 431, 3 L. ed. 614; United States *v.* Canal Bank, 3 Story 79, 25 Fed. Cas. No. 14,715.

As to Rights of Husband and Wife. Where a deed was made to a husband and wife, an attachment in a suit against the wife, issued and levied upon the property before an attachment on the same property in a suit against the husband, has priority, unless the plaintiff in the second attachment produces some evidence that the husband was intended as the grantee to the exclusion of the wife. Allen *v.* Loring, 37 Iowa 595.

A partner having a right to treat the partnership as dissolved, may issue an attachment in a suit against his former partner and obtain priority as against another creditor who had dealt with the latter as an individual. Strong *v.* Stapp, 74 Cal. 280, 15 Pac. 835.

If a debtor fails to claim his exemptions out of the property taken under a first attachment, its lien becomes superior to a second attachment to which the property would not have been exempt. Wallace *v.* Swan, 6 Dak. 220, 50 N. W. 624.

As to Resident and Non-Resident Attachment Creditors.—The rights of an attachment creditor are not at all affected by the question of citizenship, and the attachment laws give no preferences as between resident and non-resident attaching creditors. Barnett *v.* Kinney, 2 Idaho 740, 23 Pac. 922, *citing* Green *v.* Van Buskirk, 7 Wall. (U. S.) 139, 151, 19 L. ed. 109; Sheldon *v.* Blauvelt, 29 S. C. 453, 7 S. E. 593.

Before and After Release of Property From Bankruptcy.—Where proceedings in bankruptcy had been begun against a corporation in one state and an ancillary receiver had been appointed in another, and an adjudication was made by the bankruptcy court that the corporation was not subject to bankruptcy proceedings, an attachment issued and served upon the receiver before the adjudication by a creditor having advance information that the corporation was not subject to the bankruptcy proceedings will maintain its priority over an attachment served upon the receiver after the adjudication. *In re* John L. Nelson, etc., Co., 149 Fed. 590.

Property pursued to another county and brought back can only be attached subject to the prior lien acquired in such other county. Pierson *v.* Robb, 4 Ill. 139.

Where an attachment was levied before a county was divided, upon property divided off and include in the new county, and the execution was thereafter levied by the sheriff of the old county, such execution cannot be maintained as against an attachment levied subsequently and upon which execution properly issued. Kent *v.* Roberts, 2 Story 591, 14 Fed. Cas. No. 7,715.

Suspending second attachment on land to await disposition of prior attachment. Barnard *v.* Fisher, 7 Mass. 71.

Attachment on Sunday confers no rights under a statute prohibiting all judicial proceedings on Sunday. Corning *v.* Dreyfus, 20 Fed. 426, under a Louisiana statute.

In equity, all these priorities give way to a general proceeding, which has for its object to distribute all the effects of a debtor, by paying the whole if there be assets, and then providing for a ratable distribution. Atlas Bank *v.* Nahant Bank, 23 Pick. (Mass.) 480.

17. Claflin *v.* Sylvester, 99 Mo. 276, 12 S. W. 508; Walker *v.* Roberts, 4 Rich. L. (S. C.) 561.

which one creditor has attached was for the purchase money of the property and that he may seize the property, if in the control of the vendee, without alleging the ordinary grounds for an attachment, does not give priority over a general attachment previously levied,[18] but where the single ground of the first attachment is not sustained, the rights of a later attachment creditor based on a good ground attach.[19] The first attaching creditor will be allowed the full amount of his judgment in preference to others who attach after him.[20]

Case Removed from Another County. — Where an attachment was brought in the wrong county, but the defendant appeared and had the cause transferred to the proper county, it was held that the court had jurisdiction, and the attachment had priority over an attachment subsequently issued in the county to which the first attachment was removed.[21]

State and Federal Courts. — Where attachments are sued out both in the state and in the United States courts against the same defendants, their respective priorities will be ascertained under the laws of the state,[22] and where attachment causes begun by several plaintiffs in a state court have been removed by the defendant to the federal court, the federal court will administer the rights of the parties in substantially the same way as it must be presumed they would have been determinded had the causes remained in the state courts.[23]

Except where otherwise provided by statute, or where an exceptionl rule has been established by the courts, the lien of successive attachments on real property takes effect in the order in which the attachments are issued and levied, and the priority of lien is not dependent upon priority in date of the judgments obtained. Van Camp *v.* Searle, 147 N. Y. 150, 14 N. E. 427, *affirming* 79 Hun 134, 29 N. Y. Supp. 757. See also, *supra*, XV, B.

Statutory Limitation of Three Years. A statute which limits the lien of judgments to three years has no application to funds in the hands of the court, and the fact that an attaching creditor having priority has failed to press for a decision of the court as to the distribution of the proceeds of attached property for more than three years does not change the priorities as between attaching creditors. State *v.* Hickman, 150 Mo. 626, 51 S. W. 680.

18. Arkadelphia Lumber Co. *v.* McNutt, 68 Ark. 417, 59 S. W. 761, 82 Am. St. Rep. 299.

Vendor's Privilege of Sequestration. The statutory privilege of sequestration which is given to a vendor exists only so long as the vendor is unpaid and the property remains in the power of the vendee, and the rights of third parties have not intervened, and a prior attachment has priority. Fox *v.* Arkansas Industrial Co., 52 Ark. 450, 12 S. W. 875.

19. Sloane *v.* Williamson, 4 Heisk. (Tenn.) 506.

20. Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206.

21. Laird *v.* Dickerson, 40 Iowa 665. In Carney *v.* Taylor, 4 Kan. 178, it was held that where an attachment was issued in a county in which the defendant neither had property nor was found, and was sent to and levied upon property of the defendant in another county, the court had not acquired jurisdiction and a subsequent attachment issued in the county in which the property was situated has priority, and the fact that the defendant was subsequently found and personally served in the former county did not restore the priority of the first attachment.

22. Bates *v.* Days, 17 Fed. 167; Alder *v.* Roth, 5 Fed. 895, 2 McCreary 447. See U. S. Rev. St., §915, 4 Fed. St. Ann. 577.

23. Bankers', etc., Tel. Co. *v.* Chicago Carpet Co., 28 Fed. 398.

As to attachment in different states, it has been held that a judgment of condemnation rendered in a court of competent jurisdiction in another state, and execution and satisfaction thereof by the garnishee, is a good plea in bar to a suit by the original creditor against the garnishee for the same debt, whether the process of attachment in the other state was prior or subsequent in date.[24]

Direction or Agreement To Stay Execution.— Where an attachment creditor directs the officer holding the writ not to levy unless some other creditor gets out an attachment, a subsequent attachment issued and placed in the hands of the officer with a direction to levy at once before the former order was countermanded gives the second attachment priority,[25] though it has been held that where on attachment upon real property the plaintiff agrees to stay execution for a certain time, the lien is not postponed to that of a judgment rendered after the levy of the attachment.[26]

Where Lien Commences From Levy. — Where an attachment lien commences from the time of service or levy of the writ or warrant, the attachment which has been first served or levied is entitled to priority,[27]

24. Cole *v.* Fliteraft, 47 Md. 312, the court saying, with respect to the doctrine that priority of suit would determine the right: "These remarks were doubtless correct as far as applied to the facts then before the court; and to the courts in which the conflict of jurisdiction then occurred, as between federal and state courts in the same state, but it is very doubtful whether they are applicable to courts of entirely distinct government. It depends entirely upon the comity of the courts of the several states, what effect may be given to the pending process of the courts of one state in another. There is not, as far as we are advised, any legal obligation on a state court to suspend its action in a case before its suitors, because a suit is pending in another state for the same property between other parties."

25. Florsheim Dry-Goods Co. *v.* Geo. Taylor Com. Co., 59 Ark. 307, 27 S. W. 79, applying the rule in execution cases, that, under such a direction to hold, the officer acts, not in his official capacity, but as agent for the plaintiff. See also, Blakeley *v.* Smith, 16 Ky. L. Rep. 109, 26 S. W. 584.

A mortgage executed while an attachment was in the hands of the sheriff, with instructions from plaintiff's attorney not to levy it until he told him to do so, creates a lien superior to the lien created by a subsequent levy of the attachment. Gray *v.* Patton, 13 Bush (Ky.) 625.

26. Ensworth *v.* King, 50 Mo. 477, wherein the court said that where the levy of the attachment has been personal property, a different rule would govern; where in the case of personal property, a plaintiff directs an officer to hold up his execution, and not to sell or proceed to make the money until he shall give further orders, and until he shall find younger executions crowding in, such acts render the execution dormant and fraudulent as to subsequent executions, and in the case of real estate the judgment confers the lien, and in the case of personalty, it arises out of the execution.

27. **U. S.**—Naumburg *v.* Hyatt, 24 Fed. 898; Johnson *v.* Griffith, 2 Cranch C. C. 199, 13 Fed. Cas. No. 7,386; Grigsby *v.* Love, 2 Cranch C. C. 413, 11 Fed. Cas. No. 5,827 (as toa chancery attachment under a Virginia statute). **Conn.**—Beers *v.* Place, 36 Conn. 578, 3 Fed. Cas. No. 1,233; Hollister *v.* Goodale, 8 Conn. 332, 21 Am. Dec. 674. **Ga.**—Willis *v.* Parsons, 13 Ga. 335; McDougald *v.* Barnard, 3 Ga. 169. **La.** Grant *v.* Fiol, 17 La. 158; Edson *v.* Freret, 11 La. Ann. 710; Harmon *v.* Paul Juge Fils, 6 La. Ann. 768. **Mont.** Steinhart *v.* Fyhrie, 5 Mont. 463, 6 Pac. 367. **N. Y.**—Patterson *v.* Perry, 5 Bosw. 518, 10 Abb. Pr. 82. **Tenn.**—Gilliland *v.* Cullum, 6 Lea 521; Arledge *v.* White, 1 Head 241. **Tex.**—Heye *v.*

though several issued from different courts.[28] And when writs come to the hands of the same officer against the same defendant, it is generally held or is a matter of statutory direction that the officer should levy the writs in the order in which they are received by him.[29] And such order, it is generally held, will preserve the priority of lien though the first attachment may in fact have been levied after one issued later.[30]

Moody, 61 Tex. 615, 4 S. W. 242; Dalsheimer *v.* Morris, 8 Tex. Civ. App. 268, 28 S. W. 240. Va.—Erskine *v.* Staley, 12 Leigh 406.

The levy of an attachment first in point of time, regular in form, and to secure a valid indebtedness, should be first satisfied out of the proceeds of the attached property in the hands of the sheriff. Stephenson *v.* Parker Stationery Co., 142 Mo. 13, 43 S. W. 380.

As in order to a valid levy of a writ of attachment upon personal property, such property must be within view of the officer, and subject to his immediate disposition and control, when an officer attempted to levy by making a return of a levy on grain in a car several miles away, a subsequent actual levy on the grain has priority. The first attachment did not become even an incipient lien. Culver *v.* Rumsey, 6 Ill. App. 598.

The mere lodgment of an attachment in the sheriff's office does not create a lien on all the property and credits of the debtor so as to make him answerable to the attachment in preference to other attachments which may be actually served. Robertson *v.* Forest, 2 Brev. (S. C.) 466; Crowninshield *v.* Strobel, 2 Brev. (S. C.) 80.

Levying on Different Property.—Where one plaintiff only levied upon certain effects, such plaintiff is entitled to subject such effects to the exclusion of the other attaching creditors. Farmers' Bank *v.* Day, 6 Gratt. (Va.) 360.

Where other property than that seized under a first attachment is seized under a second attachment before execution under the first attachment, such property must be held to satisfy any judgment that may be recovered under the second attachment. Gillig *v.* George C. Treadwell Co., 11 Misc. 237, 32 N. Y. Supp. 974.

Not the time of execution sale, but the time of levy governs. Poor *v.* Chapin, 97 Me. 295, 54 Atl. 753.

28. Patterson *v.* Stephenson, 77 Mo. 329.

29. Under a statute which authorizes the court to settle controversies in relation to the priority of the different attachments as right and justice may require, it has been held that where there are several attachments, the writ first levied is *prima facie* entitled to priority in satisfaction, regardless of the order in which the writs came to the hands of the officer, but when two or more of such writs come into the hands of the same officer, it is his duty to levy first the one first received, and if he violates this rule, the court may restore the rights of the party prejudiced. State *v.* Harrington, 28 Mo. App. 287.

Relation of Officer and Deputies.—The time of levies by deputies of the same sheriff effect nothing as to rights of priority. State *v.* Harrington, 28 Mo. App. 287. But *compare* Meacham Arms Co. *v.* Strong, 3 Wash. Ter. 61, 13 Pac. 245, holding that where one writ of attachment is placed in the hands of a sheriff and another against the same defendant is placed subsequently in the hands of a deputy sheriff, if the deputy makes actual levy first, the attachment thus first levied has priority.

And although, when the process comes to the hands of different deputies, this order of service may happen to be reversed without fault, the chancellor having the fund in his hands under all of the attachments, will distribute it according to the rule which should have governed the execution of the process. Kennon *v.* Ficklin, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776.

30. **Kan.**—Larbee *v.* Parks, 43 Kan. 436, 23 Pac. 598. **Ky.**—Lutter *v.* Grosse, 26 Ky. L. Rep. 585, 82 S. W. 278 (*overruling* Sewell v. Savage, 1 B. Mon. 260); Lane *v.* Robinson, 18 B. Mon. 623; Clay *v.* Scott, 7 B. Mon. 554; Nutter *v.* Connett, 3 B. Mon. 199. **N. Y.** Yale *v.* Matthews, 12 Abb. Pr. 379. **S. C.**—Callahan *v.* Hallowell, 2 Bay 8.

In the case of writs or warrants in the hands of different officers, the process by which the property is first brought under the lien of the attachment has priority,[31] and rights under the succeeding writs attach subject to and without interfering with the possession under the first process.[32]

Effect of Sales Under the Attachments. — Where there has been a sale of land under a junior attachment, the title of the defendant passes subject to the lien of a prior attachment,[33] and where land is sold at the same time under two attachments, the levy of the first attachment is thereby discharged, and such attachment creditor is thereby entitled to the money, or to the amount of his judgment out of it.[34] On a sale

The contrary has been held in May *v.* Buckhannon River Lumb. Co., 70 Md. 448, 17 Atl. 274, holding further, however, that where the sheriff has in fact first levied the attachment issued last, and the parties have stipulated that if the court should be of opinion that it was the duty of the sheriff to serve the first attachment before the second, the error of the sheriff should be corrected by an amendment of his returns to the writs so as to give priority to the first attachment, the amendment may be allowed.

Where the property levied on under a senior attachment was mortgaged to its full value, it will be deemed to have been in the same position as if no levy had been made, and junior attachments levied on other property will be postponed to the lien of the senior attachment. Atchison, etc., R. Co. *v.* Schwarzschild, etc., Co., 58 Kan. 90, 48 Pac. 591, 62 Am. St. Rep. 604.

Correction of Return.—The officer cannot, by a declaration of levy under a junior attachment, change the rule of the law or give priority over a senior order; and the court may require the officer's return to be corrected, and may give the benefit to the creditor whose order of attachment was first delivered to the sheriff. Atchison, etc., R. Co. *v.* Schwarzschild, etc., Co., 58 Kan. 90, 48 Pac. 591, 62 Am. St. Rep. 604. See also Phelps *v.* Ratcliffe, 3 Bush (Ky.) 334.

Where a partial but insufficient levy has been made upon a senior attachment and property is subsequently levied upon under a junior attachment, the later levy inures to the benefit of the senior attachment. Gillig *v.* George C. Treadwell Co., 148 N. Y. 177, 42 N. E. 590, *reversing* 11 Misc. 237, 32 N. Y. Supp. 974.

If a statute authorizes service on Sunday, when the petition states that the plaintiff will lose his claim unless it is served on that day, and one attachment issued on Saturday night omitted such averment, but in a later one such an allegation was made, the officer properly refused to serve the later attachment first on Sunday when the petition supporting the first attachment was amended so as to authorize the service of the attachment on Sunday. Richards *v.* Schrieber, etc., Co., 98 Iowa 422, 67 N. W. 369. The court pointed out that the writ was at all times valid, and, though suspended on Sunday morning, was revived by the amendment.

Where a copy of a writ was delivered to the sheriff, the judge retaining possession of the original by mistake, and a second writ sued out by other creditors was placed in the hands of the sheriff before the original of the first writ, the second writ has priority. The officer has no jurisdiction to act until the process is fully completed. The writ was still *sub judice.* Niagara Grape Market Co. *v.* Wygant, 1 App. Div. 588, 37 N. Y. Supp. 486.

31. Arkadelphia Lumb. Co. *v.* McNutt, 68 Ark. 417, 59 S. W. 761, 82 Am. St. Rep. 299; Derrick *v.* Cole, 60 Ark. 394, 30 S. W. 760; Simon *v.* Alder-Goldman Com. Co., 56 Ark. 292, 19 S. W. 921.

32. Patterson *v.* Stephenson, 77 Mo. 329.

33. **Under Statute Declaring the Priority To Be in the One Who First Attaches.**—De Wolf *v.* Murphy, 11 R. I. 630.

34. Hanauer *v.* Casey, 26 Ark. 352. **Distinguishing personal property,** the court, in Hanauer *v.* Casey, 26 Ark. 352, said: "It is true, where several

of personalty under attachments, the senior attachment creditor may sue the junior creditor who has obtained the proceeds, in an action for money had and received.[35]

Effect of Losing Lien of First Attachment.— The rights and priorities of attaching creditors, as between themselves, are matters of strict law, and if the senior attachment creditor once loses his lien, the rights of the junior attaching creditors intervene and take precedence.[36] Such prior lien is lost by a release,[37] or dismissal of his attachment,[38] or by a waiver or abandonment of it,[39] and the right acquired by the junior

executions come to the hands of the sheriff, at different times, and he sells personal property under the last, the others are to be first paid; but this is because the property levied on is bound, by the executions, from the time of the delivery of them to him; and upon a sale thereof, he must, to be entitled to receive the price, deliver the same to the purchaser, which, as a matter of course, releases the liens, and an absolute title passes to the purchaser.''

35. Caperton *v.* McCorkle, 5 Gratt. (Va.) 177.

36. Burnham *v.* Blank, 49 Mo. App. 56; Adler *v.* Anderson, 42 Mo. App. 189.

37. Adler *v.* Anderson, 42 Mo. App. 189.

Sale of Property By Consent.—A stipulation entered into by attaching creditors, the debtor and a general assignee for creditors, that the property should be sold and the proceeds paid to the clerk of court to be held subject to the order of the court for the purposes of the cases in which the attachments had issued, does not release the attachments, but the fund is held for the payment of the attaching creditors according to their respective interests. Cressy *v.* Katz-Nevins-Rees Mfg. Co., 91 Iowa 444, 59 N. W. 63. See also Bell *v.* Pearce, 1 B. Mon. (Ky.) 73.

Assignment of Judgment.—Where an attachment creditor assigns his judgment, this operates as an extinguishment and dissolution of the attachment, and the assignee holds the property discharged of any lien thereunder but subject to the lien of a junior attachment. Donk *v.* St. Louis Glucose, etc., Co., 17 Ill. App. 369.

Consolidating Claims.—Where several creditors of a firm, who were mostly ignorant of the partnership and dealt with one of the partners alone, after the partnership goods had been attached by one of the creditors, to save expenses consolidated their debts and accepted a note from the other partner upon an agreement that he should not be called upon beyond the value of the partnership goods, and the payee of the note afterwards sued on the note and attached the partnership goods, such attachment is entitled to priority over that issued before the consolidation of the debts. Witret *v.* Richards, 10 Conn. 37.

Officer Appointed Guardian of Plaintiff.—Where a deputy sheriff, after commencing the levy of an attachment, was appointed guardian of the plaintiff, who since the issuing of the attachment had been adjudged insane, such deputy was without authority to complete the service of the attachment under a statute providing that ''no officer shall serve a writ . . . where he, or a private corporation of which he is a member, is a party or interested,'' and subsequent attachment creditors obtain priority. Clark *v.* Patterson, 58 Vt. 676, 5 Atl. 564.

38. Tootle *v.* Cahn, 52 Kan. 73, 34 Pac. 401.

Taking Attached Property in Payments.—Where the claim of an attaching creditor exceeded in value all the property attached, and, by arrangement with the debtor, he received all the property from the sheriff, at its full value, in part satisfaction of his claim and attachment, this constituted a discharge and discontinuance of the suit, and the officer is liable to creditors who attached the property before its surrender by the sheriff. Brandon Iron Co. *v.* Gleason, 24 Vt. 228.

39. **Electing To Take Other Proceedings.**—Where attaching creditors changed their purpose of pursuing their remedy by attachment and elected to

attachment cannot be divested by reinstating the first attachment.[40]

b. *Under Statutes Providing for Pro Rata Distribution.* — In at least three jurisdictions, namely Colorado, Florida, and Illinois, statutes provide for a *pro rata* distribution of the proceeds of attached property among several creditors suing by attachment, or when part sue by attachment and the others by ordinary summons. Two classes of cases seem to be provided for: First, where two or more creditors commence by attachment, and all writs are returnable to the same term, they are protected by the statute whether they all obtain judgments at the same or at different terms of court. Second, all judgments in suits by summons, capias or attachment, rendered at the term when judgment is obtained in the action of attachment regardless of the time when the actions were commenced.[41]

take other proceedings, subsequent attaching creditors gained a preference lien. Sullivan *v.* Cleveland, 62 Tex. 677.

Failure To Record Execution Deed in Time.—Under a statute requiring a purchaser at an attachment sale to record his deed within three months after the sale, where a sale was made under a junior attachment before execution sale under a previous attachment, such sale under the junior attachment is good against the subsequent sale under the first attachment when the deed under the later sale was not recorded until after the expiration of three months from the sale. Hayford *v.* Rust, 81 Me. 97, 16 Atl. 372.

Issuing General Execution.—No intention to abandon a priority is expressed or implied from the act of issuing a general execution and causing a sale thereunder of the same property on which the priority was established. Liebman *v.* Ashbacker, 36 Ohio St. 94.

Where attachments have been abandoned, there can be no priorities, and the property is subject to division *pro rata* among the various creditors. Claiborne *v.* Stewart, 4 Baxt. (Tenn.) 206.

40. Murphy *v.* Crew, 38 Ga. 139.

41. See **U. S.**—Baum *v.* Gosline, 15 Fed. 220, under Colorado statute. **Colo.** Brady *v.* Farwell, 8 Colo. 97, 5 Pac. 808; Davis *v.* Excelsior Co., 7 Colo. 436, 5 Pac. 816; Daniels *v.* Lewis, 7 Colo. 430, 4 Pac. 57; Maloney *v.* Grimes, 1 Colo. 111. **Fla.**—Smith *v.* Bowden, 23 Fla. 150, 1 So. 314; Post *v.* Carpenter, 3 Fla. 1. **Ill.**—Pollack *v.* Slack, 92 Ill. 221; Jones *v.* Jones, 16 Ill. 117; Chandler *v.* Mullanphy, 7 Ill. 464; Locke *v.* Duncan, 53 Ill. App. 373; McCoy *v.* Schnellbacker, 2 Ill. App. 582.

Proceeds of sale of perishable property embraced within the statute. Donk *v.* Alexander, 117 Ill. 330, 7 N. E. 672.

The statute applies where the summons is issued less than ten days before the return term. Mechanics' Sav. Inst. *v.* Givens, 82 Ill. 157.

A judgment by confession is not within the letter or spirit and intent of the statute. Brewster *v.* Riley, 19 Ill. App. 581.

First Attachment Dismissed.—Intervening Execution.—Under the Illinois statute providing that judgments shall share *pro rata,* according to the amount of the several judgments, the mere levy of a writ of attachment does not have the effect of holding the property for the benefit of subsequent attaching creditors, and where an execution in a suit commenced by ordinary summons has been issued and a previous attachment is then dismissed, such execution has priority over an execution issued on a judgment in an attachment suit brought after the issuing of such execution. Paltzer *v.* National Bank, 145 Ill. 177, 34 N. E. 34, *affirming* 41 Ill. App. 443.

Under the proviso, declaring that a creditor by whose diligence property about to be removed, actually removed, or concealed, has been secured, may be allowed a priority over other attachments, a finding of such superior diligence on the part of one creditor by the court, affirmed by the intermediate appellate court is binding upon the supreme court. MacVeagh *v.* Roy-

In the first class of cases, attaching creditors are entitled to distribution *pro rata* when returnable to the same term, although they may not obtain judgment at the same time.[42]

In the second class of cases, the judgments obtained at the same term are placed upon the same footing, whether the suits in which they were obtained were instituted by attachment or ordinary summons,[43] and the statute does not allow one creditor to recover separate judgments against the common debtor upon divers evidences held for one and the same debt, and then be permitted to receive a *pro rata* dividend upon each of such judgments.[44]

c. *Invalidity of First Attachment.* — Where the attachment, first in point of time, was issued in a case for which the law has not provided this remedy, it cannot stand in the way of a subsequent attachment,[45]

sten, 172 Ill. 515, 50 N. E. 153, *affirming* 71 Ill. App. 617.

Where an attachment comes within the operation of the priviso, a junior attachment creditor loses the benefit of the lien of the first attachment, and an attachment issued out of another court before the junior attachment has priority.' MacVeagh *v.* Roysten, 172 Ill. 515, 50 N. E. 153, *affirming* 71 Ill. App. 617.

A Manitoba statute provides that where several persons sue out writs of attachment, the proceeds and effects attached shall be ratably distributed among such of the attaching plaintiffs as shall in due course obtain judgment and sue out execution; before the statute, is was held that the first attaching creditor took priority over all subsequent ones. Fischel *v.* Townsend, 1 Manitoba 99.

42. Warren *v.* Iscarian Community, 16 Ill. 114.

When several creditors attach the same property under writs returnable to different terms of court, the rule of precedence, as modified by the statute, requires that they should be classified with reference to the terms of court to which their writs are returnable, and gives preference to the several classes according to priority of service. Maloney *v.* Grimes, 1 Colo. 111.

"**The words 'returned to the same term of the court to which they are returnable,'** should be interpreted to mean and to apply to all writs of attachment which are in fact returned to, at or during the same term of court at or during which they may properly be returned after service according to law." Daniels *v.* Lewis, 7 Colo. 430, 4 Pac. 57.

Effect of Continuances.—If a civil action, commenced at the same term of court as attachments, should, for any cause, be continued, although without fault or consent of the plaintiff in such action, he would thereby lose the right to share with the attaching creditors, in the proceeds of the attached property; and this, though the attachments should also be continued, and judgments should eventually be entered in all the causes, at the same term of the court. Rucker *v.* Fuller, 11 Ill. 223.

43. Smith *v.* Bowden, 23 Fla. 150, 1 So. 314.

44. Everingham *v.* National City Bank, 124 Ill. 527, 17 N. E. 26.

45. Meyer *v.* Ruff, 13 Ky. L. Rep. 254, 16 S. W. 84; Ward *v.* Howard, 12 Ohio St. 158.

Where in an action by a non-resident against a non-resident, the record does not show that the contract was made or that the cause of action arose within the state, an attachment subsequently properly sued out has priority. Smith *v.* Union Milk Co., 70 Hun 348, 24 N. Y. Supp. 79.

Where two creditors of a legatee file bills against the executor and the legatee to subject the interest of the legatee, and one creditor filed his bill before the executor qualified, his attachment must be postponed to the lien of the creditor filing his bill after

as in the case of a failure to show that there is owing any specific debt.[46]

First Attachment on Debt Not Due. — If a debt has not yet matured when the attachment suit is commenced, the claim should be postponed to a junior attachment creditor whose debt is due.[47] Though, when a statute provides that a creditor whose debt is not due may proceed by attachment, an attaching creditor cannot claim priority over a previous attachment on the ground that the debt in that case was not due at the time the attachment was sued out, unless there was also fraud in the transaction.[48] And it has been held that the act of an attachment creditor in adding to his just demand a sum clearly not due and taking a judgment for the whole, will vacate the whole attachment as against a subsequent attaching creditor,[49] though the rule has been differently stated, that where the excess was claimed with the design of defraud-

qualification. Ward *v.* Bowen, 2 Sneed (Tenn.) 58, the court saying that no objection was made by the executor or debtor to the liability of the fund to attachment.

An attachment sued out on a money count may be supported by a note over due and unpaid, and will not be postponed to a subsequent attachment sued out and declaring specifically upon a note. Fairbanks *v.* Stanley, 18 Me. 296. But *compare* Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388.

Ratification.—Where an attachment was invalid because unauthorized, rights under a second attachment cannot be displaced by a subsequent ratification of the former attachment. Caruth-Byrnes Hardware Co. *v.* Deere, 53 Ark. 140, 13 S. W. 517, 7 L. R. A. 405.

On Agreements Between Creditors. Where it was agreed between a creditor who had attached real estate, and several other creditors who had attached the same property, that the latter would not interfere with the disposition of it, it was held that as under the law real estate is not to be sold at auction but is to be set off to the creditor, by appraisement, such an agreement did not affect the validity of the former creditor's levy. Spencer *v.* Champion, 13 Conn. 11.

Invalidity Shown by Subsequent Attaching Creditor.—In an action by one of several attaching creditors against the others to determine priorities among the several lienholders, the plaintiff cannot take advantage of any mere irregularity or informality of another attachment for the purpose of defeating his priority, but he may show that his attachment was issued without authority of law, and thereby defeat it. Seibert *v.* Switzer, 35 Ohio St. 661.

It is competent, for a subsequent attaching creditor, who enters in a suit under the statute for the purpose of contesting the claim of a prior attaching creditor, to introduce any evidence contesting the validity of the claim, and showing that it is illegal and void as against subsequent attaching creditors, even if the testimony would be incompetent, if offered by the debtor himself. Harding *v.* Harding, 25 Vt. 487.

46. Norton *v.* Hickok, 25 Conn. 356. See also Ayres *v.* Husted, 15 Conn. 504, as to part of a judgment.

47. **Cal.**—Patrick *v.* Montader, 13 Cal. 434, at least *prima facie* void. **Ill.** Schilling *v.* Deane, 36 Ill. App. 513. **Mass.**—Baird *v.* Williams, 19 Pick. 381; Pierce *v.* Jackson, 6 Mass. 242. **S. C.** Walker *v.* Roberts, 4 Rich. L. 561.

See, *supra*, VII, E.

48. Espenhain *v.* Meyer, 74 Wis. 379, 43 N. W. 157.

49. Pierce *v.* Partridge, 3 Met. (Mass.) 44.

Where an attaching creditor wrongly united a claim not due with a cause of action on which the attachment might properly issue, in a suit by a subsequent attaching creditor to restrain an execution sale under a judgment on the prior attachment, the judgment need not be declared void, but the rights of the complainants will be protected by postponing the lien of the defendants to the liens obtained

ing others, those who are wronged may perhaps avoid it entirely although good in part, but when there is no fraudulent intention the excess only will be postponed to the subsequent attachment.[50]

First Attachment Fraudulent. — Where an attachment was collusive and fraudulent, and was sued out and levied upon the property for the purpose of hindering, delaying, and defrauding creditors and to shield the property of the defendant from such creditors, regular attachments subsequently issued will be given priority,[51] and where the debt was collusively and fraudulently executed, a subsequent attachment has priority.[52]

A judgment by confession is open to attack on the part of a subsequent attaching creditor on the ground that it was not based upon a *bona fide* indebtedness and was fraudulent as to creditors.[53] But where the creditor had the right to attach, the mere fact that the attachment was favored by the debtor does not make it a fraudulent attachment as to other subsequent attaching creditors.[54]

by the complainants. Hale *v.* Chandler, 3 Mich. 531.

50. Coghill *v.* Marks, 29 Cal. 673; Hinchman *v.* Town, 10 Mich. 508. See also Syracuse City Bank *v.* Coville, 19 How Pr. (N. Y.) 385; Schneider *v.* Roe (Tex.), 25 S. W. 58.

51. **Ia.**—Haller *v.* Parrott, 82 Iowa 42, 47 N. W. 996. **Ky.**—See Deposit Bank *v.* Smith, 109 Ky. 311, 58 S. W. 792. **Mass.**—Adams *v.* Paige, 7 Pick. 542. **Tex.**—Interstate Nat. Bank *v.* Stuart, 39 S. W. 963; Zadick *v.* Schafer, 77 Tex. 501, 14 S. W. 153; Freiberg *v.* Freiberg, 74 Tex. 122, 11 S. W. 1123.

The fact that a person in possession of property under a legally impounded claim of title, placed them in the nominal possession of his attorney, in a place known only to himself, and was thus enabled to secure a levy on them prior in law to that of other creditors, does not postpone his lien to theirs, when he had not resorted to fraudulent devises or to false representations in order to delay or deceive other creditors. Dooley *v.* Hadden, 179 U. S. 646, 21 Sup. Ct. 259, 45 L. ed. 357, *reversing* 93 Fed. 728, 35 C. C. A. 554.

Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over attachments preceding his, on the ground, that by his superior diligence the fraud has been discovered. Patrick *v.* Montader, 13 Cal. 434.

Permitting property attached to remain in possession of the defendant is a presumptive fraud upon a subsequent attaching creditor, and a mere colorable removal and possession of the property does not repel the presumption of fraud arising from the possession. Burrows *v.* Stoddard, 3 Conn. 160.

Inducing Second Creditor To Delay His Attachment.—It is no ground, in chancery, for postponing a prior to a subsequent attachment, that the second attaching creditor was induced to delay his attachment by being told, by the other creditor, that he had already attached the property, when in fact he had not, whereby he gained time and opportunity to put his attachment first upon the property. Bardwell *v.* Perry, 19 Vt. 292, 47 Am. Dec. 687.

Where goods belonging to two persons have been attached by a creditor of each, and had been first levied upon by an officer for a creditor of one and afterwards by a different officer for a creditor of the other, no question of fraud can be involved, as it is not a controversy between two creditors of one person, but is a controversy between creditors of different parties, and relates solely to the possession of the property. Pond *v.* Skidmore, 40 Conn. 213.

52. Harding *v.* Harding, 25 Vt. 487.

53. Brewster *v.* Riley, 19 Ill. App. 581.

54. Rawlins *v.* Pratt, 45 La. Ann. 58, 12 So. 197.

Where part of the first attaching creditor's claim is fraudulent and void as to a subsequent attaching creditor the whole claim loses its priority.[55] The fact, however, that a false claim is blended with a just demand, does not make the attachment fraudulent as to a subsequent attaching creditor, in the absence of actual fraud, and the first attachment will be treated as security for the amount actually due.[56]

Defects in Proceedings. — A subsequent attaching creditor cannot take advantage of what may properly be regarded as informalities or irregularities in the proceedings on a former attachment, though constituting good grounds for objection on the part of the defendant.[57]

d. *Several Levies at Same Time.* — Where several creditors have attached property under levies made at the same time, they hold without preference and in undivided moieties in the proportion of their respec-

A debtor may create a bona fide preference by suffering an attachment. Claflin *v.* Sylvester, 99 Mo. 276, 12 S. W. 508.

A *bona fide* creditor's *bona fide* attachment for existing good cause is not destroyed or his rights postponed to subsequent creditors for the reason that he pays the debtor defendant a money consideration to permit a judgment sustaining the well founded attachment and for the debt. Doggett *v.* Wimer, 54 Mo. App. 125.

Withdrawal of Plea in Abatement. Where the defendant filed a plea in abatement to the writ of attachment, but on the day set for the trial of the plea, withdrew it and filed an answer in which he admitted the plaintiff's cause of action and consented that judgment might be rendered for the amount claimed, this was not a judgment by confession such as would postpone the lien of the attachment. Adler *v.* Anderson, 42 Mo. App. 189.

55. Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388; Hale *v.* Chandler, 3 Mich. 531.

Where a creditor obtained an attachment for an amount in excess of that justly due, and the court found that the creditor knew that the ground of attachment as to the excess was known by the creditor to be false at the time the attachment issued, the lien was properly postponed to that of an attachment subsequently issued. Kollette *v.* Seibel, 7 Tex. Civ. App. 260, 26 S. W. 863.

56. Mendes *v.* Freiters, 16 Nev. 388; Craig *v.* California Vineyard Co., 30 Ore. 43, 46 Pac. 421.

57. Ohio.—Ward *v.* Howard, 12 Ohio St. 158. Okla.—Coyle Mercantile Co. *v.* Nix, 7 Okla. 267, 54 Pac. 469 (affidavit defective but not void). S. C.—Walker *v.* Roberts, 4 Rich. L. 561. Tenn.—Lea *v.* Maxwell, 1 Head 365.

An attachment against a corporation under a wrong name gives way to a subsequent attachment in the proper name. Lorie *v.* Abernathy, 63 Mo. App. 249, 1 Mo. App. 778. See also Kittredge *v.* Gifford, 62 N. H. 134, holding that an amendment does not restore the priority of the first attachment.

Defective Bill.—Where a bill, in an action in which an attachment was issued, was defective in failing to state the character of the debt and that the debt was just, as required by the statute, and pending a motion to discharge the attachment for these defects the bill was amended so as to meet the grounds of the motion, an attachment issued upon a sufficient bill before the amendment was made is entitled to priority. Kendrick *v.* Mason (Tenn.), 62 S. W. 359.

Where a defendant issued process against himself in the name of a creditor, on a note given upon the understanding that in case of difficulty the debtor would secure the creditor, and the attachment was subsequently ratified, the attachment was valid when issued and will hold its priority over a subsequent attachment. Bayley *v.* Bryant, 24 Pick. (Mass.) 198.

Effect of Ratification.—A first attachment was sued out without the knowledge of the plaintiff at the instance of a surety for the defendant, and the

tive claims to the sum total of claims,[58] unless the moiety, which one can hold is more than sufficient to satisfy his debt, in which case the surplus will go to the other or others.[59]

On Same Day. — It has been held that where attachments went into the sheriff's hands and were served on the same day, as among the attaching creditors there is no preference resulting out of fractions of a day,[60] while other cases hold that the one first issued and levied has priority.[61] And when two attachments were issued and levied upon property upon the same day, and the earlier one was upon a claim on

action was ratified by the plaintiff. But in the meantime an attachment was issued under which a lien was acquired. Caruth-Byrnes Hardware Co. *v.* Deere, 53 Ark. 140, 13 S. W. 517, 7 L. R. A. 405, *citing* Baird *v.* Williams, 19 Pick. (Mass.) 381.

58. **Mass.**—Shove *v.* Dow, 13 Mass. 529. **N. H.**—Thurston *v.* Huntington, 17 N. H. 438. **Vt.**—Wilson *v.* Blake, 53 Vt. 305.

Creditors whose attachments were levied at the same time will be entitled to distribution, *pari passu,* if there be a deficit in the proceeds of the property thus attached by them at the same time. Nutter *v.* Connet, 3 B. Mon. (Ky.) 199.

Where the property turned out to be an equity of redemption, the equity was properly sold in moieties at the same time to the same bidder by the officer holding both executions, one undivided half thereof upon one execution and the other half upon the other. True *v.* Emery, 67 Me. 28.

Creditor Attaching Small Part of Estate.—No objection can properly be taken by one creditor because the other set off to himself a smaller proportion of the estate than by law he was entitled to, and the case may be considered as if a levy had been made by him on an undivided moiety of the land. Durant *v.* Johnson, 19 Pick. (Mass.) 544.

Where one officer returned several writs in a particular order, subject to each other, this gives the attachments priority among themselves, though they were made at the same time, but another attachment served at the same time by another officer takes a share in the proportion of his claim to the whole number of claims. Thurston *v.* Huntington, 17 N. H. 438.

Contract Between Officers To Divide Property.—When attachments were made so near together in point of time that a dispute between the officers which had priority was a serious one, a contract between them to settle this dispute by a division of the property is binding upon them, however it might be upon the creditors who had attached. Lyman *v.* Dow, 25 Vt. 405.

59. Blaisdell *v.* Pray, 68 Me. 269; Sigourney *v.* Eaton, 14 Pick. (Mass.) 414, 25 Am. Dec. 414.

60. Jones *v.* Ealer, 1 Ohio Dec. (Reprint) 385, 8 West L. Rep. 500.

A statutory provision "that all attachments lodged upon the same day shall take rank together" applies to attachments on both real and personal property. Steffens *v.* Wanbocker, 17 S. C. 475.

61. Gomila *v.* Milliken, 41 La. Ann. 116, 5 So. 548; Tufts *v.* Carradine, 3 La. Ann. 430; Western Nat. Bank *v.* National Union Bank, 91 Md. 613, 46 Atl. 960. See also Stone *v.* Abbott, 3 Baxt. (Tenn.) 319, wherein the court said that the rule is different where it appears the levies were made at the same time, or made under circumstances showing the several writs were, at the time of the levy of the first, in the hands of the officer, and he was present for the purpose of levying all—the law giving no election to an officer to give preference to one creditor over another in the discharge of his official duty.

Fractions of a Day May Be Noticed. Corning *v.* Dreyfus, 20 Fed. 426. But see Steffens *v.* Wanboeker, 17 S. C. 475.

The precise time of each attachment may be shown. Bigelow *v.* Willson, 1 Pick. (Mass.) 485.

Parol Evidence To Show Time of Day. Brainard *v.* Bushnell, 11 Conn. 16.

An endorsement upon a writ as to the time it was levied is conclusive upon the parties to the writ, but not as to another attachment creditor who may show that it was not in fact levied

which the plaintiff ought not to recover, the later attachment has the prior lien.[62]

3. As Between Attachments and Other Liens and Conveyances. — a. *In General.* — It is a general rule that the lien which an attaching creditor acquires by his attachment is without effect as against prior incumbrances and liens,[63] but that an attachment on land creates a lien which is paramount to any subsequent alienation or charge which could arise by operation of law or from the act of the defendant in attach-

until after his own writ, issued on the same day. Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. 378.

Under a statute providing that "in case two or more attachments are issued against the same party defendant, the one first in the hands of the proper officer for service shall have the prior lien," where two attachments were issued and served on the same day, the one first issued and served has priority. Underhill *v.* McManus, 175 Pa. 39, 34 Atl. 308; Fourth St. Nat. Bank *v.* Hunter, 19 Phila. 486, 46 Leg. Int. 56. See Jones *v.* Bonsall, 11 Phila. 561, 32 Leg. Int. 397; Case *v.* Case, 5 Pa. L. J. 281.

Rules of Presumption.—Where one attachment was levied according to the return at twelve o'clock noon, and another was levied on the same day with no time stated on the return, the former must take precedence of the latter. Fairfield *v.* Paine, 23 Me. 498, 41 Am. Dec. 357.

In Ginsberg *v.* Pohl, 35 Md. 505, the court said: "Where attachments, by way of original process, are laid on the same day, and there is nothing in the officer's return, nor on the face of the proceedings, to show a priority in the time of the service, it may be fairly presumed that they were served at the same time; but if laid at different times on the same day, they will take precedence, according to the priority of service, for although as a general rule, the law does not regard fractions of a day, yet this rule is subject to exceptions in cases where it is necessary to ascertain and determine a priority of right."

Where bonds were executed on the same day by two creditors who had filed bills to attach a fund remaining in the hands of a master in chancery, and subpoenas were served on the master the one ten minutes before the other, the fund was ordered to be divided in proportion to the amount of their respective claims. Dyer *v.* Mears, 2 B. Mon. (Ky.) 528, the court saying that the priority depended upon the order of time in which the bonds were executed, and not either upon the priority of the order of attachment in the one case, or the priority of the service of the subpoena upon the master, in the other, and there being nothing to indicate which bond was first executed and no conclusive presumption on the point, the fund should be divided.

62. Ashton *v.* Clayton, 27 Kan. 626.

63. Banks *v.* Rice, 8 Colo. App. 217, 45 Pac. 515; Root *v.* Ross, 29 Vt. 488. See also, *supra*, VI, D, 9.

As to the rights of co-tenants, see *supra*, VI, D, 12.

As to a landlord's lien for rent, see the title "Landlord and Tenant."

As to mechanics' liens, see the title "Mechanics' Liens."

As to warehousemen's liens, see the title "Warehousemen."

Where a creditor has several liens on property prior to an attachment, the attachment creditor cannot complain of the order of enforcement of those liens. Adone *v.* Jemison, 65 Tex. 680.

A creditor in possession of property has a priority of lien over that of an attaching creditor. Parker *v.* McIver, 1 Desaus. (S. C.) 274, 1 Am. Dec. 656.

Where money was loaned for the purchase of certain property, the lender can have a lien superior to an attachment creditor only by taking possession of the property before levy of the attachment. Reed *v.* Ash, 3 Nev. 116.

Where a check was drawn before an attachment and was presented on the same day that the attachment was served but later in the day, the check was an appropriation of the funds regardless of the attachment. Winchester Bank *v.* Clark County Nat. Bank, 21 Ky. L. Rep. 311, 51 S. W. 315.

A privilege of a clerk for salary has

ment,[64] and the levy of an attachment on personal property has such priority so long as the attaching officer maintains his actual or constructive possession of the personalty attached.[65]

Effect of Recording Statutes Generally.— In many of the jurisdictions, having recording acts, the statute either in express terms[66] or by construction recognizes an attaching creditor as standing in the position of a purchaser for value.[67] In other jurisdictions, on the contrary, attachment creditors are not regarded as *bona fide* purchasers for a valuable consideration, within the meaning of the statutes, unless ex-

priority over an attachment. Tiernan *v.* Murrah, 1 Rob. (La.) 443.

An attachment and sale of a vessel in one state for materials furnished in that state, does not displace a previous lien for materials furnished for and work done on the vessel in another state. Wight *v.* Maxwell, 4 Mich. 45.

The joint owners of a vessel, having a lien on the vessel in their possession for a claim against a co-owner, are entitled to priority over an attachment sued out and levied upon the vessel by a creditor of the co-owner. Seabrook *v.* Rose, Riley Eq. (S. C.)) 127.

A prior equity of which an attachment creditor has no notice cannot be given priority over the attachment. Bailey *v.* Warner, 28 Vt. 87.

64. Grigg *v.* Banks, 59 Ala. 311, wherein the court said: "The power of the debtor to charge, or to alienate them, in subordination to the lien, was full and complete. The only restraint on the power, was that by its exercise the priority of lien created by the levy, could not be displaced or diminished, and whoever succeeded to the estate of the debtor, or acquired a charge on it, must take the estate *cum onere.*"

An Arkansas statute providing that an attachment is security for the satisfaction of such judgment as may be recovered, in effect declares its object to be to secure the judgment by preventing subsequent alienations and incumbrances. It is no part of its office to cut off, destroy, or affect the prior rights, equities, or incumbrances of third persons. Tenant *v.* Watson, 58 Ark. 252, 24 S. W. 495.

A Michigan statute providing that "real estate shall be bound, and the attachment shall be a lien thereon, from the time when it was attached, if a certified copy of the attachment, with a description of such real estate, shall be deposited in the office of the register of deeds in the county where the same is situated, within three days after such real estate was attached, otherwise such attachment shall be a lien thereon only from the time when such certified copy shall be so deposited," takes from the debtor his right to sell, or make other disposition of the property to the prejudice of the attaching creditor, but in no way interferes with the previously acquired rights of third persons. Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

A statute giving a certain creditor a right of entry upon property of the debtor upon the the happening of a certain contingency does not impair the lien of an attachment levied upon the property before such entry. Bath *v.* Miller, 51 Me. 341.

65. **Claim and Delivery Pending Attachment.**—Where a prior execution creditor levied upon property in excess of an amount sufficient to satisfy his judgment, and released his lien upon a portion of the goods for consideration to claimants who had taken the property under claim and delivery proceedings, he is liable to account to an attachment creditor for such property released. Tolerton, etc., Co. *v.* Petrie, 12 S. D. 595, 82 N. W. 199.

66. Boehreinger *v.* Creighton, 10 Ore. 42.

Under a statute declaring that "from the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith," a creditor levying an attachment has the same right in or to the property affected thereby which he would gain by a purchase of the property from the debtor. Riddle *v.* Miller, 19 Ore. 468, 23 Pac. 807.

67. Cowley *v.* McLaughlin, 141 Mass. 181, 4 N. E. 821; Woodward *v.* Sart-

pressly made so,[68] and it follows from such rulings that though a conveyance is not recorded, it is effective against a subsequent attachment of the land as the property of the grantor.[69]

Rights Not Required To Be Recorded. — Such statutes operate only against claims dependent on instruments which are required or permitted to be recorded, and rights to which the law gives rise in certain states of fact and of which it requires no evidence upon the records or in writing, such as vendors' liens and certain kinds of trusts, are not

well, 129 Mass. 210; Parker *v.* Miller, 9 Ohio 108.

An attaching creditor belongs to that class of lienors described in the statute as incumbrancers "otherwise" than by mortgage or judgment. Jerome *v.* Carbonate Nat. Bank, 22 Colo. 37, 43 Pac. 215.

Notice of Assignment of Insurance Policy.—Where an attachment creditor had notice of an assignment by the debtor of an insurance policy, he has not priority in the proceeds of the insurance though the assignment may not have been properly recorded as required by statute. Shebel *v.* Bryden, 114 Pa. 147, 6 Atl. 905.

68. **Ala.**—Tishoming & Sav. Inst. *v.* Johnson, 146 Ala. 691, memo., 40 So. 503. **Ill.**—Walsh *v.* Hiawatha First Nat. Bank, 228 Ill. 446, 81 N. E. 1067; LaSalle Pressed Brick Co. *v.* Coe, 65 Ill. App. 619. **Ia.**—Tama City First Nat. Bank *v.* Hayzlett, 40 Iowa 659. **Minn.** Greenleaf *v.* Edes, 2 Minn. 264. **N. D.**—Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308. **Wash.**—Rohrer *v.* Snyder, 29 Wash. 199, 69 Pac. 748.

In Schweizer *v.* Tracy, 76 Ill. 345, the court said that an attaching creditor cannot be regarded as a *bona fide* purchaser, or be viewed like a mortgagee, who is considered a *quasi* purchaser. The claim of an attaching creditor to protection is not of equal strength with that of a *bona fide* purchaser for a valuable consideration. He parts with nothing in exchange for the property, nor does he take it in satisfaction of any precedent debt. The property is merely seized for the purpose of having it afterward so appropriated.

The California registry act does not make an unrecorded deed void as against subsequent attaching creditors, but only against subsequent purchasers, or mortgagees, for a valuable consideration, and without notice of the prior unrecorded conveyance. Plant *v.* Smythe, 45 Cal. 161.

Under a Michigan statute, simply declaring that the attachment "shall be a lien" from the time the papers are filed, an attachment does not make any one competent to claim the position of a purchaser before the sheriff's deed. Millar *v.* Babcock, 25 Mich. 137.

A Minnesota statute making an unrecorded deed void, "as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded" did not affect the rights of an attaching creditor. Lamberton *v.* Merchants' Nat. Bank, 24 Minn. 281, the court pointing out that a later statute embraced attachments and judgments.

69. **Cal.**—Morrow *v.* Graves, 77 Cal. 218, 19 Pac. 489; Hoag *v.* Howard, 55 Cal. 564. **Dak.**—Bateman *v.* Backus, 4 Dak. 433, 34 N. W. 66, 68. **Ia.**—Moorman *v.* Gibbs, 75 Iowa 537, 39 N. W. 832; Hoy *v.* Allen, 27 Iowa 208; Norton *v.* Williams, 9 Iowa 528, *distinguishing* and *discrediting* Brown v. Tuthill, 1 Greene 190. **Minn.**—Baze *v.* Arper, 6 Minn. 220. **S. D.**—Robbin *v.* Palmer, 9 S. D. 36, 67 N. W. 949.

An attachment has not priority over a previous unrecorded deed, when no lien was released nor any credit advanced on the faith that the debtor continued to be the owner of the land. Shirk *v.* Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381.

A writ of attachment is not an "instrument" within the meaning of a statute providing that a grant of an estate in real property is conclusive except against an "incumbrancer who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded." Hoag *v.* Howard, 55 Cal. 564.

Whether a Creditor When Conveyance

postponed to rights of creditors resulting from the mere acquisition of liens by legal process.[70]

b. *Conveyance of Real Property.* — The general rule is that an attachment which has become a lien on land has priority over a deed by the attachment debtor of the property attached subsequently executed and delivered,[71] and, conversely, that such a deed will take precedence of a subsequent attachment.[72] And a deed made to a *bona fide* pur-

Made.—Especially where there is no proof that the attachment plaintiff was a creditor at the date when the prior conveyance purports to have been made and acknowledged. Savery *v.* Browning, 18 Iowa 246.

70. **Conn.**—Waterman *v.* Buckingham, 79 Conn. 286, 64 Atl. 212. **N. J.**—Depeyster *v.* Gould, 3 N. J. Eq. 474, 29 Am. Dec. 723. **Tex.**—Paris Grocer Co. *v.* Burks, 101 Tex. 106, 105 S. W. 174.

71. Bissell *v.* Nooney, 33 Conn. 411, holding that where land was attached at half past ten in the forenoon, and on the same day a deed executed the same day was filed for record at twenty-six minutes past four in the afternoon of that day, the attachment must be regarded as prior in fact to the execution of the deed, in the absence of all evidence to the contrary.

In Bigelow *v.* Topliff, 25 Vt. 273, 60 Am. Dec. 264, the court said: "In relation to the doctrine of a superior equity in purchasers over that of creditors, it is to be observed that the principle has never been recognized or adopted in this state. On the contrary, the lien of attaching creditors has always been considered as creating an equitable title, equal to that of purchasers; and the principle equally applies between purchasers and creditors, that the first in diligence or time is first in right."

Where property was attached earlier on the same day than deeds were delivered for the same property, the attachment has priority. Howard *v.* Traer, 47 Iowa 702.

The recording of a deed so defective that it cannot pass title, cannot be considered constructive notice of such instrument, and this is so though the instrument appear to be good on its face. Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695.

An uncertainty of description in a deed cannot be aided by the more perfect description in a second deed when before the execution of the second deed a creditor had acquired a valid lien by attachment on the lands in controversy. Pierson *v.* Sanger (Tex. Civ. App.), 51 S. W. 869, *reversed* on other grounds in 93 Tex. 160, 53 S. W. 1012.

Release of Equity.—In Whitcomb *v.* Simpson, 39 Me. 21, it was held that where an equity of redemption has been attached, and a conveyance is subsequently made by the mortgagor to the mortgagee for the notes secured by the mortgage and other property, the mortgagee cannot hold the land levied on against the attaching creditor of the mortgagor. But see Myers *v.* Browne, 1 D. Chip. (Vt.) 448.

The ratification, by a grantee, of an unauthorized conveyance to him does not relate back to the time of the execution so as to cut off rights under the levy of an attachment before the ratification. Kempner *v.* Rosenthal, 81 Tex. 12, 16 S. W. 639, the court saying that the fact that the deed had been delivered and recorded cannot change or affect the rule.

Deed of Composition Under English Bankruptcy Act.—Fielmann *v.* Brunner, 2 Hun (N. Y.) 354.

72. **Ia.**—Ware *v.* Delahaye, 95 Iowa 667, 64 N. W. 640; Boggs *v.* Douglass, 89 Iowa 150, 56 N. W. 412. **Mass.**—Warren *v.* Childs, 11 Mass. 222. **Tenn.** Sharp *v.* Hunter, 7 Coldw. 389.

Purchase After Attachment Through Mesne Conveyances.—Equity will not grant relief in a suit to remove a cloud from the title of a purchase under an attachment where the defendant, purchasing the property subsequent to the attachment, was a *bona fide* and innocent purchaser, and the property previous to the attachment had passed from the attachment defendant through two or three hands; the parties will be left to their remedy at law. Hamilton *v.* McClelland, 45 Mo. 424.

Conveyance Supported in Equity.—When a conveyance, though void in law, is one which will be upheld in

chaser has priority over an attachment issued before the deed was made but the lien under which was not perfected until afterwards,[73] or the subsequent levy under the attachment was ineffectual,[74] and the title of such a purchaser cannot be affected by a previous attachment which was not valid by statute.[75]

Contract To Convey Land. — An interest of a *bona fide* purchaser in land, under a contract to convey, is to be preferred over an attachment issued against the vendor subsequently to the contract,[76] but a parol agreement without the vendee going into possession cannot avail as a prior equity over attaching creditors.[77]

Existence Vel Non of Recording Statute. — Under registration laws, it has been held that unless title bonds are recorded, they are void as

equity, an attachment issued thereafter against the property as that of the vendor will not prevail against the conveyance. Canda *v.* Powers, 38 N. J. Eq. 412.

An equitable title to land having been acquired before the levy of appellant's attachment, his right to the land is valid as against the attachment. Brooks-Waterfield Co. *v.* Bush, 8 Ky. L. Rep. 258, 1 S. W. 424.

Before Sale Under Attachment.— Until a sale has been made under a judgment or attachment the lien acquired under them is subject to all prior unrecorded deeds and equities existing against the land. Hope *v.* Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366, the case being decided upon the principle that the lien of a judgment or attachment does not exceed the actual interest the debtor had in the land at the time of the rendition of the judgment or levy of the attachment.

Claimants Not Parties To Suit.—If a person has in good faith parted with his title to lands attached, a foreclosure of the attachment lien may be refused, although the claimants are not parties to the suit. Walker *v.* Houston (Tex. Civ. App.), 29 S. W. 1139.

The merely presumed acceptance of a deed will not defeat the lien of an intervening attaching creditor. Bell *v.* Farmer's Bank, 11 Bush (Ky.) 34, 21 Am. Rep. 205.

73. Wheaton *v.* Neville, 19 Cal. 41 (though the grantee knew that the attachment had been issued); Everett *v.* Carleton, 85 Me. 397, 27 Atl. 265.

A recorded deed will take priority of an attachment, levied before the deed was recorded, if a notice of a levy of the attachment was not filed with the recorder. Gaty *v.* Pittman, 11 Ill. 20.

A deed to a *bona fide* purchaser confers priority over an attachment previously issued but the lien under which had not been perfected by recording the writ and return in the town clerk's office, and this though copies of the writ and return had been deposited in the office but the clerk had neglected to record them. Burchard *v.* Fair Haven, 48 Vt. 327.

74. Stevens *v.* Morse, 7 Me. 36, 20 Am. Dec. 337.

75. Saco *v.* Hopkinton, 29 Me. 268.

76. Garr *v.* Hill, 9 N. J. Eq. 210.

The specific performance of a land contract, at the suit of the vendee, cannot be prevented by the levy of an attachment, after the date of the contract, against the vendor. Horton *v.* Hubbard, 83 Mich. 123, 47 N. W. 115.

Fraud in Vendor.—Payment by the vendee of part of the purchase price subsequent to the attachment gives the attachment creditor no rights when the vendee had no notice of the levy, and he paid the money in good faith upon his contract; but if he had actual notice of the levy of the attachment upon the property and of the vendor's fraud, the vendee would not be protected. Burke *v.* Johnson, 37 Kan. 337, 15 Pac. 204, 1 Am. St. Rep. 252.

Where the attachment was fraudulent as to the vendee, the vendee may maintain trespass against the attachment creditor for the fraudulent levy. Spear *v.* Hubbard, 4 Pick. (Mass.) 143.

77. Graves *v.* Ward, 2 Duv. (Ky.) 301.

Where an heir at law, owner of an undivided interest in the real estate of the intestate, was indebted to the estate, and agreed that the administrator might sell his interest in the land

to creditors of the vendor who acquire liens without notice,[78] but where there is no statute requiring an assignment of a bond for title to be recorded, an assignee from an assignee of a bond for title has priority over a subsequent attachment against his assignor, though the attachment creditor had no notice, actual or constructive, of the latter assignment.[79]

Effect of Recording Acts. — Under such statutes it is held that a creditor who attaches real estate standing upon the records in the name of the attachment defendant acquires a lien upon the property attached by virtue of the statute, which takes precedence of an outstanding unrecorded title or interest provided the attachment is made without notice or knowledge of the outstanding title or interest,[80]

and apply the proceeds, no lien was thereby created, and an attachment levied on such interest before a conveyance under the agreement creates a priority. Allison *v.* Graham, 67 Iowa 68, 24 N. W. 597.

One entering into possession of land under an unwritten contract for conveyance, has equitable rights superior to those of the vendor's subsequently attaching creditors. Jamison *v.* Miller, 27 N. J. Eq. 586.

An equitable title held by a *bona fide* purchaser, though by parol contract, will be preferred in equity to the lien of an attachment creditor subsequently acquired, when such purchaser went into possession, and the parol contract relied on is certain and definite in its terms, and sustained by satisfactory proof. Hurt *v.* Prillaman, 79 Va. 257.

78. Catlin *v.* Bennatt, 47 Tex. 165.

An unrecorded assignment of an unrecorded contract for the sale of land is not void as against an attachment and judgment against the vendee, as the vendee under the unrecorded contract has not an attachable interest in the land. Lyman *v.* Gaar, 75 Minn. 207, 77 N. W. 828, 74 Am. St. Rep. 452.

79. Macrae *v.* Goodbar, 80 Miss. 315, 31 So. 812.

80. **U. S.**—Stafford Nat. Bank *v.* Sprague, 17 Fed. 784 (under a Connecticut statute); United States *v.* Canal Bank, 3 Story 79, 25 Fed. Cas. No. 14,715 (under Maine statutes). **Colo.**—Jerome *v.* Carbonate Nat. Bank, 22 Colo. 37, 43 Pac. 215; Wahrenberger *v.* Waid, 8 Colo. App. 200, 45 Pac. 518 (under a statute which provides that after, and not before, filing for record, deeds, etc., "shall take effect as subsequent *bona fide* purchasers and incumbrancers by mortgage, judgment or otherwise not having notice thereof"); Gates Ironworks *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667. **Fla.**—Carr *v.* Thomas, 18 Fla. 736. **Ill.**—Ray *v.* Keith, 218 Ill. 182, 75 N. E. 921. **La.**—Ft. Wayne First Nat. Bank *v.* Ft. Wayne Artificial Ice Co., 105 La. 133, 29 So. 379. **Mass.** D'Arcy *v.* Mooshkin, 183 Mass. 382, 67 N. E. 339; Woodward *v.* Sartwell, 129 Mass. 210; Richardson *v.* Smith, 11 Allen 134; Sibley *v.* Leffingwell, 8 Allen 584; Parker *v.* Osgood, 3 Allen 487; Houghton *v.* Bartholomew, 10 Met. 138; Priest *v.* Rice, 1 Pick. 164, 11 Am. Dec. 156. **Ore.**—Security Sav. etc. Co. *v.* Loewenberg, 38 Ore. 159, 62 Pac. 647. **Tex.**—Paris Grocer Co. *v.* Bucks, 101 Tex. 106, 105 S. W. 174; Caldwell *v.* Bryan's Exr., 20 Tex. Civ. App. 168, 49 S. W. 240; Robertson *v.* McClay, 19 Tex. Civ. App. 513, 48 S. W. 35; Hamilton-Brown Shoe Co. *v.* Lewis, 7 Tex. Civ. App. 509, 28 S. W. 101. **Vt.**—Perrin *v.* Reed, 35 Vt. 2; Slocum *v.* Catlin, 22 Vt. 137.

If Attachment Perfected by Judgment, Execution, Sale, and Deed.—Martin *v.* Dryden, 6 Ill. 187.

Where a conveyance, trust or lien, made or created by a debtor on real estate, is void as to an attaching creditor under a recording act, a debtor who makes or creates the conveyance or lien may be deemed to hold the property for the benefit of the creditor to the extent of the debt for which he obtains a lien. Houston *v.* McCluney, 8 W. Va. 135.

In Tennessee it has been held that the rights of an attaching creditor are not affected by notice of a previous unregistered deed. Wilson *v.* Eifler, 11 Heisk. 179, in which case counsel of

or if the conveyance is not recorded in reasonable time,[81] and the mere knowledge of a negotiation but not of a completed transaction will not prevent a claim sued by attachment having priority over the deed,[82] but when the record shows no title in the debtor, and the

complainant had notice of the deed before the levy of the attachment. See also Hervey *v.* Champion, 11 Humph. 569.

"The lien of an attachment has the same effect, both at law and in equity, as judgment and execution liens; and a creditor without judgment, who obtains an attachment and levies it upon the land of his debtor, claimed by another under an unregistered deed, secures thereby a lien, which he may ripen into a title by subsequent decree, or sale under execution." Southern Bank & T. Co. *v.* Folsom, 75 Fed. 929, 43 U. S. App. 713, 21 C. C. A. 568 (under the Tennessee statute), *per* Lurton. C. J., *citing* Parker *v.* Freeman, 2 Tenn. Ch. 612, 614; Lyle *v.* Longley, 6 Baxt. (Tenn.) 286.

Where a mortgagee neglected to record his mortgage until after the levy of an attachment, the mortgagee must be postponed until the attachment judgment is discharged. Jones *v.* Jones, 16 Ill. 117.

Though a defeasance be unregistered, as the interest of the mortgagee is not attachable and an attaching creditor is not a purchaser for a valuable consideration, an attaching creditor of the mortgagee, without notice of the defeasance is not in any position to question the validity of a transfer of the mortgage interest. Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

Defective Deed Not Recorded.—Paine *v.* Mooreland, 15 Ohio 435, 45 Am. Dec. 585.

The record of a mortgage from a third person to the attachment defendant is sufficient to put the plaintiff upon notice that the defendant had conveyed the land to the mortgagor by some conveyance not recorded. Ogden *v.* Haven, 24 Ill. 57. But see Veazie *v.* Parker, 23 Me. 170.

The record of a deed from the grantee of an attachment defendant does not put the creditor upon notice of an unrecorded deed from the attachment defendant. Roberts *v.* Bourne, 23 Me. 165, 39 Am. Dec. 614.

Deed filed but not properly recorded has priority over attachment subsequently issued, though the creditor had not actual knowledge of the existence of the deed. Durgin *v.* Mitchell, 50 N. H. 586, note.

The knowledge of the officer of the existence of a prior deed, communicated to the attachment creditor after the attachment but before the levy will not postpone the attachment. Stanley *v.* Perley, 5 Me. 369.

Attachment at Time Deed Filed.—When an attachment was made at the same time that a deed was handed to a register to be acknowledged and recorded, the attachment has priority, as the certificate of acknowledgment could not have been written before the attachment took effect. Sigourney *v.* Larned, 10 Pick. (Mass.) 72.

Where an attachment was sued out by the debtor himself in fraud of a grantee to whom he had deeded the property attached, the creditor must be charged with notice of the existence of the deed, as the debtor, in securing the attachment against himself, was the agent of the creditor. Hovey *v.* Blanchard, 13 N. H. 145.

The rule is different as to personal property which the vendee suffers to remain in the possession of the vendor, as such a sale the law regards as fraudulent, and void as to creditors, for the want of change of possession, and a creditor with full knowledge of such a transaction, only has notice of a sale, that in law is void as to him. Perrin *v.* Reed, 35 Vt. 2.

81. **Conn.**—Welch *v.* Gould, 2 Root 287; Moor *v.* Watson, 1 Root 388. **Ore.** Haines *v.* Connell, 48 Ore. 469, 87 Pac. 265, 120 Am. St. Rep. 835, *rehearing denied,* 48 Ore. 475, 88 Pac. 872, more than five days. **Tex.**—R. E. Bell Hdw. Co. *v.* Riddle, 31 Tex. Civ App. 411, 72 S. W. 613, more than three days.

A mortgage not recorded until after an attachment of mortgaged property, where the delay has been unreasonable and unexplained, is not good against the attaching creditor. Pond *v.* Skidmore, 40 Conn. 213.

82. Stevens *v.* King, 84 Me. 291, 24 Atl. 850.

creditor does not know that his debtor has one, he cannot claim under an attachment the benefit of a fiction to get more than his debtor really owned.[83] In some cases, however, it is held that rights under an attachment are not preferred, where, before the judgment in attachment is obtained, the creditor has notice of the unrecorded deed,[84] or the conveyance is recorded,[85] or where the conveyance was duly acknowledged and recorded before the date of the sheriff's sale,[86] or before a deed to the premises based upon the attachment judgment and execution.[87]

83. Cowley *v.* McLaughlin, 141 Mass. 181, 4 N. E. 821.

A statute providing that a conveyance not recorded shall be void "as against any attachment levied thereon . . . against the person in whose name the title to such land appears of record," places attachment creditors on a footing with bona fide purchasers as against an unrecorded conveyance, only where the attachment is against the person in whose name the title to the land appears of record. Lyman *v.* Gaar, Scott & Co., 75 Minn. 207, 77 N. W. 828, 74 Am. St. Rep. 452.

84. **Colo.**—Campbell *v.* First Nat. Bank, 22 Colo. 177, 43 Pac. 1007. **Ill.**—Cox *v.* Milner, 23 Ill. 476. **N. J.**—Merchants' Bldg., etc., Assn. *v.* Barber, 30 Atl. 865; Garwood *v.* Garwood, 9 N. J. L. 193 (under a statute which avoids a conveyance of land not recorded within fifteen days as against a subsequent judgment creditor). **Vt.**—McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (as to a mortgage).

An equitable written lien on land, though not recorded but of which an attaching creditor has notice, will not be overreached by the attachment in a court of equity. Bailey *v.* Welch, 4 B. Mon. (Ky.) 244.

Although apprized of the deed when he made his levy, an attachment defendant's title relates back to the day of the attachment, at which time he had no knowledge of the deed. Emerson *v.* Littlefield, 12 Me. 148.

Knowledge That Deed Was Being Made.—An attaching creditor obtains priority over a mortgage when the attachment was made before the deed was recorded, but not until after it was executed and delivered, when the attaching creditor did not know that the mortgage had been executed when he caused his attachment to be made, but knew that the deed was about being made. Cushing *v.* Hurd, 4 Pick. (Mass.) 253, 16 Am. Dec. 335.

Where an attachment was invalid because issued in an action brought in the wrong county, the creditor was not entitled to the possession of the property, and when actual notice was given of a mortgage before any other proceedings were had with respect to the property than the levy, the attachment creditor was thereafter as much bound by it as if it had been previously filed for record in the proper county. Haller *v.* Parrott, 82 Iowa 42, 47 N. W. 996.

85. Williams *v.* Heffner, 30 La. Ann. 1193; Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308.

Recorded Same Day.—When the record of a mortgage shows it to have been made at five o'clock in the afternoon of a certain day, there is no presumption that an attachment made on the same day was made earlier in the same day, and rights under the mortgage must prevail. Taylor *v.* Emery, 16 N. H. 359.

86. Chandler *v.* Bailey, 89 Mo. 641, 1 S. W. 745.

In Vermont it is held that the lien of an attaching creditor acquired by attachment of real estate, the title to which is in his debtor, although the attachment is made without notice that his debtor has conveyed it to a bona fide purchaser, is defeated by actual notice of such conveyance received before he levies his execution thereon, or has lawfully applied it to the satisfaction of his debt. Hackett *v.* Callender, 32 Vt. 97, 109, *overruling* Bigelow *v.* Topliff, 25 Vt. 273, 288, 60 Am. Dec. 264; Sanger *v.* Craigue, 10 Vt. 555. See also Reynolds *v.* Haskins, 68 Vt. 426, 35 Atl. 349.

87. Naudain *v.* Fullenwider, 72 Neb. 221, 100 N. W. 296; Harral *v.* Gray, 10 Neb. 186, 4 N. W. 1040.

Possession by the grantee under an unrecorded conveyance, if visible, exclusive and continuous, is sufficient to raise a presumption of notice to an attaching creditor, who will take under his attachment subject to the rights of such grantee,[88] though the creditor may not actually know that the grantee is in possession.[89]

The burden is on the attaching creditor to show that the attachment was levied in good faith, and without notice or knowledge of the interest of the grantee under an unrecorded conveyance.[90]

c. *Sale of Personal Property.* — Where delivery is necessary to consummate a sale of personal property, in order to enable the purchaser to hold the property as against an attaching creditor of the vendor there must be a real, substantial, visible change of possession.[91]

88. **U. S.**—Stafford Nat. Bank *v.* Sprague, 17 Fed. 784 (under a Connecticut statute); Weld *v.* Madden, 2 Cliff. 584, 29 Fed. Cas. No. 17,373 (under a Maine statute). **Colo.**—Jerome *v.* Carbonate Nat. Bank, 22 Colo. 37, 43 Pac. 215. **Ill.**—Thomas *v.* Burnett, 128 Ill. 37, 21 N. E. 352, 37 L. R. A. 222. **Me.**—Kent *v.* Plummer, 7 Me. 464. **Mass.**—Anonymous, Quincy 370. **N. H.**—Newbury Bank *v.* Eastman, 44 N. H. 431. **Tex.**—Paris Grocer Co. *v.* Burks, 101 Tex. 196, 105 S. W. 174; R. E. Bell Hdw. Co. *v.* Riddle, 31 Tex. Civ. App. 411, 72 S. W. 13.

Compare Lawrence *v.* Tucker, 7 Me. 195.

89. Galley *v.* Ward, 60 N. H. 331.

90. Haines *v.* Connell, 48 Ore. 469, 87 Pac. 265, 120 Am. St. Rep. 835, *rehearing* denied, 48 Ore. 475, 88 Pac. 872.

An attaching creditor, though placed on an equality with a purchaser by a statute, cannot insist on any greater protection than would be granted to such purchaser; and, in suits in equity, the claim of a *bona fide* purchaser for value is an affirmative defense, which must be pleaded, thereby placing the burden of proof in such cases upon the party relying thereon. Jennings *v.* Lentz, 50 Ore. 483, 93 Pac. 327.

Under a statute providing that "from the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith, and for a valuable consideration, of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property," an attaching creditor, in order to be deemed a purchaser in good faith as against one having an outstanding equity, must allege and prove such facts as would have to be set up and established in the case of a direct purchase of the property. Rhodes *v.* McGarry, 19 Ore. 222, 23 Pac. 971.

It is a question for the jury to determine whether a deed upon record from a mortgagor to the mortgagee, conveying the land with a warranty against all incumbrances excepting the mortgage, was notice to an attaching creditor of the mortgagee that the mortgage had been assigned. Clark *v.* Jenkins, 5 Pick (Mass.) 280.

91. Parker *v.* Marvell, 60 N. H. 30; Perrin *v.* Reed, 35 Vt. 2; Morris *v.* Hyde, 8 Vt. 352, 30 Am. Dec. 475; Judd *v.* Langdon, 5 Vt. 231. See *supra* XII, D, 6.

Change of Possession Within Reasonable Time.—Seymour *v.* O'Keefe, 44 Conn. 128.

Where a sale is complete, it is no longer liable to attachment as the property of the seller. Smith *v.* Whitfield, 67 Tex. 124, 2 S. W. 822.

"**The common law,** as formerly expounded, and as still maintained in some states, regarded a continual possession in the vendor as *ipso facto* fraudulent, and as rendering void a sale otherwise perfect, as against subsequent purchasers or attaching creditors. In this state this principle is modified, so far as to regard this fact of possession as one of the *indicia of* fraud only; which may be explained consistently with the honesty of the transaction." Mason *v.* Sprague, 47 Me. 18.

Where it was the intent that delivery and payment should be concurrent acts, the title will be deemed to have re-

When, however, the property is of such kind and in such situation that there cannot be an actual delivery, the sale will be supported as against an attachment when evidence of title accompanies the transaction.[92]

Conditional Sale. — An attaching creditor takes subject to rights of the vendor under a valid conditional sale,[93] but where a conditional sale contract is required by statute to be recorded and has not been, an attachment of the property as that of the vendee has priority.[94]

d. *Mortgages.* — And so, the priority of attachments or mortgages generally depends upon rights vesting first in the attachment cred-

mained in the vendor until the condition of payment is complied with, as against an attaching creditor. Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40, 21 N. E. 49, *reversing* 44 Hun 434, 9 N. Y. St. 141.

On a contract of sale in which there was no change of possession and no title was to pass except upon payment of the purchase price, an attachment thereafter issued and before payment will hold as against such contract. Tomlinson *v.* Collins, 20 Conn. 364.

In case of two sales of personal property, both equally valid, his is the better right who first gets possession of the property, and an attaching creditor stands in the light of a purchaser and is to be protected as such. Burnell *v.* Robertson, 10 Ill. 282.

Priority of Vendor's Claim for Purchase Price.—Under a statute providing that "personal property shall, in all cases, be subject to execution on a judgment against the purchaser for the purchase price thereof, and shall in no case be exempt from such judgment and execution, except in the hands of an innocent purchaser, for value, without notice of the existence of such prior claim for the purchase money," an attachment issued before an execution on a judgment for the purchase price has not priority, as an attachment creditor is not an innocent purchaser. Bolckow Milling Co. *v.* Turner, 23 Mo. App. 103.

It is for the jury to say whether there has been such a change of possession as to prevent the defendant from holding the goods by virtue of the attachment. Tuttle *v.* Robinson, 78 Ill. 332; Kingsbury *v.* Buchanan, 11 Iowa 387.

92. Gibson *v.* Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123. See also State Bank *v.* Delbanco, 1 Phila. (Pa.) 104, 7 Leg. Int. 179, as to a sale of personal property in the hands of a bailee.

There must be proof of a delivery, actual or symbolical (Mason *v.* Sprague, 47 Me. 18), as by turning over keep of premises where the property is kept, with the intention that the vendee shall thereafter exercise control (Peycke *v.* Hazen, 119 Iowa 641, 93 N. W. 568).

A bill of sale will pass the property as against a subsequent attachment, when the vendee endeavors to take possession within a reasonable time. Meade *v.* Smith, 16 Conn. 346. See also Carter *v.* Willard, 19 Pick. (Mass.) 1.

Where a bill of sale was executed and mailed to the vendee without his knowledge, only a few hours before the attachment, and was not received by him until after the attachment was served, the attachment would have priority. McCutchin *v.* Platt, 22 Wis. 561.

A mere contract to sell, unaccompanied by payment, will not transfer the title of goods as against an attaching creditor. Taacks *v.* Schmidt, 18 Abb. Pr. (N. Y.) 307.

93. Armington *v.* Houston, 38 Vt. 448, 91 Am. Dec. 366.

94. Hart *v.* Barney, etc., Mfg. Co. 7 Fed. 543; National Cash Register Co. *v.* Broeksmit, 103 Iowa 271, 72 N. W. 526 (a levy upon "all goods, wares, merchandise, furniture, and fixtures contained in" a certain building belonging to the attachment defendant).

itor[95] or in the mortgagee, as the case may be.[96] Other circumstances, however, sometimes enter into the question of the respective priorities of attachments and mortgages, and suggestive rulings are stated in the notes.[97]

e. *Assignments.* — Priorities between an attachment creditor and an assignee of the property or rights attached are generally to be determined as in other cases by the time the respective rights accrued,

95. Western Union Tel. Co. *v.* Caldwell, 141 Mass. 489, 6 N. E. 737; Naudain *v.* Fullenwider, 72 Neb. 221, 100 N. W. 296.

See *supra*, XV, E, 3. See also the title "Chattel Mortgages."

The rights of third parties with notice that the attachment is still subsisting are no greater than those of the debtor. Barnard *v.* Towne, 70 N. H. 154, 46 Atl. 687.

Attachment Judgment Without Order as to Property.—Where on attachment suits, in which a mortgagee replevied the property and the property was sold and the proceeds held subject to the further order of the court, the taking of personal judgments in the attachment suits without any order with reference to the attached property does not give priority to the mortgages. Wallach *v.* Wylie, 28 Kan. 138.

96. Blanchard *v.* Blanchard, 6 La. 294. **Mich.**—Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. 630; Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823. **N. Y.**—McLallen *v.* Jones, 20 N. Y. 162. **Tex.**—Davis *v.* John Farwell Co., 49 S. W. 656.

Notice That Attachment Is Subsisting.—Where a mortgage is taken while the mortgagor is in possession, and the mortgagee knows at the time it is executed that an attachment had been levied upon the property but has no notice then that it is still subsisting, the mortgage will hold against the attachment. Carpenter *v.* Cummings, 40 N. H. 158.

In the above case it was further held that an assignee of the mortgage and note stands well upon the assignor's ground; and if the attachment might have been subsisting for some purposes and as to some persons, it is immaterial that the assignee had notice of it.

If land is sold subject to mortgages, an attachment creditor of the vendee holds subject to the rights of the mortgage creditors. Iowa L. & T. Co. *v.* Mowery, 67 Iowa 113, 24 N. W. 747.

If a mortgagee, to protect his title, purchases prior attachment liens, such liens were technically extinguished, but he has the right, as against subsequent attaching creditors to enforce an equity as to the money paid out as well as to his rights under his mortgage. Armstrong *v.* McAlpin, 18 Ohio St. 184.

A purchaser under the attachment cannot dispossess a mortgagee until the debt to secure which the mortgage was made is discharged. Compton *v.* Seley (Tex.), 27 S. W. 1077. See also Robinson *v.* Veal, 1 White & Wils. Civ. Cas. § 311.

97. **Priority of Attachments.**—If a creditor attaches two pieces of property and later releases the attachment on one without notice of a mortgage executed after the attachment upon the other, such release cannot be taken advantage of by the mortgagee for his benefit, nor be made a ground for his relief in equity. Johnson *v.* Bell, 58 N. H. 395.

Where the mortgagor might successfully resist the claim of the mortgagee to the mortgage lien, his attaching creditors are entitled to the benefit of all the defenses he could make so far as may be necessary for the protection of their attachment liens. Pearce *v.* Hall, 12 Bush (Ky.) 209.

"*If the mortgagee in a chattel mortgage neglects to reduce the property to possession* upon the default of the mortgagor, or within a reasonable time thereafter, to be determined by the circumstances of the parties, he loses his lien as against the rights of third persons." Shannon *v.* Wolf, 173 Ill. 253, 50 N. E. 682, *reversing* 68 Ill. App. 486.

Subsequent Notice of Prior Defective Mortgage. — An attachment creditor cannot be deprived of his lien by subsequent notice of a prior defective mortgage when he did not have notice

as that the attachment was complete before the assignment,[98] or that the assignment took place before the lien of the attachment was perfected.[99] An assignment of a chose in action which is *prima facie* valid is good as against a subsequent attachment,[1] and if there is a parol assignment of a debt or other chose in action the assignee has

before the attachment. Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695.

Corporate Mortgage Limited to Net Earnings.—Where, by the terms of a corporate mortgage the gross earnings are to be appropriated to the debts contracted in managing the property, and until so appropriated, and the net profits ascertained, the lien of the mortgages does not attach, an attachment for a debt chargeable to the expense account has priority over the mortgage. Clay *v.* East Tennessee, etc., R. Co., 6 Heisk. (Tenn.) 421.

Where a chattel mortgage is unknown to the law it cannot defeat rights acquired by an attachment, though made in another state where it is recognized. Delop *v.* Windsor, 26 La. Ann. 185.

Priority of Mortgages.—*If the release of a mortgage is obtained by fraud* of the mortgagor, an attaching creditor stands in no better position than the mortgagor. Hoffman *v.* Wilhelm, 68 Iowa 510, 27 N. W. 483, *citing* Vannice *v.* Bergen, 16 Iowa 555.

A mortgagee who held also an unsecured note of the mortgagor, foreclosed and at the sale bid in at a price sufficient to cover both. It was held that an attachment creditor was entitled to the excess of the price bid over the foreclosure decree. Harvey *v.* Foster, 64 Cal. 296, 30 Pac. 849.

98. Kewen *v.* Johnson, 11 Cal. 260 (as to an assignment of the proceeds of the sale of attached property); Pond *v.* Baker, 58 Vt. 293, 21 Atl. 164. See also *supra*, XV, E, 3.

Where the transferee took property on an agreement to settle a debt of the transferrer without stipulating the terms of settlement, and, after settlement, recorded his title by transfer, the transaction was not strictly a sale, but an attaching creditor must pay out of the proceeds of the property the sum advanced by the transferee. Prude *v.* Morris, 38 La. Ann. 767.

An attachment of an equity of redemption has priority over a subsequent assignment by the mortgagor. Gilbert *v.* Merrill, 8 Me. 295.

The assignment of a bond secured by mortgage does not pass the lands as against an attachment by a creditor of the assignor, before the assignment of the mortgage is recorded. Symes *v.* Hill, Quincy (Mass.) 318.

99. Crork *v.* Audenreid, 7 Ben. 564, 6 Fed. Cas. No. 3,412; Greentree *v.* Rosenstock, 61 N. Y. 583.

The assignment of goods and debts before an attachment thereon gives to the assignee a priority, and it is immaterial whether the debts were collected before or since the issuing of the writ of attachment. Ankrim *v.* Woodward, 4 Rawle (Pa.) 343.

Check Against Bank Deposit Not Presented.—Where a deposit in a bank has been attached, the bank cannot deduct the amount of a check which has not been presented. Duncan *v.* Berlin, 60 N. Y. 151.

An attaching creditor has a right to call for proof of the consideration of an assignment which is opposed to him. Maher *v.* Brown, 2 La. 492.

1. Newman *v.* Bagley, 16 Pick. (Mass.) 570. See also Young *v.* Hail, 6 Lea (Tenn.) 179, as to notes.

The words "goods and chattels," in a registration statute, do not include a mere chose in action, as a debt, or claim on another for money due, and the assignment of such debt or claim for value, though not recorded, will be good against a subsequent attachment upon such debt or claim. Kirkland *v.* Brune, 31 Gratt. (Va.) 126.

An assignment of a chose in action is not complete, so as to vest title absolutely in the assignee, until notice of the assignment to the debtor; and so an attachment by a creditor in the period intervening between the assignment and the notice will have preference over such assignment. Dillingham *v.* Traders Ins. Co., 120 Tenn. 302, 108 S. W. 1148, 16 L. R. A. (N. S.) 220.

Before Maturity.—An attachment is unavailing against a *bona fide* holder

an equity superior to that of a subsequent attachment.[2] And so, when an interest in a judgment levy has been assigned, the assignor has no interest thereafter subject to attachment.[3]

Assignment for the Benefit of Creditors. — As to the effect of an assignment for the benefit of creditors, and rights and priorities as between such an assignment and attachments on the property assigned, reference is made to another part of this work.[4]

f. *Bearing of Notice.* — The title to property is not changed by the issuance or levy of an attachment, and so, subject to a previous

for value of negotiable paper, who obtains it after attachment, before maturity, and without notice. Kieffer *v.* Ehler, 18 Pa. 388.

Where an injunction to restrain the assignment of a note has been obtained in a suit against the payee of the note, the injunction is personal to preserve the rights of the plaintiff to have a judgment that may be obtained satisfied by the application of such note, but an assignee may hold the note subject to the claim of the injunction plaintiff who had also attached the property. Wilhoit *v.* Castell, 3 Baxt. (Tenn.) 419.

A debt to fall due in the future for services to be afterwards rendered may be transferred by assignment before the services are rendered, and such transfer, if *bona fide,* will defeat an attachment subsequently sued out against the transferrer. Payne *v.* Mobile, 4 Ala. 333, 37 Am. Dec. 744.

An order on the holder of a bill of exchange to deliver it to a third person, is not a delivery thereof, and the creditor of the transferrer may attach the thing sold before delivery. Ober *v.* Matthews, 24 La. Ann. 90.

Where a debtor was informed before payment that the attached debt had been assigned before the service upon him of the attachment, he should have refused to pay the debt to the officer, and though he may have paid the debt to the officer under the process, is still liable to his creditor's assignee. Lyman *v.* Cartwright, 3 E. D. Smith (N. Y.) 117.

2. Beard *v.* Sharp, 23 Ky. L. Rep. 1582, 65 S. W. 810. See also Pollard *v.* Pollard, 68 N. H. 356, 39 Atl. 329.

"It has been the law of the lord mayor's court in London from the time of Richard I, that an equitable assignment of a *chose in action* should prevail against an attachment. . . . **This application of the rule** obtains in Massachusetts and in the United States generally, though a few courts hold otherwise. Drake on Attachments, c. 24; Thayer *v.* Daniels, 113 Mass. 129, and cases cited." Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. 369.

3. Warren *v.* Ireland, 29 Me. 62.

Equitable Assignment of a Verdict to the Attorney.—Patten *v.* Wilson, 34 Pa. 299.

Attachment creditors are not purchasers for value and have no rights as such, and when by separate instrument a judgment has been assigned before the levy of an attachment and attached to the judgment and attested by the clerk a few hours afterwards, the assignee has priority over the attachment creditor. Knapp *v.* Stanley, 45 Mo. App. 264. See also the title "Garnishment," and see, *supra,* XV, E, 3.

Though a judgment was entered immediately on the verdict instead of waiting until a motion for new trial could be made, one who takes an assignment of the judgment has priority over an attachment of it, and this though the attachment creditor had no notice of the assignment. Hutchinson *v.* Brown, 8 App. Cas. (D. C.) 157.

Though he is defendant in the judgment, an attaching creditor can obtain no lien under his attachment to defeat the assignee. Baldwin *v.* Wright, 3 Gill (Md.) 241.

The dominating principle governing the foregoing case, the court said, is analogous to that in those cases where it is ruled that a *bona fide* purchaser of real estate, who has failed to record his deed until after judgment is obtained against the vendor, but who records it before a sale under the judgment, will hold it against a purchaser under the judgment.

4. See the title "Assignment for the Benefit of Creditors."

attachment,[5] the owner may alienate the property whether it be real[6] or personal,[7] and the purchaser takes subject to the lien of the at-

5. Stone *v.* Connelly, 1 Met. (Ky.) 652, 71 Am. Dec. 499; Abbott *v.* Sturtevant, 30 Me. 40.

Interest of Mortgagee.—Davenport *v.* Lacon, 17 Conn. 278; Wheeler *v.* Nichols, 32 Me. 233.

The grantee must protect the property from sale under the attachment, to preserve any rights therein. Saunders *v.* McLean, 65 Miss. 397, 4 So. 299.

Upon the discharge of the attachment, the title of the purchaser from the defendant becomes obsolute. Dixon *v.* Barnett, 3 Wash. 645, 29 Pac. 209.

Purchaser should be indemnified for prior liens which he has paid if property is sold under attachment. Beall *v.* Barclay, 10 B. Mon. (Ky.) 261.

Proceeds of timber cut from the land before levy of the execution under the attachment, paid to the grantee, cannot be recovered by the attachment creditor. Chase *v.* Bradley, 26 Me. 531.

Purchaser under the attachment takes before a purchaser from the debtor (Miller *v.* Jamison, 24 N. J. Eq. 41; McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782); but he cannot hold the property against the officer who made the attachment (Jetton *v.* Tobey, 62 Ark. 84, 34 S. W. 531).

6. **Ala.**—Randolph *v.* Carlton, 8 Ala. 606. **Ark.**—Bergman *v.* Sells, 39 Ark, 97. **Conn.**—Davenport *v.* Lacon, 17 Conn. 278. **Fla.**—McClellan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381. **Kan.**—Stillman *v.* Hamer, 70 Kan. 469, 78 Pac. 836, 109 Am. St. Rep. 465. **Ky.**—Warner *v.* Everett, 7 B. Mon. 262; Steel *v.* Seale, 4 Ky. L. Rep. 42. **Mo.**—Lackey *v.* Seibert, 23 Mo. 85. **Tenn.**—Vance *v.* Cooper, 2 Coldw. 497. **W. Va.**—Bowlby *v.* De Witt, 47 W. Va. 323, 34 S. E. 919.

A statute providing that "an order of attachment binds the defendant's property in the county, which might be seized under an execution against him from the time of the delivery of the order to the sheriff, or other officer" means "that an order of attachment binds the defendant's property, subject to execution in the county, so that the defendant cannot sell, transfer, or dispose of it after the writ comes to the hands of the officer, so as to defeat the right of the plaintiff, if his attachment is sustained, and he obtains judgment to have the property sold, and the proceeds applied in satisfaction of his debt." Derrick *v.* State, 60 Ark. 394, 30 S. W. 760.

A transfer of property after the filing of an attachment bill, or after the issuing out of an attachment at law, of property described in the attachment, against the defendant, is inoperative. Vance *v.* Cooper, 2 Coldw. (Tenn.) 497.

Purchase After a Judgment in Attachment and Before an Order of Sale. Davis *v.* John V. Farwell Co. (Tex. Civ. App.), 49 S. W. 656.

A mortgagee takes subject to a previous attachment. **Ala.**—Grigg *v.* Banks, 59 Ala. 311. **Ind.**—Runner *v.* Scott, 150 Ind. 441, 50 N. E. 479. **Ia.**—Tollerton, etc., Co. *v.* Skelton, 118 Iowa 543, 92 N. W. 651, 96 Am. St. Rep. 409; Clark *v.* Patton, 92 Iowa 247, 60 N. W. 533. **La.**—Harvey *v.* Grymes, 8 Mart. 395. **Mass.**—Appleton *v.* Bancroft, 10 Met. 231. **Tenn.**—Burrough *v.* Brooks, 3 Head 392.

After Chancery Subpoena But Before Return Day.—Richeson *v.* Richeson, 2 Gratt. (Va.) 497.

Where a verbal contract for the purchase of land was made previous to an attachment, a deed made and delivered to the vendee pursuant to the verbal contract subsequent to the attachment does not relate back to the date of the contract and defeat the lien created by the attachment. Voorheis *v.* Eiting, 15 Ky. L. Rep. 161, 22 S. W. 80. See also White *v.* O'Bannon, 86 Ky. 93, 5 S. W. 346.

If several pieces of land belonging to a debtor are attached, and the debtor conveys one of the tracts, and afterwards mortgages the others, the grantee of the first tract is entitled to have the others subjected first to the satisfaction of the attachment, and the mortgagee subject to the same equity. Hunt *v.* Mansfield, 31 Conn. 488.

7. **Ala.**—Ware's Admr. *v.* Russell, 70 Ala. 174, 45 Am. Rep. 82. **Mass.**—Denny *v.* Willard, 11 Pick. 519, 22 Am. Dec. 389; Bigelow *v.* Willson, 1 Pick. 485. **Mo.**—Lebaume *v.* Sweeney, 21 Mo. 166. See Paine *v.* Tilden, 20 Vt. 554.

tachment whether he had actual notice or not,[8] unless a statute requires a *lis pendens* of such suits to be recorded, or its equivalent, and such statute has not been followed. Even in such a case, if the pur-

Under the levy of a writ of attachment on personal property, if the custody and possession thereof is such as to enable the officer to hold the property and subject it to the order of the court issuing the writ, it is sufficient to create a lien thereon prior to a lien of a chattel mortgage executed and filed subsequent to making the levy of this writ, but prior to taking actual possession of all of the property, on which the writ was levied, provided the officer proceeds with reasonable diligence to reduce all of such property to his actual possession, and does so reduce it. Falk-Bloch Mercantile Co. *v.* Branstetter, 4 Idaho 661, 43 Pac. 571.

An instruction that "Where an officer begins his service and does an incipient act, and is interrupted by actual force, no intermediate disposition of the property shall prejudice him, or prevent his returning, as soon as in his power, and completing his service," was held to be incorrect. Williams *v.* Cheesebrough, 4 Conn. 356.

An attachment on shares of stock takes priority of a subsequent *bona fide* purchaser for value and without notice. Shenandoah Valley R. Co. *v.* Griffith, 76 Va. 913.

Sale between issue and levy is clear of the lien. Hunt *v.* Strew, 39 Mich. 368.

Actual or symbolical delivery to purchaser is effectual to consummate the sale. Arnold *v.* Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296.

The rights of the levying officer are not vitiated by a formal delivery which does not interfere with his control. Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713. See also Wheeler *v.* Nichols, 32 Me. 233.

In Appleton *v.* Bancroft, 10 Met. (Mass.) 231, the court said: "A constructive delivery is sufficient. But when property is in the custody of a third person for a special purpose, and a sale otherwise valid is made, notice to the person in possession is a good delivery, even though that person has a lien on the property." See also Mann *v.* Huston, 1 Gray (Mass.) 250; Whipple *v.* Thayer, 16 Pick. (Mass.) 25, 26 Am. Dec. 626; Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688; Tuxworth *v.* Moore, 9 Pick. (Mass.) 347, 20 Am. Dec. 479.

Delivery to receiptor and by receiptor to debtor allows a valid sale by the latter to the receiptor or to a stranger. Denny *v.* Willard, 11 Pick. (Mass.) 519, 22 Am. Dec. 389.

Part of goods sold before attachment—attachment takes effect on goods shown in inventory not embraced in bill of sale. Eversman *v.* Clements, 6 Colo. App. 224, 40 Pac. 575.

The payee of a note cannot endorse it over after it has been attached in the drawer's hands. Robinson *v.* Mitchell, 1 Harr. (Del.) 365.

8. Morse *v.* Smith, 47 N. H. 474; Bowlby *v.* De Witt, 47 W. Va. 323, 34 S. E. 919.

However fair the sale may be, though it be for cash and with the most innocent intentions, it cannot be that a sale of property by the defendant, after the levy of an attachment upon it, can be good against the levy. Ozmore *v.* Hood, 53 Ga. 114, the court saying: "The property is in the hands of the law, and an attachment on land would be utterly valueless if this were the law. The attachment and the levy is in the nature of *lis pendens*, the officer, by his levy, has impounded the property, and whatever right the defendant has must await the disposal of the court. The doctrine of *lis pendens* does not stand so much upon notice as upon the necessity, that the proceedings of a court shall not be capable of being trifled with by the action of the party proceeded against."

A purchaser has not constructive notice of an attachment on land when his grantor, in whose name the record title stands, is not a party to the attachment suit. Travis *v.* Topeka Supply Co., 42 Kan. 625, 22 Pac. 991, wherein the court said: "It does not seem to us that these lots were in the custody of the law so as to produce all the usual consequences to people who intermeddle with it, that generally attaches to property that may be strictly said to be *in custodia legis*."

chaser has actual notice of the attachment, he takes subject to the attachment.[9]

The title of such vendee vests if the previous attachment is invalid[10] or is not consummated.[11]

Second Attachment. — The title vests in the vendee upon the discharge of the attachment, notwithstanding the levy of a second attachment subsequent to the sale to him.[12]

g. *Garnishment.* — The priority of an attachment or garnishment depends upon the priority of levy or service.[13] A levy by trustee process, on goods which are in the actual possession of the trustees, cannot be defeated by a subsequent attachment of the goods.[14]

9. Cooley *v.* Sanford, Kirby (Conn.) 103; Bowlby *v.* De Witt, 47 W. Va. 323, 34 S. E. 919.

10. Ball *v.* Divoll, 17 Pick. (Mass.) 143; Smith *v.* Saxton, 6 Pick. (Mass.) 483; Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498 (as to a mortgage executed subsequent to an attachment).

An attachment which is a mere trespass cannot prevent a sale. Calkins *v.* Lockwood, 17 Conn. 154, 42 Am. Dec. 729.

Though Motion To Vacate Attachment Denied.—When after the conveyance, a motion by the defendant to vacate the attachment was denied, this does not affect the title of the grantee though no appeal was taken from the order denying the motion. O'Farrell *v.* Heard, 22 Minn. 189.

An attachment on the interest of a legatee, if such could be made, will not hold against a conveyance by the executor of such interest where the will authorized the executor to sell all or any part of the interests. Braman *v.* Stiles, 2 Pick. (Mass.) 460, 13 Am. Dec. 445.

Mere Irregularity Before Issuing Attachment.—A levy by virtue of an ancillary attachment upon lands, creates a lien upon the land, of which subsequent purchasers are bound to take notice, and an irregularity anterior to the issuing of the attachment does not affect the lien, where the irregularities might have been taken advantage of by the defendant either by motion or writ of error, but do not affect the jurisdiction of the court over the person of the defendant or the subject matter of the suit. Budd *v.* Long, 13 Fla. 288.

11. Fitch *v.* Rogers, 7 Vt. 403, where there was no change of possession by removal or otherwise.

In Vance *v.* Cooper, 2 Heisk. (Tenn.) 93, it was held that in cases at law, the lien is given from the time of suing out the attachment, as against property mentioned in the attachment, but when the writ does not specify the property, it does not attach until levy as against an intermediate purchaser. See also Lacy *v.* Moore, 6 Coldw. (Tenn.) 348.

12. Dixon *v.* Barnett, 3 Wash. 645, 29 Pac. 209.

Payment of First Attachment.—Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688; Whipple *v.* Thayer, 16 Pick. (Mass.) 25, 26 Am. Dec. 626; Klinck *v.* Kelly, 7 Abb. L. J. 93.

13. **Kan.**—R. T. Davis Mill Co. *v.* Bangs, 6 Kan. App. 38, 49 Pac. 628 (holding that the lien of garnishment accrues at the time of service of summons, and that such a lien is prior to an attachment then in the hands of the sheriff and afterwards levied upon the property). **Ky.**—Maggard *v.* Asher, 119 Ky. 46, 82 S. W. 1002 (where the garnishee paid in land and attachment was subsequently levied). **Ohio.** McCombs *v.* Howard, 18 Ohio St. 422. **Va.**—Erskine *v.* Staley, 12 Leigh 406. **Tenn.**—English *v.* King, 10 Heisk. 666.

Mortgagee in Possession.—Where a deed absolute on its face was in fact a mortgage, and the mortgagee was in possession, an attachment on the land in a suit against the holder of the title, served before garnishment by another creditor of the mortgagee in possession, has priority. Wooldridge *v.* Mississippi Valley Bank, 36 Fed. 97.

14. Rockwood *v.* Varnum, 17 Pick.

h. *Other Suits.* — It has been said that all who deal with regard to property attached must do so subject to the attachment lien, and that an attachment lien, commencing from the issue or levy of the writ, gives priority to such lien over intervening liens, incumbrances or sales.[15] And an attachment not sued out until after service of process in a suit to set aside as fraudulent a sale of the property levied on, does not obtain a prior lien,[16] nor has an attachment priority over a suit previously instituted in equity to subject property to the payment of a debt being prosecuted to judgment in a law action, when by statute third persons are required to take notice of such a suit.[17]

A notice of lis pendens which has been duly filed and recorded, gives constructive notice to those acquiring interests after it is filed,[18] but, though an attachment was levied before a deed was recorded, the

(Mass.) 289; Middleburg Bank *v.* Edgerton, 30 Vt. 182.

An attachment in common form, after an attachment by virtue of a trustee process, is valid, and under such an attachment the goods are bound in the hands of the officer as well as in the hands of the trustee; the trustee process would have priority, having been first served, but the attaching officer may hold the goods subject to the lien of the creditor attaching under the trustee process. Platt *v.* Brown, 16 Pick. (Mass.) 553; Burlingame *v.* Bell, 16 Mass. 318.

15. Merrick *v.* Hutt, 15 Ark. 331.

But see Keeffer *v.* Ehler, 18 Pa. 388, wherein the court said: "The doctrine of implied notice by *lis pendens* is totally inapplicable to such cases, and is everywhere weakened in its operation, even when it is admitted to exist. In a case of bankruptcy, notice may be implied; because that refers to the general circumstances of a previous holder, into which a purchaser is expected to inquire, and not to a special fact, like an attachment, which may have its origin in any magistrate's office in any county in the state," holding that an attachment is unavailing against a *bona fide* holder for value of negotiable paper, who obtains it after attachment, before maturity, and without notice. *Compare* Schacklett's Appeal, 14 Pa. 326.

Notice From the Time of Publication of Summons.—Day *v.* Thompson, 11 Neb. 123, 7 N. W. 533. See *infra*, XII, F.

Summons Set Aside.—Wellsford *v.* Durst, 8 Kan. App. 231, 55 Pac. 493.

Property rights of injured party in action for divorce under statute, cannot defeat the vested rights of creditors which attached prior to the institution of divorce proceedings. Jennings *v.* Montague, 2 Gratt. (Va.) 350.

16. Jefferson County Sav. Bank *v.* McDermott, 99 Ala. 79, 10 So. 154.

17. Keith *v.* Hosier, 88 Iowa 649, 55 N. W. 952. *Compare* McBride *v.* Harn, 48 Iowa 151.

In Cotton *v.* Dacey, 61 Fed. 481, it was held that where a suit in equity to subject property has been commenced and subpoenas have been served upon the defendants therein, the rights of the plaintiff are superior to those of an attachment plaintiff when a subpoena in the equity suit was served upon him after the attachment was levied but before a judgment was rendered.

Previous Invalid Attachments.—Peoples' Bank *v.* West, 67 Miss. 729, 7 So. 513, 8 L. R. A. 727.

18. Hope *v.* Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308.

In Peoria First Nat. Bank *v.* Farmers', etc., Bank (Ind.), 82 N. E. 1013, the court said that no *lis pendens* notice is required by the statute when the property attached is in the county where the order of attachment is issued, and when attachment proceedings have been taken, there is constructive notice, and a mortgage is then taken subject to the attachment lien.

A mortgagee, having acquired a lien *pendente lite*, is charged with notice and takes subject to the rights of the

deed will take priority if a notice of the levy of the attachment was not filed as required by statute.[19]

The judgment in the attachment suit relates back to the levy and takes precedence of a decree rendered thereafter,[20] or to the judg-

plaintiff in the action wherein the attachment was levied and final judgment rendered. Westervelt *v.* Hagge, 61 Neb. 647, 85 N. W. 852, 54 L. R. A. 333.

19. Gaty *v.* Pittman, 11 Ill. 20.

See also *supra*, XII, D, 6 F.

Under a statute providing that from a notice of the filing of a notice of *lis pendens*, the pendency of the action shall be constructive notice to a purchaser, and every person whose conveyance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser and shall be bound "to the same extent as if he were made a party to the action," a plaintiff in attachment filing a notice of *lis pendens* with notice of a prior unregistered deed does not obtain priority. Lamont *v.* Cheshire, 65 N. Y. 30. See also *supra*, XV, E, 3.

Entry on judgment docket necessary as notice. Satterfield *v.* Malone, 35 Fed. 445, under a Pennsylvania statute.

Filing With Clerk a Notice of Attachment.—"To make service of an attachment on real estate, the law requires that there shall be filed with the clerk a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim as stated in the warrant, and a description of the particular property levied upon, which must be subscribed by the plaintiff's attorney, adding his office address, and be recorded and indexed by the clerk in the same book, in like manner, as a notice of the pendency of the action. Code Civ. Proc. § 649." Daniels, J., in Hodgman *v.* Barker, 60 Hun 156, 14 N. Y. Supp. 574, *affirmed*, 128 N. Y. 601, 27 N. E. 1029.

A Michigan statute provides that "real estate attached shall be bound, and the attachment shall be a lien thereon from the time when a certified copy of this attachment, with a description of the real estate attached, shall be deposited in the office of the register of deeds in the county where the real estate is situated." Under this statute, until the copy has been filed there is no lien, and there is nothing to authorize a court to proceed to judgment. Davis Sewing Mach. Co. *v.* Whitney, 61 Mich. 518, 28 N. W. 674. Such a statute in no way interferes with the previously acquired rights of third persons. Columbia Bank *v.* Jacobs, 10 Mich. 349.

Entry of levy in incumbrance book necessary under Iowa statute. See Tama City First Nat. Bank *v.* Hayzlett, 40 Iowa 659.

The record of an attachment against a husband alone levied upon lands as his property does not impart constructive notice to a purchaser from the wife who held the legal title. Bailey *v.* McGregor, 46 Iowa 667.

20. Baldwin *v.* Leftwich, 12 Ala. 838; McClellan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381. See also Schacklett's Appeal, 14 Pa. 326; Tappan *v.* Harrison, 2 Humph. (Tenn.) 172.

As to priority between a decree of divorce charging certain lands and an attachment thereon, the court, in Spencer *v.* Spencer, 9 R. I. 150, said: "We are of the opinion that the rule of *lis pendens*, if applicable at all to a simple petition for divorce and alimony, etc., where the property sought to be charged is described, is only applicable because it rests upon the latter ground; and, therefore, that notice of the filing of the petition to third persons who are creditors of the respondent's husband, is not, as to such persons, equivalent to service, so as to postpone their *bona fide* attachments of the property described. This might be the effect of such notice in the case of a suit brought to establish or enforce a right or equity subsisting previous to the suit, in the property therein described; or in a case, if any such there be, where a lien begins with the filing before service, but not the effect, we think, in the case of a suit which, like a petition for divorce and alimony, is brought to create or acquire a right

ment,[21] and if the levy in the attachment was anterior to the judgment, the purchaser under the attachment will take though the attachment judgment be junior.[22]

A void judgment must give way to a subsequent attachment.[23]

In Georgia, in contests between plaintiffs in attachment and in ordinary suits, the priority depends upon the time of obtaining the respective judgments and not upon the time of the levy of the attachment.[24]

Executions. — Under the rule that a lien is created on property attached from the time of the attachment, the priority as between an attachment on property and an execution issued upon a general judgment against the same defendant, will depend, as the case may be, upon the priority in time of the levy of the attachment[25] or of the

or equity in such property as a consequence of its successful prosecution, there being no fraud or collusion to affect the validity of the attachments."

A judgment for alimony is a lien upon the land of the husband upon service of notice by publication, and the interest of the husband in the land is the ownership subject to the lien, and a subsequent attaching creditor acquires a lien upon the land subject to the lien of the judgment for alimony. Harshberger *v.* Harshberger, 26 Iowa 503.

21. Where by statutes, a judgment binds lands from the time of the actual entry of such judgment, and an attachment binds such property from the time of executing the same, an attachment has not any preference over a previous jugment on which an execution has not been delivered, at the service of the attachment. Reeves *v.* Johnson, 12 N. J. L. 29.

A right acquired by an assignee of a judgment is superior to any right acquired by an attachment creditor under an attachment lien of date subsequent to the judgment lien. Corbett *v.* Provident Nat. Bank, 23 Tex. Civ. App. 602, 57 S. W. 61.

22. **Cal.**—Weinerich *v.* Hensley, 121 Cal. 647, 54 Pac. 254. **La.**—Carrol *v.* McDonough, 10 Mart. 609. **Miss.**—Redus *v.* Wofford, 4 Smed. & M. 579.

23. Perry *v.* Sharpe, 8 Fed. 15; Jones. *v.* Manganese Iron Ore. Co. (N. J.) 3 Atl. 517, holding that the attaching creditor is entitled to an injunction to restrain a sale under a void judgment.

Where a confession of judgment has not been made and entered in compliance with the law, a subsequent attachment takes precedence. Puget Sound Nat. Bank *v.* Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

24. Silvey *v.* Phoenix Ins. Co., 94 Ga. 609, 21 S. E. 607; Kilgo *v.* Castleberry, 38 Ga. 512, 95 Am. Dec. 406; Litchton *v.* McDougald, 5 Ga. 176.

25. **Ky.**—Hackley's Exrs. *v.* Swigert, 5 B. Mon. 86, 41 Am. Dec. 256; Wallace *v.* Hanley, 4 J. J. Marsh 622. **N. Y.**—Souls *v.* Cornell, 15 App. Div. 161, 44 N. Y. Supp, 194; Watts *v.* Willett, 2 Hilt. 212. **N. C.**—McMillan *v.* Parsons, 52 N. C. 163; Harbin *v.* Carson, 20 N. C. 388. **Pa.**—Rice *v.* Walinszius, 12 Pa. Super. 329; Thielens *v.* White, 13 W. N. C. 194. **S. C.**—Goore *v.* McDaniel, 1 McCord L. 480. **S. D.**—Finch *v.* Park, 15 S. D. 339, 89 N. W. 654.

An execution on land standing on the record in the name of one person should be suspended on account of a prior general attachment in a suit against such person and another. Wadsworth *v.* William, 97 Mass. 339.

Although On the Same Day.—Pond *v.* Griffin, 1 Ala. 678.

"No fractions of a day are taken into account in determining the lien of an attachment, and hence all such writs served on the same day will be held to have been served at the same time. Just the opposite rule prevails as to executions. Their lien only attaches from the moment of their delivery to the sheriff. And if the property is already in the custody of the law by virtue of a foreign attachment duly executed, the lien of the execution cannot be carried back so as to place it on a footing with the attachment." Warner's Appeal, 13 W. N. C. (Pa.) 505.

Service of Summons in Other Suit.—When service of summons in another suit was made before the attachment,

execution.[26] And an attachment has priority over an execution subsequently levied upon the property although the judgment had

an execution thereunder has priority over the attachment. Fischel *v.* Townsend, 1 Manitoba 99. In this case the court said that when a writ of summons in another suit was issued after an attachment, an execution thereunder has not priority over the attachment, but this creditor is entitled to share *pari passu* with the attaching creditors.

Equity of Redemption Before Bill of Foreclosure.—Lyon *v.* Sanford, 5 Conn. 544.

As of Commencement of Lien.—Under statutes providing that as between warrants of attachment and executions, the one first delivered to the officer has preference, notwithstanding a levy first made by virtue of the junior writ, where a writ of attachment was vacated and the property levied upon released, and the order vacating the writ was subsequently set aside, the effect of the order was to give the warrant vitality in the hands of the sheriff as of the date when it was issued, and the proceeds of a sale under executions issued upon judgments entered subsequently to the issue of the writ of attachment and before the order vacating subsequently to the issue of the writ of attachment and before the order vacating the writ was set aside should be applied to the satisfaction of a judgment under the attachment though no further levy thereunder has been made. Pach *v.* Gilbert, 124 N. Y. 612, 27 N. E. 391, *affirming* 18 Civ. Proc. 262, 9 N. Y. Supp. 548.

An execution, not issued until after a writ of attachment was delivered to the sheriff, can have no priority. Kendallville First Nat. Bank *v.* Stanley, 4 Ind. App. 213, 30 N. E. 799.

An execution is a lien and binds the goods from the time it comes to the hands of the sheriff, but a writ of foreign attachment only from the taking of them by the officer. Stockley *v.* Wadman, 1 Houst. (Del.) 350, holding that where the officer under a writ of attachment makes an inventory of goods, with a view to the appraisement of them, this constitutes a taking of them in contemplation of law, and such a levy has preference over an execution coming into the hands of the sheriff subsequently though on the same day.

Release of Attachment.—An attachment creditor, who has attached much more land than sufficient to pay his debt and who consents that another may levy an execution upon a certain part of the land he has attached, cannot afterwards claim such part released. Hills *v.* Hubbard, 2 Root (Conn.) 397.

An order discharging an attachment, containing a clause which prevented the order from taking effect and suspending its operation for thirty days, and which was vacated on motion made within the time and the motion to dissolve the attachment was finally overruled, did not operate to release at any time the property seized under the attachment as to an execution creditor who had levied subject to such attachment. Guernsey *v.* First Nat. Bank, 63 Kan. 203, 65 Pac. 250.

Choses in action are not subject to execution and therefore statutes regulating the order of preference among execution and attachment creditors do not apply to such property attached. Chicago First Nat. Bank *v.* Reinitz, 16 Civ. Proc. 307, 4 N. Y. Supp. 801.

If a creditor is induced by fraud to withdraw an attachment in order that an execution may have preference, an attachment subsequently issued on discovering the fraud will be given priority. Leonard *v.* Bowne, 63 N. J. Eq. 488, 52 Atl. 631.

Where executions are invalid, because unauthorized, an attachment levied before the ratification of the execution by the judgment creditor has priority. Galle *v.* Tode, 148 N. Y. 270, 42 N. E. 673. And see Perry *v.* Sharpe, 8 Fed. 15.

On Fraudulent Confession of Judgment.—An attaching creditor whose writ of attachment has been levied on goods in the possession of the sheriff by virtue of an execution issued on a judgment by confession alleged to be fraudulently obtained has such a lien on the goods as to authorize, under proper averments, the issuance of an injunction to restrain the sheriff from proceeding under the execution. Blum *v.* Schram & Co., 58 Tex. 524. See also Bromley *v.* Cohen, 3 Ohio Dec. (Reprint) 296.

26. Ala.—Parks *v.* Coffey, 52 Ala.

been rendered[27] or the execution had been issued before the attachment was issued,[28] unless under a statute a judgment binds real estate from the time of actual entry of judgment and an attachment binds the property from the time of executing the same, in which case a judgment has priority over a subsequent attachment.[29]

Where writs are in the hands of different officers that one will be first satisfied under which the levy is first made.[30]

32; Governor *v.* Davis, 20 Ala. 366. Ill.—Everingham *v.* Nat. City Bank, 124 Ill. 527, 17 N. E. 26, *affirming* 25 Ill. App. 637. N. Y.—Wells *v.* Marshall, 4 Cow. 411; Lambert *v.* Paulding, 18 Johns. 311. Va—Puryear *v.* Taylor, 12 Gratt. 401.

In Hanchett *v.* Ives. 133 Ill. 332, 24 N. E. 396, *reversing* 33 Ill. App. 471, the court discussing and adopting what it supposed to be the doctrine in England, said that an execution coming to the hands of an officer authorized to execute the same, becomes a lien on the personal property of the defendant therein from the date of its receipt, as against a subsequent writ issuing from a different court and actually levied by a different officer, so as to entitle the holder of the first writ, before sale, to seize the property and take it from the second officer.

"Where tangible personal property has been levied upon by execution prior to the commencement of an action or proceeding in the nature of a creditor's bill to set aside transfers or judgments, the property is to be regarded as that of a judgment debtor; and, where there was a prior valid levy or lien, it is superior to any subsequent lien of the creditor who instituted such action or proceeding." Lopez *v.* Campbell, 163 N. Y. 340, 57 N. E. 501, *reversing* 18 App. Div. 427, 46 N. Y. Supp. 91.

Where plaintiff on confession of judgment is innocent of fraud an execution issued thereunder before the levy of an attachment has priority Galle *v.* Tode, 148 N. Y. 270, 42 N. E. 673.

Failure of Sheriff To Follow Directions.—Where attachments were placed in the hands of the sheriff with the direction by plaintiff's attorney that an execution should be indorsed as having come to his hands first, but the sheriff levied the attachments and, subject to them, the execution, the attachment creditors cannot retain an advantage gained by failure of the sheriff to observe the proper order of lien as directed. Connolley *v.* Eisman, 22 Ky. L. Rep. 1247, 60 S. W. 372, *citing* Gray's Admr. *v.* Patton's Admr., 13 Bush (Ky.) 625. See also Moore *v.* Fitz, 15 Ind. 43.

Invalid Attachment.—Matter of Dillon, 2 Pearson (Pa.) 182.

A Colorado statute allowing creditors to share in the distribution of the proceeds of a debtor's property, who obtain judgments at the same term of court to which the writs of attachments are returnable, does not require a pro rata distribution among judgment and attaching creditors of property that has been subjected to executions upon judgments rendered in civil actions at the same term of court during which the attachments were issued and levied, but prior to the issuance and levy of the attachments, when other statutes recognize the priority of executions issued upon judgments recovered previous to the issuing of writs of attachment. Brady *v.* Farwell, 8 Colo. 97, 5 Pac. 808.

27. Eddy *v.* Weaver, 37 Kan. 540, 15 Pac. 492.

28.—Ky.—Bourne *v.* Hocker, 11 B. Mon. 23. Mo.—Field *v.* Milburn, 9 Mo. 492. Okla.—Burnham *v.* Dickson, 5 Okla. 112, 47 Pac. 1059, though the two writs were issued on the same day.

29. Reeves *v.* Johnson, 12 N. J. L. 29.

30. Del.—Stockley *v.* Wadman, 1 Houst. 350. Ind.—Moore *v.* Fitz, 15 Ind. 43. Ky.—Bourne *v.* Hocker, 11 B. Mon. 23. Mo.—Field *v.* Milburn, 9 Mo. 492. Wash.—R. Wallace, etc., Mfg. Co. *v.* Sharick, 15 Wash. 643, 47 Pac. 20. See also *supra*, XV, E.

Personal property having been levied on by an officer under executions in his hands and the possession thereof taken by him, is not subject to a further levy by another officer under writs of attachment issued from another court, while the first levy continues in force and before the judgments are satis-

4. For the Determination of the Court. — A contest as to priorities should be settled by the court, and not by the sheriff who is a ministerial officer,[31] and such a question cannot be tried on a motion by one of the attachment creditors to amend the *ad damnum*.[32]

The court may award issue to try the respective rights of parties having liens by attachments upon the property of the same defendants,[33] or between an attachment creditor and one claiming under a prior lien.[34]

fied and the execution recalled. Pitkin *v.* Burnham, 62 Neb. 385, 87 N. W. 160, 55 L. R. A. 280, 89 Am. St. Rep. 763, wherein the court said: "The property having been lawfully seized and brought within the law's custody, successive levies may be made by the officer having the possession of such property, and the property may also be constructively attached and a valid lien acquired thereon by suitable proceedings, in which the officer in possession may be garnisheed, as was done in the case at bar by appellants, as having in his possession goods and chattels of the debtor subject to attachment. In such case, the attaching creditor acquires a lien thereon, and an interest therein to the same extent and of like effect as though the property had been directly attached in the first instance, subject of course, to all prior valid levies existing thereon at the time of serving on the officer summons in garnishment."

31. State *v.* Hickman, 150 Mo. 626, 51 S. W. 680.

On Proceedings for Distribution of Proceeds.—Questions of priority between attaching creditors, some of whom are plaintiffs in a United States court and some in a state court, may be determined on proceedings for distribution of the proceeds of sale of the attached property made by the marshal, who has obtained the actual custody by virtue of a first seizure. Gumbel *v.* Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. ed. 374; Bates *v.* Days, 17 Fed. 167.

32. Chase *v.* Wyeth, 17 N. H. 486.

33. Espenhain *v.* Meyer, 74 Wis. 379, 43 N. W. 157.

Missouri Rev. St. 1889, §570, declares that "the court may settle and determine all controversies which may arise between any of the plaintiffs in relation to the property, and the priority, validity, good faith and effect of the different attachments. . . . The statute contemplates only that the court, in this summary proceeding, shall determine such controversies as may arise between the different attachment plaintiffs in relation to the property attached and levied upon," and does not authorize the court, without the aid of a jury, to determine all controversies that may have arisen and upon that determination make an order as priorities of liens without regard to the question as to the priority in point of time, validity, and good faith of the different attachments. It does not contemplate that the court shall settle "all controversies that might arise between different conflicting attachment creditors growing out of the manner of the creation of the debt on which the attachments are based, or that all controversies between the conflicting attachment creditors might be adjusted by the court, and an order made distributing the attached funds as right and justice might require according to the view of the judge before whom the cases might be pending." This invades the province of the jury. Stephenson *v.* Parker Stationery Co., 142 Me. 13, 43 S. W. 380. *Compare* Clinton First Nat. Bank *v.* Brenneisen, 97 Mo. 145, 10 S. W. 884.

The court said that sufficient chancery power can be exercised by the court to settle the question of priority and good faith of attachments, to postpone one for fraud and upon any conception of justice peculiar to equity. Freedman *v.* Holberg, 89 Mo. App. 340.

34. "The witness claims title to all the money in his possession by reason of a prior indebtedness, and of advances made by him to the debtor. The plaintiff claims the right to examine as to the dealings between the witness and the debtor. An examination of the authorities inclines me to think that he cannot do so upon this motion,

In What Court Priorities Settled.— Where attachments or attachments and executions are issued from different courts, the court out of which the first issued should determine questions of priorities, and the cases originating in the other courts should be transferred thereto.[35]

Burden of Proof.— Where one of two attachment creditors gave to the officer a bond to indemnify him against all loss that should be caused by his obeying the obligor's order to levy the execution under his attachment, it is the duty of such creditor to assume the burden of showing which attachment was entitled to priority,[36] and in a suit by a person seeking to enforce a verbal lien on real estate, against a creditor relying on a subsequent attachment, or a purchaser under the attachment, to avoid the lien, the latter must, by evidence competent against the former, prove that the party attaching was a creditor, and that he sued out a sufficient attachment, and it was levied, in order to sustain the attachment lien.[37]

F. Waiver, Abandonment or Forfeiture. — **1. General Rules.** — Though there has been an actual attachment, if it has been immediately abandoned, the lien is a nullity and is as if it had never existed,[38] and a subsequent lien takes effect.[39]

The law does not presume or favor abandonment or forfeiture of an attachment.[40] On the contrary, the presumption is that the lien con-

under the facts submitted. . . . The object of the examination is not to try the title of the witness, but to ascertain the character and extent of that title. So far as appears upon the face of the papers, the indebtedness of the debtor to the witness is a valid claim, but its invalidity can be shown by the plaintiff; but it must be done in other proceedings where the whole issue between the parties can be tried and properly determined. While, however, this is true I think that the witness is bound to show the character of his title to the property in question, although he will not be compelled to establish its validity. . . . A party cannot be called upon in this informal and *ex parte* manner to have his rights determined, neither can he be subject to a searching cross-examination as to his rights. The law gives him the right of jury, and of a proper power for the determination of the validity of his claim. On the other hand, the plaintiff is entitled to know what his claim is in specific terms, and the authority under which he holds. . . . It appears that there exists an assignment of the money in question to the witness. The assignment must be produced and the circumstances and condition under which it was given must be shown. I think that the witness should also give a specific statement of his claim upon the money." Ess *v.* Toplanyi, 4 Civ. Proc. (N. Y.) 173.

35. Metzner *v.* Graham, 57 Mo. 404; Sutton *v.* Stevens, 41 Mo. App. 42; Deere Wells & Co. *v.* Eagle Mfg. Co., 49 Neb. 385, 68 N. W. 504.

Change of Venue in First Case.—But when the first case has then been removed to another court by change of venue, this does not have the effect of transferring the other suit likewise. Sutton *v.* Stevens, 41 Mo. App. 42.

36. Philbrick *v.* Shaw, 63 N. H. 81.

37. Houston *v.* McCluney, 8 W. Va. 135.

38. French *v.* Stanley, 21 Me. 512.

That an attorney may release an attachment of property whenever it may appear advisable for the interests of his client, reference is made to the title "Attorneys."

39. Cook *v.* Love, 33 Tex. 487.

Debt not due—suit dismissed. Pierce *v.* Myers, 28 Kan. 364.

40. Wright *v.* Westheimer, 3 Idaho 232, 28 Pac. 430, 35 Am. St. Rep. 269; Stillman *v.* Hamer, 70 Kan. 469, 78 Pac. 836, 109 Am. St. Rep. 465.

tinues.[41] It has been said that before an attachment lien will be deemed to have been abandoned there must be some affirmative act or conduct of the creditor inconsistent with the continuance of the lien.[42]

It is a question of fact, ordinarily, whether there has been in any given case an abandonment or waiver of an existing attachment,[43] and the intention of the plaintiff must be sought.[44]

2. Miscellaneous Rulings. —An attachment lien has been held to be lost by mixing the attached goods with other articles of the same kind attached by another officer upon a writ against the same person;[45] by failure to indemnify the officer on demand;[46] by accepting security;[47] by failure of the plaintiff to require security from the defendant upon his appearance;[48] by the submission of the action and all demands between the parties to referees;[49] by a purchase on the part of the attachment creditor of the attached property at an execution sale in favor of another party, and giving bond for the price;[50] by a merger

41. Westervelt *v.* Baker, 1 Neb. (Unof.) 635, 95 N. W. 793.

42. Stillman *v.* Hamer, 70 Kan. 469, 78 Pac. 836, 109 Am. St. Rep. 465.

"Undoubtedly the possessor of an attachment lien on real property may lose it as he may lose any other valuable right by delay or other conduct indicating an abandonment of it, which is reasonably relied upon by another so that such other will be prejudiced if such person be allowed to change his position." Barth *v.* Loeffelholtz, 108 Wis. 562, 84 N. W. 846.

Where the writ had been served before the claim was due, and the officer, under the direction of the plaintiff and before the writ had been returned, erased the endorsement of service and attached the same property after the claim was due, if the rights of the defendant had been essentially affected by the erasure of the first endorsement of service, the officer might be compelled to restore it. Ward *v.* Curtiss, 18 Conn. 290.

43. **Ala.**—Greene *v.* Tims, 16 Ala. 541. **Mass.**—Com. *v.* Brigham, 123 Mass. 248. **Wis.**—Barth *v.* Loeffelholtz, 108 Wis. 562, 84 N. W. 846.

And see Com. *v.* Middleby, 187 Mass. 342, 73 N. E. 208.

A notice by the sheriff that he relinquished an attachment upon property which had been injured by the negligence of the sheriff without an actual redelivery, did not amount to a return of the property and does not relieve him from liability for further damage after the relinquishment. Becker *v.* Bailles, 44 Conn. 167.

44. Merchants' Nat. Bank *v.* Greenhood, 16 Mont. 395, 41 Pac. 250, 851.

Under an agreement to discontinue attachments, one of the attachment creditors could not claim a lien under proceedings which were conducted *ex parte*. Middlebury Bank *v.* Edgerton, 30 Vt. 182.

45. Gordon *v.* Jenney, 16 Mass. 465.

46. Smith *v.* Osgood, 46 N. H. 178. See also Cudahy *v.* Rhinehart, 133 N. Y. 248, 30 N. E. 1004, *reversing* on other grounds 60 Hun 414, 21 Civ. Proc. 52, 15 N. Y. Supp. 514, and holding that where there are several attaching creditors of the same property, the title to which is in dispute, and on demand some give indemnity to the sheriff and others refuse to do so, the latter will be precluded from claiming the avails of the attached property, though their attachment may be prior to that of those who give indemnity.

47. **Ill.**—Ryhiner *v.* Ruegger, 19 Ill. App. 156. **S. C.**—Gardner *v.* Hust, 2 Rich. L. 601. **Tenn.**—Claiborne *v.* Stewart, 4 Baxt. 206.

On acceptance of a deed of trust by creditors who agree to a payment of the debts of the debtor *pro rata*, an attachment lien is released. Rahity *v.* Stringfellow, 72 N. C. 328.

48. Tiernans *v.* Schley, 2 Leigh. (Va.) 25.

49. Mooney *v.* Kavanagh, 4 Me. 277.

50. McConnell *v.* Hanley, 7 J. J. Marsh. (Ky.) 528.

of interests by a foreclosure and assignment of the judgment;[51] by filing the claim with an assignee under an assignment for the benefit of creditors;[52] by failure to file a replication to a plea in abatement denying the causes for attachment;[53] by failure to provide an undertaking for the retention of attached property pending review of an order discharging an attachment;[54] or by confession of error;[55] as also by settlement,[56] withdrawal,[57] discontinuance,[58] or dismissal of the suit.[59]

51. Donk *v.* Alexander, 117 Ill. 330, 7 N. E. 672.

52. F. A. Drew Glass Co. *v.* Baldwin, 27 Mo. App. 44, holding that by presenting his claim to an assignee under a general assignment for the benefit of creditors, and having his judgment, the plaintiff in attachment thereby recognized the validity of the deed of assignment; that the property attached by prior seizure passed under the deed; and must be held to have intended to come in on an equality with the other general creditors, and to have the assignee to sell the property seized under the attachment, all of which could only ensue by an abandonment of the attachment. See also Gathercole *v.* Bedel, 65 N. H. 211, 18 Atl. 319. To the contrary, see Yates *v.* Dodge, 123 Ill. 50, 13 N. E. 847.

Where a foreign corporation begins proceedings for the appointment of a receiver under a charge of insolvency, and makes a deed of its property to the receiver, a creditor, residing in Ohio, who files his claim in that court, is estopped from attaching other property in the state belonging to the company for the purpose of paying his claim. Rice *v.* Farnham, 4 Ohio Dec. 217.

The mere filing of a petition in bankruptcy does not dissolve an attachment. Bertz *v.* Turner, 102 Cal. 672, 36 Pac. 1014.

The filing of a note sued on in attachment in the bankruptcy court is a waiver or an abandonment of the attachment. Bowley *v.* Bowley, 41 Me. 542.

Small Part of Amount Sued for Filed. An objection that the filing of a claim with an assignee is an abandonment of an attachment is not applicable to an action in which the amount sued for is large and made up of various claims, only one of which was filed with the assignee, and that for only a small amount. Neufelder *v.* German American Ins. Co., 6 Wash. 336, 33 Pac. 870, 36 Am. St. Rep. 166, 22 L. R. A. 287.

Where there are several attaching creditors, the action of some in filing their claims with an assignee cannot affect the rights of the others under their attachments. Neufelder *v.* German American Ins. Co., 6 Wash. 336, 33 Pac. 870, 36 Am. St. Rep. 166, 22 L. R. A. 287.

53. Schulenberg *v.* Farwell, 84 Ill. 400.

54. Adams County Bank *v.* Morgan, 26 Neb. 148, 41 N. W. 993.

55. Kuehn *v.* Paroni, 20 Nev. 203, 19 Pac. 273, holding that where counsel stated that the sheriff had been directed to discharge a certain writ of attachment and that the plaintiff claimed nothing under this writ, the statement is equivalent to a confession of error, and upon this admission the attachment levied under the defective writ should be discharged.

56. Barton Bros. *v.* Hunter, 59 Mo. App. 610; Felker *v.* Emerson, 17 Vt. 101.

57. Union Mfg. Co. *v.* Pitkin, 14 Conn. 174.

Priority Obtained by Fraud.—When an attaching creditor has been induced by fraud to withdraw his attachment and thereby has enabled another creditor to obtain a lien by execution, such execution creditor, though he did not participate in the fraud, cannot take advantage of the fraud which was committed for his benefit, and takes subject to the rights of the attachment creditor. Leonard *v.* Bowne, 63 N. J. Eq. 488, 52 Atl. 631.

58. Brandon Iron Co. *v.* Gleason, 24 Vt. 228, where the title of one who discontinued in consideration of the transfer to him of all the property was held bad as against subsequent attachments which were pressed to execution.

59. Paltzer *v.* National Bank, 41 Ill. App. 443.

On the other hand the lien has been declared not to be waived or released by the release of other security by an attaching mortgagee;[60] by the withdrawal of a plea in abatement,[61] by the removal of the action from a state court to a United States circuit court;[62] by the removal of the property from the county by a third person claiming title;[63] by a stipulation entered into among attaching creditors that the property may be sold privately and the proceeds held subject to the order of the court for the purposes of the cases in which the attachment had issued;[64] by the issuance and levy, out of great caution, of a second writ of attachment in the same suit and upon the same property;[65] or by the attachment creditor being a bidder at the execution sale under the attachment.[66]

3. Surrender of Possession by Officer. — If the officer fails to retain and continue in the possession of the property levied on either by himself or by his agent, the attachment will be regarded as abandoned and dissolved,[67] unless it is a case in which the property is not capable of being taken into actual possession.[68] And so, the lien is released or abandoned when the debtor is permitted to retain possession of the

Reinstating cause after dismissal operates to preserve the lien. Jaffray *v.* H. B. Claflin Co., 119 Mo. 117, 24 S. W. 761.

60. Lacey *v.* Tomlinson, 5 Day (Conn.) 477.

By the entry of judgment, an attachment is not discharged. Thompson *v.* Culver, 38 Barb. (N. Y.) 442, 24 How. Pr. 286, 15 Abb. Pr. 97. See *supra,* XV, C.

61. Claflin *v.* Sylvester, 99 Mo. 276, 12 S. W. 508, wherein the court said that if a consent judgment entered before the return day of the writ operates as a discharge of a lien, this is not such a case; this is a judgment rendered *in invitum* in due course of law after the return day of the writ, duly served.

62. Hatcher *v.* Hendrie, etc., Mfg. Co., 133 Fed. 267, 68 C. C. A. 19, where it was said that perhaps this would not be true if the property were personal.

63. Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653.

64. Cressy *v.* Katz-Nevins-Rees Mfg. Co., 91 Iowa 444, 59 N. W. 63. See also Collins *v.* Brigham, 11 N. H. 420.

65. Wright *v.* Westheimer, 3 Idaho 232, 28 Pac. 430, 35 Am. St. Rep. 269.

Attachments sued out at law, which have been enjoined, are not abandoned by a bill seeking by attachment to reach assets not subjected by the attachments at law. Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836.

66. Beall *v.* Barclay, 10 B. Mon. (Ky.) 261.

67. **Ill.**—Hardin *v.* Sisson, 36 Ill. App. 383. **Ia.**—Littleton *v.* Wyman, 69 Iowa 248, 28 N. W. 582. **Me.**—Thompson *v.* Baker, 74 Me. 48; Gower *v.* Stevens, 19 Me. 92, 36 Am. Dec. 737. **Mass.**—Shephard *v.* Butterfield, 4 Cush. 425, 50 Am. Dec. 796; Carrington *v.* Smith, 8 Pick. 419; Bagley *v.* White, 4 Pick. 395, 16 Am. Dec. 353. **N. Y.**—Kuhlman *v.* Order, 5 Duer 242. **Tex.**—Wolf *v.* Taylor, 68 Tex. 660, 5 S. W. 855.

Temporary absence at suggestion of interpleader's attorney to consult an attorney, held not to show intention to abandon. Nicholson *v.* Merstetter, 68 Mo. App. 441.

Releasing Steamboat by Agreement To Make Voyage.—By an agreement that the steamboat attached should be released for the purpose of a voyage with the understanding that the boat should be re-delivered to the sheriff and continue subject to the attachment, the lien on the boat was not thereby extinguished. Conn *v.* Caldwell, 6 Ill. 531.

68. Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713.

The fact that property which has been attached in the way provided for property which cannot be removed im-

goods levied on,[69] or when the goods are permitted to return to the possession of the debtor by the officer himself[70] or by a mere bailee.[71] Such lien is not lost, however, by a receiptor of the property allowing it to remain in, or return to, the possession of the debtor,[72] or when the property has been taken from the possession of the officer or keeper wrongfully[73] or without his knowledge and consent.[74]

Taking a written receipt from a receiptor, reciting the attachment, promising to return the property to the officer holding the execution, within thirty days after judgment, and limiting his liability to a specific sum, does not dissolve the attachment,[75] but taking an alternative receipt, to pay a certain specified sum or deliver the goods attached, gives the receiptor an election and dissolves the attachment.[76] This rule, that

mediately, is allowed to remain in the owner's use for thirteen months before seizure on execution, does not show an abandonment of the attachment. Higgins *v.* Drennan, 157 Mass. 384, 32 N. E. 354.

Where bulky property, of little value, situated in an open shed, after a levy thereon, was left therein without a notice of the levy being posted, the levy was abandoned even as to a subsequent mortgagee who had notice of the levy. Shephard *v.* Butterfield, 4 Cush. (Mass.) 425, 50 Am. Dec. 796.

Unless the delay to remove them be but for a reasonable time, and then be accounted for by the state of the property, as for example, that it was for a growing crop, or an article in the court of being manufactured, or the like, an attachment lien is lost. Roberts *v.* Scales, 23 N. C. 88.

69. Jones Lumb., etc., Co. *v.* Faris, 6 S. D. 112, 60 N. W. 403; Pomroy *v.* Kingsley, 1 Tyler (Vt.) 294.

In Taintor *v.* Williams, 7 Conn. 271, the court said: "Possession of personal property is the only *indicium* of ownership; and the suffering of the debtor, after the service of an attachment or an execution, to retain the possession, is *prima facie* proof, that the attachment or execution levy is fraudulent in respect of creditors. It is of the very essence of a lien by attachment, that possession be taken and held; and when this is relinquished, there is a termination of the lien, and the general owner is remitted to his property unencumbered."

70. Dunklee *v.* Fales, 5 N. H. 527.

71. **Ill.**—Hardin *v.* Sisson, 36 Ill. App. 383. **Mass.**—Boynton *v.* Warren, 99 Mass. 172; Sanderson *v.* Edwards, 16 Pick. 146; Fettyplace *v.* Dutch, 13 Pick. 388, 23 Am. Dec. 688; Robinson *v.* Mansfield, 13 Pick. 139. **Mo.**—Russell *v.* Major, 29 Mo. App. 167.

72. Small *v.* Hutchins, 19 Me. 255; Merrill *v.* Curtis, 18 Me. 272; Barnard *v.* Towne, 70 N. H. 154, 46 Atl. 687; Buzzell *v.* Hardy, 58 N. H. 331.

To the contrary, see Baker *v.* Warren, 6 Gray (Mass.) 527.

When, on a receipt being given for the property that the receiptors would pay the claim or deliver the property, the property was delivered to the defendant and was used as before, the plaintiff remarking "you have got your vessel back again," the attachment was dissolved. Waterhouse *v.* Bird, 37 Me. 326.

73. Clow *v.* Gilbert, 54 Ill. App. 134; Butterfield *v.* Clemence, 10 Cush. (Mass.) 269.

Seizure by inspector of revenue subsequently released, does not destroy the lien. Beech *v.* Abbott, 6 Vt. 586.

74. Harriman *v.* Gray, 108 Mass. 229; Butterfield *v.* Clemence, 10 Cush. (Mass.) 269.

Removing property out of the state, by a person to whom the same was delivered for safe keeping, by an attaching officer, does not discharge the lien. Utley *v.* Smith, 7 Vt. 154, 29 Am. Dec. 152.

75. Perry *v.* Somerby, 57 Me. 552.

76. Mitchell *v.* Gooch, 60 Me. 110; Waterman *v.* Treat, 49 Me. 309, 77 Am. Dec. 261; Stanley *v.* Drinkwater, 43 Me. 468; Weston *v.* Dorr, 25 Me. 176, 43 Am. Dec. 259.

the lien is not released, applies as between the officer and debtor, and the plaintiff can retake the property from the receiptor or from the debtor, unless it has been attached by some other officer or has been sold to some third person, without notice of the attachment,[77] and if the officer take the same property into his custody by virtue of a second writ of attachment and keeps it from the receiptor, this will discharge the receipt.[78]

Delivery to a keeper, of property attached, is not an abandonment of the attachment.[79]

Release by Officer Without Authority. — An attaching officer who does anything to impair the effect of an attachment on personal property is liable to the plaintiff,[80] and a subsequent licnee or purchaser, with notice, of the property attached, will take subject to the lien of the attachment.[81]

An order of court is not essential to a release of an attachment on real property when the plaintiff has directed a release.[82]

4. Laches. — As against a subsequent attaching creditor, the lien of an attachment is temporary, and will expire if the creditor does not prosecute his suit to judgment with all due diligence.[83] And where a statute prescribes the time within which attached property shall be held to respond to the judgment, the failure to connect the final process with the lien will result in a loss of the lien as against another claimant by sale or lien,[84] but in the absence of statute, a lien is lost by delay in issuing an execution only when such delay is unreasonable.[85]

77 Rowe *v.* Page, 54 N. H. 190.

78. Rood *v.* Scott, 5 Vt. 263.

79. The Joseph Gorham, 13 Fed. Cas. No. 7,537.

Delivery of a key of the room in which attached goods are stored to a third party who has property stored in the same building, is not an abandonment. Com. *v.* Brigham, 123 Mass. 248.

80. Turner *v.* Austin, 16 Mass. 181.

81. Barton *v.* Continental Oil Co., 5 Colo. App. 341, 38 Pac. 432, where an under sheriff attempted to release upon the margin of the record. And see Danforth *v.* Carter, 4 Iowa 230, where pending an appeal the officer surrendered without an order of the court.

The failure of a receiver to include attached property in his inventory is not an abandonment of a levy of an attachment by him as marshal, so as to defeat the right of the attaching creditor under the valid levy. National Cash Register Co. *v.* Broeksmit, 103 Iowa 271, 72 N. W. 526.

82. Smith *v.* Robinson, 64 Cal. 387, 1 Pac. 353.

83. Petree *v.* Bell, 2 Bush (Ky.) 58 (delay of two years); Van Loan *v.* Kline, 10 Johns. (N. Y.) 129.

84. Whipple *v.* Sheldon, 63 Vt. 197, 21 Atl. 271.

When execution is stayed by order of court, the plaintiff is entitled to an order of the court preserving his attachment lien. Rowan *v.* Union Arms Co., 36 Vt. 124.

85. Davis *v.* John V. Farwell Co. (Tex. Civ. App.), 49 S. W. 656. as to failure to issue order of sale for several months not creating an estoppel.

Two months is not unreasonable. Geiges *v.* Greiner, 68 Mich. 153, 36 N. W. 48.

Delay for more than one year after judgment in enforcing a sale of the attached property, does not result in a loss of the lien, notwithstanding under statutes a judgment of a court of record is a lien upon the real estate of the judgment debtor for a year, and unless the lien is enforced by a sale of the property within a year the lien is lost. Campbell *v.* Atwood (Tenn. Ch.), 47 S. W. 168.

An unauthorized direction by the attorney to the sheriff not to sell the attached property under execution is

5. The Bearing of Form of Judgment or Execution. — By taking a personal judgment without procuring an order for the sale of the attached property, it is held in some cases, a plaintiff waives his lien,[86]

not a waiver and abandonment of the liens. Katz *v.* Obenchain, 48 Ore. 352, 85 Pac. 617, 120 Am. St. Rep. 821.

The withdrawal of the execution from the hands of the sheriff on the day of, and before the sale of the land, does not discharge the lien of the attachment. Van Camp *v.* Searle, 147 N. Y. 150, 41 N. E. 427.

86. **Ind.**—United States Mtg. Co. *v.* Henderson, 111 Ind. 24, 12 N. E. 88; Sannes *v.* Ross, 105 Ind. 558, 5 N. E. 699; Smith *v.* Scott, 86 Ind. 346; Lowry *v.* McGee, 75 Ind. 508; Capital City Dairy Co. *v.* Plummer, 20 Ind. App. 408, 49 N. E. 963. **Ore.**—Moore Mfg. Co. *v.* Billings, 46 Ore. 401, 80 Pac. 422. **Tenn.**—Mullendore *v.* Hall, 2 Tenn. Ch. App. 273.

Judgment for a sale of part of the real property attached, is in effect a release of the remainder. Thomas *v.* Johnson, 137 Ind. 244, 36 N. E. 893.

A Texas statute requires an express foreclosure of an attachment lien on personal property to appear in the judgment. Wallace *v.* Bogel, 2 S. W. 49. See also Cook *v.* Love, 33 Tex. 487.

In Wallace *v.* Bogel, *supra*, the judgment was rendered before the statute. Willie, C. J., said: "The proceeding was therefore *in personam*, and the proper judgment in behalf of the plaintiff was a recovery of such sum as he showed to be due him from the defendants. Whether the judgment should go further, and expressly foreclose the attachment lien, without any statutory provision to that effect, must depend upon whether such express foreclosure is necessary to a sale of the attached property in satisfaction of the judgment. There is no doubt but that the lien acquired by the levy must be presumed by the recovery of a judgment against the defendant; but the question is as to what kind of judgment will preserve the lien, and what will be treated as abandoning it. In some states it is required by statute that the judgment shall contain an order to sell the attached property, and in those states a failure to incorporate this special order in the judgment releases the attachment lien. Wasson *v.* Cone, 86 Ill. 46; Lowry *v.* McGee, 75 Ind. 508. In other states it seems to be the practice to add to the judgment the words, 'with privilege upon the property attached.' Waples, Attachm. 506. This is, in effect, a reservation of a right to sell the attached property, in payment of the judgment. Neither in the foregoing states, nor in any others to whose reports we have access, is it held than an express foreclosure of the lien must appear in the judgment. The lien appears to be treated as sufficiently foreclosed or preserved by the personal judgment, but the consequent order of sale must follow to carry the judgment into effect, or the order or privilege of sale is itself a recognition of the lien sufficient to preserve it. In other states the rule of decision seems to be that the mere rendition of a personal judgment against the defendant, by implication, preserves the lien, and that there need be neither express foreclosure of the lien, nor reservation of a privilege to sell the property, nor an order to sell contained in the judgment. Betancourt *v.* Eberlin, 71 Ala. 461; Young *v.* Campbell, 5 Gilman, 80; Waynant *v.* Dodson, 12 Iowa, 22; Coleman *v.* Waters, 13 W. Va. 278. The lien fastened upon the attached property through the diligence of the plaintiff, and kept alive during the progress of the suit, is not presumed to be abandoned, unless there be something in the judgment or in the record of the cause inconsistent with its continuance. This now seems best supported by authority, and bored out by reason. If the property is subject to the attachment, and the writ is not quashed, the recovery of a final personal judgment by the plaintiff is all that is necessary to entitle him to a sale of the property attached."

A lien on land is not lost, as the statute in such cases dispenses with foreclosure, making the mere recital of the issuance of attachment and levy sufficient to preserve the lien, the sale under execution relating back and vesting in the purchaser all title held

but generally, in the absence of statute, the rule is otherwise.[87]

The commitment of the judgment debtor is not a release of an attachment, as the judgment is not thereby satisfied.[88]

Taking judgment by confession has been held not to waive the attachment lien,[89] though the dissolution of a lien has been declared to result as against an attack by a subsequent attaching creditor upon the failure of the plaintiff to prosecute his attachment to judgment in the manner required by law, and his acceptance of a judgment by confession, not based upon or in conformity with the writ of attachment.[90]

By issuing a general execution on an attachment judgment, a creditor does not waive the lien of the attachment,[91] provided the attached property is sold on the execution.[92]

6. Return of Nulla Bona. — A return of *nulla bona* on a first execution after judgment is not a surrender of an attachment lien on real estate.[93] As to personal property a different rule obtains. Where, instead of levying the execution upon the attached property, the sheriff, with the consent of the plaintiff, returned the execution *nulla bona,*

by the defendant in execution at the time of the levy of the writ. LeDoux *v.* Johnson (Tex. Civ. App.), 23 S. W. 902, holding that a leasehold estate levied on is not personal property.

87. **Ill.**—Yarnell *v.* Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380, *reversing* 65 Ill. App. 83. **Minn.**—Hencke *v.* Twomey, 58 Minn. 550, 60 N. W. 667. **Mont.**—State *v.* Eddy, 10 Mont. 311, 25 Pac. 1032. **Neb.**—Coulson *v.* Saltsman, 71 Neb. 495, 98 N. W. 1055.

When an appearance is entered by the defendant, without giving bond, as authorized by statute, in a suit begun by attachment, the proceedings are converted into a personal action *sub modo,* and the judgment recovered will have the quality of a judgment *in personam;* but the lien of the attachment will be preserved, notwithstanding such appearance. "After such an appearance, the suit proceeds *in personam,* the action remaining a proceeding *in rem* as to the property attached." Goldmark *v.* Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720.

Pending Appeal From Order Dissolving Attachment.—An attachment lien is not lost by the attachment plaintiff appealing from an order dissolving the attachment, and while the appeal was pending and unperfected, prosecuting the action in which the attachment was issued to judgment, and taking execution on the judgment and selling the attached premises. Martin *v.* Maxey, 14 Mont. 85, 35 Pac. 667; Ryan *v.* Maxey, 14 Mont. 81, 35 Pac. 515.

Where the attachment issue has been referred to a master in chancery under a general rule of court, taking a judgment by default on the debt pending the reference does not require the court to sustain or discharge the attachment at the time judgment is rendered, under the statute. Carter *v.* Barton, 2 Ind. Ter. 99, 48 S. W. 1017.

88. Twining *v.* Foot, 5 Cush. (Mass.) 512; Bailey *v.* Jewett, 14 Mass. 155; Almy *v.* Wolcott, 13 Mass. 73; Lyman *v.* Lyman, 11 Mass. 317.

89. Schloss *v.* State Bank, 4 Wash. 726, 31 Pac. 23.

90. Gilbert *v.* Gilbert, 33 Mo. App. 259; Murray *v.* Eldridge, 2 Vt. 388.

91. Amyett *v.* Backhouse, 7 N. C. 63. See also Perry *v.* Mendenhall, 57 N. C. 157.

Where the statutes provide only one form of execution as to personal property and a special execution against attached personal property is not known to the statute, a lien is not lost by issuing an execution in ordinary form. Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421.

92. Hencke *v.* Twomey, 58 Minn. 550, 60 N. W. 667. See also Yarnell *v.* Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380, *reversing* 65 Ill. App. 83.

93. Lant *v.* Morgan's Admr, 75 Fed. 627, 43 U. S. App. 623, 21 C. C. A. 457, *reversing* 71 Fed. 7.

this is an abandonment of the attachment lien,[94] though such lien is not to be regarded as abandoned where it does not appear that there was any intention on the part of the attaching creditor to abandon the lien acquired by his attachment, and the return unsatisfied of the execution was made because it encountered a fraudulent obstruction.[95]

G. Restoration of Lien. — When convinced of its error in quashing an attachment, the court may set aside its order, doing so at the same term at which it was rendered, or even when final judgment is rendered,[96] and on reversing an order discharging an attachment, the lien of the attachment is restored[97] on a prompt proceeding for review,[98] though where by final judgment against the plaintiff an attachment lien was dissolved, the lien is not restored by a reversal of the judgment on a writ of error, which had not been promptly sued out on exceptions to the decision taken at once in the attachment suit.[99] The

94. Butler *v.* White, 25 Minn. 432.

In Lant *v.* Morgan's Admr., 75 Fed. 627, 43 U. S. App. 623, 21 C. C. A. 457, *reversing* 71 Fed. 7, the court, discussing personal property attached, said: "The necessity for excluding the owner from beneficial enjoyment in the thing attached has justly given rise to the requirement that when his judgment is obtained the attaching creditor shall speedily satisfy it out of that which he has so long withheld from the defendant owner. If, instead of doing so, the issue of execution is followed by a return *nulla bona*, it is inferred against the judgment creditor that he proposes to rely on other property for his debt, and that he has abandoned his lien. Or, if no execution is issued upon a judgment within a reasonable time, the lien is to be regarded as abandoned, because the defendant owner of the attached personalty may justly complain that, if he is not to have the use of it, he ought at least to have it sold, and the proceeds of it applied to the payment of his debts."

95. Merchants' Nat. Bank *v.* Greenhood, 16 Mont. 395, 41 Pac. 250, 851.

96. Woldert *v.* Nedderhut Pack. Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378. See Pach *v.* Orr, 15 Civ. Proc. 176, 1 N. Y. Supp. 760, *modified*, 112 N Y. 670, 20 N. E. 415.

If a voluntary non-suit is set aside at the same term of the court at which it was taken, the lien of the attachment levy as it existed before the non-suit remains unimpaired. Dollins *v.* Pollock, 89 Ala. 351, 7 So. 904. But see Union Mfg. Co. *v.* Pitkin, 14 Conn. 174.

Not on Mere Motion To Amend Judgment.—Givens *v.* Caudle, 34 La. Ann. 1025. See also Gower *v.* Stevens, 19 Me. 92, 36 Am. Dec. 737, that the lien may not be revived by notice.

As Affecting Third Persons.—When a warrant of attachment has been vacated and the levy thereunder released, a subsequent restoration of that warrant of attachment could not operate to burden the property in the hands of a *bona fide* purchaser, nor become a charge upon it in the hands of an assignee under a general assignment for the benefit of creditors. Pach *v.* Gilbert, 124 N. Y. 612, 27 N. E. 391, *affirming* 18 Civ. Proc. 262, 9 N. Y. Supp. 548. See also Pach *v.* Orr, 15 Civ. Proc. 176, 1 N. Y. Supp. 760, *modified*, 112 N. Y. 670, 20 N. E. 415.

97. Cabell *v.* Patterson, 98 Ky. 520, 32 S. W. 746. But *compare* Eikel *v.* Hanscom, 3 Wills. Civ. Cas. (Tex.) §474.

Where an attachment lien is discharged by failure to levy execution within thirty days from the entry of judgment, an order of court vacating the judgment rendered would not revive an attachment actually dissolved. Murphy *v.* Hill, 68 N. H. 544, 44 Atl. 703.

98. Sundance First Nat. Bank *v.* Mooreroft Ranch Co., 5 Wyo. 50, 36 Pac. 821.

99. Harrow *v.* Lyon, 3 Greene (Iowa) 157.

lien will not be restored, of course, on a motion made upon an insufficient showing.[1]

By Agreement of Parties.— Where there has been a relinquishment of the attachment by agreement of the parties to the process, they may subsequently agree to abandon their relinquishment of the property and to reinstate it in the possession of the officer under the previous levy, so far at least as regards their own right and liabilities under it.[2]

XVI. PROCEEDINGS TO ENFORCE CLAIMS OF THIRD PERSONS. — A. ELECTION OF REMEDIES. — A person claiming title to, or an interest in, the attached property is not bound to interfere in the suit in which the seizure is made, to assert his rights. He has his election to assert his rights by intervening in the attachment suit or by an independent action.[3]

B. REPLEVIN. — Where a third person claims the property attached he may bring an independent action in replevin.[4] But in some juris-

1. Sundance First Nat. Bank *v.* Moorcroft Ranch Co., 5 Wyo. 50, 36 Pac. 821.

2. Fifield *v.* Wooster, 21 Vt. 215.

3. **Ind.**—Risher *v.* Gilpin, 29 Ind. 53. **Ia.**—Sperry *v.* Ethridge, 70 Iowa 27, 30 N. W. 4. **Kan.**—Thomas *v.* Baker, 41 Kan. 350, 21 Pac. 252. **La.** Shuff *v.* Morgan, 9 Mart. 592. **Mo.**— Wangler *v.* Franklin, 70 Mo. 659. **Pa.** Megee *v.* Beirne, 39 Pa. 50. **S. C.**— Olin *v.* Figeroux, 1 McMull. L. 203. **Tex.**—Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

See also Bloom *v.* McGehee, 38 Ark. 329, and the statutes of the various states.

"A person whose goods have been seized improperly, and who is no party to the suit, is not concluded by the judgment." Samuel *v.* Agnew, 80 Ill. 553.

In Gates *v.* Pennsylvania Land, etc., Co., 9 Ohio C. C. 378, 6 Ohio Cir. Dec. 163, 2 Ohio Dec. 312, the court said: "The owner of personal property levied upon by an attachment, if different from the one against whom the attachment issues, does not intervene and settle his rights in that case, but must resort to an action in replevin. So if levy is made upon real property, the owner does not intervene and ask that his rights to the property be determined in the original action, but he resorts to an independent action to assert his claim to the property attached."

Proceeding by Rule.—In Remington Paper Co. *v.* Louisiana Printing, etc., Co., 56 Fed. 287, the court said: "It is urged by the plaintiff in this suit that the proceeding by the receiver should have been by intervention; that he cannot proceed by rule. I have no doubt that, as a general thing, the intervention must be resorted to by a person other than an original party to the suit, but I cannot see that in this case any harm can come by allowing the matter to be heard by rule. In either case there is a liability for costs, the result would have been the same, and by proceeding by rule greater expedition was allowable. The receiver is as fully here as if he had intervened. I think, therefore, I ought to allow him to proceed by rule."

The Indiana statute requiring any person other than the defendant, claiming attached property and having notice of the attachment, to assert his title, applies only to proceedings before a justice of the peace. Davis *v.* Warfield, 38 Ind. 461.

4. **U. S.**—Marden *v.* Starr, 107 Fed. 199. **Ala.**—Rhodes *v.* Smith, 66 Ala. 174. **Ark.**—Willis *v.* Reinhardt, 52 Ark. 128, 12 S. W. 241. **Cal.**—Kellogg *v.* Burr, 126 Cal. 38, 58 Pac. 306. See also Hillman *v.* Griffin, 59 Pac. 194. **Conn.**—Jackson *v.* Hubbard, 36 Conn. 10; Bowen *v.* Hutchins, 18 Conn. 550. **Ill.**—Samuel *v.* Agnew, 80 Ill. 553; Goetz *v.* Hanchett, 40 Ill. App. 206; Blatchford *v.* Boyden, 18 Ill. App. 378. **Ia.**—McIver *v.* Davenport, 110 Iowa 740, 81 N. W. 585; Alborn *v.* Alborn, 100 Iowa 382, 69 N. W. 678; Smith *v.*

dictions replevin cannot be maintained after the property is levied on by the officer, on the ground that the property is in the custody of the law.[5]

C. Trover. — The action of trover for conversion is likewise open to one claiming the property.[6]

D. Detinue. — So in some jurisdictions detinue is an available remedy to recover the property attached.[7]

E. Trespass. — An action of trespass has been allowed against the officer and the party authorizing the seizure.[8]

F. Filing Claims Under Original Proceedings. — Under some statutes where an attachment has been issued, and the defendant brought into court, other creditors may come in and proceed under such attachment,[9] and in such case no new summons need issue against

Montgomery, 5 Iowa 370. **Kan.**—Bruce *v.* Squires, 68 Kan. 199, 74 Pac. 1102; Goodwin *v.* Sutheimer, 8 Kan. App. 212, 55 Pac. 486. **Mass.**—Ayer *v.* Bartlett, 170 Mass. 142, 49 N. E. 82; Fay *v.* Duggan, 135 Mass. 242; Gardner *v.* Dutch, 9 Mass. 427. See also Scudder *v.* Worster, 11 Cush. 573, 578. **Mich.**—Gottesman *v.* Chipman, 125 Mich. 60, 83 N. W. 1026; Schoolcraft *v.* Simpson, 123 Mich. 215, 81 N. W. 1076; Goeschel *v.* Fisher, 108 Mich. 212, 65 N. W. 965; Partlow *v.* Swigart, 90 Mich. 61, 51 N. W. 270; Tandler *v.* Saunders, 56 Mich. 142, 22 N. W. 271; Town *v.* Tabor, 34 Mich. 262. **Miss.**—Hopkins *v.* Drake, 44 Miss. 619. **Neb.** Horkey *v.* Kendall, 53 Neb. 522, 73 N. W. 953, 68 Am. St. Rep. 623. **N. H.**—Wheeler *v.* Eaton, 67 N. H. 368, 39 Atl. 901. **N Y**—Leinkauf Bkg. Co. *v.* Grell, 62 App. Div. 275, 70 N. Y. Supp. 1083. **Okla.**—Dunn *v.* Overton, 15 Okla. 670, 83 Pac. 715; Moore *v.* Calvert, 8 Okla. 358, 58 Pac. 627; Marrinan *v.* Knight, 7 Okla. 419, 54 Pac. 656. **S. D.**—Carson *v.* Fuller, 11 S. D. 502, 78 N. W. 960, 74 Am. St. Rep. 823. **Vt.**—Reed *v.* Starkey, 69 Vt. 200, 37 Atl. 297; Estey *v.* Love, 32 Vt. 744. **Wis.**—S. C. Herbst Importing Co. *v.* Burnham, 81 Wis. 408, 51 N. W. 262. **Wyo.**—Cheeseman *v.* Fenton, 13 Wyo. 436, 80 Pac. 823, 110 Am. St. Rep. 1010.

A third person claiming the attached property in an action of replevin against the officer taking the property must show right of possession in himself at the time when his action was commenced. Schweitzer *v.* Hanna, 91 Wis. 318, 64 N. W. 997.

A party by interpleading and claiming property attached is not estopped to bring replevin for the same property. Lowry *v.* Kinsey, 26 Ill. App. 309.

Under the Indiana statute a claimant may assert his claim by bringing an action in replevin, provided he has not received the statutory notice from the attaching officer which is prescribed where third parties claim the property, before he begins his action. Patterson *v.* Snow, 24 Ind. App. 572, 57 N. E. 286.

For a full discussion of this subject see the title "**Replevin.**"

5. Baltimore, etc., R. Co. *v.* Klaff, 103 Md. 357, 63 Atl. 360, 115 Am. St. Rep. 363, 5 L. R. A. (N. S.) 495, 7 Ann. Cas. 905; Butts *v.* Woods, 4 N. M. 343, 16 Pac. 617.

6. Hannan *v.* Connett, 10 Colo. App. 171, 50 Pac. 214. See the title "**Trover.**"

7. Gillespie *v.* McClesky, 160 Ala. 289, 49 So. 362. See the title "**Detinue.**"

8. Shuff *v.* Morgan, 9 Mart. (La.) 592; Holmes *v.* Balcom, 84 Me. 226, 24 Atl. 821. See the titles "**Case;**" and "**Trespass.**"

9. **U. S.**—Gibson *v.* Stevens, 3 McLean 551, 10 Fed. Cas. No. 5,401, under an Indiana statute. **Colo.**—Rouse *v.* Wallace, 10 Colo. App. 93, 50 Pac. 366. **Ind.**—Lexington, etc. R. Co. *v.* Ford Plate Glass Co., 84 Ind. 516; Henderson *v.* Bliss, 8 Ind. 100; Gilly *v.* Breckenridge, 2 Blackf. 100. **S. C.**—Mitchell & Co. *v.* Byrne, 6 Rich. L. 171.

In Ziegenhager *v.* Doe, 1 Ind. 296, the court said: "To avoid the expense to the defendant of separate writs in all these cases, the statute provides that, where one writ has been issued,

the defendant in order to entitle the creditor to share in the proceeds of the attachment.[10]

A creditor becomes a party to the original suit by filing his complaint, affidavit and undertaking in such a manner as to indicate a purpose to prosecute under the original action,[11] and he is estopped from setting up rights superior to those of the attaching creditor.[12]

Such Claim Is a Lien. — The claims filed under the original attachment become a lien on the property from the time of the service of the original writ.[13] A creditor applying for leave to come in under an attachment need not file his claim with such application. But if he files it then he is not thereby estopped from proving beyond the amount specified.[14]

Discontinuance by Attaching Creditors. — Where claims have been filed under an attachment, a discontinuance by the original attaching creditor does not impair the right of parties filing such claims to proceed in the suit and obtain judgment.[15]

the defendant being brought into court, constructively, at least, upon it, other creditors may proceed under such writ, and that it shall not be dismissed to the prejudice of those so proceeding, each of the claims so filed standing, in reality, as an independent attachment suit. Such being the case, it would seem to make no difference that the claims filed subsequently to the attaching creditor's, were not due at the issuing of the writ nor, that the claim upon which the writ issued had been paid, as the attachment was actually pending upon a single claim at the time a subsequent one was filed."

Under the Indiana statute the right of other creditors to file claims under the original attachment terminates with the "final adjustment of the suit;" that is to say, with the final judgment and order of sale. Cooper *v.* Metzger, 74 Ind. 544.

The death of the defendant after the return day of the writ of attachment does not abate or discontinue the action and a creditor may apply or enter his rule to be admitted, as if the defendant were alive. Smith *v.* Warden, 35 N. J. L. 346.

Claims for labor done or work performed may be presented to the officer and attaching creditor under Cal. Code Civ. Proc. §1206. Legg & Shaw *v.* Worthington, 157 Cal. 488, 108 Pac. 284.

10. Schmidt *v.* Colley, 29 Ind. 120.

11. Ryan *v.* Burkam, 42 Ind. 507. See also Sturgis *v.* Rogers, 26 Ind. 1.

When Attachment Proceeding Defeated.—"When a creditor files a claim, under an attachment proceeding, he becomes a party to such proceeding, and when such proceeding is tried and determined the judgment concludes all persons who are parties. The statute does not contemplate a separate trial of such proceeding by each creditor who becomes a party by filing his claim, and if a creditor's claim is allowed, but the proceedings in attachment are defeated, as was done in this case, such creditor has no lien or claim upon such property by virtue of such proceeding." Trentman *v.* Wiley, 85 Ind. 33.

12. Rouse *v.* Wallace, 10 Colo. App. 93, 50 Pac. 366.

13. Ryan *v.* Burkam, 42 Ind. 507; Shirk *v.* Wilson, 13 Ind. 129. But see Ziegenhager *v.* Doe, 1 Ind. 296, holding that the attachment lien commences as early as the levying of the writ, as to the claim on which it issued, and the lien of subsequent claims commences as early as the date when such claims were filed.

14. Hanness *v.* Smith, 21 N. J. L. 495.

15. Taylor *v.* Elliott, 51 Ind. 375; Rugg *v.* Johnson, 13 Ind. 437; People *v.* Judges, 1 Dougl. (Mich.) 417.

Right of Attaching Creditor To Dismiss.—"It is sufficient for us to declare that where the parties know, as matter of law, that third persons may acquire rights under a pending action, it cannot be dismissed during term, so as to affect the rights of those parties, without an order of court.

Payment of the claim of the attaching creditor after judgment and auditors appointed does not necessarily stop the attachment proceeding.[16]

Distribution of Proceeds. — Where creditors come in under an attachment and establish their claims, the proceeds will be distributed *pro rata*.[17]

G. NOTICE AND DEMAND. — Some statutes provide that a third person claiming an interest in property attached may serve a notice of the claim upon the attaching officer and demand the property.[18] But where the attached property is taken from the possession of one not named in the writ and owned by him, the taking is wrongful and it is

Ryan *v.* Burkam, 42 Ind. 507. If the third person had notice of the agreement to dismiss, it is possible that the order of the court subsequently entered confirming the dismissal would bind him, but that it is not the case here, for the third person had no notice of the agreement to dismiss." McLain *v.* Draper, 109 Ind. 556, 8 N. E. 910.

Injunction To Prevent Dismissal.— Where property is attached and laborers having preferred claims give notice of such claims as provided by statute, they cannot maintain an injunction to prevent the attaching creditor from dismissing the attachment. Winrod *v.* Wolters, 141 Cal. 399, 74 Pac. 1037.

16. Stone *v.* Jones, 4 Harr. (Del.) 255, wherein the court said: "The other creditors have an interest in the proceedings, as they may not issue any second writ of attachment. A substitution is not necessary, as in the case of the death of the attaching creditor; the proceedings may still be conducted in his name; and the auditors have leave to report to the next term."

17. Fee *v.* Moore. 74 Ind. 319; Compton *v.* Crone, 58 Ind. 106; Benedict *v.* Benedict, 15 N. J. Eq. 150.

18. **Cal.**—Taylor *v.* Seymour, 6 Cal. 512. **Ia.**—Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. 714, 9 Am. St. Rep. 497. **Me.**—Nichols *v.* Perry, 58 Me. 29. **Mass.**—Putnam *v.* Rowe, 110 Mass. 28; Averill *v.* Irish, 1 Gray 254.

Where a party has more than one mortgage and sets up only one in his notice and demand he cannot waive the lien under such mortgage and rely upon another and different mortgage upon which he has made no demand. Witham *v.* Butterfield, 6 Cush. (Mass.) 217.

The Massachusetts statute, "requiring a demand and notice of the amount of the debt or liability by the mortgagee, in case of an attachment of mortgaged goods, applies only to attachments by state officers, and not to attachments made or processes issuing from the courts of the United States." Howe *v.* Freeman, 14 Gray 566, *reversed* on the question of jurisdiction, 24 How. (U. S.) 450, 16 L. ed. 749.

When the attachment is by trustee process it is not necessary for the mortgagee to make the demand required by the statute. The provisions of the statute apply to an attachment of goods by an actual seizure of the same. Putnam *v.* Cushing, 10 Gray (Mass.) 334.

Under the Iowa statute giving laborer's claims a preference and providing that where the property of his employer is attached he "shall present to the officer levying on such property, . . . or to the court having the custody of such property or from which such process issued, the statement of his claim," it was held that the filing of a statement with the clerk of the court from which the attachment issued was a compliance with the statute. Stuart *v.* Twining, 112 Iowa 154, 83 N. W. 891.

Subsequent Attachments.—"A demand by a mortgagee of the sum due on his mortgage upon an attaching officer or creditor does not prevent other creditors from subsequently attaching the same property. It only operates to dissolve, *sub modo*, the attachments already made. All subsequent attachments stand on the same footing as if no previous attachments

not necessary for the claimant to give notice or demand the property.[19]

Purpose of Notice.— It has been held that statutes requiring notice of claims and a demand are intended for the protection of the attaching officer.[20] But it has also been held that the notice is for the benefit of the attaching creditor.[21] So the attaching creditor waives the objec-

had existed." Wheeler *v.* Bacon, 4 Gray (Mass.)) 550.

As to filing of affidavit, see: Fla.— Richardson *v.* Smith, 21 Fla. 336, setting up property in a partnership. Minn.—Carpenter *v.* Bodkin, 36 Minn. 183, 30 N. W. 453, affidavit by agent on information furnished by principal. Miss.—Canty *v.* Wood, 38 So. 315 (holding that plaintiff waived his right to dismiss by joining issue); Higdon *v.* Vaughn, 58 Miss. 572. Wash.— State *v.* Superior Court, 6 Wash. 417, 34 Pac. 151.

19. Fairbanks *v.* Kent, 16 Colo. App. 35, 63 Pac. 707; Probstfield *v.* Hunt, 17 N. D. 572, 118 N. W. 226; Aber *v.* Twichell, 17 N. D. 229, 116 N. W. 95.

When the property attached is in the possession of a person other than the defendant, the attaching creditor is charged with notice of the rights of the party in possession. Bacon *v.* Thompson, 60 Iowa 284, 14 N. W. 312.

Right to Possession.—"Here, not only the title to the property was vested in Kellogg, who had never parted with it, but, at the time the demand was made by him upon the sheriff for the return of the property, he was entitled to its immediate possession, and those facts entitled him to maintain the action of claim and delivery. It was so expressly held in Rodgers *v.* Bachman, 109 Cal. 552, a case directly in point." Kellogg *v.* Burr, 126 Cal. 38, 41, 58 Pac. 306.

In Probstfield *v.* Hunt, 17 N. D. 572, 118 N. W. 226, Morgan, C. J., speaking for the court, said: "We think the statute should be construed as applying to such cases of possession by the defendant named in the writ, or his authorized agent, as shows the control of the property to be in either the defendant or such agent."

"It is contended that, as defendant did not pay or offer to pay the amount of the debt secured by the mortgage, as provided by chapter 117, Laws Twenty-first General Assembly, the levy is void; and hence it was not necessary to serve the notice of ownership prescribed by chapter 45, Laws 1884, before instituting the suit. Section 4 of the act provides, however, that nothing contained in the act shall in any way affect the right of the creditor to contest for any reason the validity of the mortgage. The creditors were contesting the validity of the mortgage on the grounds: 1. That it was fraudulent; 2. That it had never been delivered; and 3. That they had no notice of it, which, if true, rendered it invalid as to them. The provisions of the act have no application when the mortgage is sought to be avoided on these grounds, and the requirement for notice is not affected by them." Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. 714, 9 Am. St. Rep. 497, 503.

20. Kellogg *v.* Burr, 126 Cal. 38, 58 Pac. 306, *citing* Paden *v.* Goldbaum (Cal.), 37 Pac. 759; Dubois *v.* Spinks, 114 Cal. 289, 46 Pac. 95; Brenot *v.* Robinson, 108 Cal. 143, 41 Pac. 37.

In Ayres *v.* Dorsey Produce Co., 101 Iowa 141, 70 N. W. 111, 63 Am. St. Rep. 376, the court said: "It is contended that notice of ownership, . . . should have been served on the sheriff before this action was begun. The notice there referred to is for the protection of the officer making the levy. It would serve no such purpose where a delivery bond has been executed, and is not required by the statute permitting the release of property thereby."

"The purpose of the written demand required of the mortgagee is to give the officer or attaching creditor notice of the existence of the claim, and such information as to its nature and amount as will enable him to act understandingly in reference to it. If it is sufficiently explicit and accurate to answer these purposes, it is not rendered invalid by mere informalities. If made in good faith, it will not be defeated by inaccuracies or other defects which do not tend to mislead, or by which the parties in the particular case could not be damnified." Folsom *v.* Clemence, 111 Mass. 273.

21. Campbell *v.* Eastman, 170 Mass.

tion that the notice is insufficient by giving a sufficient indemnifying bond to the officer.[22]

Time of Notice. — If there is a failure of such notice and demand within the time prescribed by the statute, no action for the recovery of the property can be maintained.[23] In the absence of statutory provision as to the time within which the demand shall be made and the account stated the claimant must be reasonably diligent in asserting his lien. What is reasonable diligence depends upon the circumstances peculiar to each case.[24]

Manner of Service. — Where the statute does not prescribe the manner in which the notice shall be served, the mere delivery of the notice to the officer is sufficient.[25] When a laborer has a claim preferred by

523, 49 N. E. 914. See also McKee *v.* Gareelon, 60 Me. 165, 11 Am. Rep. 200.

22. Donnelly *v.* Mitchell, 119 Iowa 432, 93 N. W. 369.

23. Gross *v.* Jordan, 83 Me. 380, 22 Atl. 250; Potter *v.* McKenney, 78 Me. 80, 2 Atl. 844; Haskell *v.* Gordon, 3 Met. (Mass.) 268.

24. Congress Invest. Co. *v.* Reid, 205 Mass. 576, 91 N. E. 896; Legate *v.* Potter, 1 Met. (Mass.) 325; Johnson *v.* Sumner, 1 Met. (Mass.) 172.

"The objection most relied upon, as to this part of the case, was, that the statement and demand were not made in a reasonable time—being more than two years from the time when the attachments were made by the officer, during all of which interval of time, it is said, the officer could not know what to do with the property. . . . The defendants knew of the suit which was pending between the prior mortgagees and the attaching officer, which, we have seen, was not decided until September, 1839. And the statement and demand were made upon the attaching officer immediately afterwards. . . . The plaintiffs could not know, until after the decision of the case touching the first mortgage, whether or not they might legally demand or claim of the attaching officer the money which was secured by the first mortgage. And it is not contended that the plaintiffs were guilty of any laches after that case was decided. We think that the objection made in regard to the statement of the plaintiffs' claim, and to the demand of payment cannot prevail, for the reasons before stated." Housatonic Bank *v.* Martin, 1 Met. (Mass.) 294, 305.

"While, on the one hand, early knowledge, on the part of the mortgagee, that the property has been attached, will require more speedy assertion of his rights, so, on the other hand, if the attaching creditor, or the officer, has, through the mortgagee, though informally, actual knowledge of the mortgage, and the nature and extent of the lien acquired thereby, this fact will be entitled to some consideration on the question whether the mortgagee has lost his lien by unreasonable delay in making the formal demand and statement of his claim, which the statute requires." Dewey, J., in Legate *v.* Potter, 1 Metc. 325, 326, 327, quoted with approval in Congress Inv. Co. *v.* Reid, 205 Mass. 576, 91 N. E. 896.

25. Turner *v.* Younker, 76 Iowa 258, 41 N. W. 10.

In Gerson *v.* Jamar, 30 La. Ann. 1294, it was held that where a third person in whose possession property has been attached intervenes, and claims the ownership of the property, his intervention need be served only on the plaintiff in attachment. It is not necessary for him to cite the defendant in attachment, who does not dispute his title.

Evidence of Service.—"The return also shows that on the very day that the sheriff made the levy he was served by the plaintiff with a notice of his ownership of the goods, and the notice served was attached to the return of the writ. This was competent evidence of the service of the notice. It was an admission of record that the notice was served in the proper time; and, to avoid repetition, we will here say that any other proof of such service was wholly unnecessary, and

statute, service of the notice of such claim upon the attorney of the attaching creditor is sufficient.[26]

Burden of Proof. — The burden of proving that the notice was given, and demand made as provided by statute, is upon the claimant.[27]

Form of Demand. — The notice or demand is sufficient when the nature and extent of the claimant's interest is stated and how it was acquired.[28] Where the notice of a claimant does not state how an interest was acquired in property or the consideration paid therefor, it is insufficient.[29] The demand is not insufficient merely because addressed to the officer without designating his official capacity.[30]

Statement of Amount. — The claimant must render a true account or statement of the amount due him when demanding payment of his claim.[31] The question is, not what is claimed, but what is due? The account is sufficient where it states the amount of the claim due with interest.[32]

objection to the other evidence of proof of notice need not be considered.'' Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. 754.

26. Carter *v.* Green Mountain Gold Min. Co., 83 Cal. 222, 23 Pac. 317.

27. Citizens' Nat. Bank *v.* Oldham, 136 Mass. 515; Wing *v.* Bishop, 9 Gray (Mass.) 223.

28. Hibbard *v.* Zenor, 82 Iowa 505, 49 N. W. 63; Crawford *v.* Nolan, 70 Iowa 97, 30 N. W. 32.

Where the notice stated that the plaintiff claimed and was the owner of all the property levied upon, ''except a portion owned by . . . '' it was held that it was sufficient, and the exception did not vitiate it. Susskind *v.* Hall (Cal.), 44 Pac. 328.

Where the notice stated that the mortgagees were the owners of ''a certain stock of drugs,'' and made reference to the mortgage wherein the property mortgaged was described as a ''drug stock,'' it was held that it was sufficiently specific to enable the officer to determine what goods were claimed, and did not limit the claimant to the recovery of the drugs alone contained in the stock. Kern *v.* Wilson, 82 Iowa 407, 48 N. W. 919.

A demand for an amount larger than is due is sufficient where the amount due is greater than the value of the property. Clark *v.* Dearborn, 103 Mass. 335.

29. McFarlane *v.* Dick, 145 Iowa 89, 123 N. W. 1005; Bradley *v.* Miller, 100 Iowa 169, 69 N. W. 426.

30. Duggan *v.* Wright, 157 Mass. 228, 32 N. E. 159.

31. Buck *v.* Ingersoll, 11 Met. (Mass.) 226.

In Moriarty *v.* Lovejoy, 23 Pick. (Mass.) 321, the court said: ''Preliminary to the right of vacating the attachment by the mortgagee for the non-payment of the debt secured by the mortgage, is the duty on the part of the mortgagee of stating a just and true account of the debt due, and demanding payment of the same.''

32. Jones *v.* Richardson, 10 Met. (Mass.) 481.

In Sullivan Sav. Inst. *v.* Kelley, 59 N. H. 160, the court said: ''The account rendered contained a copy of the note and of all the indorsements thereon, with the dates of payment, and stated that the interest paid and indorsed was computed at a certain rate per cent. This was a compliance with the requirement of the statute. The question to be answered by the account was, not what the plaintiff claimed to be due, but what was due. The account correctly stated all the facts bearing on that question. At what rate the interest should be computed, was a question of law which the plaintiff was not bound to answer.''

Where the claimant has two mortgages and the second mortgage secures a part of the notes secured by the first, an account of the amount due on each mortgage by itself without stating that some of the notes are secured in both is sufficient. Barton *v.* Chellis, 45 N. H. 135.

An error in computing interest on the amount stated as due will not render the account insufficient.[33]

Opinion Insufficient. — If, instead of a direct and positive statement such as the statute requires merely the opinion of the claimant is given as to what is due, it is insufficient.[34]

False Account. — The account must be true and just; a false account will not avail.[35] But an account rendered for an amount larger than that due, where it is given in good faith, will not constitute a false account.[36]

Demand by Mortgagee. — A demand on the attaching officer by a mortgagee is sufficient when it states he has a mortgage on the property attached, the amount of such mortgage and the purpose for which the mortgage was given,[37] but it is not sufficient to state merely that

33. Duncklee *v.* Gay, 39 N. H. 292.

34. Page *v.* Ordway, 40 N. H. 253. In Phillips *v.* Fields, 83 Me. 348, 22 Atl. 243, where a mortgagee stated that it was impossible for him to know the amount of his mortgage claim, "but, if I am correct, it is somewhere about $2300," it was held to be insufficient.

35. Congress Inv. Co. *v.* Reed, 205 Mass. 576, 91 N. E. 896; Hills *v.* Farrington, 3 Allen (Mass.) 427 (holding that the burden is on the claimant to show that he stated a just and true account of his debt or demand).

36. Rowley *v.* Rice, 10 Met. (Mass.) 7; Gibbs *v.* Parsons, 64 N. H. 66, 6 Atl. 93; Putnam *v.* Osgood, 51 N. H. 192.

Prejudice to Attaching Creditor.— Where the claim made by the plaintiff is largely in excess of the money due to him, he cannot avoid the letter of the statutory requirement to state a just and true account, on the ground that he had no intention to deceive, and intended to state his true debt, where it cannot be said that the attaching creditor was not misled to his pecuniary loss. Cousins *v.* O'Brien, 188 Mass. 146, 74 N. E. 289.

37. Hanson *v.* Herrick, 100 Mass. 323; Harding *v.* Coburn, 12 Met. (Mass.) 333, 46 Am. Dec. 680.

Validity Does Not Depend on Form of Action.—"The demand made by the plaintiff on the officer for the amount due on the mortgages is objected to as insufficient to sustain replevin, although it is admitted to have been sufficient to enable the plaintiff to maintain an action of trover. But the statute under which the demand was made does not make its validity depend on the form of action in which the mortgagee seeks to enforce his rights. If it is rightly made, in conformity with the provisions of the statute, the mortgagee can recover his property by replevin, or its value in trover or trespass. Upon looking at the demand in the present case, it seems to be in all respects sufficient." Molineux *v.* Coburn, 6 Gray (Mass.) 124.

No Particular Form of Expression Requisite.—"It is true that no demand of payment is expressed in direct terms in the written instrument; but that is obviously the real effect and purport of it. It distinctly notified the defendant of the existence of the mortgage made by Sawyer, of the purpose for which it was given, of the property conveyed by it, and of the amount due upon the notes described in the condition of it. The object, purpose and meaning of this notice could not be mistaken. It was a claim to have the property delivered to the plaintiff, discharged and relieved from the attachment. . . . That was sufficient, since no particular form of expression is requisite to constitute a demand of payment." Brewster *v.* Bailey, 10 Gray (Mass.) 37.

Restricting Demand.—"It is said that the demand was restricted to the property held by the plaintiff under a mortgage, and cannot apply to the property subsequently transferred by the pledge of January 11th, 1842. . . . If it had been, as seemed to be assumed in the argument, a demand restricted exclusively to property held

the mortgage was given as security for a note for a certain amount.[38] It is not necessary that the mortgagee in his demand shall designate the articles included in his mortgage so as to distinguish them from others of like character with which they might be commingled,[39] but the demand should state when the mortgage was given, by whom, and to whom,[40] and the property covered by the mortgage.[41]

Demand on Mortgagee for Account. — It is sometimes provided by statute that the attaching creditor or officer must demand of the mortgagee an account of the amount due upon his mortgage. The demand is sufficient where it calls for an account of the amount of the debt secured by the mortgage.[42] The demand should be for the amount due at the time of making the demand.[43]

Failure To State Account. — Where a claimant, after notice of the attachment given by the officer, fails to deliver a statement of the amount due on the claim, as required by statute, his interest in the property, as against the right acquired under the attachment, ceases.[44]

H. INTERVENTION.[45] — The right to intervene is founded on an interest in the attached property created by a claim to the demand, or some

under a mortgage, it would have been a fatal objection to the demand. But, upon carefully scrutinizing the writing delivered to Adams as a demand, we think its language is not thus restricted to property held by the mortgage of January, 1841, but may be reasonably held to include any lien he might have by way of pledge." Rowley *v.* Rice, 10 Met. (Mass.) 7.

38. Sprague *v.* Branch, 3 Cush. (Mass.) 575.

39. Folsom *v.* Clemence, 111 Mass. 273.

40. Wilson *v.* Crooker, 145 Mass. 571, 14 N. E. 798.

"In the present case the demand is more barren than any that has ever been held sufficient by this court. . . . It does not state when or by whom the property was mortgaged, nor where the mortgage or the record of it may be found. The mortgage might have been made by any of the debtor's predecessors in title as well as by the debtor, and have been recorded in any city or town where the property previously had been owned. The language not only did not purport to state an 'account' of the amount for which the property was then liable to the mortagee, but it was probably intended to state the amount for which the mortgage was originally made. We are of opinion that it falls short of the requirements of the statute." Campbell *v.* Eastman, 170 Mass. 523, 49 N. E. 914.

41. Woodward *v.* Ham, 140 Mass. 154, 2 N. E. 702.

42. Ricker *v.* Blanchard, 45 N. H. 39; Kimball *v.* Morrison, 40 N. H. 117; Gilmore *v.* Gale, 33 N. H. 410.

43. Farr *v.* Dudley, 21 N. H. 372.

44. **Me.**—Colson *v.* Wilson, 58 Me. 416. **N. H.**—Fife *v.* Ford, 67 N. H. 539, 41 Atl. 1051; Bryant *v.* Morrison, 44 N. H. 288; Kimball *v.* Morrison, 40 N. H. 117. **Vt.**—Green *v.* Kelley, 64 Vt. 309, 24 Atl. 133.

45. "The 'cause' dismissed by the county court was evidently the proceeding by intervention. The original cause was not before that court for any purpose, hence the judgment could have had no reference thereto. In many respects an intervention proceeding is an independent suit. It performs the same office, in effect, as the ordinary action of replevin, and is a cumulative remedy, which the owner of property wrongfully seized by attachment may or may not invoke. It saves the expense and trouble of a separate action, by an adjudication of the independent claim of ownership in connection with the original suit. Therefore the phraseology of the court below in dismissing the 'cause' is perfectly accurate and proper." Kinnear *v.* Flanders, 17 Colo. 11, 28 Pac. 327.

For the procedure in intervention generally, see the title "Intervention."

part thereof, in suit, or a claim to, or lien upon the property, or some part thereof.[46]

In some jurisdictions intervention is allowed,[47] and in others denied, where real estate is attached.[48]

Who May Intervene. — A third person claiming title to the property attached,[49] or a right to the possession, or to a special interest there-

46. **Cal.**—Kimball *v.* Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111; Horn *v.* Volcano Water Co., 13 Cal. 62. **D. C.**—Daniels *v.* Solomon, 11 App. Cas. 163. **La.**—H. B. Claflin Co. *v.* Feibelman, 44 La. Ann. 518, 10 So. 862. **Mo.**—Rice *v.* Sally, 176 Mo. 107, 75 S. W. 398; Simmons Hdw. Co. *v.* Loewen, 95 Mo. App. 122, 68 S. W. 947; F. O. Sawyer Paper Co. *v.* Mangan, 60 Mo. App. 76. **N. Y.**—Still Stove Wks. *v.* Scott, 62 App. Div. 566, 71 N. Y. Supp. 181. **Tex.**—Noyes *v.* Brown, 75 Tex. 458, 13 S. W. 36; Williams *v.* Bailey (Tex. Civ. App.), 29 S. W. 834; Hinzie *v.* Moody, 1 Tex. Civ. App. 26, 20 S. W. 769. **W. Va.**—Smith *v.* Parkersburg Co-operative Assn., 48 W. Va. 232, 37 S. E. 645.

In Whitman *v.* Willis, 51 Tex. 421, the court said: "When the title to real property is not directly, but only indirectly involved, as in this case, where it is not in issue, but simply levied upon as the property of the original defendant, then it is believed that a third party who is in possession, in order to entitle himself to the right to intervene, should allege such facts as would authorize a court of equity to grant him a writ of injunction, upon the familiar doctrine, that he cannot ask equitable relief when he has an adequate remedy at law."

Property Sold by Claimant.—Where a claimant of property has sold it prior to the levy but the sale is so far incomplete that the purchaser may look to him for further action, he may intervene in the attachment suit and assert his right to the property. Mansur *v.* Hill, 22 Mo. App. 372.

Property Destroyed.—Where the attached property has been destroyed before an interplea is filed, the claimant cannot maintain the proceeding. I. Stadden Grocery Co. *v.* Lusk, 95 Mo. App. 261, 68 S. W. 587.

Notice.—Perkins *v.* Bailey, 38 Wash. 46, 80 Pac. 177, 107 Am. St. Rep. 831, where a default judgment was set aside for want of notice to the intervener.

In Levy *v.* Weber, 8 La. Ann. 439, the court said: "There is nothing in the record which shows that the claim of the intervener was ever adjudicated upon, or that it was abandoned. Neither does it appear that the intervener ever had any knowledge of the judgment rendered against her vendor, recognizing the attaching creditor's privilege in the property. In the absence of such proof, and in view of all the circumstances disclosed by the record, it is clear that the rights of the intervener must stand unaffected."

47. Juilliard *v.* May, 130 Ill. 87, 22 N. E. 477; City Ins. Co. *v.* Commercial Bank, 68 Ill. 348, 351; Bodwell *v.* Heaton, 40 Kan. 36, 18 Pac. 901; Bennett *v.* Wolverton, 24 Kan. 284.

48. **Ia.**—Loving *v.* Edes, 8 Iowa 427. **Kan.**—Boston *v.* Wright, 3 Kan. 220. **Mo.**—Gordon *v.* McCurdy, 26 Mo. 304; Henry Petring Grocer Co. *v.* Eastwood, 79 Mo. App. 270. **Neb.**—Danker *v.* Jacobs, 79 Neb. 435, 112 N. W. 579; Kimbro *v.* Clark, 17 Neb. 403, 22 N. W. 788.

49. **U. S.**—United States *v.* Neely, 146 Fed. 764. **Ark.**—Faulkner *v.* Cook, 83 Ark. 205, 103 S. W. 384; Tillar *v.* Liebke, 78 Ark. 324, 95 S. W. 769; Terry *v.* Clark, 77 Ark. 567, 92 S. W. 788. **Colo.**—Hannan *v.* Connett, 10 Colo. App. 171, 50 Pac. 214. **Fla.**—Valdosta Merc. Co. *v.* White, 52 Fla. 453, 42 So. 633. **Ga.**—Hopper *v.* Wilson, 128 Ga. 776, 58 S. E. 359; Hines *v.* Kimball, 47 Ga. 587. **Ill.**—Juilliard *v.* May, 130 Ill. 87, 22 N. E. 477. **Ia.** City Nat. Bank *v.* Graham, 135 Iowa 230, 112 N. W. 793; Anderson *v.* Taylor, 131 Iowa 485, 108 N. W. 1051; Ohde *v.* Hoffman, 90 N. W. 750. **Kan.** Wm. W. Kendall Boot, etc., Co. *v.* August, 51 Kan. 53, 32 Pac. 635; Dearborn *v.* Vaughan, 46 Kan. 506; 26 Pac. 1038; Long *v.* Murphy, 27 Kan. 375. **Ky.**—Patton *v.* Madison Nat. Bank, 126 Ky. 469, 104 S. W. 264; Heaverin

in,[50] or a lien on the property attached,[51] may intervene to protect his or a lien on the property attached,[51] may intervene to protect his rights. So may a mortgagee of the attached property,[52] a judgment creditor of the defendant,[53] a trustee in insolvency,[54] an assignee for

v. Robinson, 15 Ky. L. Rep. 15, 21 S. W. 876; Columbia Bank *v.* Overstreet, 10 Bush 148. **La.**—Hicks Co. *v.* Thomas, 114 La. 219, 38 So. 148. **Md.** Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; Carson *v.* White, 6 Gill 17. **Minn.**—Wright *v.* Tanner, 92 Minn. 94, 99 N. W. 422. **Miss.**—Canty *v.* Wood, 38 So. 315; Dreyfus *v.* Mayer, 69 Miss. 282, 12 So. 267. **Mo.**—Siling *v.* Hendrickson, 193 Mo. 365, 92 S. W. 105; Vermillion *v.* Parsons, 118 Mo. App. 260, 94 S. W. 208. **N. Y.**—Lipschitz *v.* Halperin, 53 Misc. 280, 103 N. Y. Supp. 202. **N. C.**—Sims *v.* Goettle, 82 N. C. 268. **Tex.**—Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796; Boehm *v.* Calisch, 3 S. W. 293; Whitman *v.* Willis, 51 Tex. 421; Terry *v.* Webb (Tex. Civ. App.), 96 S. W. 70; Horstman *v.* Little (Tex. Civ. App.), 88 S. W. 286; Groesbeck *v.* Evans (Tex. Civ. App.), 83 S. W. 430; Barkley *v.* Wood (Tex. Civ. App.), 41 S. W. 717. **W. Va.**—Capehart's Exrs. *v.* Dowery, 10 W. Va. 130.

"Under section 2345, R. S. 1909, 'any person claiming property, money, effects or credits attached, may interplead,' etc. And it is held that an interpleader under this statute must stand in the same plight as if he were the plaintiff in an action of replevin. And it is contended, as the interpleaders could not recover in an action of replevin for the cattle sold by them to Thero for which the unpaid drafts were given, they cannot recover on their interpleas. If the interpleas were statutory, perhaps the position of plaintiff is sound; but, as it is equitable and seeks to enforce an equitable right, we do not think it is tenable." National Live Stock Com. Co. *v.* Thero (Mo. App.), 135 S. W. 961.

Compare Haines *v.* Stewart, 3 Neb. (Unof.) 216, 91 N. W. 539; Stanley *v.* Foote, 9 Wyo. 335, 63 Pac. 940, which hold "that the mere fact that a party claims to be the owner of attached property does not give him the right to intervene in the attachment suit, and thus have the question of his ownership determined in the attachment suit."

Intervention by garnishee who holds title to the property. Wallace *v.* Maroney, 6 Mack. (D. C.) 221.

Mere strangers who are neither parties to the suit nor privies to the process cannot intervene. **Ala.**—McAbee *v.* Parker, 78 Ala. 573. **Del.**—Pennsylvania Steel Co. *v.* New Jersey Southern R. Co., 4 Houst. 572. **N. C.** Toms *v.* Warson, 66 N. C. 417.

50. Shore *v.* Baltimore, etc., R. Co., 76 S. C. 472, 57 S. E. 526, 11 Am. & Eng. Ann. Cas. 909.

51. **D. C.**—Daniels *v.* Solomon, 11 App. Cas. 163. **Ga.**—Wade *v.* Hamilton, 30 Ga. 450. **S. C.**—Mitchell *v.* Byrne, 6 Rich. L. 171. **Tex.**—Evans *v.* Groesbeck, 42 Tex. Civ. App. 43, 93 S. W. 1005.

As for example, a landlord (Sanders *v.* Ohlhausen, 51 Mo. 163; Reavis *v.* Moore (Tex. Civ. App.), 20 S. W. 955), or one holding a mechanic's lien (Hurley *v.* Epps, 69 Ga. 611).

52. **Ala.**—Mitcham *v.* Schuessler, 98 Ala. 635, 13 So. 617. **Ark.**—Applewhite *v.* Harrell Mill Co., 49 Ark. 279, 5 S. W. 292. **Kan.**—Bodwell *v.* Heaton, 40 Kan. 36, 18 Pac. 901; Symns Grocer Co. *v.* Lee, 9 Kan. App. 574, 58 Pac. 237. **Mo.**—State Bank *v.* Keeney, 134 Mo. App. 74, 114 S. W. 553; Lafferty *v.* Hilliker, 109 Mo. App. 56, 81 S. W. 910; Huiser *v.* Beck, 55 Mo. App. 668. **Okla.**—Miller *v.* Campbell Com. Co., 13 Okla. 75, 74 Pac. 507. **Tex.**—Rentfrow *v.* Lancaster, 10 Tex. Civ. App. 321, 31 S. W. 229. **Wash.**—Perkins *v.* Bailey, 38 Wash. 46, 80 Pac. 177, 107 Am. St. Rep. 831; Langert *v.* Brown, 3 Wash. Ter. 102, 13 Pac. 704.

53. **Cal.**—Davis *v.* Eppinger, 18 Cal. 378, 79 Am. Dec. 184. **D. C.**—Daniels *v.* Solomon, 11 App. Cas. 163. **Ill.**—Schilling *v.* Deane, 36 Ill. App. 513. **La.**—New Orleans Canal, etc., Co. *v.* Beard, 16 La. Ann. 345, 79 Am. Dec. 582. **Md.**—Clarke *v.* Meixsell, 29 Md. 221. **N. Y.**—Steuben County Bank *v.* Alberger, 78 N. Y. 252.

54. Palmer *v.* Hughes, 84 Md. 652, 36 Atl. 431.

the benefit of creditors,[55] a receiver of an insolvent corporation,[56] a bailee of the property,[57] a surety of the defendant where fraud is charged,[58] or beneficiaries under a deed of trust covering the property attached.[59]

A general creditor will not as a rule be permitted to intervene in an attachment proceeding.[60] But under some statutes any creditor of the attachment may intervene to set up that there is fraud or collusion between plaintiff and defendant, or that the debt claimed by plaintiff is simulated or fictitious in whole or in part.[61] A subsequent attaching creditor may intervene.[62]

An interest in the property acquired after judgment and confirmation of sale has been held not to give the right to intervene.[63]

When May Parties Intervene. — Generally it is held that intervention may be at any time before final judgment,[64] and usually, by statute, it must be before a trial and judgment in the main action.[65] In some

55. May *v.* Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001, *affirming* 113 Ill. App. 415; P. Cox Mfg. Co. *v.* August, 51 Kan. 59, 32 Pac. 636.

56. Trow's Printing, etc., Co. *v.* Hart, 85 N. Y. 500.

57. Shahan *v.* Herzberg, 73 Ala. 59.

58. Burch *v.* Watts, 37 Tex. 135.

59. **Ky.**—Bamberger *v.* Halberg, 78 Ky. 376. **Mo.**—Holland *v.* Depriest, 65 Mo. App. 329. **Okla.**—Hockaday *v.* Dryc, 7 Okla. 288, 54 Pac. 475.

60. **Ala.**—Cartwright *v.* Bamberger, 90 Ala. 405, 8 So. 264. **La.**—Gasquet *v.* Johnson, 1 La. 425. **Tex.**—Stansell *v.* Fleming, 81 Tex. 294, 16 S. W. 1033. **W. Va.**—Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753.

61. Meridian First Nat Bank *v.* Cochran, 71 Miss. 175, 14 So. 439.

62. **U. S.**—Gumbel *v.* Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. ed. 374. **Ark.**—Johnson *v.* Gillenwater, 75 Ark. 114, 87 S. W. 439; Rice *v.* Dorrian, 57 Ark. 541, 22 S. W. 213; Goodbar *v.* Brooks, 57 Ark. 450, 22 S. W. 96; Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458. **Cal.**—McEldowney *v.* Madden, 124 Cal. 108, 56 Pac. 783; Kimball *v.* Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111; Speyer *v.* Ihmels, 21 Cal. 281, 81 Am. Dec. 157. **Kan.**—Standard Implement Co. *v.* Lansing Wagon Wks., 58 Kan. 125, 48 Pac. 638; Wichita Nat. Bank *v.* Wichita Produce Co., 8 Kan. App. 40, 54 Pac. 11. **La.**—H. B. Claflin Co. *v.* Feibelman, 44 La. Ann. 518, 10 So. 862. **Okla.** Coyle Merc. Co. *v.* Nix, 7 Okla. 267, 54 Pac. 469. **Tex.**—Murphy *v.* Nash, 45 S. W. 944; Orr, etc., Shoe Co. *v.* Harris, 82 Tex. 273, 18 S. W. 308; Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46; Bateman *v.* Ramsey, 74 Tex. 589, 12 S. W. 235; Grabenheimer *v.* Rindskoff, 64 Tex. 49; Nenney *v.* Schluter, 62 Tex. 327; Joseph Peters Furniture Co. *v.* Dickey, 2 Tex. Unrep. Cas. 237. **W. Va.**—Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791. **Wis.**—Breslauer *v.* Geilfuss, 65 Wis. 377, 27 N. W. 47.

63. McAbee *v.* Parker, 78 Ala. 573; Harrison *v.* Shaffer, 60 Kan. 176, 55 Pac. 881.

64. Heaverin *v.* Robinson, 15 Ky. L. Rep. 15, 21 S. W. 876; Evans *v.* Governor's Creek Transp., etc., Co., 50 N. C. 331; Dobson *v.* Bush, 4 N. C. 18 (holding that a default may be set aside in order to enable a third party to intervene).

In Graves *v.* Hall, 27 Tex. 148, it was held to be error to dismiss a petition of an intervener, filed the day before trial.

65. **Colo.**—Whalen *v.* McMahon, 16 Colo. 373, 26 Pac. 583; Latham *v.* Gregory, 9 Colo. App. 292, 47 Pac. 975. **Miss.**—Paine *v.* Holliday, 68 Miss. 298, 8 So. 676. **Mo.**—McElfatrick *v.* Macauley, 15 Mo. App. 102. **Neb.**—Rudolf *v.* McDonald, 6 Neb. 163. **N. J.**—Mount *v.* Ely, 7 N. J. L. 83. **S. D.**—Hickok *v.* Eastman, 21 S. D. 591, 114 N. W. 706. **W. Va.**—Chapman *v.* Pittsburg, etc., R. Co., 26 W. Va. 324.

jurisdictions, however, a claim may be interposed after judgment,[66] or at any time before the sale of the property,[67] and even after a sale if, pursuant to order, the proceeds are held subject to the final decision.[68]

What May Be Attacked. — An intervener claiming title to, or interest in, the attached property may contest the attachment[69] on the grounds that it is void,[70] that it issued upon a debt not due,[71] that the debt at-

66. Parham *v.* Potts-Thompson Liquor Co., 127 Ga. 303, 56 S. E. 460; Rogers *v.* Bates, 19 Ga. 545.

In Juilliard *v.* May, 130 Ill. 87, 22 N. E. 477, it was held that under the statute a claim may be put in "during or before the term at which final judgment is entered against the defendant in the attachment."

Compare Witherspon *v.* Swift, 112 Ga. 689, 37 S. E. 976, holding that it was too late, after an attachment case had proceeded to final judgment in favor of the plaintiff against the defendant therein, to file a claim in resistance to a levy entered upon the attachment and not designed to arrest the progress of the execution.

67. Simmons *v.* Bennett, 20 Ga. 48.

68. Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

Perishable Property.—Where perishable property is attached and sold and the proceeds paid into court, a third person may intervene in the suit. Nolan *v.* Deutsuch, 23 Mo. App. 1.

Before payment to the plaintiff. Simmons Clothing Co. *v.* Davis, 3 Ind. Ter. 379, 58 S. W. 655; Petty *v.* Hayden, 115 Iowa 212, 88 N. W. 339; Edwards *v.* Cosgro, 71 Iowa 296, 32 N. W. 350. *Compare* Newton First Nat. Bank *v.* Jasper County Bank, 71 Iowa 486, 32 N. W. 400.

Assignee of owner may intervene to claim proceeds. Carp *v.* Itzkowitz, 77 Mo. App. 592.

After the property has been bonded it is too late to intervene. Dorr *v.* Kershaw, 18 La. 57; Wright *v.* White, 14 La. Ann. 583; McRae *v.* Austin, 9 La. Ann. 360; Beal *v.* Alexander, 1 Rob. (La.) 277.

Bonding after intervention does not affect the intervention as the bond stands in lieu of the property seized and released. Cass *v.* Rouark, 25 La. Ann. 353.

Indemnity Bond to Officer.—An indemnifying bond executed to the sheriff before the levy of the attachment, does not affect the right of a claimant to assert his claim, as the bond is solely for the benefit of the sheriff. Gevedon *v.* Branham, 20 Ky. L. Rep. 791, 47 S. W. 589.

69. Noyes *v.* Canada, 30 Fed. 665; Reed's Appeal, 71 Pa. 378.

70. **Ala.**—Wigs *v.* Ringemann, 155 Ala. 189, 45 So. 153. **Ark.**—Rice *v.* Dorrian, 57 Ark. 541, 22 S. W. 213. **Kan.**—Dickenson & Bros. *v.* Cowley, 15 Kan. 269.

In Scott *v.* De Witt, 42 Tex. Civ. App. 69, 93 S. W. 215, the court said: "Appellant's proposition to the effect that a stranger to the process by which property is seized cannot question the regularity of the writ, judgment, or proceeding on which it is based, cannot be accepted in its broadest sense. We are not aware of any case which holds that the regularity of the seizure cannot be questioned where such matter is specially pleaded, and we are not inclined to do so."

Right to Attachment Barred by Statute of Limitation.—"Where an attachment, sued out under the fraudulent debtor's act, is levied upon land as the property of the defendant in execution, and such property is claimed by another person, the question whether the right of the attaching creditor to sue out the atachment had become barred by the statute of limitations at the time he proceeded to do so is not one which can be raised by the claimant upon the trial of the claim case. This is true although it appears from the evidence that the claimant relies for title upon a deed from the defendant in the attachment proceeding, which was alleged in the attachment affidavit to have been executed for the purpose of defeating and defrauding the attaching creditor." Strickland *v.* Jones, 131 Ga. 409, 62 S. E. 322.

71. **Cal.**—Speyer *v.* Ihmels, 21 Cal. 280, 81 Am. Dec. 157; Davis *v.* Eppinger, 18 Cal. 378, 79 Am. Dec. 184. **Ill.**—Schilling *v.* Deane, 36 Ill. App. 513. **Miss.**—Henderson *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70.

tached for is not valid,[72] or that the attachment was obtained by fraud and collusion between the plaintiff and the defendant in attachment.[73] But he cannot take advantage of a mere irregularity in the proceedings of the plaintiff in attachment,[74] as defects in the affidavit,[75]

72. **Ga.**—Smith *v.* Gettinger, 3 Ga. 140. **Mass.**—Baird *v.* Williams, 19 Pick. 381. **Miss.**—Meridian First Nat. Bank *v.* Solomon, 71 Miss. 889, 16 So. 302. **N. H.**—Pike *v.* Pike, 24 N. H. 384. **Tex.**—Bateman *v.* Ramsey, 74 Tex. 589, 12 S. W. 235; Freiberg *v.* Freiberg, 74 Tex. 122, 11 S. W. 1123; Johnson & Co. *v.* Heidenheimer, 65 Tex. 263; Nenney *v.* Schluter, 62 Tex. 327; Barkley *v.* Wood (Tex. Civ. App.), 41 S. W. 717.

Compare Fayetteville Bank *v.* Spurling, 52 N. C. 398, holding that a subsequent attaching creditor should not be permitted to intervene in the proceeding on a prior attachment for the purpose of contesting the existence and validity of the debt therein sued for.

73. **Ark.**—Davis *v.* H. B. Claflin Co., 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 996, 58 Am. St. Rep. 102, 35 L. R. A. 776. **Ky.**—Flowers *v.* Miller, 13 Ky. L. Rep. 250, 16 S. W. 705. **Mich.** Hale *v.* Chandler, 3 Mich. 531. **Miss.** Lowenstein *v.* Aaron, 69 Miss. 341, 12 So. 269. **Tex.**—Bateman *v.* Ramsey, 74 Tex. 589, 12 S. W. 235; Grabenheimer *v.* Rindskoff Bros., 64 Tex. 49.

In Goodbar *v.* City Nat. Bank, 78 Tex. 461, 14 S. W. 851, the court said: "The right of a subsequent attaching creditor to intervene in an action in which a prior attachment has been levied, for the purpose of showing that the older attachment is based on a fraudulent demand or one which has in fact no existence, for the purpose of having declared his lien superior and enforcing payment out of the attached property, is fully recognized by the decisions of this court."

In Whipple *v.* Cass, 8 Iowa 126, it was held that where, in an action by an attachment creditor, the defendant makes default, other attaching creditors will not be permitted to defend the suit for him for the purpose of showing that he was not indebted to the plaintiff, and that the action was the result of a collusion between the parties thereto.

74. **U. S.**—Rice *v.* Alder-Goldman Com. Co. 71 Fed. 151, 36 U. S. App. 266, 18 C. C. A. 15, following Arkansas practice. **Ark.**—Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458. **Ga.** Foster *v.* Higginbothan, 49 Ga. 263; Wright *v.* Brown, 7 Ga. App. 389, 66 S. E. 1034. **Ind.**—Tyner *v.* Gapin, 3 Blackf. 370. **La.**—Ft. Wayne First Nat. Bank *v.* Ft. Wayne Artificial Ice Co., 105 La. 133, 29 So. 379; Emerson *v.* Fox, 3 La. 178; Gilkeson Sloss Com. Co. *v.* Bond, 44 La. Ann. 841, 11 So. 220; Fleming *v.* Shields, 21 La. Ann. 118, 99 Am. Dec. 719; Harper *v.* Commercial, etc., Bank, 15 La. Ann. 136; Clamageran *v.* Bucks, 4 Mart. (N. S.) 488, 16 Am. Dec. 185; Lee *v.* Bradlee, 8 Mart. 20. See also Romagosa *v.* De Nodal, 12 La. Ann. 341; Goodman *v.* Allen, 11 La. Ann. 246. **Mass.**—Randall *v.* Williams, 19 Pick. 381. **Neb.** Danker *v.* Jacobs, 79 Neb. 435, 112 N. W. 579; Rudolf *v.* McDonald, 6 Neb. 136. **N. H.**—Reynolds *v.* Damrell, 19 N. H. 394. **N. C.**—Blair & Co *v.* Pur year, 87 N. C. 101. **S. C.**—*Ex parte* Perry Stove Co., 43 S. C. 176, 20 S. E. 980; McBride *v.* Floyd, 2 Bailey L. 209; Kincaid *v.* Neall, 3 McCord L. 201. **Tex.**—Bateman *v.* Ramsey, 74 Tex. 589, 12 S. W. 235. **Wis.**—Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421.

In Curtis *v.* Wortsman, 26 Fed. 36, the court said: "The defendant having failed to traverse the grounds of attachment, and judgment having been rendered thereon, the claimant cannot controvert their truth."

In Ballew *v.* Young, 24 Okla. 182, 103 Pac. 623, it was held that the party intervening can make only such objections to the irregularity of the proceeding as he could in attaching them in an independent collateral proceeding.

75. **Ala.**—May *v.* Courtnay, 47 Ala. 185. **Cal.**—Fridenberg *v.* Pierson, 18 Cal. 152, 79 Am. Dec. 162. **Colo.**—Leppel *v.* Beck, 2 Colo. App. 390, 31

or mere informality in the service of process as to defendant.[76]

I. The Proceedings. — **1. In General.** — It is for the claimant to see that an issue is made up and the trial brought on[77] in the court in which the attachment is pending.[78] Generally, the claim is heard and determined before the attachment suit.[79]

Where several claims are filed it is in the discretion of the court to try the issues on the several claims at the same time.[80] The record of each claim should be kept separate.[81]

The Issue. — Upon the trial of a claim to the attached property the issue to be determined is whether or not the claimant has any title to, lien on, or interest in, the attached property or its proceeds.[82] The validity of the levy of the attachment is immaterial.[83]

Pac. 185. **S. C.**—Darby & Co. *v.* Shannon, 19 S. C. 526. **Tex.**—Goodbar *v.* City Nat. Bank, 78 Tex. 461, 14 S. W. 851; Farmers', etc., Bank *v.* Waco Elec. R. Co. (Tex. Civ. App.), 36 S. W. 131; Ross *v.* Lewyn, 5 Tex. Civ. App. 593, 23 S. W. 450, 24 S. W. 538. See also Orr, etc., Shoe Co. *v.* Harris, 82 Tex. 273, 18 S. W. 308. **Wis.**—Landauer *v.* Vietor, 69 Wis. 434, 34 N. W. 229.

But *compare* Jacobs *v.* Hogan, 85 N. Y. 243; Murray *v.* Hankin, 30 Hun (N. Y.) 37, 3 Civ. Proc. 342, as to jurisdictional defects in the affidavits.

76. Hawkins *v.* McAlister, 86 Miss. 84, 38 So. 225.

The omission to serve the summons personally or by publication within thirty days after the attachment is granted may be taken advantage of by defendant but not by others. Simpson *v.* Burch, 4 Hun (N. Y.) 315, 6 Thomp. & C. 560.

77. Yale *v.* Hoopes, 12 La. Ann. 460. See also Miller *v.* Desha, 3 Bush (Ky.) 212.

78. Frost *v.* Bebout, 14 La. 104.

No valid service, no jurisdiction. Gibson *v.* Wilson, 5 Ark. 422.

79. **Ky.**—Taylor *v.* Taylor, 3 Bush 118. **Miss.**—Melius *v.* Houston, 41 Miss. 59. **Mo.**—Brownwell, etc., Car Co. *v.* Barnard, 139 Mo. 142, 40 S. W. 762. **Va.**—Kern *v.* Wyatt, 89 Va. 885, 17 S. E. 549. But see Waples-Platter Co. *v.* Low, 54 Fed. 93, 10 U. S. App. 704, 4 C. C. A. 205, where it was said: "The better practice is to first and separately try to the court the issue between the plaintiff and defendant arising under the attachment affidavit."

Not To Be Tried in Vacation.—New Orleans *v.* Morris, 29 La. Ann. 241.

80. Heyer *v.* Alexander, 108 Ill. 385.

81. Brennan *v.* O'Driscoll, 33 Mo. 372.

82. **Ala.**—Schloss *v.* Inman, 129 Ala. 424, 30 So. 667; Foster *v.* Goodwin, 82 Ala. 384, 2 So. 895; Yarborough *v.* Moss, 9 Ala. 382. **Ark.**—Faulkner *v.* Cook, 83 Ark. 205, 105 S. W. 384. **Fla.**—H. B. Claflin Co. *v.* Harrison, 44 Fla. 218, 31 So. 818. **Ga.** Parham *v.* Potts-Thompson Liquor Co., 127 Ga. 303, 56 S. E. 460. **Ill.**—May *v.* Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001, *affirming* 113 Ill. App. 415. **La.**—Harper *v.* Commercial, etc., Bank, 15 La. Ann. 136. See also Schlieder *v.* Martinez, 38 La. Ann. 847. **Miss.**—Meridian First Nat. Bank *v.* Cochran, 71 Miss. 175, 14 So. 439. **Mo.** Graham Paper Co. *v.* Crowther, 92 Mo. App. 273; Beck *v.* Wisely, 63 Mo. App. 239, 1 Mo. App. 782. **N. C.** Springfield First Nat. Bank *v.* Asheville Furniture Co., 120 N. C. 475, 26 S. E. 927; McLean *v.* Douglas, 28 N. C. 233. **Va.**—Starke *v.* Scott, 78 Va. 180.

"It is the office and purpose of the interplea to try and determine the title and ownership to specific chattels and the right of the sheriff to seize and hold them under his writ as the property of the attachment defendant. The sole issue thereon is the question of ownership and of course, as ownership is usually accompanied with the right of possession, the right of possession is incidentally tried and determined." Ottumwa Nat. Bank *v.* Totten, 114 Mo. App. 97, 89 S. W. 65.

83. **Ala.**—Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458. **Fla.**—H. B. Claflin Co.

Trial by Jury. — The claim of a third person to the property attached should be tried by a jury and it is error for the court to pass upon the claim without a jury,[84] unless the parties agree to a trial by the court.[85]

A direction for a verdict is improper, of course, if the evidence is conflicting.[86] But the court should direct a finding for the claimant where his claim is established by undisputed evidence,[87] or for the plaintiff where the claimant does not offer sufficient evidence to sustain his claim.[88]

2. Pleadings. — *The Petition.* — The petition of a third person claiming the property attached must be in writing and must embody sufficient matter to make up an issue upon, if necessary, and support a verdict and judgment.[89] It must show such an interest in the sub-

v. Harrison, 44 Fla. 218, 31 So. 818. **Ia.**—Markley *v.* Keeney, 87 Iowa 398, 54 N. W. 251. **Miss.**—White *v.* Roach, 53 So. 622. **N. C.**—Springfield First Nat. Bank *v.* Asheville Furniture, etc., Co., 120 N. C. 475, 26 S. E. 927.

84. **Mo.**—Caruth-Byrnes Hardware Co. *v.* Wolter, 91 Mo. 484, 3 S. W. 865. **Va.**—Anderson *v.* Johnson, 32 Gratt. 558. **W. Va.**—Lipscomb *v.* Condon, 56 W. Va. 416, 49 S. E. 392, 107 Am. St. Rep. 938, 67 L. R. A. 670.

Issues Between Several Interveners. Where property is attached and a mortgagee asserts his claim to the property by interpleading and several other persons interplead to assert claims against the property, the issues raised and joined between such interpleaders should be tried and determined by the court. Miller *v.* Campbell Com. Co., 13 Okla. 75, 74 Pac. 507.

Trial by Sheriff's Jury.—In New York a provision is made for trying claims of third persons by a sheriff's jury. Shaw *v.* Dunn, 122 App. Div. 736, 107 N. Y. Supp. 777; Minor *v.* Gurley, 39 Misc. 662, 80 N. Y. Supp. 596; Bachellor *v.* Schuyler, 3 Hill 386

85. Howard *v.* Oppenheimer, 25 Md 350, *approved,* 25 Md. 368; Springfield First Nat. Bank *v.* Asheville Furniture etc., Co., 120 N. C. 475, 26 S. E. 927.

"The garnishee and claimant who has elected to try his case upon a motion to quash before the court, and after the evidence had been partly taken, has the right to dismiss his *motion* and by filing a plea to try the *same question before a jury.*" Ferrall *v.* Faren, 67 Md. 76, 8 Atl. 819.

86. **Ala.**—Ringeman *v.* Wiggs, 146 Ala. 685, 40 So. 323. **Ark.**—Stone *v.* Cassidy, 75 Ark. 603, 87 S. W. 621. **Md.**—Cecil Bank *v.* Snively, 23 Md. 253. **Minn.**—Brown *v.* Mayer, 91 Minn. 140, 97 N. W. 736. **Miss.**—Meridian Fertilizer Factory *v.* Bush, 77 Miss. 697, 27 So. 645. **Mo.**—John Deere Plow Co. *v.* Sullivan, 158 Mo. 440, 59 S. W. 1005; Fink *v.* Phelps, 30 Mo. App. 431. **Pa.**—Rogers *v.* Schadt, 218 Pa. 617, 67 Atl. 919. **Tex.**—Baum *v.* Sanger, 49 S. W. 650; St. Louis Wire-Mill Co. *v.* Lindheim, 4 Wills. Civ. Cas. §300; (Tex. App.), 18 S. W. 675.

87. Collins County Nat. Bank *v.* Harris, 90 Ark. 439, 119 S. W. 666; Vermillion *v.* Parsons, 118 Mo. App. 260, 94 S. W. 298. See also Levinson *v.* Godfrey (N. J.), 74 Atl. 278, for facts held sufficient to justify the direction of a verdict for the claimant.

88. Sargent *v.* Cameron, 11 Colo. App. 200, 53 Pac. 394; Alpine Cotton Mills *v.* Weil, 129 N. C. 452, 40 S. E. 218.

89. Neal *v.* Newland, 4 Ark. 459.

Description of property must be sufficient to establish its identity. A petition stating "that the said merchandise to which reference is made in this petition of intervention included all the goods and chattels returned by the sheriff in his pretended writ of attachment herein," is sufficient. Grove *v.* Foutch, 6 Colo. App. 357, 40 Pac. 852.

Petition Alleging Fraud and Collusion.—Where the petition alleges that the attachment was the result of a collusive agreement between the plaintiff and the defendant, and that it was made with the intent to hinder, delay, and defraud the creditors of the defendant, a failure to allege that

ject-matter as to entitle the party to intervene.[90] An allegation of ownership is sufficient,[91] but if one attempts to allege title under a mortgage he must allege the maturity of the debt secured and that it is unpaid.[92]

Parties. — All persons whose interest will be affected by the intervention must be made parties. Thus the attaching creditor is a necessary party defendant.[93]

Substitution of Parties. — The trustee may be substituted as plaintiff in place of the *cestui que trust* who has intervened to claim the property.[94]

Amendment. — The plaintiff may demand that the intervener amend his pleadings so that they will give exact information as to the nature of the demand he has to meet. And where the intervener is twice ordered to so amend and fails to meet the requirement of the order, the intervention may be dismissed.[95] The intervener cannot amend after judgment so as to set up new issues.[96]

the claim of the plaintiff was fictitious, does not render it insufficient, as the attachment would also be invalid, either because it was suffered or procured to be made for the use and benefit of the defendant, or that it was contrived between the parties with the intent to hinder, defraud, or delay the other creditors of the defendant. Martin Clothing Co. *v.* Page, 1 Tex. Civ. App. 537, 21 S. W. 702.

Failure to verify the petition as required by statute will not be sufficient ground for its dismissal where the party was not ruled to verify. Cofield *v.* Kline (Ky.), 124 S. W. 407.

90. **Ga.**—Central of Georgia R. Co. *v.* Evans, 133 Ga. 639, 66 S. E. 788. **Ia.**—Sammis *v.* Hitt, 112 Iowa 664, 84 N. W. 945. **La.**—Rawlins *v.* Pratt, 45 La. Ann. 58, 12 So. 197. **Minn.**—Lewis *v.* Harwood, 28 Minn. 428, 10 N. W. 586. **Tex.**—Dorroh *v.* Bailey, 125 S. W. 620; Nenney *v.* Schluter, 62 Tex. 327.

See *supra*, XVI, H.

91. Maus *v.* Bome, 123 Ind. 522, 24 N. E. 345.

92. Wyeth Hardware Co. *v.* Carthage Hardware Co., 75 Mo. App. 518.

93. Cook *v.* Pollard, 70 Tex. 723, 8 S. W. 512. See also Freiberg *v.* Freiberg (Tex.), 19 S. W. 791. But see Gerson *v.* Jamar, 30 La. Ann. 1294; Bradshaw *v.* Georgia L. & T. Co. (Tenn.), 59 S. W. 785.

94. Winkelmaier *v.* Weaver, 28 Mo. 358.

95. Curtis *v.* Jordan, 110 La. 429, 34 So. 591.

Non-jurisdictional Matter.—In Daniels *v.* Solomon, 11 App. Cas. (D. C.) 171, it was claimed that the petition of intervention was fatally defective in not sufficiently alleging that the defendants in attachment had no other property upon which interveners might have levied their execution and obtained complete satisfaction, and the court said: "Had this objection been taken by demurrer and sustained, there would be no error in the dismissal of the petition. But, however important the fact, it was not jurisdictional; and whilst its omission was a grave defect in the petition, it was one that could, and doubtless would, have been supplied by immediate amendment had attention been directed to it at the proper time."

96. Bicklin *v.* Kendall, 72 Iowa 490, 34 N. W. 283.

Charging Collusion.—Where on the trial it was made to appear that the plaintiff in attachment had paid to the defendants a certain sum in consideration of the withdrawal by the defendants of their plea traversing the grounds upon which the attachment was sued out, and the intervener thereupon asked to be permitted to so amend their petition as to charge that the attachment had been sued out by collusion between the plaintiffs and defendants, it was held that the court properly refused to allow the amendment as this proof did not tend to show collusion. Meridian First Nat. Bank *v.* Cochran, 71 Miss. 175, 14 So. 439.

Answer. — The answer should be in writing.[97] An answer tenders an issue which alleges that at the date of the seizure of the property by virtue of the attachment, it was the property of the defendant and subject to attachment.[98]

Alleging Indebtedness to Plaintiff. — It is unnecessary for the answer to allege an indebtedness of the defendant to the plaintiff where the allegations of the intervener's petition admits that plaintiff is a creditor.[99]

Where the plaintiff in the attachment fails to answer the petition, and the attaching officer duly answers the intervention and asserts that he rightfully levied on the property, the intervener is not entitled to a judgment by default against the plaintiff.[1]

3. The Evidence. — The intervener must be ready to exhibit his evidence. He cannot be permitted to retard the principal suit.[2] The proof must conform to the allegations.[3]

Admissibility. — The general principles governing the admissibility of evidence on the trial of issues in an intervention case are the same as those of other cases.[4]

97. **Harmless Error.**—"The court erred in refusing to require a written answer to the interplea of the appellants. But in the present case the error was obviously a harmless one. The oral answer which the appellee was permitted to make appears to have been concisely stated, and the single issue it tendered was such as the jury could not have failed to understand when submitted to them by the court's charge." Rosewater *v.* Schwab Clothing Co., 58 Ark. 446, 25 S. W. 73.

98. Smokey *v.* Wack, 57 Miss. 832.

In Hutchinson Nat. Bank *v.* Crow, 56 Ill. App. 558, it was held that where property attached is claimed by a third party by interplea and the plaintiff in attachment contends that the title of the interpleader is fraudulent and that property is that of the defendant, it is error on the part of the court to omit to instruct the jury as to the question of the good faith of the transaction by which the interpleader acquired the property.

In answer to a third opposition, alleging ownership of personal property seized, the seizing creditor may allege and prove the title fraudulent. A revocatory action is not necessary in such case. Lahitte *v.* Frere, 42 La. Ann. 864, 8 So. 598.

99. Meyberg *v.* Jacobs, 40 Mo. App. 128.

1. Boltz *v.* Eagon, 34 Fed. 452, following *Missouri* practice.

2. Gaines *v.* Page, 15 La. Ann. 108.

In a full discussion of matters of evidence as between creditor and claimant, see 2 ENCYCLOPEDIA OF EVIDENCE, 82 *et seq.*

3. Pritchard *v.* McKinstry, 12 La. 224; Saunders *v.* Ireland (Tex.), 27 S. W. 880. See also Plano Mfg. Co. *v.* Cunningham, 73 Mo. App. 376.

4. **Inventory of Goods Levied On.**—"The plaintiffs' purpose in introducing in evidence the inventory of goods levied on does not appear to have been stated. It was shown to have been a part of the sheriff's return of levy, and, treating it as such, there was no reversible error in refusing to exclude it. . . . It was admissible on the subject of values in connection with and as part of the testimony of the witness . . . which was to the effect that he helped to make the inventory, and that the values of goods were as stated thereon." Schloss *v.* Inman, 129 Ala. 424, 30 So. 667.

Listing Property for Taxes.—"There was no error in admitting in evidence the tax assessments showing that the husband had given in the property as his and in his own name. While it was not evidence of title as against the wife, it was competent evidence as contradicting the testimony of the husband, who was examined as a witness in behalf of the wife and testified that the property in question was his wife's. It certainly tended to weaken the probative force of his

Burden of Proof and of Evidence. — Possession by the defendant is

testimony.'' Arnold *v.* Cofer, 135 Ala. 364, 33 So. 539.

Acts of Defendant Tending To Show Fraud.—''The circuit court admitted evidence of certain acts of defendant occurring after the sale of the goods, which tended to show a fraudulent intent on his part in making such sale. It is contended that it was error to admit such evidence against appellant, but, while this might be true had the issue upon the interplea been tried separately from the attachment issue, yet the point is not well taken here, for both issues were, by consent, tried together. As the evidence was competent against the defendant firm to sustain the attachment, it was not error to admit it.'' Carl, etc., Co. *v.* Beal, etc., Grocer Co., 64 Ark. 373, 42 S. W. 664.

Books of Defendant.—The books of the defendant may be admitted in evidence on the trial of the claimant's issue, in so far as they furnish information as to the amount of existence of claimant's debt, or payments made on it, if any. Broach *v.* Wortheimer-Swartz Shoe Co. (Miss.), 21 So. 300.

Describing Nature of Property Attached.—When there has been a levy, described as being upon certain barrels and half barrels, ''each about half full,'' but with no statement as to the actual contents, the levy is to be treated as a levy upon the barrels and contents; and, upon the trial of a claim case arising under such a levy, it is not error to admit evidence showing what were the contents of such barrels. Parham *v.* Potts-Thompson Liquor Co., 127 Ga. 303, 56 S. E. 460.

Disposition of Property by Defendant Before Suit.—''It was necessary for the intervener to establish his claim of title as against the plaintiffs, and we see no good reason why he should have been precluded from showing that the property which he had acquired a written title to after the levying of the attachment, in execution of a previous verbal agreement, had ceased to be [defendant's] long before the institution of this suit, and belonged to persons from whom the intervener derives his said title. The objection was properly overruled.'' Shields *v.* Perry, 16 La. 463.

Abandonment of Claim.—''The creditors offered to read to the jury a contract which apparently shows an abandonment by [claimant] of his claim, and which was quite important on the issue presented. The court refused to let them read it, and they then tendered an amended answer, setting up the writing, and this was also rejected. We think it was error to reject this testimony and this pleading.'' Henderson *v.* Baker, 20 Ky. L. Rep. 580, 47 S. W. 211.

Papers in Attachment Suit.—The affidavit, bond and other papers in the attachment suit are not evidence of defendant's indebtedness to plaintiff. Yost Mfg. Co. *v.* Alton, 168 Ill. 564, 48 N. E. 175. And see Albert *v.* Besel, 88 Mo. 150.

Relationship of intervener to defendant is immaterial. Baum *v.* Sanger (Tex.), 49 S. W. 650.

As to Possession.—Max *v.* Watkins, 30 Ga. 682; Wright *v.* Tanner, 92 Minn. 94, 99 N. W. 422.

''Whether evidence of possession may not be competent as tending to show title in some cases, we do not say. But it does not seem to us that such evidence would be proper in this case, where the property in controversy is only claimed to have been bought by the interveners twelve days before the attachment was levied—was in an incomplete condition at the time—had not been moved from the defendant's factory, and where the validity of this sale to the interveners is the very question involved in the trial. It does not seem to have been proper evidence, and we see no error in this ruling of the court.'' Springfield First Nat. Bank *v.* Asheville Furniture, etc., Co., 120 N. C. 475, 26 S. E. 927.

Evidence to contradict return may be introduced by the intervener. Burgert *v.* Borchert, 59 Mo. 80.

Under a general denial it may be shown that the intervening claim is fraudulent. Mankato First Nat. Bank *v.* Kansas City Lime Co., 43 Mo. App. 561.

Declarations of the Parties.—**Ia.**—Deere *v.* Wolf, 77 Iowa 115, 41 N. W. 588. **La.**—McManus *v.* West, 1 Rob. 462. **Mass.**—Lambert *v.* Craig, 12 Pick. 199; Strong *v.* Wheeler, 5 Pick. 410.

presumptive evidence of title in him, and the claimant has the burden of showing title.[5]

Possession by the claimant imposes upon the plaintiff the burden of showing title in the defendant.[6] In some states the burden upon the plaintiff by statute.[7]

Miss.—Brewer *v.* Gates, 31 So. 205; French *v.* Sale, 60 Miss. 516.

5. **U. S.**—Curtis *v.* Wortsman, 25 Fed. 893. **Colo.**—Burr *v.* Clement, 9 Colo. 1, 9 Pac. 633. **Ga.**—People's Nat. Bank *v.* Harper, 114 Ga. 603, 40 S. E. 717. **Ill.**—Hollenback *v.* Todd, 119 Ill. 543, 8 N. E. 829; Commercial Nat. Bank *v.* Canniff, 51 Ill. App. 579, *affirmed*, 151 Ill. 329, 37 N. E. 898. **Ind. Ter.**—Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 1 Ind. Ter. 314, 37 S. W. 103. **Ia.**—Remington Typewriter Co. *v.* McArthur, 123 N. W. 760; City Nat. Bank *v.* Crahan, 135 Iowa 230, 112 N. W. 793. **Kan.**—Standard Implement Co. *v.* Parlin, 51 Kan. 566, 33 Pac. 363. **La.**—Ft. Wayne First Nat. Bank *v.* Ft. Wayne Artificial Ice Co., 105 La. 133, 29 So. 379. **Mo.**—Stone *v.* Spencer, 77 Mo. 356; Kelly Goodfellow Shoe Co. *v.* Sally, 114 Mo. App. 222, 89 S. W. 889; Graham Paper Co. *v.* Crowther, 92 Mo. App. 273; Rock Island Implement Co. *v.* Corbin, 83 Mo. App. 438; Wyeth Hdw. Co. *v.* Carthage Hdw. Co., 75 Mo. App. 518; Boller *v.* Cohen, 42 Mo. App. 97. **N. C.**—Willard Mfg. Co. *v.* Tierney, 133 N. C. 630, 45 S. E. 1026; Alpine Cotton Mills *v.* Weil, 129 N. C. 452, 40 S. E. 218; Wallace *v.* Robeson, 100 N. C. 206, 6 S. E. 650. **S. C.**—Central R. etc. Co. *v.* Georgia Constr. etc. Co., 32 S. C. 319, 11 S. E. 192. **Tex.**—Pierson *v.* Tom, 10 Tex. 145.

In Thompson *v.* Waterman, 100 Ga. 586, 28 S. E. 286, the court said: "The possession of the defendant is presumptive evidence of title in him, and therefore makes out a *prima facie* case for the plaintiff in attachment. The burden being upon the claimant, he cannot carry this burden by showing that some other person than himself has the title, and that therefore the levy should not be allowed to proceed." He must recover on the strength of his own title. Connersville Buggy Co. *v.* Lowery, 104 Mo. App. 186, 77 S. W. 771. See also Batavia *v.* Wallace, 102 Fed. 240, 42 C. C. A. 310; State Bank *v.* Keeney, 134 Mo. App. 74, 114 S. W. 553; Toney *v.* Goodley, 57 Mo. App. 235.

"The issue between Orr [the claimant] and appellant was simple and distinct. He claimed to be the owner of the horse, and appellant denied that he was the owner. It seems to us that, if no proof had been introduced, Orr would have failed. Therefore the burden rested upon him to show that he was the owner of it, and this court has so held in the case of Brown, etc., *v.* Johnson & Johnson, 132 Ky. 70, 116 S. W. 273." Natlee Draft Horse Co. *v.* Marion Cripe & Co. (Ky. L. Rep.), 135 S. W. 292.

6. **Ga.**—American Nat. Bank *v.* Lee, 124 Ga. 863, 53 S. E. 268. **La.**—Thayer *v.* Page, 8 La. 135. **Mo.**—Morgan *v.* Wood, 38 Mo. App. 255. **S. C.**—Pelzer Mfg. Co. *v.* Pitts, 76 S. C. 349, 57 S. E. 27, 11 Ann. Cas. 665.

"The interpleader was in possession of the property at the time of the levy of the attachment writ, and the burden was on plaintiff to show that it held a better title and right of possession than that claimed by the interpleader, whose possession under claim of ownership made a *prima facie* case in his favor." Fairbanks, Morse & Co. *v.* Coulson Stock Co., 151 Mo. App. 260, 131 S. W. 894.

Compare Lagomarcino *v.* Quattrochi, 89 Iowa 197, 56 N. W. 435, where the court said: "Importance is attached to the fact that intervener's possession at the time of the levy is not denied, and the rule of law is urged that possession of personal property is presumptive evidence of ownership. . . . This rule does not apply to this case. This property belonged to the defendant, under the claims of both parties, at one time; and the real issue was, as presented, had the intervener purchased it? He averred that his ownership was by purchase. Mere possession would not prove purchase. Under the intervener's statements, if he had not purchased the property, he did not own it. We think he assumed by his pleading the burden of showing a purchase."

7. Bernheim *v.* Dibrell (Miss.), 11 So. 795; Dickman *v.* Williams, 50 Miss.

When the party who has the burden of proof establishes a *prima facie* case the onus is shifted.[8]

Sufficiency of Evidence.[9]

4. Instructions. — The instructions should be limited to the issues.[10]

5. The Verdict. — The verdict must be responsive to the issues.[11] A

500; Mandel *v.* McClure, 14 Smed. & M. (Miss.) 11.

Attaching creditors must show that the attached property belongs to the defendants. Daniels *v.* Solomon, 11 App. Cas. (D. C.) 163; Morrow *v.* Smith, 4 B. Mon. (Ky.) 99.

8. Roberts *v.* Ringemann, 145 Ala. 678 mem., 40 So. 81; British, etc., Mtg. Co. *v.* Cody, 135 Ala. 622, 33 So. 832.

"It is true that the affirmative of the issue, title or no title to the goods, was on the interpleader, and it devolved on him to prove his title by a preponderance of the evidence, but when he had so proven his title by the introduction of the bill of sale in evidence, made proof of payment and the delivery of possession of the goods to him before the institution of the attachment proceedings, the onus was shifted, and the plaintiff to defeat this prima facie title of the interpleader took refuge under its affirmative plea of fraud in the sale and offered its proof in support thereof. This was an affirmative defense, so plead and so relied on by the plaintiff, and the burden was on it to make out its special and affirmative defense by a preponderance of the evidence." Merrill Drug Co. *v.* Lusk, 73 Mo. App. 571.

"The plaintiffs attempted to and did seize property by virtue of an attachment, and, when the claimant showed himself to be the owner, it was incumbent upon the plaintiffs to show that he had divested himself of his title; and such evidence must be facts or circumstances from which it can fairly be inferred that such transfer was made." Lipschitz *v.* Halperin, 53 Misc. 280, 103 N. Y. Supp. 202.

The plaintiff makes a *prima facie* case by showing that the property was levied on in the possession of the defendant. **U. S.**—Curtis *v.* Wortsman, 25 Fed. 893. **Ala.**—Ringeman *v.* Wiggs, 146 Ala. 685, 40 So. 323. **Ga.**—Harvey *v.* Jewell, 84 Ga. 234, 10 S. E. 631.

The claimant makes a case by showing that he was in possession. Baer *v.* Groves, 46 Mo. App. 245.

9. Ownership of property claimed by son when his father and other members of the family lived on and helped to work the farm. Bowling *v.* Davis, 103 Ky. 187, 44 S. W. 643, 45 S. W. 77.

Identifying property seized as the same as that covered by a mortgage. Rice *v.* Sally, 176 Mo. 107, 75 S. W. 398.

For further illustrations of the sufficiency of the evidence in particular cases, see **Ill.**—Hollenback *v.* Todd, 119 Ill. 543, 8 N. E. 829. **Kan.**—Newman *v.* Woodson Nat. Bank, 38 Kan. 456, 16 Pac. 823. **Miss.**—Helm *v.* Gray, 59 Miss. 54. **Mo.**—Kirchenschlager *v.* Armitage Herschel Co., 58 Mo. App. 165. **Tex.**—Mayer *v.* Texas Brew. Co., 26 S. W. 774; Texas, etc. R. Co. *v.* Nicholson, 22 S. W. 771; Caton *v.* Jones, 21 Tex. 788.

10. Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643.

For illustrations of instructions approved or disapproved see the following cases: **Ala.**—Arnold *v.* Cofer, 135 Ala. 364, 33 So. 539. **Colo.**—Doane *v.* Glenn, 1 Colo. 400, *reversed* on another point, 21 Wall. (U. S.) 33, 22 L. ed. 476. **Ga.**—Harvey *v.* Jewell, 84 Ga. 234, 10 S. E. 631; Winston First Nat. Bank *v.* Atlanta Rubber Co., 77 Ga. 781. **Ill.**—Hutchinson Nat. Bank *v.* Crow, 56 Ill. App. 558. **Ind. Ter.**—Shapard Grocery Co. *v.* Hynes, 3 Ind. Ter. 74, 53 S. W. 486; Breedlove *v.* Dennie, 2 Ind. Ter. 606, 53 S. W. 436. **Ia.**—What Cheer *v.* Hines, 86 Iowa 231, 53 N. W. 126; Martin *v.* Davis, 76 Iowa 762, 40 N. W. 712. **Mass.**—Sibley *v.* Leffingwell, 8 Allen 584. **Miss.**—Alexander *v.* Dulaney, 16 So. 355; Ott *v.* Smith, 68 Miss. 773, 10 So. 70; Chambers *v.* Meaut, 66 Miss. 625, 6 So. 465. **Mo.**—Wear *v.* Sanger, 91 Mo. 348, 2 S. W. 307; Vermillion *v.* Parsons, 118 Mo. App. 260, 94 S. W. 298; Lafferty *v.* Hilliker, 109 Mo. App. 56, 81 S. W. 910; Baer *v.* Lisman, 85 Mo. App. 317; Monarch Rubber Co. *v.* Hutchison, 82 Mo. App. 603. **Tex.**—Brown *v.* Lessing, 70 Tex. 544, 7 S. W. 783.

See the title "Instructions."

11. Hewson *v.* Tootle, 72 Mo. 632. See Heidenheimer *v.* Johnson, 76 Tex.

verdict as to only a part of the property is a nullity.[12] And a general finding for the intervener is erroneous when he claims only a special interest.[13]

Although the attached property has been sold the verdict in favor of the intervener should be simply that he is owner of the property in dispute.[14] It has also been held that where the property has been converted into money, a money verdict is sufficient.[15]

Assessing Value of Property. — It has been held that the verdict should assess the value of the property seized,[16] though elsewhere this is unnecessary.[17]

6. The Judgment. — The judgment should follow the pleadings and the proof.[18]

Where the verdict is for the claimant, a judgment decreeing the pos-

200, 13 S. W. 46, for a verdict held to be responsive to the issues presented.

In Hagardine-McKittric Dry Goods Co. *v.* Carr, 83 Mo. App. 318, the court said: "Was the interpleader the owner of the property at the time it was attached? This was the sole issue and the verdict ought to have responded to it. Here the jury stated that the issues were found for [intervener] and that they assessed the value of the property at $235. This verdict was insufficient and did not authorize a judgment of any kind."

Ownership at Time of Levy.— Schwein *v.* Sims, 2 Met. (Ky.) 209.

Verdict Sufficient To Show Intent of Jury.—"The jury rendered the following verdict: 'We, the jury, impanelled and sworn to try the issues herein, find the issues in favor of the plaintiff . . .' After the jury had been discharged by the court, the court amended this verdict by adding after the word 'plaintiff' the words 'and against the interpleaders.' The issues the jury were sworn to try, and the only issues actually tried and submitted to them, were issues between the plaintiffs and the interpleaders. We think the original verdict sufficient to manifest the intent of the jury, and therefore to support the judgment." Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 1 Ind. Ter. 314, 37 S. W. 103.

Form of Verdict.—"The plaintiff [claimant] was required by the terms of his bond to appear and establish his title to the property, and if he did not do so the jury should have so found, and should have further found the value of the property as to which he had failed to establish his claim. But, in view of the fact that there was no contention as to the value of the property, plaintiff was not injured by the form of the verdict. The jury must have found that the claimant was not the owner of the property. The judgment rendered was for the amount of the claim of the attaching creditor and within the admitted value of the property, and was such as the statute required." Peterson *v.* Wright, 9 Wash. 202, 37 Pac. 419.

See the title "**Verdict.**"

12. State Bank *v.* Byrd, 8 Ark. 152.

13. Columbia Bank *v.* Spring, 55 N. J. L. 545, 26 Atl. 711.

14. Plano Mfg. Co. *v.* Cunningham, 73 Mo. App. 376; S. Albert Grocer Co. *v.* Goetz, 57 Mo. App. 8; Nolan *v.* Deutsch, 23 Mo. App. 1.

15. Ranney-Alton Mercantile Co. *v.* Hanes, 9 Okla. 471, 60 Pac. 284, holding that in such case a verdict of the jury in the alternative, for the possession of the property, or the value thereof, is not necessary. But see Springfield Engine, etc., Co. *v.* Glazier, 55 Mo. App. 95; Rindskoff *v.* Rogers, 34 Mo. App. 126.

16. Clarke *v.* Parker, 63 Miss. 549.

Under a claim of special ownership the verdict should find the extent of the intervener's interest. Nelson Distilling Co. *v.* Hubbard, 53 Mo. App. 23.

17. Faulkner *v.* Cook, 83 Ark. 205, 103 S. W. 384.

Not Proper.—McLean *v.* Douglass, 28 N. C. 233.

18. See the title "**Judgment.**"

session of the property to be delivered to him is proper.[19] Where the property has been sold the judgment should award the claimant the proceeds of such sale,[20] and not the value of the property.[21]

In some jurisdictions the judgment should be rendered in the alternative, that is, for the return of the property or for its value.[22] When the issue has been determined in favor of the claimant the case is as though no attachment had issued;[23] the right to the property vests in him,[24] and the attachment should be dismissed.[25]

When Against Claimant. — Where the issues are found against the claimant the judgment should be for the condemnation of the property;[26] a money judgment for the value of the property attached cannot be entered.[27] The intervener is bound by a judgment for the plain-

19. Bach *v.* Leopold, 8 La. Ann. 386. *Compare* Buckingham *v.* Shoyer, 86 Ill. App. 364, where it was held that, under the statute, the only judgment that the claimant could take was one for costs.

In Joslin *v.* Teats, 5 Colo. App. 531, 39 Pac. 349, the inclusion of a sum for attorney's fees was held not authorized by statute.

A money judgment in favor of the claimant is bad. **Ill.**—Glover *v.* Wills, 40 Ill. 350. **Mo.**—Williams *v.* Braden, 57 Mo. App. 317. **N. C.**—McLean *v.* Douglass, 28 N. C. 233.

20. Rogers, etc., Hardware Co., *v.* Randell, 69 Mo. App. 342; Williams *v.* Braden, 57 Mo. App. 317; Nolan *v.* Deutsch, 23 Mo. App. 1.

21. Fly *v.* Grieb, 62 Ark. 209, 35 S. W. 214; Hughes Bros. Mfg. Co. *v.* Reagan, 4 Ind. Ter. 472, 69 S. W. 940. See also Swift *v.* Russell, 97 Fed. 443, 38 C. C. A. 259.

22. Burlacher *v.* Watson, 38 Tex. 62; Hill *v.* Gardner, 35 Wash. 529, 77 Pac. 808.

But though the statute provides for such a judgment (as in detinue), if the property is no longer in existence there can be no judgment for its value. Irion *v.* Hume, 50 Miss. 419, where slaves had been seized.

Interest.—A statute so providing does not authorize the inclusion of interest in the judgment. Hill *v.* Gardner, 35 Wash. 529, 77 Pac. 808.

23. Wheeles *v.* New York Steam Dye Works, 129 Ala. 393, 29 So. 793. "The interpleader having obtained a final judgment for all the attached property, the cause stood as if no attachment had ever issued. The plaintiff had the right to dismiss its attachment voluntarily, and proceed without regard to the attachment." Brownwell, etc., Car Co. *v.* Barnard, 139 Mo. 142, 40 S. W. 762.

24. State *v.* Fink, 57 Mo. App. 626. **Where the judgment awards the value of improvements** to the intervener, he is not entitled to retain possession of the property as against a seizing creditor until the amount awarded him is paid. Coleman *v.* Teddlie, 106 La. 192, 30 So. 99.

The effect of plaintiff's filing bond is to stop the delivery of the property to claimant. Haas *v.* Sewick, 23 Civ. Proc. 397, 30 N. Y. Supp. 145.

25. Simonds *v.* Pearce, 31 Fed. 137. *Compare* Speyer *v.* Ihmels, 21 Cal. 280, 81 Am. Dec. 157, where the plaintiff's lien was postponed to the intervener's.

26. Arnold *v.* Cofer, 135 Ala. 364, 33 So. 539; Seamans *v.* White, 8 Ala. 656. See also Reavis *v.* Moore (Tex.), 20 S. W. 955.

27. Valley Bank *v.* Wolf, 101 Iowa 51, 69 N. W. 1131. In this case Kinne, C. J., said: "The provisions of the statute as to what is to be tried and determined are specific. It is the validity of the attachment, the claim of intervener to the money or property attached, or some interest in it or lien upon it; and these are the matters which the court is expressly authorized to summarily investigate. Clearly, we think, the decision of the trial court in this case, that he could not enter a money judgment against intervener and in favor of the plaintiff for the value of the property attached, was correct, and in accord with the exact provisions of the statute. It is said that such a conclusion works a hardship in compelling the plaintiff to resort to another suit upon the bond, when the whole matter of the inter-

tiff,[28] and cannot thereafter recover the property from the officer.[29]

J. Bond for Possession of Property. — Under statutes a claimant may obtain possession of the property by the execution of a bond conditioned for the delivery of the property,[30] and damages and costs,[31] payable to the plaintiff in attachment,[32] or to the officer,[33] as the statute requires. The lien is not discharged by the execution of such a bond;[34] nor is the person in whose possession the property is attached estopped from asserting a claim to the property by the execution of a forthcoming bond.[35]

Statute of Limitations. — Where the claimant gives a delivery bond conditioned to deliver the property at a specified time after judgment against the defendant, the statute of limitation begins to run at the

vener's liability should be settled in this proceeding. It is not to be denied that there is much force in appellant's contention, but the plain provisions of the statute cannot be ignored by us, even to the end that litigation may be lessened. No case is cited, and a diligent search of the authorities discloses none, applicable to the questions here presented.''

28. **U. S.**—Rice *v.* Alder-Goldman Commission Co., 71 Fed. 151, 36 U. S. App. 266, 18 C. C. A. 15. **Ala.**—Derrett *v.* Alexander, 25 Ala. 265. **Ark.** Hershy *v.* Clarksville Institute, 15 Ark. 128. **Mo.**—Tipton Bank *v.* Cochel, 27 Mo. App. 529.

29. Capital Lumbering Co. *v.* Hall, 9 Ore. 93.

30. **Ky.**—Deposit Bank *v.* Thomason, 23 Ky. L. Rep. 1957, 66 S. W. 604. **Miss.**—Higdon *v.* Vaughn, 58 Miss. 572. **N. Y.**—Finn *v.* Mehrbach, 30 Civ. Proc. 242, 65 N. Y. Supp. 250; Pierce *v.* Kingsmill, 25 Barb. 631. **Wash.**—Peterson *v.* Wright, 9 Wash. 202, 37 Pac. 419.

See the title ''Bonds.'' But see Kinnear *v.* Flanders, 17 Colo. 11, 28 Pac. 327.

A bond not complying with the statute does not entitle the intervener to the possession of the attached property. Jennings *v.* Warnock, 37 Iowa 278.

Death of surety does not make a new bond necessary. Larsen *v.* Murray, 29 Tex. Civ. App. 520, 68 S. W. 295.

Several Writs.—Where the property has been levied on under several writs it has been held the proper practice to execute only one bond payable to all the plaintiffs in the writs. P. J. Peters Saddlery, etc. Co. *v.* Schoelkopf, 71 Tex. 418, 9 S. W. 336; Elser *v.* Graber, 69 Tex. 222, 6 S. W. 560; Blankenship *v.* Thurman, 68 Tex. 672, 5 S. W. 836.

So only one bond is necessary though writs are issued out of several courts. Phillips *v.* Davis (Tex.), 49 S. W. 144.

31. **Ala.**—McElrath *v.* Whetstone, 89 Ala. 623, 8 So. 7. **Tex.**—Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551; Wallace *v.* Terry, 15 S. W. 35, 4 Wills. Civ. Cas. §58. **W. Va.**—Tappan *v.* Pease, 7 W. Va. 682; Ludington *v.* Hull, 4 W. Va. 130.

32. Eichoff *v.* Tidball, 61 Tex. 421; Jacobs *v.* Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386.

33. Benton *v.* Benson, 32 Ga. 354. But *compare* Selman *v.* Shackelford, 17 Ga. 615.

34. Deposit Bank *v.* Thomason, 23 Ky. L. Rep. 1957, 66 S. W. 604. See also Valley Bank *v.* Shenandoah Nat. Bank, 109 Iowa 43, 79 N. W. 391.

35. **Ark.**—Applewhite *v.* Harrell Mill Co., 49 Ark. 279, 5 S. W. 292. **Ky.**—Schwein *v.* Sims, 2 Met. 209. **Mich.**—Woods *v.* Robertson, 31 Mich. 64. **Mo.**—Huels *v.* Boettger, 40 Mo. App. 310; Mansur *v.* Hill, 22 Mo. App. 372; Bradley Hubbard Mfg. Co. *v.* Bean, 20 Mo. App. 111.

So as to a Surety.—Redwitz *v.* Waggaman, 33 La. Ann. 26. See also Rogers *v.* Bishop, 9 Gray (Mass.) 225.

Compare Wallace *v.* Burnham, 28 La. Ann. 791, wherein the court said: ''Interveners, having become the sureties on the release bond, are estopped from asserting any claim to or privilege on the property so delivered to defendant.''

expiration of the time limited after the judgment, although the intervention claim has not been determined.[36]

Informalities in a delivery bond given by the intervener are waived where no question as to its sufficiency is made in the pleadings, and where the parties for a long period have treated it as binding.[37]

XVII. THE ACTION. — A. SERVICE OF PROCESS. — If there is no statutory requirement that the levy of the attachment shall be followed or preceded by service of process, actual or constructive,[38] a valid levy constitutes constructive notice to the defendant,[39] and is

But under the Kansas statutes the execution by the intervener to the marshal of a bond estops him from denying that the property belongs to the defendant, or that it was subject to the attachment. Bowden *v.* Burnham, 59 Fed. 752, 19 U. S. App. 448, 8 C. C. A. 248; Peterson *v.* Woollen, 48 Kan. 770, 30 Pac. 128; Case *v.* Steele, 34 Kan. 90, 8 Pac. 242; Wolf *v.* Hahn, 28 Kan. 588; Haxtun *v.* Sizer, 23 Kan. 310. But this is so only where the property has been actually returned by the officer. Case *v.* Schultz, 31 Kan. 96, 1 Pac. 269.

36. Valley Bank *v.* Shenandoah Nat. Bank, 109 Iowa 43, 79 N. W. 391.

37. Valley Bank *v.* Wolf, 101 Iowa 51, 69 N. W. 1131.

Amendment of Bond.—"When the attachment was levied the claimants made affidavit and executed a replevy bond instead of a claim bond, and it was indorsed as such by the sheriff. Before entering upon the trial, by leave of the court the bond was amended so as to make it a claim bond. This amendment was allowed against the objections of the plaintiff. The court did not err in this ruling." Martin *v.* Mayer, 112 Ala. 620, 20 So. 963.

38. See the various statutes and cases cited *infra.*

A nominal attachment is sufficient to authorize a service by a separate summons. Peabody *v.* Hamilton, 106 Mass. 217.

Dismissal of suit after dissolution of attachment, in the absence of service of process. Bland *v.* Schott, 5 Mo. 213.

Effect of Addition of Parties Plaintiff.—Where a statute provides that creditors may file under and become parties to an original attachment proceeding instituted by another party it has been held that service of summons in the case first commenced is sufficient not only for that case but also for others filed under it. Woods *v.* Brown, 93 Ind. 164, 47 Am. Rep. 369; Schmidt *v.* Colley, 29 Ind. 120.

Tennessee.—In Grubbs *v.* Colter, 7 Baxt. 432, it was said: "After the attachment was issued and levied, a subpoena to answer was issued and served upon defendant. This does not alter the status of the case, or make the subpoena to answer the leading writ. The fact that it became practicable to give personal notice, does not deprive the complainant of his remedies provided by statute."

In Bivins *v.* Mathews, 7 Baxt. (Tenn.) 256, the court, in construing the attachment act of 1871, said: "The intention of the statute being, as we construe it, that if the summons is served on the defendant, then this becomes the leading process in the case, the attachment, if levied on property, taking the position equivalent to an ancillary attachment, and holding the property until the termination of the litigation. If the summons is not served, and the attachment is levied on property, then the case is to proceed as in other cases of original attachment."

Louisiana.—"It is well settled, that the attaching creditor may, at the same time, proceed by personal citation against the debtor." Gibson *v.* Huie, 14 La. 124.

39. **Ala.**—King *v.* Bucks, 11 Ala. 217; Thompson *v.* Allen, 4 Stew. & P. 184. See Hadley *v.* Bryars, 58 Ala. 139. **Ga.**—Craig *v.* Fraser, 73 Ga. 246, *distinguishing* Treutlen *v.* Smith, 54 Ga. 575. **Miss.**—Calhoun *v.* Ware, 34 Miss. 146; Ridley *v.* Ridley, 24 Miss. 648. **Tenn.**—See Cheatham *v.* Trotter, Peck 198. **Tex.**—Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100.

Construction of Statute.—In Craig *v.* Fraser, 73 Ga. 246, it was held that where a statute provides that in case

therefore not a violation of the constitutional provision which declares that no person shall be deprived of his property without due process of law.[40] In many cases it has been held that in the absence of appearance by the defendant, jurisdiction over the attached property is lost if service is not had in the manner and time prescribed,[41] and that a judgment *in personam* against the defendant, or *in rem* against the

a defendant has appeared or been cited to appear a judgment on the attachment shall have the same effect as when there has been a personal service and in all other cases shall bind only the property attached, no service of process or other notice is necessary to authorize a judgment which is connned to the attached property of a non-resident defendant.

40. Smith *v.* Brown, 96 Ga. 274, 23 S. E. 849.

41. **Ark.**—McDonald *v.* Smith, 24 Ark. 614. **Mich.**—Millar *v.* Babcock, 29 Mich. 526; Pearson *v.* Creslin, 16 Mich. 281. **N. H.**—Nelson *v.* Sewett, 4 N. H. 256. **N. Y.**—Blossom *v.* Estes, 84 N. Y. 614, *affirming* 59 How. Pr. 381; Mojarrieta *v.* Saenz, 80 N. Y. 547; Taylor *v.* Troncoso, 76 N. Y. 599; Sabin *v.* Kendrick, 2 App. Div. 96, 37 N. Y. Supp. 524; Ludwig *v.* Blum, 63 Hun 631, 18 N. Y. Supp. 69; Betzemann *v.* Brooks, 31 Hun 271; McVey *v.* Cantrell, 8 Hun 522; Martin *v.* Smith, 37 Misc. 425, 75 N. Y. Supp. 780; Parke *v.* Gay, 28 Misc. 329, 59 N. Y. Supp. 890; Hernstien *v.* Matthewson, 5 How. Pr. 196; Waffle *v.* Goble, 53 Barb. 517; Taddiken *v.* Cantrell, 4 Thomp. & C. 222. **N. D.**—Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. 341. **S. D.**—McLaughlin *v.* Wheeler, 2 S. D. 379, 50 N. W. 834. **Tenn.**—Maxwell *v.* Lea, 6 Heisk. 247; Barber *v.* Denning, 4 Sneed 267. **Wis.** Allen *v.* Lee, 6 Wis. 478.

As to the manner and sufficiency of service of process in general see the title "**Service of Process.**"

Death of Defendant Before Publication Completed.—Where the publication of the summons was commenced but not completed before the death of the defendant it was held under the New York code that the attachment would be set aside. Barron *v.* South Brooklyn Saw Mill Co., 18 Abb. N. C. (N. Y.) 352.

Request To Suspend Legal Proceedings.—A request by the defendant to the plaintiff to suspend legal proceedings does not estop the defendant from setting up want of service or publication of summons. Mojarrieta *v.* Saenz, 80 N. Y. 547.

Joint Defendants.—A failure to serve the summons on all the joint defendants within the time specified in the statute will not be ground for vacating the attachment where there has been a service on one or more of them. Yerkes *v.* McFadden, 141 N. Y. 136, 36 N. E. 7; Orvis *v.* Goldschmidt, 64 How. Pr. (N. Y.) 71, 2 Civ. Proc. 314.

Defect in form of the summons is not cause for setting aside the attachment. Rogers *v.* Farnham, 25 N. H. 511; Gans *v.* Beasley, 4 N. D. 140, 59 N. W. 714.

Jurisdiction Conditional on Service. The statute under which most of the above decisions were rendered "authorizes the issue of a warrant of attachment to accompany the summons, but it prescribes that personal service of the summons must be made upon a defendant against whose property a warrant of attachment is granted, within 30 days after the granting of the warrant, or else, before the expiration of the same time, service of the summons by publication must be commenced, or service thereof must be made without the state, pursuant to an order obtained for that purpose." It has been held that while this statute "gives the court jurisdiction to issue a warrant of attachment before the service of the summons, yet such jurisdiction, when obtained, is conditioned upon the service of the summons within 30 days, as prescribed, . . . and, if the summons has not been served as there prescribed, the jurisdiction falls to the ground, and the proceedings thereafter are the same as if jurisdiction had never been acquired." Ross *v.* Ingersoll, 53 App. Div. 86, 65 N. Y. Supp. 753. And see other New York cases cited *supra*.

In Millar *v.* Babcock, 29 Mich. 526, it was held that where the lien ac-

attached property, is absolutely void, and subject to a collateral attack.[42] Elsewhere it is held, however, that where an attachment is regularly made, the absence of proper service upon or appearance by the defendant does not deprive the court of jurisdiction over the at-

quired by an attachment is made conditional on the service of process within a certain time, a service made subsequently to the prescribed period is ineffectual, in the absence of any provision therefor, to preserve the lien and give the court jurisdiction to render judgment against the property.

If, however, no definite time is fixed within which process must be served in order to preserve the lien, the failure of the plaintiff to obtain service does not render unlawful the sheriff's custody of the property. Darnell *v.* Mack, 46 Neb. 740, 65 N. W. 805.

The Florida statute does not require an attachment to be set aside because of failure to serve the summons. Simpson *v.* Knight, 12 Fla. 144.

42. **U. S.**—Picquet *v.* Swan, 5 Mason 35, 19 Fed. Cas. No. 11,134. See Treadwell *v.* Seymour, 41 Fed. 579. **Ala.**—Wilmerding *v.* Corbin Bkg. Co., 126 Ala. 268, 28 So. 640. **Ark.**—Richmond *v.* Duncan, 4 Ark. 197. **Colo.**—See Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4; Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204. **Fla.**—Simpson *v.* Knight, 12 Fla. 144. **Ga.**—Baker *v.* Aultman, 107 Ga. 339, 33 S. E. 423, 73 Am. St. Rep. 132; McCrory *v.* Hall, 104 Ga. 666, 30 S. E. 881; Smith *v.* Brown, 96 Ga. 274, 23 S. E. 849. **Ill.**—Haywood *v.* Collins, 60 Ill. 328 (*following* Haywood *v.* McCrory, 36 Ill. 459); Firebaugh *v.* Hall, 63 Ill. 81. **Kan.**—Kincaid *v.* Frog, 49 Kan. 766, 31 Pac. 704. **Ky.** Bailey *v.* Beadles, 7 Bush 383; Allen *v.* Brown, 4 Met. 342. **La.**—Elder *v.* Ludeling, 50 La. Ann. 1077, 23 So. 929; Hanna *v.* Loring, 11 Mart. 276; Stockton *v.* Hasluck, 10 Mart. 472; Love *v.* Dickson, 7 Mart. (N. S.) 160; Cochran *v.* Smith, 2 Mart. (N. S.) 552. **Md.**—Brent *v.* Taylor, 6 Md. 58; Stone *v.* Magruder, 10 Gill & J. 383, 32 Am. Dec. 177. **Mich.**—Savidge *v.* Ottawa Circuit Judge, 105 Mich. 257, 63 N. W. 295; Nugent *v.* Nugent, 70 Mich. 52, 37 N. W. 706; Millar *v.* Babcock, 29 Mich. 526; King *v.* Harrington, 14 Mich. 532. **Minn.**—Barber *v.* Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836; Heffner *v.* Gunz, 29 Minn. 108, 12 N. W. 342. **Miss.**—Edwards *v.* Toomer, 14 Smed. & M. 75. **Mo.**—See Tufts *v.* Volkening, 122 Mo. 631, 27 S. W. 522. **N. M.**—Smith *v.* Montoya, 3 N. M. 39, 1 Pac. 175. **N. Y.** Ross *v.* Ingersoll, 53 App. Div. 86, 65 N. Y. Supp. 753; Simpson *v.* Burch, 4 Hun 315; Gere *v.* Gundlach, 57 Barb. 13; Moore *v.* Thayer, 6 How. Pr. 47. See Fisher *v.* Nash, 47 App. Div. 234, 62 N. Y. Supp. 646. **N. C.**—Evans *v.* Alridge, 133 N. C. 378, 45 S. E. 772; McClure *v.* Fellows, 131 N. C. 509, 42 S. E. 951; Marsh *v.* Williams, 63 N. C. 371. See Spillman *v.* Williams, 91 N. C. 483. **Tenn.**—Nashville *v.* Wilson, 88 Tenn. 407, 12 S. W. 1082; Murry *v.* Conner, 4 Baxt. 220; Nashville, etc., R. Co. *v.* Todd, 11 Heisk. 549; Ingle *v.* McCurry, 1 Heisk. 26. See Gibson *v.* Carroll, 1 Heisk. 23. **Va.**—See Dorr's Admr. *v.* Rohr, 82 Va. 359, 3 Am. St. Rep. 106. *Compare* Kern *v.* Wyatt, 89 Va. 885, 17 S. E. 549. **W. Va.**—Haymond *v.* Camden, 22 W. Va. 180. **Wis.**—Cox *v.* North Wisconsin Lumb. Co., 42 Wis. 141, 51 N. W. 1130; Cummings *v.* Tabor, 61 Wis. 185, 21 N. W. 72 (*distinguished* in Barth *v.* Loeffelholtz, 108 Wis. 562, 84 N. W. 846); Anderson *v.* Coburn, 27 Wis. 558.

In Grier *v.* Campbell, 21 Ala. 327, the court said: "But care must be taken that the property levied upon is the property of the defendant; for it is too clear to admit of argument, that if the plaintiff make a simulated levy on property to which the defendant has no claim of right, this will not have the effect of constructive notice so as to authorize the court to proceed to judgment. Indeed, a judgment predicated upon such levy is no more binding than a judgment rendered upon ordinary process, of which the defendant had no notice whatever. And it is wholly immaterial what length of time transpires between the levy and judgment, inasmuch as the court does not acquire jurisdiction of the cause, and cannot,

tached property, and that a judgment *in rem*, though it may be irregular and liable to reversal, will not set aside collaterally.[43]

Mode of Service in General.— The service of summons must be made

therefore, properly render any judgment against the defendant."

An entry of the levy upon the docket does not operate as constructive notice. New England Mortg. Security Co. *v.* Watson, 99 Ga. 733, 27 S. E. 160.

Defendant's Right to Costs in Absence of Service.—In a case where the plaintiffs attached and carried away property of the defendant, but no service of summons was made, the defendant obtained from the officer an attested copy of the writ of attachment. The plaintiffs did not enter their action in court, and the plaintiff, at the return term of the writ, presented his petition for costs, which the court refused to sustain, saying that the statute "provides that a writ may be framed to attach the goods, or it may be by original summons, with an order to attach. But in either case, a separate summons must be served. The writ in this case was in common form of a writ of attachment. It was not served. The officer was bound to give the copy, which the petitioner procured. It was no act of the respondents. There was then no service, nor was there any attempt to make one. The question then is, whether, when there has been no service, a defendant's complaint for costs can be sustained. We think it cannot be done. When such a complaint is made, the proper evidence of service should be presented. The complainant's remedy is by another, and perhaps, more efficacious procedure." Hodge *v.* Swasey, 30 Me. 162.

43. **U. S.**—Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 934 (*followed* in Mickey *v.* Stratton, 5 Sawy. 475, 17 Fed. Cas. No. 9,530); Voorhees *v.* Jackson, 10 Pet. 449, 9 L. ed. 490. See Bigelow *v.* Chatterton, 51 Fed. 614, 10 U. S. App. 267, 2 C. C. A. 402. **Ark.**—Field *v.* Dortch, 34 Ark. 399. **Miss.**—Erwin *v.* Heath, 50 Miss. 795. **Mo.**—Randall *v.* Snyder, 214 Mo. 23, 112 S. W. 529, 127 Am. St. Rep. 653; Williams *v.* Lobban, 206 Mo. 399, 104 S. W. 58; Shea *v.* Shea, 154 Mo. 599, 55 S. W. 869, 77 Am. St. Rep. 779; Johnson *v.* Gage, 57 Mo. 160; Holland *v.* Adair, 55 Mo. 40; Freeman *v.* Thompson, 53 Mo. 183; Hardin *v.* Lee, 51 Mo. 241; Thompson *v.* Simpson (Mo. App.), 127 S. W. 620; Simmons *v.* Missouri Pac. R. Co., 19 Mo. App. 542. **Neb.**—Crowell *v.* Johnson, 2 Neb. 146, *followed* in Darnell *v.* Mack, 46 Neb. 740, 65 N. W. 805, which *overruled* Wescott *v.* Archer, 12 Neb. 345, 11 N. W. 491, 577. **Ohio.**—Paine *v.* Mooreland, 15 Ohio 435, 45 Am. Dec. 585 (*followed* in Cochran *v.* Loring, 17 Ohio 409); Putnam *v.* Loeb, 2 Ohio C. C. 110, 1 Ohio Cir. Dec. 391. **Ore.**—Colfax Bank *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664. **Vt.**—Beech *v.* Abbott, 6 Vt. 586.

In Kane *v.* McCown, 55 Mo. 181, the court said: "It is said, however, that where there is no publication, such as is required by law, the court has no jurisdiction over the person of the non-resident, and can therefore pass no judgment on him, even so far as the property attached is concerned. The judgment in such cases, it will be observed, can only affect the property attached, and when the record shows a finding of the court, that there has been a legal order of publication, and a publication made in pursuance of such order, it is not apparent how this finding or determination of fact can be attacked collaterally any more than any other conclusion of the court in the course of its proceeding to final judgment. Its opinion on the sufficiency of the order of publication may be entirely wrong, reversible on review, but the error does not vitiate the title acquired under the judgment."

In Crowell *v.* Johnson, 2 Neb. 146, Lake, J., in considering the objections that the record failed to show a service by publication as prescribed by statute, said: "We find that the Court had acquired jurisdiction of the property *by the levy of the order of attachment thereon.* The necessary affidavit for the attachment had been filed, and order duly issued and levied, whereby the property of the debtor was taken from him, and placed

in the manner prescribed by the legislature, in order to render the ser-

in the custody of the law. Now, all this may be done on the very day the action is commenced, and before any notice is given to the defendant. Thus far, it is strictly a proceeding *in rem;* and the want of notice to the debtor can have no effect whatever. But the law regards it but just to the defendant that he be notified of the proceeding against his property, and provides that notice shall be given to him. If he be within the jurisdiction of the Court, the notice must be personal; but if, as here, he be a non-resident, beyond the jurisdiction of the Court, such notice may be given by publication. In either case, to be valid, it must conform substantially to the requirements of the statute. But, should it fail to do so, the proceeding is of course voidable, but not void. It may be reversed in a proceeding instituted for that purpose; but it cannot be assailed collaterally. The rule is the same, whether the notice be personal by the service of a summons, or constructive by publishing the same in a newspaper."

A leading case in support of this rule is Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931, wherein, on a writ of error to the circuit court for the Eastern District of Tennessee, Mr. Justice Miller, in delivering the opinion of the court, said: "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceeedings purely *in rem.* Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court, the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, . . . but . . . we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property. So also of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made, and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment. But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice. . . . The case of Voorhees *v.* The Bank of the United States was much like this, and required stronger presumptions in favor of the jurisdiction of the court to sustain its acts than the one before us. The defendant there, as here, held land under attachment proceedings against a non-resident who had never been served with process or appeared in the case. No affidavit was produced, nor publication of notice, nor appraisement of the property, but it was condemned and sold without waiting twelve months from the return of the writ, and without calling him at three different terms of the court, all of which are specially required by the act regulating the proceedings in Ohio, where they were had. This court held that there was sufficient evidence of jurisdiction in the court which rendered the judgment, notwithstanding the defects we have mentioned, and that they were not fatal in a collateral proceeding."

In Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257, the court disagreeing with Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931, wherein the opinion was based upon the law in Tennessee, said: "It is well settled in this state that an attachment is a proceeding *in personam* and not *in rem.* . . . It is therefore apparent that a judgment upon original or judicial attachment rests upon the theory that by the levy and publication as prescribed by our statutes, the defendant has notice in contemplation of law or the proceedings against him . . . We are of opinion that the decision in the case of Cooper *v.* Reynolds, 10 Wall., is not in conformity to the decisions of

vice effective;[44] but the service of a writ of attachment in the manner required for the service of a summons has been held to operate as a service of a separate writ of summons,[45] even though ineffective as a

this court, and to hold in conformity to the opinion in that case would overturn the uniform current of decisions made by this court upon the office and effect of the levy of an ancillary attachment.'' However, as the court pointed out the case at bar was not controlled by Cooper *v.* Reynolds for the reason that the judgment therein was one at law founded upon an ancillary attachment while that in the case at bar was had upon an original attachment bill filed in the chancery court. But although it was the opinion that ''to dispense with the prescribed publication, and proceed to take jurisdiction upon the levy of the attachment alone, would be to act in violation of the statutes and not in conformity to them,'' it also held that the recital of the judgment *pro confesso* that publication was duly made, and the repetition of such recital in a later decree, had to be taken as true and that it was proper to reject evidence in contradiction of the recitals.

A distinction is made between cases decided under statutes providing that the attachment should become void should process not be secured within a prescribed time, and those decided under statutes wherein no such provision is found. See Darnell *v.* Mack, 46 Neb. 740, 65 N. W. 805.

Objection By Garnishee Ineffectual. In Simmons *v.* Missouri Pac. R. Co., 19 Mo. App. 542, the court said: ''The objection of the garnishee to the jurisdiction of the court in the principal proceeding stands on the same footing as the objection of any third person, questioning the validity of the proceeding in a collateral way. If the question were before us in a direct proceeding, that is, on an appeal or writ of error prosecuted by the defendant in the attachment suit, we might be obliged to hold that the defective publication, if such it should be found to be, would be ground for reversing the judgment. But it is settled by several decisions of our supreme court, that jurisdiction in attachment proceedings is acquired by the levy of an attachment regularly issued, and is not ousted by the fact that the subsequent publication was not regularly made.''

Death of debtor before the rendition of judgment renders the judgment as between the parties merely voidable. Cochran *v.* Loring, 17 Ohio 409, 433.

44. Peck *v.* Warren, 8 Pick. (Mass.) 163, wherein it was said: ''The St. 1797, c. 50, §1, provides the mode of service of writs, when goods or estate are attached; and it requires that a summons shall be delivered to the party, or left at his last and usual place of abode; and in case the defendant was at no time an inhabitant or resident in this commonwealth, then such summons is to be left with his tenant, agent or attorney. The service in this case was in the latter mode; but it appears by the writ itself, that the defendant had been at some former time an inhabitant or resident within the commonwealth, so that this mode of service was not lawful. It is no answer to say, that this service was more likely to give notice than the other, on account of the long absence of the defendant from the commonwealth. The legislature is to judge of this, and it having prescribed the kind of service, none other will avail.''

See further the title ''Service of Process.''

45. Seers *v.* Blakesly, 1 Root (Conn.) 54; Paul *v.* Bird, 25 N. J. L. 559. See Spettigue *v.* Hutton, 9 Pa. Co. Ct. 156.

Necessity of Separate Summons.— Blanchard *v.* Day, 31 Me. 494.

Service of Invalid Attachment.— Where a writ of attachment is insufficient to authorize a seizure of goods, its personal service and proper return does not give the court jurisdiction, under a statute providing that, ''if the attachment be returned personally served upon any of the defendants, the justice shall proceed therein in the same manner as upon a summons returned personally served.'' Borland *v.* Kingsbury, 65 Mich. 59, 62, 31 N. W. 620 (*overruling* Hills *v.* Moore, 40 Mich. 210), where the court said: ''Laws, therefore, which author-

service of attachment,[46] and in certain jurisdictions a combined writ of summons and attachment is expressly provided for by statute.[47] The return in such a case is sufficient if it is such as would be made on service of attachment only, so long as it shows that everything has been done which is necessary for the service of the writ as a writ of summons as well as for its service as a writ of attachment.[48]

Attachment of Joint Property. — Service upon one of two defendants sued upon a joint liability is sufficient if the joint property is attached.[49]

Personal Service. — Where it is provided that the court shall be deemed to have acquired jurisdiction from the time of the service of

ize the creditor to levy upon, seize, and take the property of the debtor from his possession and control before a final judgment, and at the very commencement of suit, on the mere assertion of indebtedness, should be strictly construed, and it should appear that the requirements of the statute authorizing this extraordinary remedy have been fully complied with in letter and spirit. The affidavit is essential to confer jurisdiction. If it is not filed, or if it is defective in matters of substance, and its defects are not waived by a general appearance, the justice obtains no jurisdiction over the cause, and his acts are *coram non judice.*''

The execution of a replevin bond has been held tantamount to actual service. Richard *v.* Mooney, 39 Miss. 357.

46. Brewer *v.* Story, 2 Vt. 281.

47. **Ind. Ter.**—Handley *v.* Anderson, 5 Ind. Ter. 186, 82 S. W. 716. **Mich.** Thompson *v.* Thomas, 11 Mich. 274; McLellan *v.* McDonald, 1 Mich. N. P. 24. **N. J.**—Paul *v.* Bird, 25 N. J. L. 559. **R. I.**—Greenwich Nat. Bank *v.* Hall, 11 R. I. 124.

Quashing of Combined Writ.—If such a writ be quashed as a summons it is not good as an attachment. Paul *v.* Bird, 25 N. J. L. 559, wherein the plaintiff contended that he should be allowed to retain the lien he had acquired by virtue of the attachment and issue a new summons to the defendant to appear and answer the suit. The court said: ''There is nothing in the act to warrant this practice. The effect of such a construction would be to allow a plaintiff under one writ to attach property or credits of a defendant in the hands of a garnishee today, and summon him to appear to the suit by a subsequent writ, to be issued and served at some future day; to have two writs instead of one, issued and made returnable on different days. The act gives but one writ, calls it a writ of attachment, and directs that it shall perform the double office of a summons and an attachment; be served as a summons, and executed as an attachment. The summons is the commencement of the suit, the attachment an incident of it. To quash the summons is to put an end to the suit, and the proceeding in attachment necessarily falls with it.''

48. Greenwich Nat. Bank *v.* Hall, 11 R. I. 124, wherein the court said: ''The objection is that the officer makes return simply of service by attachment, the leaving of the copy being required for such service. The answer to this objection is, that the writ was a writ of summons as well as a writ of attachment; that an attested copy of it was left at the last and usual place of abode of the defendant, which is all that was required for the service of it as a writ of summons; that the fact that the copy may have been left simply for the purpose of perfecting the service by attachment cannot limit the legal effect of the act; and that . . . the answer is in our opinion conclusive if the service could be made in both forms by leaving a single copy. We see no reason why it might not have been so made. The defendant would get no information from another copy which he could not get from the copy left. The writ was in effect two writs, and the single copy was in effect a copy of both.''

49. Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254; Yerkes *v.* McFadden, 141 N. Y. 136, 36 N. E. 7,

summons, and the defendant resides within the state and can be personally served, the court acquires jurisdiction only upon personal service and a levy unless there is a voluntary appearance.[50] Personal service is necessary to give the court jurisdiction over property not liable to attachment,[51] or other than that which has been attached;[52] but will not give life to an attachment which has not been validly served.[53]

Non-Resident or Absent Defendant.—The levy of an attachment does not extend the jurisdiction of a court over a non-resident and, therefore, does not furnish any exception to the general rule that, in the absence of an appearance, personal service within the jurisdiction is a prerequisite to a personal judgment against a non-resident or absent

reversing, 66 Hun 630, 22 N. Y. Supp. 1119; Orvis *v.* Goldschmidt, 64 How. Pr. (N. Y.) 71, 2 Civ. Proc. 314.

In Yerkes *v.* McFadden, 141 N. Y. 136, 36 N. E. 7, the court said: "Where an attachment issues against the property of several defendants in an action on a joint liability, it may be executed by a seizure of the joint property, and although the summons is served on but one of the defendants within the time prescribed, and no service is made or publication commenced against the other defendants, the attachment cannot be vacated as to them for that reason. The attachment and the lien continues, and if the plaintiff obtains judgment on joint liability, the joint property seized on the attachment may be sold on the execution."

50. Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Brown *v.* Brown, 2 Sneed (Tenn.) 431.

Return of absconding defendant after an order for publication does not make personal service necessary. Duche *v.* Voisin, 18 Abb. N. C. (N. Y.) 358.

Place of Service.—Where an action is instituted by attachment against an absconding debtor in the county from which he absconded, process may be served upon him in any other county of the state, and a judgment rendered on such service will be valid, unless he appears and contests the right to maintain the action there. Gandy *v.* Jolly, 35 Neb. 711, 53 N. W. 658, 37 Am. St. Rep. 460. See further the title "Service of Process."

Failure to levy the attachment after personal service has been obtained does not abate the action. Williams *v.* Kimball, 8 Mart. N. S. (La.) 351, wherein the court said: "Although the attachment has been obtained, if after this ordinary mode of service of the citation, no property be attached, either because he has none, or has succeeded in removing his out of the sheriff's way, or even because the plaintiff has directed the sheriff to forbear levying the attachment, still, the defendant being regularly made a party, the suit is to proceed in the ordinary way, as if no attachment had been asked. . . . An attachment, like other conservatory acts, is not, when the defendant is personally cited, a mode of bringing a suit, but a remedy or incident, which may precede, accompany, or be subsequent to the action. In the language of the code, it may accompany a demand, or give effect to a suit, which the plaintiff has brought, or intends to bring."

In Illinois the rule under a former statute was that personal service was a prerequisite to an attachment in aid of a suit commenced. Moore *v.* Hamilton, 7 Ill. 429. This rule was afterwards changed because of an amendment to the statute. Haldeman *v.* Starrett, 23 Ill. 393.

Scire Facias.—An attachment in aid of a *scire facias* to make a person a party to a judgment can be had only when a *scire facias* has been issued. Firebaugh *v.* Hall, 63 Ill. 81.

51. West *v.* Schnebly, 54 Ill. 523; Kniseley *v.* Parker, 34 Ill. 482.

52. Conn *v.* Caldwell, 6 Ill. 531; Bower *v.* Town, 12 Mich. 230.

53. Elder *v.* Ludeling, 50 La. Ann. 1077, 23 So. 929.

defendant.[54] Personal service upon a non-resident or absent defendant is not necessary, however, to authorize a judgment against the prop-

54. **U. S.**—St. Clair *v.* Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222; Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931; Wyman *v.* Russell, 4 Biss. 307, 30 Fed. Cas. No. 18,125. See Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Graham *v.* Spencer, 14 Fed. 603. **Ala.**—Exchange Nat. Bank *v.* Clement, 109 Ala. 270, 19 So. 814. **Ia.** Hedrick *v.* Brandon, 9 Iowa 319; Courtney *v.* Carr, 6 Iowa 238. **Mo.** Jewett *v.* Boardman, 181 Mo. 647, 81 S. W. 186. **N. H.**—Downer *v.* Shaw, 22 N. H. 277. **N. Y.**—Kilburn *v.* Woodworth, 5 Johns. 37, 4 Am. Dec. 321. **Tenn.**—Earthman's Admr. *v.* Jones, 2 Yerg. 484. **Tex.**—Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295; Rowan *v.* Shapard, 2 Wills. Civ. Cas. §§295, 302 (declaring Wilson *v.* Ziegler, 44 Tex. 657 overruled). **Vt.**—Godfrey *v.* Downer, 47 Vt. 653. **Eng.** See Fisher *v.* Lane, 3 Wils. C. Pl. 297, 95 Eng Reprint 1065.

In the leading case of Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931, the court, per Mr. Justice Miller, said: "The plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued, and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not. If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect to which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff."

Reason of Rule.—"It is, of course, fundamental that, without jurisdiction of the person obtained, a personal judgment against a defendant cannot be validly rendered. To secure such jurisdiction the rule was, prior to Bank *v.* Clement, 109 Ala. 270, 19 South. 814, that notice implied in the levy, and service of notice in the manner prescribed of the levy, though such notice was not personally served on the defendant, availed to bring the defendant within the lawful powers of the court. This rule proceeded on the idea that the proceeding in attachment or garnishment was by nature *in personam*. Whatever may have been the wisdom and soundness of such a rule, long enforced by the courts of this state, the theory of attachments in keeping with which the mentioned rule obtained, was entirely changed when the Supreme Court of the United States, in a cause in which a non-resident was the party defendant, declared a proceeding in attachment or garnishment to be *in rem*, and not *in personam*. Accordingly, in Bank *v.* Clement, *supra*, this court yielding a proper influence to the announcement of the Supreme Court of the United States in a cause in which that court had superior and controlling jurisdiction, because of the non-residence of a party therein, accepted the principle, and applied it in that case, viz., that without personal service a judgment *in personam* against a merely constructively served defendant or garnishee could not be validly rendered, but that the proceeding in attachment or garnishment being, in the absence of personal service, *in rem*, the power of the court in the given cause was strictly limited to the enforcement of the pressed demand by the subjection, if so entitled, of the property levied on to the satisfaction of the demand. So we are not confronted with the alternative whether the rule established to the behoof of non-residents shall be denied or applied to residents who are not personally served, but whose property is under the ban of

erty attached within the jurisdiction,[55] except in the case of certain courts of limited jurisdiction.[56]

process in attachment or garnishment in the courts of this state. The character of proceedings, attachment or garnishment, being fixed *in rem*, and not *in personam*, we think that the principle stated compels the conclusion that no jurisdiction to render a personal judgment can be validly acquired unless the service is personal and actual, rather than simply constructive. If any other view was entertained, an incongruous situation would result, to say nothing of the ignoring of the principle upon which the rule as to non-residents is rested by the Supreme Court of the United States. To cling to the earlier rule followed in this state would extend to the non-resident an exception which our own courts would deny to our own citizens. Independent of the principle and its consequent rule, common fairness, if its recognition imparts no other principle, demands that we make no insidious distinction against citizens of this state. It would be the creation of an insufferable anomaly to hold that in one class of cases such proceedings were *in rem*, and in another *in personam*. And it may be here generally observed that where, in attachment or garnishment proceedings, no personal service was had, the trial court should, in accordance with its practices, ascertain the damages or debt to which the plaintiff is entitled, and then render a judgment only in condemnation of the property subject to be sold, the proceeds thereof to be applied to the satisfaction *pro tanto* of the ascertained debt or damages." De Arman *v.* Massey, 151 Ala. 639, 44 So. 688.

Right to Service Outside Jurisdiction.—Russia *v.* Prospouriakoff, 18 Manitoba 56, 7 West. L. Rep. 766, 8 West. L. Rep. 10, 461.

55. Wyman *v.* Russell, 4 Biss. 307, 30 Fed. Cas. No. 18,115.

In Grevell *v.* Whiteman, 32 Misc. 279, 65 N. Y. Supp. 974, it was said: "It is also urged that, as the defendant is a non-resident of the state, no judgment can be rendered against him unless he has been personally served with the summons. If these proceedings involved the determination of the personal liberty of the defendant, there could be no question but that he should be brought within the jurisdiction of the court by service of process within the state, unless he voluntarily appeared. But this being a proceeding *in rem*, and the property having been attached within the jurisdiction of the court, personal service of the summons is not necessary to constitute due process of law, or to give the court jurisdiction of the subject-matter. Hunt *v.* Hunt, 72 N. Y. 217. The process is effectual to bind such property of the defendant as is found within the jurisdiction of the court. When property is attached, and there has been no personal service or appearance, the judgment will be *in rem* only, and not a judgment *in personam*. It will bind only the property attached, and no execution can further issue against other property of the defendant. It is a distinguishing peculiarity of a proceeding *in rem* that the jurisdiction of the court rests merely upon the seizure or attachment of the property, and no personal service of the summons on the defendant is required. The effect of this rule is that the plaintiff, by attaching the property of the defendant within the jurisdiction of the court, may have it applied towards the satisfaction of her judgment, when recovered."

Personal service is not ground for abating an attachment obtained on the ground that the debtor is a non-resident. Hall *v.* Packard, 51 W. Va. 264, 41 S. E. 142.

Personal service of a second writ does not deprive the court of jurisdiction previously acquired by the attachment in another county. Field *v.* Shoop, 6 Ill. App. 445.

56. Zerga *v.* Benoist, 7 Robt. (N. Y.) 199, wherein it was said: "This action is one of those mentioned in the second subdivision of section 33 of the Code. In that class this court has no jurisdiction whatever unless the defendant is a resident of the city of New York, or, if non-resident, is personally served with a summons within the city. In this case, the defendant being a non-resident, and not having been served with summons, at

2. Publication. — a. *General Requisites.* — Service by publication in the manner prescribed by law[57] is generally requisite to jurisdiciton in an attachment suit against a non-resident or absent defendant where personal service cannot be effected and there is no appearance,[58]

the time of the levy of the attachment, the court at that time had no jurisdiction either of the subject matter or the person of the defendant. It follows that the writ of attachment was at that time of no more validity than if the judge had never signed it, and the levy under it was wholly void and unauthorized."

A County Court in Illinois.—Smith *v.* Yargo, 28 Ill. App. 594.

57. **U. S.**—See Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931. **Colo.** O'Rear *v.* Lazarus, 8 Colo. 608, 9 Pac. 621. **Ky.**—Allen *v.* Brown, 4 Met. 342. **Md.**—Campbell *v.* Webb, 11 Md. 471. **Mich.**—King *v.* Harrington, 14 Mich. 532. **Miss.**—Patrick *v.* Dillard, 44 Miss. 384; Moore *v.* Williams, 44 Miss. 61. **N. C.**—Burwell *v.* Lafferty, 76 N. C. 383. **Ohio.**—Colwell *v.* Steubenville, 2 Ohio 229. **Tenn.**—Ingle *v.* McCurry, 1 Heisk. 26; Riley *v.* Nichols, 1 Heisk. 16; Rogers *v.* Rush, 4 Coldw. 272.

Generally as to service by publication see the titles "**Publication,**" and "**Service of Process.**"

Non-compliance with requirements as to manner of publication will not be overlooked because the judgment appears to be substantially correct. Petty *v.* Frick Co., 86 Va. 501, 10 S. E. 886.

Publication against partnership held sufficient though the firm name was incorrectly stated. Tabler *v.* Mitchell, 62 Miss. 437.

Substituted Publication. — Penniman *v.* Daniel, 90 N. C. 154; Branch *v.* Frank, 81 N. C. 180. See Price *v.* Cox, 83 N. C. 261.

In Bank of New Hanover *v.* Blossom, 92 N. C. 695, it was said: "Why should it not be so? The purpose of publication is to give notice of the proceeding to the absent defendant, and if the plaintiff has made one ineffectual effort to give it, we see no adequate reason why, upon cause shown, the court, in the exercise of the liberal power of amendment conferred, may not allow a second and correct publication to be made, that shall conform to the law. An alias summons, and others in succession, may be sued out as of right; why may not a substituted publication be permitted on application to the judge in furtherance of the object of the section?"

Defects cured by alias order. Best *v.* British, etc., Mtg. Co., 128 N. C. 351, 38 S. E. 923.

58. **U. S.**—Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931. **Ala.**—DeJarnette *v.* Dreyfus, 51 So. 932. **Cal.** Wait *v.* Kern River Min., etc., Co., 157 Cal. 16, 106 Pac. 98. **Ind.**—Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662. **Ia.**—Doolittle *v.* Shelton, 1 Greene 272. **Mich.**—See Goodspeed *v.* Smith, 161 Mich. 688, 126 N. W. 975. **Miss.**—Griffing *v.* Mills, 40 Miss. 611. **Mo.**—Magrew *v.* Foster, 54 Mo. 258; Freeman *v.* Rollins, 45 Mo. 315; Gates *v.* Clavadetscher, 19 Mo. 125. See Irvine *v.* Leyh, 124 Mo. 361, 27 S. W. 512. **Neb.** Barnes *v.* Boston Invest. Co., 4 Neb. (Unof.) 349, 94 N. W. 101. **N. H.** Thompson *v.* Carroll, 36 N. H. 21. **N. C.**—Penniman *v.* Daniel, 90 N. C. 154. **Ore.**—Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664. **S. C.**—Little *v.* Christie, 69 S. C. 57, 48 S. E. 89; Cook *v.* Ganey, 1 Brev. 377. **Tex.** Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812; Milburn *v.* Smith, 11 Tex. Civ. App. 678, 33 S. W. 910. **Wash.**—Cosh-Murray Co. *v.* Tuttich, 10 Wash. 449, 38 Pac. 1134. But see Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257.

In Wade *v.* Wade's Admr., 81 Vt. 275, 69 Atl. 826, it was said: "The property of non-residents cannot be charged without notice, actual or constructive. The proper delivery of copies [of writ of attachment] for non-resident defendants completes the service of the writ, but does not amount to notice of either kind. The leaving of the copy may result in actual notice, but if this is not shown other notice must be given. The statute provides that in default of prior notice the court shall continue the

though by some statutes the matter is in the court's discretion,[59] and a judgment based on such service is conclusive.[60] But the publication

cause and order notice by publication."

But in some jurisdictions where the statute provides for service by leaving a copy at the usual place of abode of a defendant who has absconded or absented himself, such service is sufficient without publication (Bell *v.* Gaylord, 6 N. M. 227, 27 Pac. 494; Spiegelberg *v.* Sullivan, 1 N. M. 575), even to support a judgment relied upon as the basis of a judgment against a garnishee (Giles *v.* Hicks, 45 Ark. 271), if made in the manner provided for by statute (Ames *v.* Winsor, 19 Pick. [Mass.] 247, where it was held that a temporary place of residence within the jurisdiction was not defendant's "usual abode").

Effect of Service of Copy of Attachment.—It is sometimes expressly provided that publication is unnecessary where there has been service upon the defendant of a copy of the attachment. Capehart's Exr. *v.* Dowery, 10 W. Va. 130.

Attachment of Joint Property.—If one of several joint defendants is served no publication is necessary as against the others. Yerkes *v.* McFadden, 141 N. Y. 136, 36 N. E. 7, *reversing* 66 Hun 630, 22 N. Y. Supp. 1119.

Change of Cause of Action.—The publication must be of the cause of action on which the judgment is to be rendered, and when publication is thus made judgment cannot be rendered on another cause of action of which no notice has been given. Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295.

Where an attachment is invalid because the action is one in which attachment is not authorized the attempted service by publication based on such void attachment is itself invalid. Mullen *v.* Norfolk, etc., Canal Co., 114 N. C. 8, 19 S. E. 106, *following* Winfree *v.* Bagley, 102 N. C. 515, 9 S. E. 198.

Publication in Trustee Process.—Under a statute providing that if any person summoned as trustee is chargeable as such and the principal defendant has had no personal notice of the suit, the trustee may appear and defend such suit for the defendant, it has been held that a suit may be commenced against a non-resident principal defendant, by the attachment of his property in the hands of his trustee, residing in the state, and afterwards notifying the defendant of the pendency of the suit, although the statute does not provide in express terms that where the property of a non-resident is attached in the hands of a trustee notice may be given by publication. King *v.* Holmes, 27 N. H. 266.

59. Thus, where a statute provided that the court "may order notice of the attachment to be inserted in some newspaper, in the state or territory wherein the defendant is supposed to reside," the court said: "And it is contended that the word 'may' should be construed as 'shall'; and that instead of being discretionary, it is mandatory on the court to order this publication. We cannot adopt this construction of the act. The statute in which this cause appears, was not hastily adopted. Every word seems to have been deliberately chosen. When a mandate was intended, the appropriate word is used. . . . We must, therefore, conclude that the word 'may' was used in this instance by design; and that in using it, the legislature intended to leave it discretionary in the court to give notice there referred to. A failure, therefore, to order and give such notice, does not render the judgment erroneous." Ridley *v.* Ridley, 24 Miss. 648, *followed* in Calhoun *v.* Ware, 34 Miss. 146. See also Cheatham *v.* Trotter, Peck (Tenn.) 198.

60. Salemonson *v.* Thompson, 13 N. D. 182, 101 N. W. 320.

Effect of stating amount claimed in the publication as required is to confine the judgment to that amount. Cotton Mills *v.* Weil, 129 N. C. 452, 40 S. E. 218, wherein the court said: "The service by publication gave the court jurisdiction over the property attached (and not over the person) to the extent of its value, not exceeding the amount claimed in the publication. The object of the publication is to inform the defendant of the amount claimed, and that his property within

alone gives the court no jurisdiction,[61] and even with the levy will not support a personal judgment against a non-resident.[62]

Personal service outside the jurisdiction is sometimes declared to be equivalent to service by publication,[63] though it will not support a personal judgment.[64]

Where a second writ of attachment is legally issued in the same suit with the first, and is a proceeding in that suit, an additional publication of

the jurisdiction is sought to be condemned to pay that amount. Being informed by the publication of the amount claimed, and it being true, the defendant might content himself with the proceedings and allow that amount collected out of his property. For it is expressly required in section 352 of the code that said publication (of the warrant of attachment and summons) 'shall state . . . the amount of the claims.' . . ."

61. **U. S.**—Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931: McGillin *v.* Claflin, 52 Fed. 657. **Ia.**—Cooper *v.* Smith, 25 Iowa 269; Wells *v.* Sequin, 14 Iowa 143; Judah *v.* Stephenson, 10 Iowa 493. **Miss.**—Bias *v.* Vance, 32 Miss. 198. **N. C.**—Graham *v.* O'Bryan, 120 N. C. 463, 27 S. E. 122; Deaver *v.* Keith, 27 N. C. 374. **N. D.**—Ireland *v.* Adair, 12 N. D. 29, 94 N. W. 766, 102 Am. St. Rep. 561. **Ohio.**—Endel *v.* Leibrock, 33 Ohio St. 254. **Pa.**—See Noble *v.* Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66. *Contra,* Cleland *v.* Tavernier, 11 Minn. 194.

Where in the absence of service of process or appearance it appears from the record that the property attached is not the property of the debtor, the judgment thereon is absolutely null and void, for an appearance or service of process on the person or property of the defendant is essential to the validity of every judgment. Skinner *v.* Moore, 19 N. C. 138, 30 Am. Dec. 155.

But the fact that the property attached was not that of the defendant, cannot be shown by evidence *dehors* the record; and the interlocutory judgment condemning the property attached as the property of the defendant, is as much conclusive as any other judgment, until it be set aside or reversed. Skinner *v.* Moore, 19 N. C. 138, 30 Am. Dec. 155.

62. **U. S.**—Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931. See Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. **Ind.**—See Redman *v.* Burgess, 20 Ind. App. 371, 50 N. E. 825. **Ia.** Smith *v.* Griffin, 59 Iowa 409, 13 N. W. 423; Mayfield *v.* Bennett, 48 Iowa 194; Banta *v.* Wood, 32 Iowa 469. **Kan.** Cackley *v.* Smith, 38 Kan. 450, 17 Pac. 156; Repine *v.* McPherson, 2 Kan. 340. **Ky.**—Payne *v.* Witherspoon, 14 B. Mon. 270. **Miss.**—Bias *v.* Vance, 32 Miss. 198. **Ore.**—See Bank of Colfax *v.* Richardson, 34 Ore. 518, 54 Pac. 359, 75 Am. St. Rep. 664. **Tex.** Milburn *v.* Smith, 11 Tex. Civ. App. 678, 33 S. W. 910. **W. Va.**—Hall *v.* Lowther, 22 W. Va. 570. **Wis.**—Cox *v.* North Wisconsin Lumb. Co., 82 Wis. 141, 51 N. W. 1130.

Compare Meyer *v.* Keith, 99 Ala. 519, 13 So. 500, wherein it was held that a personal judgment by default may be rendered against a non-resident on statutory notice.

63. **Ia.**—Clark *v.* Tull, 113 Iowa 143, 84 N. W. 1030; Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573. **S. C.**—George Norris Co. *v.* Levin Sons, 81 S. C. 36, 61 S. E. 1103. **Tex.** Thomson *v.* Shackelford, 6 Tex. Civ. App. 121, 24 S. W. 980. **Va.**—Smith *v.* Chilton, 77 Va. 535; Anderson *v.* Johnson, 32 Gratt. 558.

Usual place of abode outside the jurisdiction. Kendrick *v.* Kimball, 33 N. H. 482.

64. Clark *v.* Tull, 113 Iowa 143, 84 N. W. 1030, *following* Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573.

In Action for Specific Performance. Spurr *v.* Scoville, 3 Cush. (Mass.) 578, where the court said: "The attachment of the defendant's land can avail nothing in this case. If this were a suit at law, the attachment might be followed up by a judgment and execution, and the land taken in satisfaction. But, in such case, the property only would be made subject to the jurisdiction, so as to render the judgment binding as a proceeding

notice is not required to give the court jurisdiction as to the whole case.[65]

Number and Times of Publication. — If statutes do not prescribe the duration of the publication and the time within which it must be begun,[66] a reasonable time is allowed,[67] and publication at any time dur-

in rem, but it would not be allowed to operate *in personam* in the courts of other states."

65. Brose *v.* Doe, 2 Ind. 666.

Vacation of First Attachment.—Parke *v.* Gay, 28 Misc. 329, 59 N. Y. Supp. 890.

66. **Colo.**—Crary *v.* Barber, 1 Colo. 172. **Ind.**—Marnine *v.* Murphy, 8 Ind. 272. **Ia.**—Bretney *v.* Jones, 1 Greene 366. **Kan.**—Jones *v.* Warnick, 49 Kan. 63, 30 Pac. 115. **Mich.**—Kurtz *v.* Gartner, 141 Mich. 262, 104 N. W. 596. **Tenn.**—Riley *v.* Nichols, 1 Heisk. 16.

In Harlow *v.* Becktle, 1 Blackf. (Ind.) 237, the court said: "The 3d section of the act relative to foreign attachments, enacts—that no judgment shall be entered on the attachment until the expiration of 12 months; during which time the party suing out the attachment, shall cause notice thereof to be advertised three weeks successively in a public newspaper. It is contended that this notice should be given at an early period after issuing the attachment, and that judgment should not be given until 12 months after notice. We consider that 12 months is full time for the pendency of the attachment, admitting it to commence from the date of the writ; and as the legislature has not restricted the plaintiff, in giving notice, to any particular part of the 12 months, we think it beyond our province to do it. It would be reasonable to publish the notice as early as possible; but we are not authorized to fix on the precise time for the publication. In this case, notice was given within the 12 months, and several months before the trial. We, therefore, deem the objection untenable."

Second Attachment on Abandonment of First.—When a second attachment is granted on the abandonment of the first the time within which publication must be begun runs from the date of the second. Mojarietta *v.* Saenz, 58 How. Pr. (N. Y.) 505.

Return.—In Watson *v.* Toms, 42 Mich. 561, 4 N. W. 304, the court said: "A sheriff's return never becomes a part of the record until actually on file with the clerk, and he may therefore amend it without asking the leave of the court at any time before the filing. . . . But for many purposes the return may be regarded as made when it is indorsed upon the writ and signed; and where action is to be taken by the attorney upon the basis of the return, it may be proper and is probably customary, to leave the writ and return with him, instead of handing them to the clerk. The case of an attachment not personally served is one in which this course is entirely proper. The notice to be published is to be given, not by the sheriff or clerk, but by the attorney, and the writ may well be left with him for the purpose. The statute probably intends that the thirty days shall be computed from the return day, and not that either the sheriff or the attorney shall be at liberty to extend the time indefinitely by delaying to put the writ on file."

In the Discretion of the Court.—Kendrick *v.* Kimball, 33 N. H. 482.

67. In McClung *v.* Sieg, 54 W. Va. 467, 46 S. E. 210, 66 L. R. A. 884, it was held that where the affidavit for attachment and other papers in the cause show that the defendants are non-residents, and no order of publication has been taken on the return day of the process, the plaintiff is entitled to a reasonable time in which to perfect his suit by order of publication, and the suit does not abate immediately upon the return of the process and failure to take the order of publication.

Where the statute provides for publication "upon the return of the attachment" jurisdiction is not lost by a delay of publication for two years. Robinson *v.* Marr, 145 Ill. App. 178, *distinguishing* Parker *v.* Scheller, 60 Ill. App. 621, and Britton *v.* Gregg, 96 Ill. App. 29, wherein delays of three years and two years, respectively, were held unreasonable.

ing the pendency of the action has been held good[68] under statute.

Attachment and Levy. — In the absence of any provision to the contrary the publication may precede the levy of attachment, [69] or fol-

68. Thompson *v.* Carroll, 36 N. H. 21.

In Mithoff *v.* Dewees, 9 La. Ann. 550, it was said: "The answer of the attorney appointed to represent the absent defendant, was filed on the 12th of December, and the process issued to the Sheriff of Orleans, on the 15th of January following. We have no doubt, that after the attorney filed the answer, it was discovered that the attachment and citation had not been posted, and that the cause was delayed to have that essential formality fulfilled, but as property of the defendant had been attached and was then under seizure, we cannot perceive why the posting might not be subsequently made. The question is, whether at the time the judgment was rendered, the defendant had been cited by the service of the attachment in the manner required by law."

69. **Ind.**—Sawyer *v.* Sawyer, 16 Ind. 213. **Mo.**—Harris *v.* Grodner, 42 Mo. 159. **S. D.**—Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 66 N. W. 453. **Tex.**—Milburn *v.* Smith, 11 Tex. Civ. App. 678, 33 S. W. 910.

The reason of the rule has been thus stated: "The object of the publication is to give a party who has not been served with process, or who does not appear, his day in court; to *complete* the jurisdiction which, notwithstanding the levy of the writ of attachment, would be *incomplete*. As this is the object of publication, it is immaterial which has priority of date, the levy of the writ of attachment or the publication announcing the fact of the levy. . . . When the proper petition, affidavit and bond for an attachment are filed with the court or officer, jurisdiction at once arises to issue a summons or publication to the defendant and a writ for the attachment of his property." Tufts *v.* Volkening, 122 Mo. 631, 27 S. W. 522, *affirming* 51 Mo. App. 7.

Publication Before Warrant. — In Parke *v.* Gay, 28 Misc. 329, 59 N. Y. Supp. 890, the court said: "There seems to be no sound reason for insisting that the warrant of attachment must precede or accompany the order of publication. The object of the publication is to bring the defendant within the jurisdiction of the court, and the expectation is that, upon becoming apprised of the proceeding, he will enter his appearance in the action, if he wishes to contest it or otherwise to protect his interests, as he must certainly infer from the existence of the action that its purpose is to establish a debt against him and ultimately to secure payment of the same out of his property. If the view is to prevail that there can be no valid commencement of the service by publication until after the warrant of attachment is obtained, it must be logically based on the theory that there is no *res* to proceed against until there has been a levy upon property of the defendant, and that when service by publication has been commenced the action can only proceed against property then levied upon. But such an assumption as this is quite opposed to section 644 of the code, which authorizes the sheriff to levy 'from time to time, and as often as is necessary, until the amount for which it [the warrant] was issued, has been secured, or final judgment has been rendered in the action.' The *res* proceeded against is plainly that which the sheriff may have finally gathered in, either before or after the publication of the summons is complete, and even after the time for the defendant to appear has expired. Whether or no a levy has been made becomes of importance only when an application for judgment is made, for without it judgment cannot be rendered. Code Civ. Proc. §1217. It is therefore clear that the right to commence service by publication is not dependent upon a levy, and, with that established, it is difficult to escape the conclusion, on principle, that such service may be commenced before a warrant has been issued."

Publication After Beginning of Term.—In Lawver *v.* Langhans, 85 Ill. 138, the court said: "Section 22 of the act provides, that where the defendant is a non-resident of the state, the clerk of the court shall give no-

low it.[70] Some statutes require a preceding levy,[71] while others prescribe that the publication shall be made first.[72]

Summons and Return. — In some jurisdictions a summons must be issued and a return thereon must be made as a basis for publication, although it is certain that the summons cannot be served,[73] but under other statutes this is not required.[74]

The Affidavit. — A preliminary affidavit setting forth the facts on which the right to an order for publication depends is generally re-

tice by publication, at least once in each week for three weeks successively, in a newspaper most convenient to the place where the court is held. Section 23 provides, no default or proceeding shall be taken against any defendant not served with summons, unless he shall appear, until the expiration of ten days after the last publication. The statute does not require that the three publications shall be made before the court convenes, or that the first publication shall be made a certain number of days before the term commenced, as did the old statute. We perceive nothing to prevent a part of the publications being made before the term begins and a part afterwards; and at any time, upon the expiration of ten days after the last publication, if the court is in session, the plaintiff would be entitled to a default."

70. Runner *v.* Scott, 150 Ind. 441, 50 N. E. 479.

71. **U. S.**—Baumgardner *v.* Bono Fertilizer Co., 58 Fed. 1. **Miss.**—Griffing *v.* Mills, 40 Miss. 611. **S. C.**—Little *v.* Christie, 69 S. C. 57, 48 S. E. 89. **Tenn.**—Bains *v.* Perry, 1 Lea 37.

Authorization of Levy.—Wilson *v.* Lange, 40 Misc. 676, 83 N. Y. Supp. 180. See Flint *v.* Coffin, 176 Fed. 872, 100 C. C. A. 342.

72. Redwine *v.* Underwood, 101 Ky. 190, 40 S. W. 462; Kellar *v.* Stanley, 86 Ky. 240, 5 S. W. 477; Hall *v.* Grogan, 78 Ky. 11.

73. McClure *v.* Fellows, 131 N. C. 509, 42 S. E. 951.

Flint *v.* Coffin, 176 Fed. 872, 100 C. C. A. 342, wherein the court said: "There can be no legal service by publication, in attachment cases, unless in the order directing the publication of the summons there is a direction to publish the attachment with the summons, and unless in fact both the summons and the attachment are published."

74. Bannister *v.* Carroll, 43 Kan. 64, 22 Pac. 1012; Wescott *v.* Archer, 12 Neb. 345, 11 N. W. 491, 577.

"The law does not require useless or unnecessary proceedings. The only effect of a summons in cases of this character would be to put upon the record, by the return of the sheriff, the fact that the defendant was not found in the county in which the writ issued, and this would not meet the requirements of §73 of the code. That section requires that there must be a showing that the defendant cannot be served with a summons within the state. The sheriff can only serve in his own county. It seems therefore that the issue of a summons to a sheriff of a county, in cases brought against non-residents of the state, is not only not necessary, but practically useless. This leads to the conclusion that the strict construction of §57 of the code, urged by counsel for the defendant in error, is not the true one; that the requirement of that section is as well met by a service of summons by publication in a newspaper, as by one directed to the sheriff of the county in which the petition is filed. The language of the section is: 'A civil action may be commenced in a court of record, by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon;' and when at the time of the filing of a petition, an affidavit for the constructive service by publication of a summons is filed, and publication follows in due time, this is 'causing a summons to issue thereon' just as effectual for its purpose as the other mode of service." Bannister *v.* Carroll, 43 Kan. 64, 22 Pac. 1012.

quired,[75] but the attachment affidavit is sufficient if it contains all the necessary averments,[76] though the statute requires two affidavits.[77]

Property Within Jurisdiction. — The affidavit for publication against a non-resident must show that he has property within the state subject to attachment or that has been attached.[78] The mere possibility that some time in the future the non-resident may have property in the state affords no ground for service by publication.[79]

75. Chicago, etc., R. Co., *v.* Campbell, 5 Kan. App. 423, 49 Pac. 321, *affirmed,* 58 Kan. 818, 51 Pac. 1100.

76. Avery *v.* Good, 114 Mo. 290, 21 S. W. 815; Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. 694; Miller *v.* Eastman, 27 Neb. 408, 43 N. W. 179.

In Bray *v.* Marshall, 75 Mo. 327, the court said: "It is only where the affidavit for the attachment is based upon grounds other than those which will entitle the plaintiff to an order for publication, that an additional affidavit, setting forth grounds for an order of publication becomes essential."

Sufficiency of Allegations.—In Hemmi *v.* Grover, 18 N. D. 578, 120 N. W. 561, the court said: "It is true, as contended by respondent's counsel, that by section 6840, Rev. Codes 1905, the affidavit required as a basis for obtaining constructive service of the summons must state, or the complaint show, '(1) that the defendant has property within this state or debts owing to him from residents thereof.' Even if this were a proper ground for dissolving the attachment, we think the complaint fairly shows such fact. The complaint alleges, in substance, that on May 2, 1907, the defendant, through her duly authorized agent, entered into a contract to sell and transfer, by deed of conveyance, certain real property therein described and located in Stutsman county, N. D. And we think it may fairly be presumed from such fact, when not denied, that defendant was the owner of such real property, not only on May 2d, but on May 17th, the date the action was begun and the attachment sued out."

77. Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110, wherein the court said: "The defendant in error, in answer to this objection, claims that the affidavit for attachment, which was filed on February 18th, contains all the necessary ingredients of an affidavit for publication, and that this should be taken as supplying the place of an affidavit for publication. The statute provides in cases like this, for an affidavit for attachment and an affidavit for publication, and good practice would dictate that these affidavits be made separately, and they ought to be so made; but the objection which is here asserted to the attachment proceeding is not one that goes to the merits of the litigation between these parties. In other words, the objection is a technical one, and where the rights of parties are involved we do not believe that a litigant should be defeated in his right and a substantial portion of his cause dismissed, in order that we may insist upon technical correctness, or even good practice. If what has been done may reasonably be held to be all that was required to be done to comply with the statute, even though it has not been done in the form that skilled practice would dictate, we believe it should be held sufficient, and the rights of parties protected."

78. Pennsylvania Trust Co. *v.* Norris, 8 Kan. App. 699, 54 Pac. 283.

79. Guffey *v.* Grand Trunk R. Co., 67 Misc. 553, 122 N. Y. Supp. 947.

In Repine *v.* McPherson, 2 Kan. 340, it was said: "The plaintiff in an attachment obtained upon the non-residency of the defendant can make service by publication only when he seeks to subject the property of the defendant to the payment of his claim; and the fact that he is seeking to subject property of the defendant within the jurisdiction of the court issuing the process, must affirmatively appear."

Without Due Process of Law.—In Guffey *v.* Grand Trunk R. Co., 67 Misc. 553, 122 N. Y. Supp. 947, the court said: "Plaintiff's counsel, however, contends that some time in the future property of the defendant may come within this state, and then a warrant may issue and the property be seized

Mailing. — A failure to comply with the requirements of the statute as to mailing renders the publication of no avail.[80]

to satisfy the plaintiff's claim. . . . If such is the law, then a non-resident may be sued at any time for any cause of action in this state, a service by publication made, and the claim satisfied out of any property of his which may at any time thereafter be found or brought into the state. This is the penalty he would be forced to pay for not recognizing the right of a state to compel him to litigate a claim in its courts, although he owed the state no duty or allegiance. We think the statement of the case carries with it its own condemnation. . . . In our opinion, to sustain an order for service of process by publication, and any judgment which might be predicated thereon, would amount to the taking of property without 'due process of law.' The questions involved go deeper than the mere construction of the provisions of certain sections of the Code of Civil Procedure. It involves the right of the legislature to pass laws authorizing a judgment obtained under the circumstances presented in this case. The question is whether such a proceeding does not violate the provisions of the United States Constitution containing a guaranty against depriving a person of life, liberty, or property without due process of law. It is well-recognized law that in actions where personal service of process within the state is not had, and the defendant does not voluntarily appear, no judgment in personam can be obtained. . . . Where suit is brought against a non-resident by substituted service, it must partake of the nature of an action *in rem*. . . . If, however, there is no property—no '*res*'—within the jurisdiction of the court against which to proceed, it would logically seem that there existed no foundation for such a proceeding, and judicial steps are unauthorized for want of jurisdiction of the court to act. The United States Supreme Court is the tribunal where such questions must be finally settled, and we understand that court has held against the plaintiff's contention in most carefully considered cases. One of the earliest decisions is that of Cooper *v.* Reynolds, 10 Wall. 318 (19 L. ed. 931), . . . This case is followed by the later case of Pennoyer *v.* Neff, 95 U. S. 714, 723, 724, 726, 727, 728, 24 L. ed. 565, where the doctrine of Cooper *v.* Reynolds is affirmed. . . . It would seem, in view of the full and specific annunciations from the highest court in the land, that there could be little doubt that where a non-resident defendant has no property whatever within a state, and does not subject himself to its jurisdiction, that the power to judicially proceed against him is wholly absent. It is true that under the provisions of our Code of Civil Procedure no final judgment can be entered until property has, in fact, been attached, and then the judgment can only be satisfied out of the attached property. Nevertheless, if the court can grant an order for a substituted service of process by publication when there is no property in the state to attach, the non-resident defendant may be foreclosed and his right to appear and answer lost while that situation continues, and before any attachable property comes into the state. In our judgment this violates the meaning and spirit of the law, as pronounced by the United States Supreme Court.'

80. Dennison *v.* Taylor, 142 Ill. 45, 31 N. E. 148; Thormeyer *v.* Sisson, 83 Ill. 188; Parker *v.* Scheller, 60 Ill. App. 621; Baldwin *v.* Ferguson, 35 Ill. App. 393.

Hodson *v.* Tibbetts, 16 Iowa 97, wherein the court said: "It is not as if the record was incorrect, and plaintiff had, upon a proper case made, obtained an order impressing it with its new character. Thus, if copies of the notice and petition were, in fact sent to the defendants, or if the affidavit in excuse, contemplated by the statute, was actually filed, and plaintiff had obtained leave to substitute them, if lost, or to file the proof *nunc pro tunc*, the question would have been very different from that now presented. But the proceedings of September, 1861, show that no such affidavit was filed until August, 1859; and to establish affirmatively that the required proof was not made at or before the rendition of the judgment. . . . To sustain the position of respondents, would make jurisdiction depend, not upon what was done at or before the

Posting. — The failure to comply with the statutory requirement as to posting in some public place nullifies the publication.[81]

b. *Form of Notice.* — The published notices under some statutes must contain a summary statement of the nature of the action,[82] the ground for attachment,[83] the amount of the demand,[84] and the nature of the judgment sought.[85] But it need not be stated that an order will be entered for the sale of the property.[86]

time of its exercise, but upon the action of parties and officers long after the judgment was rendered, the proceedings closed, and the rights of third persons had become vested. This should never be allowed."

Mailing Process to Sheriff.—"We think that mailing process to the sheriff of the county and state where the non-resident resides, to be served upon him, was optional and not exclusive of service by attachment, and publication in cases in which these last can be had." Mullen *v.* Norfolk, etc., Canal Co., 114 N. C. 8, 19 S. E. 106.

81. **La.**—Mithoff *v.* Dewees, 9 La. Ann. 550; Kraeutler *v.* U. S. Bank, 12 Rob. 461. **Md.**—Brent *v.* Taylor, 6 Md. 58. **Va.**—Petty *v.* Frick Co., 86 Va. 501, 10 S. E. 886.

Amendment of Sheriff's Return.—In Kraeutler *v.* U. S. Bank, 12 Rob. (La.) 461, it was said: "The judgment appealed from should, perhaps, be cancelled at once, and the suit dismissed; but as it is possible that, no exception having been taken below to the want of citation, the plaintiffs have not thought necessary to show that a regular citation had been posted up, together and at the same time with the writ of attachment according to law, and to call upon the sheriff to produce it and amend his return, we think they should not be precluded from doing so; and that justice requires this case should be remanded to the court, *a qua* for that purpose only."

82. **Mo.**—Haywood *v.* Russell, 44 Mo. 252; Drake *v.* Hale, 38 Mo. 346; Davis *v.* Forse, 11 Mo. 130; Sloan *v.* Forse, 11 Mo. 126; **Neb.**—Warren *v.* Dick, 17 Neb. 241, 22 N. W. 462. **N. M.**—Smith *v.* Montoya, 3 N. M. 13, 1 Pac. 175. **N. C.**—Best *v.* British, etc., Mtg. Co., 128 N. C. 351, 38 S. E. 923. **Tenn.**—Bains *v.* Perry, 1 Lea 37; Riley *v.* Nichols, 1 Heisk. 16.

Sufficiency of Allegation.—In Warren *v.* Dick, 17 Neb. 241, 22 N. W. 462, it was said: "In the case at bar the defendants were informed by the published notice that the plaintiff 'has commenced a suit in attachment,' and that unless they appeared and answered the petition a judgment would be entered against them by default, and their property sold to satisfy the same. This was a sufficient compliance with the requirements of the statute, which requires that the notice 'must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer.'"

Attachment in Aid of Scire Facias.—Firebaugh *v.* Hall, 63 Ill. 81.

Amendment of Order.—New Hanover Bank *v.* Blossom, 92 N. C. 695.

Amendment by Alias Order.—Best *v.* British, etc., Mtg. Co., 128 N. C. 351, 38 S. E. 923.

No such statement is required unless by statute. Redman *v.* Burgess, 20 Ind. App. 371, 50 N. E. 825; Milburn *v.* Smith, 11 Tex. Civ. App. 678, 33 S. W. 910.

"It is claimed that the notice ought to have shown that the proceedings were in attachment. The notice states the pendency of the action. This, we think, is sufficient." Dronillard *v.* Whistler, 29 Ind. 552.

83. Ogg *v.* Leinart, 1 Heisk. (Tenn.) 40; Riley *v.* Nichols, 1 Heisk. (Tenn.) 16.

84. **U. S.**—Flint *v.* Coffin, 176 Fed. 872, 100 C. C. A. 342. **Ill.**—Morris *v.* School Trustees, 15 Ill. 266. **Mo.**—Haywood *v.* Russell, 44 Mo. 252; Davis *v.* Forse, 11 Mo. 130; Sloan *v.* Forse, 11 Mo. 126.

85. **Kan.**—Rapp *v.* Kyle, 26 Kan. 89. **Mo.**—Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399. **Okla.**—Ballew *v.* Young, 24 Okla. 132, 103 Pac. 623.

86. Smith *v.* Montoya, 3 N. M. 13, 1 Pac. 175.

Description of Property. — Generally the property attached need not be described.[87] Statutes which require a statement of the nature of the judgment sought,[88] or of the object and general nature of the petition,[89] have been held to call for a description of land attached,[90] and a description of the land attached is explicitly required in some jurisdictions.[91]

Names of Defendants. — The publication must state the name of the owner of the land attached as defendant.[92]

In Rapp *v.* Kyle, 26 Kan. 89, the court said: "Where the notice fully informs of the attachment proceedings, correctly describes the property attached, and gives notice of the nature of the judgment which the plaintiff claims, and to which he would be entitled under his petition, the notice is not fatally defective if it does not also state that an order will be entered for the sale of the attached property."

87. **Ill.**—Lawver *v.* Langhans, 85 Ill. 138; Morris *v.* School Trustees, 15 Ill. 266. **Ind.**—Brose *v.* Doe, 2 Ind. 666. **Neb.**—Warren *v.* Dick, 17 Neb. 241, 22 N. W. 462, holding Wescott *v.* Archer, 12 Neb. 345, 11 N. W. 491, 577, overruled by Grebe *v.* Jones, 15 Neb. 312, 18 N. W. 81. **Ohio.**—Core *v.* Oil etc., Co., 40 Ohio St. 636.

Contra, Clark v. Southgate, 3 Ohio Dec. (Reprint) 7, 2 Wkly. L. Gaz. 44.

Personal Property.—Race *v.* Maloney, 21 Kan. 31, followed in Beckwith *v.* Douglas, 25 Kan. 229.

88. Cackley *v.* Smith, 38 Kan. 450, 17 Pac. 156, *following* Cohen *v.* Trowbridge, 6 Kan. 385.

89. Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399, *overruling* Goldsworthy *v.* Thompson, 87 Mo. 233 (a suit in partition, but governed by the same statute).

90. Cackley *v.* Smith, 38 Kan. 450, 17 Pac. 156, *following* Cohen *v.* Trowbridge, 6 Kan. 385; Randall *v.* Snyder, 214 Mo. 23, 112 S. W. 529, 127 Am. St. Rep. 653; Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399.

But the lack of such description is an irregularity only. Randall *v.* Snyder, 214 Mo. 23, 112 S. W. 529, 127 Am. St. Rep. 653.

Sufficiency of Description.—The east half of the northwest quarter, section 8, township 30, range fourteen, is fatally defective. Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399.

91. "The failure of plaintiff . . . to have the publication notice describe the real estate attached, or to in any manner state the nature of the judgment sought, are such defects as would make any judgment rendered thereon at least void, and a motion to set aside such service or to vacate a judgment based thereon would have to be sustained." Ballew *v.* Young, 24 Okla. 182, 103 Pac. 623.

92. Ogg *v.* Leinart, 1 Heisk. (Tenn.) 40.

Necessity of Naming All Defendants. In Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911, it was said: "The next ground for reversal, numbered 'second' in the plaintiff's brief, is, that the publication notice in the case of Maxwell against Mrs. Denton is not sufficient, and this for the reason that the notice does not give the names of all the defendants in the action. The notice, in its title, gives the names of the parties as follows: 'Newton Maxwell, plaintiff, *v.* Charles Ruth, Mary E. Denton, et al., defendants.' There were really no defendants in the action except Charles Rath and Mrs. Denton, for no service of summons upon the other persons whose names are found in the petition was ever made, and the notice gave the names of Rath and Mrs. Denton, except that the name of Rath was given as 'Charles Ruth.' Mrs. Denton was the only person upon whom it was desired to obtain service of summons by publication, and after giving the title of the case in the publication notice, as above stated, the notice then proceeded as follows: 'Mary E. Denton, of Middleton, New York, is hereby notified that she has been sued,' etc. The notice was in all respects, except as above mentioned, formal and sufficient; and we think it was sufficient in every respect, and valid. It was sufficient to advise Mrs. Denton of the nature and

B. Appearance. — **1. Right To Appear.** — The right to appear, has been made, by some statutes, conditional on the filing of a replevin bond or special bail.[93]

A statute providing that where any defendant, not served with a copy of the attachment, appears at any time before judgment, he may be admitted by the court to defend the suit upon such terms as the court may deem reasonable, does not make it necessary to apply to the court for leave to defend, nor authorize the court to impose terms, in any stage of the case when such leave would not have been re-

character of the action brought against her, and of her interests which were sought to be affected by the action, and was to her a substantial compliance with all the requirements of the law. This was certainly sufficient.''

93. **N. C.**—Alexander *v.* Taylor, 62 N. C. 36; Britt *v.* Patterson, 31 N. C. 197. **S. C.**—Vann *v.* Frederick, 2 Bailey 303, as to the wife of an absent defendant. **Can.**—Reg. *v.* Stewart, 8 Ont. Pr. 297; Offay *v.* Offay, 26 U. C. Q. B. 363.

Where a defendant was entitled to replevy by giving a ''bail bond'' and defendant 'replevied by giving the sheriff a bond payable to the plaintiff, it was held that the defendant could not plead as he had not given a bond as required by statute. Barry *v.* Sinclair, 61 N. C. 7.

''If, however, the plaintiff chooses to permit the defendant to appear and plead without requiring special bail, he may do so; and after having replied to the defendant's plea, or joined issue upon it he could never be allowed to make the objection.'' Callender *v.* Duncan, 2 Bailey L. (S. C.) 454.

Any person may put in bail for an absent defendant under some statutes. But see Vann *v.* Frederick, 2 Bailey (S. C.) 303; Smith *v.* Gettinger, 3 Ga. 140. See also Smith *v.* Pearce, 6 Munf. (Va.) 585.

Plea in Abatement.—Special bail not a prerequisite. Abbott *v.* Warriner, 7 Blackf. (Ind.) 573.

Changed By Abolition of Imprisonment for Debt.—In Rowley *v.* Cummings, 1 Smed. & M. (Miss.) 340, the court said: ''It was formerly the settled rule in this state, that a defendant in attachment could not plead to the action until he had replevied or given special bail . . . but this rule is changed by the act abolishing imprisonment for debt. . . . We held that the bond which a defendant in attachment was required to give the sheriff to release the property, was, in effect, nothing more than a special bail bond, and that as bail could not be required, so much of the law in relation to attachments as required such a bond was virtually repealed. This being the case, the defendants in attachment had a right to appear and plead without giving the bond.''

Replevin or bail bond not a prerequisite to right to appear. **U. S.**—Gibson *v.* Scull, Hempst. 36, 10 Fed. Cas. No. 5,400a. **Ga.**—Reid *v.* Moore, 12 Ga. 368. See Thompson *v.* Wright, 22 Ga. 607. **Md.**—Lambden *v.* Bowie, 2 Md. 334. **Mo.**—Posey *v.* Buckner, 3 Mo. 604. **N. Y.**—Heckscher *v.* Trotter, 41 N. J. Eq. 502, 5 Atl. 652. **N. C.**—Stephenson *v.* Todd, 63 N. C. 368; Holmes *v.* Sackett, 63 N. C. 58. **Tex.** Sydnor *v.* Chambers, Dall. 601.

In Boyd *v.* Buckingham & Co., 10 Humph. (Tenn.) 434, the right to appear without replevying property was based upon the ground that an attachment might issue although personal service might be had. The court said: ''By the law of 1794, no attachment could issue, if personal service could be had. One object of the attachment, was to enforce the appearance of the party. . . . By the act of 1843, the attachment may issue, although personal service might be had. The sole object of the attachment now is, to secure the property, so as to have it forthcoming to satisfy the judgment. And the law which authorized the replevy of the property by giving bail, is repealed. Now if the debtor shall wish to replevy the property, he may do so, by giving a bond in double the amount of the debt, or for the forthcoming of the property attached;

quired and terms imposed had the suit been commenced by ordinary summons personally served.[94]

2. Time of Appearance. — The time within which the defendant may appear is dependent upon the provisions of the various statutes.[95]

Effect of Release of Property on Bond. — Under statutes providing for a release of the attached property on the giving of a bond or special bail it has been held that a defendant taking the advantage of such a provision waives the time allowed by law for an appearance in a case wherein service is made by publication.[96]

Appearance after judgment is sometimes allowed on a showing of good

and he may discharge his bond by paying the judgment, or by paying the value of the property. It is manifest, from this statement, that no beneficial object can be attained, by requiring a defendant in attachment, under the act of 1843, to replevy his property before he shall plead to the action. All the reason that existed under the act of 1794, has ceased. If the defendant replevy, he may only give bond for the forthcoming of the property attached. How does the execution of such a bond affect the rights of the plaintiff? Not at all; for it only places the property in the hands of the defendant during the litigation, to be handed back to the sheriff, when the judgment shall be rendered. If the sheriff is permitted to retain it in his hands, the plaintiff's interest will be equally secure."

94. Thompson *v.* Thomas, 11 Mich. 274, wherein the court said: "To hold otherwise would be to give a greater effect to the publication of notice than to the personal service of the process, and to take from the defendant, by a mere constructive notice of the suit, rights which he would have upon actual notice."

95. O'Rear *v.* Lazarus, 8 Colo. 608, 9 Pac. 621.

"The object of a judicial attachment being the same as personal service to bring the defendant into court, in order that he may answer and defend the action, being in fact a substitute for personal service, the same time should be allowed the defendant to make his defense as where there had been personal service." Gray *v.* Smith, 17 Tex. 389.

Appearance Before Time for Service Expires.—Blossom *v.* Estes, 22 Hun (N. Y.) 472, *affirmed*, 84 N. Y. 614.

In an action begun by publication both parties stand, on filing of proof, in same position as they would have occupied on the return of summons personally served. Thompson *v.* Thomas, 11 Mich. 274, *followed* Wells *v.* Walsh, 25 Mich. 344.

Meaning of "Judgment."—"The act allows the defendant 'instead of giving bail or security, at his election, at any time before judgment obtained in the attachment, to cause an appearance to be entered for him, and to take defense to the action,' . . . the term judgment obtained refers to a final judgment. The judgment at the third term (section 53,) is 'for default of appearance,' and is not to be considered as final and complete until the execution of the writ of inquiry." Manuel *v.* Mississippi, etc., R. Co., 2 Miles (Pa.) 398.

In attachment for debt not due appearance may be at any time before the maturity of the demand. Hamilton *v.* McClelland, 33 Mo. 315.

Appearance Before Final Judgment. *In Georgia* a statute expressly provides that the defendant may appear and make his defense at any time before final judgment is rendered against him. Harrison *v.* Wilson Lumb. Co., 119 Ga. 6, 45 S. E. 730; Southern Pac. Co. *v.* Stewart, 88 Ga. 13, 13 S. E. 824.

And so a defendant may appear notwithstanding he has replevied the property (Hodges *v.* Smith, 118 Ga. 789, 45 S. E. 617), or after a judgment *in personam* has been rendered against him where only a judgment *in rem* is authorized (Kimball *v.* Nicol, 58 Ga. 175).

96. Shields *v.* Barden, 6 Ark. 459; Gaylin *v.* Villeroi, 2 Houst. (Del.) 203.

cause,[97] and the right so to appear is sometimes expressly conferred by statute.[98]

3. Effect of Appearance. — As in other actions, a lack of service of process or an irregularity therein, is waived by a general[99] appear-

97. Loree *v.* Reeves, 2 Mich. 133, neglect of attorney employed by a non-resident.

In Hurlburt *v.* Reed, 5 Mich. 30, the court said: "We have no doubt that, in a suit commenced by attachment against a non-resident the court may, in the exercise of a sound discretion, set aside the judgment, and permit the defendant to plead to the declaration, where he had no notice of the proceeding against him in season to make his defense, and has been guilty of no laches," although a term has elapsed since judgment.

98. Payne *v.* Witherspoon, 14 B. Mon. (Ky.) 270 where the court said: "The right conferred upon a defendant, who has been only constructively summoned, and who did not appear, to make his appearance, after a judgment had been rendered against him, within the time specified and have a retrial of the action, does not divest him of his right to reverse the judgment in this court, for errors apparent in the record. If the plaintiff in the court below has not proceeded according to law, and has improperly recovered a judgment against the defendant, the latter can reverse it in this court. If, however, the judgment is apparently regular and proper, but was unjustly obtained, then, the defendant's appropriate remedy is by moving for a retrial in the circuit court. He can avail himself of either of these remedies, that the circumstances of the case may indicate, as the proper one."

99. **U. S.**—Toland *v.* Sprague, 12 Pet. 300, 9 L. ed. 1093; Pollard *v.* Dwight, 4 Cranch 421, 2 L. ed. 666. See Fife *v.* Bohlen, 22 Fed. 878. **Ala.** Rosenberg *v.* H. B. Claflin Co., 95 Ala. 249, 10 So. 521; Burroughs *v.* Wright, 3 Ala. 43. **Fla.**—Smith *v.* Bulkley, 15 Fla. 64. **Ga.**—Joseph *v.* Stein, 52 Ga. 332. **Ill.**—Palmer *v.* Logan, 4 Ill. 56; Robinson *v.* Marr, 145 Ill. App. 178. **Ind.**—Woods *v.* Brown, 93 Ind. 164, 47 Am. Rep. 369; Willets *v.* Ridgway, 9 Ind. 367. **Ia.**—Winchester *v.* Cox, 3 Greene 575, *following* Graves *v.* Cole, 2 Greene 467. **Mich.**—See Crane *v.* Hardy, 1 Mich. 56. **Miss.**—Barrow *v.* Burbridge, 41 Miss. 622. **Mo.**—Jacobs *v.* Western Fertilizer, etc., Wks., 9 Mo. App. 575. **Neb.**—Warren *v.* Dick, 17 Neb. 241, 22 N. W. 462. **N. H.**—Young *v.* Ross, 31 N. H. 201; Kittredge *v.* Emerson, 15 N. H. 227. **N. Y.**—Pomeroy *v.* Ricketts, 27 Hun 242 (appeal dismissed, 91 N. Y. 668); Catlin *v.* Moss, 2 Civ. Proc. 201. **Okla.**—Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110. **Pa.**—Malone *v.* Lindsley, 1 Phila. 288, 9 Leg. Int. 11. See Memphis, etc. R. Co. *v.* Wilcox, 48 Pa. 161. **Tenn.**—Blue Grass Canning Co. *v.* Wardman, 103 Tenn. 179, 52 S. W. 137; Terril *v.* Rogers, 3 Hayw. 203. **Tex.**—Green *v.* Hill, 4 Tex. 465. **W. Va.**—McClung *v.* Sieg, 54 W. Va. 467, 46 S. E. 210, 66 L. R. A. 884; Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414. **Can.**—Dominion Coal Co. *v.* Kingswell S. S. Co., 30 Nova Scotia 397.

See generally the title "Appearances."

"A general appearance to an action, cures all antecedent irregularity in the process, and places the defendant upon the same ground as if he had been personally served with process." Wheeler *v.* Cobb, 75 N. C. 21.

"The object for which a publication is directed to be made, when an attachment is sued out against non-resident defendants, is to give notice of the pendency of the suit; and it stands in the place of the service of process in ordinary cases. When the defendants appear voluntarily and contest the claim of the plaintiff, publication is then unnecessary, as its object is already attained." Corley *v.* Shropshire, 2 Ala. 66.

Appearance after statutory time for service or publication does not confer jurisdiction. **N. Y.**—Cossitt *v.* Winchell, 39 Hun 439. **N. D.**—Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. 341. **S. D.**—McLaughlin *v.* Wheeler, 2 S. D. 379, 50 N. W. 834, *reversing* on this point 1 S. D. 497, 47 N. W. 816.

ance in proper time, but is not waived by a special appearance.[1]

A general appearance is equivalent to a personal service of process and authorizes a personal judgment where otherwise only a judgment *in rem* might have been taken,[2] and is a prerequisite to a personal judg-

Appearance After Publication Begun.—A statutory direction that "if publication has been or is thereafter commenced, the service must be made complete by the continuance thereof" does not make necessary a continuance of publication after appearance. The language of the code . . . . means simply that, when the service relied upon as the ground of jurisdiction is publication, that must be, not partial and merely commenced, but continued and entirely complete. In our judgment the provision does not forbid or prevent the equivalent personal service permitted by section 424." Tuller *v.* Beck, 108 N. Y. 355, 15 N. E. 396, *affirming* 46 Hun 519, 12 N. Y. St. 591.

A stipulation that a general appearance shall not waive irregularities allows objections that would have been available in special appearance. Stearns *v.* Taylor, 27 Mich. 88, appearance to set aside default.

On collateral attack objections waived by appearance. Dunn *v.* Crocker, 22 Ind. 324.

In Maryland the want of short note is not obviated by appearance. Brent *v.* Taylor, 6 Md. 58.

1. **Colo.**—Talpey *v.* Doane, 3 Colo. 22. **Fla.**—Loring *v.* Wittich, 16 Fla. 617. **Mass.**—Ames *v.* Winsor, 19 Pick. 247.

2. **U. S.**—L'Engle *v.* Gates, 74 Fed. 513. **Cal.**—Hodgkins *v.* Dunham, 10 Cal. App. 690, 103 Pac. 351. **Fla.**—Baars *v.* Gordon, 21 Fla. 25. **Ga.**—Cincinnati, etc. R. Co. *v.* Pless, 3 Ga. App. 400, 60 S. E. 8. See Sutton *v.* Gunn, 86 Ga. 652, 12 S. E. 979. **Ill.**—Conn v. Caldwell, 6 Ill. 531. *Compare* Jones *v.* Byrd, 74 Ill. 115, appearance after judgment. **Miss.**—Hall Com. Co. *v.* Foote, 90 Miss. 422, 43 So. 676 (holding ruling in Chamberlain-Hunt Academy *v.* Port Gibson Brick Co., 80 Miss. 517, 32 So. 116, 484, changed by statute); Barrow *v.* Burbridge, 41 Miss. 622. **Mo.**—Brownwell, etc. Car Co. *v.* Barnard, 139 Mo. 142, 40 So. 762. **N. J.**—See Connelly *v.* Lerche, 56 N. J. L. 95, 28 Atl. 430; Davis *v.* Megroz, 55 N. J. L. 427, 26 Atl. 1009; Jackson *v.* Johnson, 51 N. J. L. 457, 17 Atl. 959; Thompson *v.* Eastburn, 16 N. J. L. 100. **N. Y.**—Olcott *v.* Maclean, 73 N. Y. 223, *reversing* 10 Hun 277. **Pa.** Blyler *v.* Kline, 64 Pa. 130; Moore *v.* Spackman, 12 Serg. & R. 287. **S. C.**—Arnold *v.* Frazier, 5 Strobh. L. 33. **Tex.**—Douglass *v.* Neil & Co., 37 Tex. 528; Barnett *v.* Rayburn, 4 Wills. Civ. Cas. §83 (Tex. App.), 16 S. W. 537. **Va.**—O'Brien *v.* Stephens, 11 Gratt. 610.

That peril to the defendant's rights is the cause of his appearance does not alter the rule. Olcott *v.* Maclean, 73 N. Y. 223, *reversing* 10 Hun 277.

Withdrawal "Without Prejudice." In Creighton *v.* Kerr, 20 Wall. (U. S.) 8, 22 L. ed. 309, the court said: "The leave to withdraw the appearance of the defendant's attorneys was given upon the condition that it should be 'without prejudice to the plaintiff.' This meant that the position of the plaintiff was not to be unfavorably affected by the act of withdrawal. All his rights were to remain as they then stood. A general appearance waives all question of the service of process. It is equivalent to a personal service. The question of jurisdiction only is saved. . . . If there was error in the commencement of this action by reason of a defective notice or otherwise, it was cured by the appearance. This advantage among others, was not to be impaired by the withdrawal of the appearance. A personal appearance by the defendant, through his attorneys, converted into a personal suit that which was before a proceeding *in rem*. This result had been worked when the appearance was entered, and stood in full effect when the withdrawal was made. Any judgment that he could then obtain against the defendant was binding upon the defendant, indisputable and valid against him and his property wherever he or it could be found. To reconstruct this judgment and by means of a with-

ment against a defendant constructively summoned.[3]

Dissolution of Attachment.— An appearance to the suit entitles the plaintiff to proceed to judgment, notwithstanding that the attachment has been dissolved.[4]

4. What Is an Appearance. — A defendant appears generally when he replevies the attached property,[5] or files a bail bond for its release,[6]

drawal of the appearance make it a judgment to be enforced upon certain shares of bank stock only, and liable to be re-examined as to that upon the personal application of the defendant, would produce an extremely unfavorable effect upon the plaintiff's position. It would be a 'prejudice' to him, and hence it cannot be permitted."

3. Duncan *v.* Wickliffe, 4 Met. (Ky.) 118; Payne *v.* Witherspoon, 14 B. Mon. (Ky.) 270; Ridley *v.* Ridley, 24 Miss. 648. See Camp *v.* Cahn, 53 Ga. 558.

In New Jersey a general appearance is not necessary before *certiorari* is brought to remove proceedings in attachment. Ayres *v.* Bartlet, 14 N. J. L. 330; Branson *v.* Shinn, 13 N. J. L. 250; Jeffery *v.* Wooley, 10 N. J. L. 123; Peacock *v.* Wildes, 8 N. J. L. 179.

4. Mitchell *v.* Watson, 9 Fla. 160; Green *v.* Hill, 4 Tex. 465.

Illegality of Proceedings.—"Undoubtedly, his voluntary appearance to the suit gives the court jurisdiction to proceed to judgment; but that does not necessarily cure the illegality of the attachment proceedings, if timely objection is made." Noyes *v.* Canada, 30 Fed. 665.

5. **Ala.**—Chastain *v.* Armstrong, 85 Ala. 215, 3 So. 788, *following* Peebles *v.* Weir, 60 Ala. 413. **Ark.**—Shields *v.* Barden, 6 Ark. 459. **Ga.**—Buice *v.* Lowman Gold, etc. Min. Co., 64 Ga. 769; Camp *v.* Cahn, 53 Ga. 558; Reynolds *v.* Jordan, 19 Ga. 436; Cincinnati, etc. R. Co. *v.* Pless, 3 Ga. App. 400, 60 S. E. 8. **Ky.**—Harper *v.* Bell, 2 Bibb 221. **La.**—Kendall *v.* Brown, 7 La. Ann. 668. **Miss.**—Richard *v.* Mooney, 39 Miss. 357. **Pa.**—Blyler *v.* Kline, 64 Pa. 130. **S. C.**—Harrison *v.* Casey, 1 Brev. 390.

Under a statute providing for a replevy of the attached property and also that the defendant may appear and defend the suit without replying the property attached, it has been held "that if the property be replevied in the mode prescribed, the suit becomes one *in personam*, but if it be not replevied, and the defendant merely appears and makes defense to the suit, its original character of a proceeding *in rem* is retained." Philips *v.* Hines, 33 Miss. 163.

"When the defendant appears and replevies the property attached, he has notice of the pendency of the attachment against his property for the collection of the plaintiff's demand, and no good legal reason occurs to us why the plaintiff should not be allowed to proceed to establish his debt, and obtain a general judgment against the defendant in the same manner as he might do by giving the ten days notice, as provided in the 3309th section, and such, in our judgment, is a fair interpretation of the 3328th section of the code." Camp *v.* Cahn, 53 Ga. 558.

6. **Ark.**—Shields *v.* Barden, 6 Ark. 459. **Ky.**—Duncan *v.* Wickliffe, 4 Met. 118. **La.**—Williams *v.* Gilkerson-Sloss Com. Co., 45 La. Ann. 1013, 13 So. 394. **N. Y.**—Hernstein *v.* Matthewson, 5 How. Pr. 196. **Tex.**—Shirley *v.* Byrnes, 34 Tex. 625.

Illegal Attachment.—Where an attachment is inhibited by law, the giving of a bond to dissolve such attachment, illegally issued, is not an appearance. Planters' Bank *v.* Berry, 91 Ga. 264, 18 S. E. 137.

Contra, Hilton *v.* Consumers' Can Co., 103 Va. 255, 48 S. E. 899, wherein the court said: "It is claimed by the plaintiff in error that the execution of the attachment bond by the Consumers' Can Company was an appearance to the action, which gave the court jurisdiction to enter a personal judgment against it. In this view we cannot concur. It is true that the forthcoming bond is made payable to Hilton & Allen, and its condition is that that company 'shall perform the judgment of the court.' If the judgment of the court had been to sustain the attachment, then the bond stood as a security in lieu of the property

or demurs to the complaint,[7] or appeals from a judgment enforcing an attachment,[8] or moves to set aside a judgment on the merits,[9] or by default,[10] or prosecutes a writ of error,[11] or moves to set aside a default on the ground that the documents and pleas for the defense had been posted but had not arrived at time of entry of default,[12] or applies for the statutory right of a defendant served by publication to have a judgment by default vacated and to be heard in defense.[13] A general appearance is not effected by filing written objections to the manner of serving process,[14] or by petitioning for the removal of the action from a state to a federal court.[15]

A motion to set aside the sale of the attached property has been held not to constitute an appearance.[16]

Motion To Dissolve Attachment. — The weight of authority appears to support the rule that an attachment and the action out of which it issues, are so inseparably connected that the defendant cannot appear

upon which the attachment had been levied. But the court abated the attachment, the very ground-work of the whole proceeding, and with it the bond fell, and became of no effect. It would be a strange construction to hold that a bond given by a debtor to release property from the operation of an attachment should have the effect of subjecting him to a personal judgment. Every non-resident debtor, if that be true, would be placed in the dilemma of being denied the right to release the attached property by the execution of a bond, or of submitting himself to the jurisdiction of the court and being subjected to a personal judgment. The property levied upon might be of small value as compared with the amount in controversy, but, if the principle contended for be true, the penalty of its release by the execution of a bond would be submission to the jurisdiction of the court.''

Bonds Not Effecting an Appearance. Bond of Third Parties.—The giving of a bond by outside parties for purpose of dissolving the attachment is not an appearance. Clark *v.* Bryan, 16 Md. 171.

Bond of National Bank.—The statute of the United States prohibits seizure of property belonging to national banks (irrespective of whether they be solvent or insolvent), before final judgment, by virtue of any attachment issued under a state law and returnable to a state court. Any such seizure is therefore void, and a bond given by a national bank to dissolve such attachment served by summons of garnishment, is also void. The giving of such bond is not an appearance in the attachment case so as to make valid a judgment entered upon the bond in that case, against the bank and the sureties executing the bond. Planters L., etc., Bank *v.* Berry, 91 Ga. 264, 18 S. E. 137.

Bond Not Releasing Property.— Where the giving of a forthcoming bond does not release the property from the attachment lien, but simply constitutes the defendant the bailee of the sheriff for the safe keeping of the property, the giving of the bond does not constitute an appearance. Holtzman *v.* Martinez, 2 N. M. 271.

7. Hodgkins *v.* Dunham, 10 Cal. App. 690, 103 Pac. 351.

8. See Duncan *v.* Wickliffe, 4 Met. (Ky.) 118.

9. Anderson *v.* Coburn, 27 Wis. 558, holding, however, that the rights of third persons theretofore acquired are not effected.

10. Fitterling *v.* Missouri Pac. R. Co., 79 Mo. 504, 20 Am. & Eng. R. Cas. 454; Gant *v.* Chicago, etc. R. Co., 79 Mo. 502. See Boulware *v.* Chicago, etc. R. Co., 79 Mo. 494.

11. Rankin *v.* Dulaney, 43 Miss. 197.

12. Baars *v.* Gordon, 21 Fla. 25.

13. Beckwith *v.* Douglas, 25 Kan. 229.

14. Crary *v.* Barber, 1 Colo. 172.

15. Flint *v.* Coffin, 176 Fed. 872, 100 C. C. A. 342. McGillin *v.* Claflin, 52 Fed. 657.

16. Osborn *v.* Cloud, 21 Iowa 238. But in Helmer *v.* Rehm, 14 Neb. 219, 15 N. W. 344, it was held that an ap-

and question the validity of the attachment by a traverse of the facts alleged in the affidavit as grounds for the issue of the attachment, without submitting himself to the jurisdiction of the court in the action, because by so doing the court is called upon to entertain and determine questions which can be considered only after jurisdiction has attached.[17] It is otherwise where the motion to quash in its very nature denies that the court has ever acquired jurisdiction.[18]

pearance in court, and the filing of objections to the confirmation of the sale is a waiver of defects in the published notice to the defendants.

17. **U. S.**—Graham *v.* Spencer, 14 Fed. 603. **Ark.**—Gooch *v.* Jeter, 5 Ark. 383. **Ga.**—Hickson *v.* Brown, 92 Ga. 225, 17 S. E. 1035. **Ia.**—Wood *v.* Young, 38 Iowa 102; Chittenden *v.* Hobbs, 9 Iowa 417. **Kan.**—Hillyer *v.* Biglow, 47 Kan. 473, 28 Pac. 150; Greenmell *v.* Greenmell, 26 Kan. 530. **Ky.**—Duncan *v.* Wickliffe, 4 Met. 118. **Mo.**—Evans *v.* King, 7 Mo. 411; Whiting *v.* Budd, 5 Mo. 444, *distinguished* in Abernathy *v.* Moore, 83 Mo. 65. **N. D.**—Gans *v.* Beasley, 4 N. D. 140, 59 N. W. 714. **Okla.**—Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110. **Ore.**—Belknap *v.* Charlton, 25 Ore. 41, 34 Pac. 758. **Tenn.**—Straus *v.* Weil, 5 Coldw. 121. **Wis.**—Williams *v.* Stewart, 3 Wis. 773. **Wyo.**—Roy *v.* Union Merc. Co., 3 Wyo. 417, 26 Pac. 996.

See Savannah Grocery Co. *v.* Rizer, 70 S. C. 501, 50 S. E. 199; Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414.

In Hickson *v.* Brown, 92 Ga. 225, 17 S. E. 1035, the court said: "General judgments may be rendered in attachment cases when the plaintiff gives notice in writing to the defendant of the pendency of the attachment and the proceedings thereon, as provided by section 3309 of the code; or, when the defendant replevies the property as provided in section 3319 of the code; or 'when he has appeared and made defense by himself or attorney at law,' as provided in section 3328. An examination of all these sections will show that it is the purpose and spirit of the law to allow a general judgment against a defendant in an attachment case when he has notice of the suit and a opportunity to make a defense. In our opinion, the object of the law is accomplished when it appears that the defendant filed a traverse to the ground upon which the attachment issued, and appeared in person at the trial to maintain his traverse. Under these circumstances, his opportunity to defend on the merits was fully as good as if he had received a written notice of the pendency of the attachment, or had manifested his knowledge of such pendency by replevying his property when it was seized by the officer. We can conceive of no reason why the defendant in this case might not, had he so chosen, have contested the justice of the plaintiffs' demand. We therefore think there was no error in rendering a general judgment against him, and it was not even suggested that in so doing any wrong or injustice was done him."

Right to notice of subsequent proceedings. Rose *v.* Barr, 2 Wis. 492.

Motion for Non-suit.—Stonach *v.* Glessner, 4 Wis. 275.

Motion To Quash.—Sam *v.* Hochstadler, 76 Tex. 162, 13 S. W. 535; Campbell *v.* Wilson, 6 Tex. 379; Grizzard *v.* Brown, 2 Tex. Civ. App. 53, 22 S. W. 252; Barnett *v.* Rayburn (Tex. App.), 16 S. W. 537.

Entry on record of leave to amend return and declaration does not indicate a general appearance. Crary *v.* Barber, 1 Colo. 172.

18. **U. S.** Graham *v.* Spencer, 14 Fed. 603. **Cal.**—Glidden *v.* Packard, 28 Cal. 649. **Ga.**—Cincinnati, etc. R. Co. *v.* Pless, 3 Ga. App. 400, 60 S. E. 8. **Ill.**—Johnson *v.* Buell, 26 Ill. 66. **La.** Bonner *v.* Brown, 10 La. Ann. 334. **Mass.**—Spurr *v.* Scoville, 3 Cush. 578. **Neb.**—Coffman *v.* Brandhoeffer, 33 Neb. 279, 50 N. W. 6. **N. M.**—Holzman *v.* Martinez, 2 N. M. 271. **N. Y.**—Union Dist. Co. *v.* Ruser, 16 N. Y. Supp. 50, 40 N. Y. St. 689. **Ore.**—Meyer *v.* Brooks, 29 Ore. 203, 44 Pac. 281; Belknap *v.* Charlton, 25 Ore. 41, 34 Pac. 758. **Pa.**—Spettigue *v.* Hutton, 9 Pa. Co. Ct. 156. **Tenn.**—Bryan *v.* Norfolk & W. R. Co., 119 Tenn. 349, 104 S. W. 523. **Va.**—Petty *v.* Frick Co., 86 Va.

Notice of Appearance. — By some statutes the defendant is required to give notice of his appearance.[19]

501, 10 S. E. 886. Wis.—Allen *v.* Lee, 6 Wis. 478.

See Moore *v.* Dickerson, 44 Ala. 485; Potomac Steamboat Co. *v.* Clyde, 51 Md. 174.

The form of motion to jurisdiction in the following case was held to be a proper entry of a special appearance, and not a general appearance. McGillin *v.* Claflin, 52 Fed. 657, *following* Smith *v.* Hoover, 39 Ohio St. 249.

Action Begun in Wrong County.— In a case wherein the defendants moved to vacate the attachment for the reason that the action had been begun in the wrong county and that it was a great injustice and wrong to them to have their property thus held under an attachment when there was no means of obtaining jurisdiction over their persons, the court said: "This appearance was, therefore, not for the purpose of submitting to the jurisdiction of the court, or asking it to entertain or determine any question which could only be considered after jurisdiction had attached, but it was for the sole purpose of objecting to the validity of the attachment for irregularities in the proceedings, the granting of which would have been entirely consistent with the claim that the court had no jurisdiction of the person. By their motion to discharge the attachment, for the reasons stated, the defendants appeared for no purpose incompatible with the supposition that the court had acquired no jurisdiction over them on account of a want of service of the summons, and we therefore think there was no waiver of process. Nothing less than the express language of a statute, or the necessary implication therefrom, or the overbearing weight of authority, will justify a court in holding that a defendant in an action commenced in the wrong county, in violation of section 44 of the code, could not appear and apply for the discharge of an attachment against his property, for irregularities, without being required to submit himself to the jurisdiction of the court for the purpose of the entire action; and it is not material, in such case, whether the motion happened to be well founded or not, but the question is, did it go to the merits, or was it based upon some technical grounds supposed to be sufficient to render the attachment invalid? If a defendant may not thus appear, and resist what he supposes to be a wrongful attachment without subjecting his person to the jurisdiction of the court, he must either suffer his property to be held under a pretended attachment for an indefinite time, or waive a statutory right to be sued in the county where he resides or may be found. This the law will not exact or require." Belknap *v.* Charlton, 25 Ore. 41, 34 Pac. 758.

Appearance After Objections Overruled.—In Mortgage Trust Co. *v.* Norris, 8 Kan. App. 699, 54 Pac. 283, it was held that pleading to the merits and participating in the trial after the objections to the jurisdiction of the court were overruled did not amount to a waiver of such objections. See to the same effect, Elder *v.* Ludeling, 50 La. Ann. 1077, 23 So. 929.

Objection on appeal is not precluded by an appearance to quash for lack of sufficient affidavit. Camp *v.* Tibbets, 2 E. D. Smith (N. Y.) 20, 3 Code Rep. 45.

Objection to bond not waived by motion to set aside attachment. Tiffany *v.* Lord, 65 N. Y. 310.

In Louisiana a rule taken by a nonresident defendant who has not been cited to set aside the attachment on the supplemental petition is not an appearance subjecting him to the jurisdiction of the court on the merits. Meritz *v.* Marks, 26 La. Ann. 740.

19. Regal *v.* Seagraves, 46 N. J. L. 295. In this case the court said: "It would be a hardship upon the plaintiff to require him, immediately before taking each step in his suit, to ascertain whether any appearance had been entered, and it would be no less a hardship to compel him to retrace every step taken after appearance without notice. On the other hand, it is no hardship for the defendant to require of him that he shall give notice of his appearance at once. The provision of the statute that notice shall be given within twenty days after the entry of the appearance, renders plaus-

C. Declaration, Petition or Complaint. — **1. Generally Essential.** — As the continuance of the attachment depends upon the successful issue of the main action, its issue and levy does not obviate the necessity of filing the declaration, petition or complaint with which a suit is commenced,[20] although it has been held that the filing of an affidavit for attachment which contains all the essential averments of a complaint is sufficient, both as affidavit and complaint.[21]

Improper Attachment. — A complaint will not be dismissed if it shows a right of action though the attachment was improperly issued.[22]

2. Form and Allegations. — a. *Form in General.* — In attach-

ible the defendant's claim that notice so given has relation to the time of the entry and effectuates the appearance from its date for all purposes; but this is not the necessary meaning; it may signify that, without such notice, the appearance shall be regarded as abandoned, and made void. At any rate, it does not call upon the court to defeat the plain tenor of the law, that only after appearance and notice is the plaintiff's course of procedure to be changed. The rule to vacate the judgment should be discharged.''

20. Ware *v.* Todd, 1 Ala. 199; Daniel *v.* Hochstadler, 73 Ga. 144; Banks *v.* Hunt, 70 Ga. 741; Wright *v.* Brown, 7 Ga. App. 389, 66 S. E. 1034.

See generally the title ''**Complaint, Petition and Declaration.**''

Compare, Moore *v.* Hawkins, 6 Dana (Ky.) 289, wherein the court said: ''The statute regulating attachments against *absconding debtors* does not require, or seem to contemplate, the filing of a declaration. The warrant of attachment seems to have been intended both as *process* and *count.*''

''Our statutes regulating proceedings in attachment, have not changed the rules of pleading.'' Tunnison *v.* Field, 21 Ill. 108.

Filing of short note instead of declaration. Spear *v.* Griffin, 23 Md. 418; Trasher *v.* Everhart, 3 Gill & J. (Md.) 234.

Declaration against joint debtors though the property of only one is attached. Terry *v.* Curd Mfg. Co., 66 Miss. 394, 6 So. 229.

Affidavit of Claim Unnecessary.— A rule providing that '' 'in actions of assumpsit, trespass, and such as are instituted by scire facias, and in attachment executions, if no affidavit of claim be filed within three calendar months from the impetration of the writ, judgment of *non pros.* may be entered,' '' does not apply to a foreign attachment. Paff *v.* North Bangor Co., 5 Pa. Co. Ct. 543.

One Complaint or Declaration Sufficient.—''The cause was inadvertently docketed as a separate suit, and the court ought to have caused it to be consolidated with the original action. Neither party asked to have it done, and the omission was not error. There was but one action pending, and but one declaration was necessary.'' Roberts *v.* Dunn, 71 Ill. 46.

21. Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458; Handley *v.* Anderson, 5 Ind. Ter. 186, 82 S. W. 716.

''If either the affidavit or the complaint contains all the essentials of both, to refuse to permit one to perform a double function and serve the purpose of both, would be to look more to form than to the ends of justice.'' Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458.

In Baker *v.* Ayers, 58 Ark. 524, 25 S. W. 834, it was said: ''The complaint, the note thereto attached (which is a part of it), and the affidavit filed in this action allege what is required to be shown in the complaint by section 362. They are a substantial compliance with that section. The failure to incorporate in the complaint all that is said in the affidavit is a mere irregularity, of which the junior attaching creditor can take no advantage.''

Compare, Staab *v.* Hersch, 3 N. M. 209, 3 Pac. 248, holding an affidavit insufficient as a declaration.

22. Williams *v.* Freeman, 12 Civ. Proc. (N. Y.) 334.

ment the plaintiff may declare on the common counts if that form is otherwise allowable.[23]

A complaint is not void as to subsequent attaching creditors because it was signed and the blanks therein filled up by the clerk of the court at the request of the plaintiff,[24] nor will the attachment be dissolved because the name of the state at the head of the complaint is not that in which the suit is commenced,[25] nor because there is not attached thereto a copy of the instrument on which the action is founded,[26] nor because the allegations therein are made on information and belief.[27]

Names of Parties. — A complaint will be set aside for irregularity if the names of the parties therein fail to conform to those in the writ of attachment;[28] and where an attachment is issued against a partner-

23. Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821; Tunnison *v.* Field, 21 Ill. 108.

24. Dixey *v.* Pollock, 8 Cal. 570, where it was said: "In the case of *R. H. Adams v. D. H. Pollock*, the complaint was a printed blank, and the blanks were filled up by the clerk of the court at the request of the plaintiff, but no name was subscribed at the end of the complaint until the next day, and after the attachment of Dixey was duly levied upon the same goods. It was then signed by the clerk, in this way, 'R. M. Adams, plaintiff's attorney.' It does not appear, with certainty, whether the blanks in the complaint were filled up and the name signed in the presence of Adams or not. It is most probable, from the affidavits, that the blanks were filled up in his presence, and the name subscribed in his absence. . . . .We think the complaint was not void. The conduct of the clerk in filling the blank was not correct; but still it was a mere irregularity. And it is well settled that a stranger cannot interfere upon the ground of irregularity. When the contest is between creditors, all the equities are in favor of the most diligent. The subsequent execution or attachment creditor can claim no equitable relief. If the proceedings of the prior creditor are not void, but voidable, the defendant can alone object. (9 Miss. 393; 2 Bailey, 214). In the case of *John Pollock v. D. H. Pollock*, the complaint was subscribed, 'R. H. Adams, plaintiff's attorney.' In this case the blanks were also filled up by the clerk at the request of Adams, who, it appears, was not a licensed attorney, but was the attorney in fact of John Pollock. This case differs very materially from the case of *Adams v. Pollock*."

25. "This was good ground for a motion to require the plaintiff to amend his petition, but it was not sufficient to warrant a dissolution of the attachment." Livingston *v.* Cole, 4 Neb. 379.

26. Olmstead *v.* Rivers, 9 Neb. 234, 2 N. W. 366.

27. Lanier *v.* City Bank, 9 Civ. Proc. (N. Y.) 161, the same matters were stated positively in the affidavits.

Source of information must be given if complaint is on information and belief. Price *v.* Indianapolis, etc., R. Co., 51 Hun 640, 4 N. Y. Supp. 15, appeal *dismissed*, 115 N. Y. 663, 21 N. E. 1119; Muller *v.* Hatch Cutlery Co., 12 Misc. 202, 33 N. Y. Supp. 270.

28. Brennan *v.* McLamore, Harp. (S. C.) 74, wherein the attachment was obtained in the name of "Daniel Brennan," and the declaration was filed in the name of "Brennan & McCreary."

Variance Between Petition and Note Sued on.—In Buchanan *v.* Edmisten, 1 Neb. (Unof.) 429, 436, 95 N. W. 620, a judgment in attachment was reversed. "The note attempted to be sued upon, a copy of which was set out in the petition, was executed as sole maker by the plaintiff in this action, and is signed by the use of the initial letters of his Christian name, thus, 'P. O. Buchanan.' In the petition, affidavits, published notices, process, judgments, and proceedings, down to, but not including, the order of confirmation of the sale, the sole

ship upon a contract thereof, the failure of the complaint to name both partners is fatal to the attachment;[29] but a discharge of the attachment is not warranted because the complaint fails to state the Christian names of the defendants,[30] or the name of one of a firm in whose interest the suit is brought,[31] or because it omits the word "company" from the name of a defendant corporation.[32] Where the statute so provides the declaration may be made against the property attached, a boat for instance, by name;[33] but such a provision does not support a declaration which charges the property as that of the contracting party.[34]

The Relief. — Where the filing of the complaint or petition precedes the attachment, it has been held that an attachment should be especially asked for,[35] though, where the statute provides that the writ of at-

person mentioned as defendant was described by the name of 'O. P. Buchanan;' but the order of confirmation and subsequent proceedings ran against 'P. O. Buchanan,' as defendant, and the land attempted to be levied upon and sold was that of 'P. O. Buchanan,' and the note described in the petition was his valid obligation and unpaid. There was no personal service in the action, and no appearance by anyone but the plaintiff and the purchaser."

29. Cowdin *v.* Hurford, 4 Ohio 133.

Attachment Against One Partner.— In Georgia, where an attachment is sued out against one partner on a partnership account under §3276 of the code, the declaration in attachment need not be against both partners, but only against him who is thus subject to summary process. Connon *v.* Dunlap, 64 Ga. 680.

30. "Two objections are taken: One that the first names of the defendants are not set out. This I consider merely what is termed a misnomer under the old practice. If the defendants will state that they have Christian names, and what they are, I will direct that they be inscribed in the proceedings. But, on such a ground, I shall neither discharge the attachment, nor strike the petition from the files." Laws *v.* McCarty, 1 Handy (Ohio) 191.

31. Barriere *v.* McBean, 12 La. Ann. 493.

32. Hammond *v.* Starr, 79 Cal. 556, 558, 21 Pac. 971.

33. Pool *v.* The Ray, 19 Ark. 641; Hartman *v.* Stone, 19 Ark. 639. See Toby *v.* Brown, 11 Ark. 308.

34. Haleman *v.* White, 11 Ark. 237, wherein a boat was attached and the declaration charged the boat by name. The court said: "We are fully satisfied, therefore, that the legislature did not design to confer upon the boat the capacity of contracting, and that consequently the declaration in this case in charging the contract sued upon as having been made by the boat by name, wholly fails to show any cause of action, and, as a necessary consequence, no valid judgment could be rendered upon it . . . It is clear that the motion to strike from the docket was properly sustained. It most assuredly will not be contended that the court should have done so idle and nugatory an act as to have entertained the case, and to have proceeded to final judgment, when it was perfectly plain, from the record, that no valid judgment could be pronounced in the premises. Let it be supposed that a party should institute a suit against a tree, a stone, or any other inanimate thing, can it be contended that the court would be guilty of so idle an act as to carry it through all the forms of a judicial procedure? We imagine not; but that, on the contrary, the very moment the true state of case came to the knowledge of the court, that instant would it refuse to proceed further, but would strike it from the docket as an unmeaning nullity. The case before us is precisely of that character, under our construction of the statute; and, as a necessary consequence, the court decided correctly in striking it from the docket."

35. Queen *v.* Griffith, 4 Greene (Iowa) 113, wherein the court said:

tachment shall be issued by the clerk as a matter of right on filing of the proper affidavit and bond, it has been held that a prayer in the petition for issuance of an attachment is unnecessary.[36]

A prayer for judgment for the sale of the property levied on should, under some statutes, be contained in the complaint,[37] although its omission is not necessarily a fatal defect.[38] Under other statutes no such prayer is necessary.[39]

Verification.— Although the complaint is frequently required to be sworn to,[40] it has been held that the complaint need not be verified if all the material matters set forth therein are contained in the affidavit for attachment,[41] and under some statutes an unverified complaint is sufficient.[42]

b. *Substance of Complaint.* — **(I.) In General.** — **The Recitals of the Bond and Affidavit** have no connection with the cause of action and so need not be repeated in the complaint.[43]

Homestead Right.— Where the plaintiff wishes to have the question of the defendant's right to a homestead settled in the attachment suit

"Neither the original nor the amended petition asked for an attachment. This extraordinary and stringent writ should not be issued unless especially asked for in the petition. This is clearly contemplated by the code, §1841: 'The petition which asks an attachment must be sworn to.'" And see Clark *v.* Tull, 113 Iowa 143, 144, 84 N. W. 1030.

36. DeCaussey *v.* Baily, 57 Tex. 665; Holden *v.* Meyer, 1 White & W. Civ. Cas. §829. See Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

37. Wilson *v.* Stricker, 66 Ga. 575; Kolb *v.* Cheney, 63 Ga. 688; Mehring *v.* Charles, 58 Ga. 377.

38. King *v.* Thompson, 59 Ga. 380, wherein it was held that although no special judgment is prayed for, a declaration is sufficient which distinctly avers that the declaration is predicated on the attachment to which it refers, and that the attachment is returnable at a certain term of the court and pending therein.

"Is the omission of the prayer for judgment so grave a matter as to be fatal to the action? If it is not fatal to the action the intervenor cannot be heard to complain. . . . In a suit upon account for money advanced, like the one under consideration, the only relief to which the plaintiff can be entitled is at once apparent from the allegations of the complaint, and the omission of the demand for judgment cannot be said to affect the substantial right of any adversary. A party is entitled to the relief which the facts shown clearly warrant, whether he has prayed much or little." Sannoner *v.* Jacobson, 47 Ark. 31.

39. Eaton *v.* Breathett, 8 Humph. (Tenn.) 534; Moss *v.* Katz, 69 Tex. 411, 6 S. W. 764.

A prayer for foreclosure has been held unnecessary. Frank *v.* Brown, 10 Tex. Civ. App. 430, 31 S. W. 64.

In Moss *v.* Katz, 69 Tex. 411, 6 S. W. 764, the court said: "There was no necessity for a prayer for foreclosure to be contained in the petition. The statute makes it the duty of the court to foreclose the lien in all cases where an attachment is levied upon personal property, and judgment is obtained for the plaintiff. This it must do whether asked in terms or not. There is no error in the judgment and it is affirmed."

40. Anderson *v.* Sutton, 2 Duv. (Ky.) 480.

A complaint amended materially should be verified. Queen *v.* Griffith, 4 Greene (Iowa) 113.

41. Seawell *v.* Lowery, 16 Tex. 47; Fechheimer *v.* Ball, 2 White & W. Civ. Cas. §766.

42. De Leonis *v.* Etchepare, 120 Cal. 407, 52 Pac. 718.

43. Reynolds *v.* Beel, 3 Ala, 57.

his complaint, or amendment thereto, should give the defendant notice that he is called upon to defend it.[44]

Mechanics' Lien.— In an action to enforce by attachment a lien claim for labor performed and material furnished, where the personal defendant is also the owner of the property on which the lien is claimed, such lien claim need not be set out in the declaration, and if set out is surplusage.[45]

Recital of Levy.—The complaint is sometimes required to refer to and identify the levy of the attachment,[46] but this is not everywhere necessary.[47]

(II.) Cause of Action.— The cause of action set out in the complaint must be one over which the court has jurisdiction,[48] and the same as

44. Willis *v.* Matthews, 46 Tex. 478, wherein the court said: "It may be that, if the attachment is levied on exempt property the defendant in attachment could, by a plea in abatement, have the levy set aside. But, unless the issue is made by the pleadings, the court does not pass upon the question of whether the property is or is not a homestead, and its judgment is neither 'directly on the point, nor does it necessarily involve the decision of the question.'"

45. Martin & Son *v.* Hedden Co. (Me.), 76 Atl. 935.

46. Kolb *v.* Cheney, 63 Ga. 688; Mehring *v.* Charles, 58 Ga. 377.

A declaration which set out that "the plaintiffs in attachment complain of the said Tinckham, defendant in attachment, who resides out of the state, and who has been attached to answer in an action on promises," etc., with no further allusion to the attachment proceedings, and no prayer for judgment of any kind, was held fatally defective in Wilson *v.* Sticker, 66 Ga. 575.

"A declaration upon an account for the amount specified in an attachment, which alleged that the plaintiffs in the declaration were plaintiffs in attachment then pending in the superior court, and that the attachment had been levied on a lot of groceries as the property of defendants, fully described in the sheriff's levy on the attachment, which was then in the clerk's office of the superior court of the county, and which prayed judgment against the property attached, and also a general judgment, sufficiently identified the attachment upon which it was based." Guckenheimer *v.* Day, 74 Ga. 1.

A declaration may be amended so as to contain a sufficient reference to the levy of the attachment where it describes the defendant as defendant in attachment, and after a reference to the note on which the action was brought, it was alleged that an attachment issued upon it. Kolb *v.* Cheney, 63 Ga. 688.

Attachment Against One of Several Joint Debtors.—Where a statute authorizes a writ of attachment against the separate or joint estate, or both, of joint debtors, "a declaration is not faulty which shows that an attachment has been issued against one of several joint debtors, and also sets out a joint cause of action, the reason being that the proceeding is warranted by the statute in question. By such a course of pleading, the plaintiffs show that they are pursuing their suit according to the statutory regulation, for the court will, *ex officio*, notice, in weighing the declaration, the disjunctive effect of the act on the cause of action. At the trial, a joint cause of action of necessity would appear, and, therefore, to avoid a disagreement between the *allegata* and *probata*, it would seem proper to allege the real facts in the pleading." Thayer *v.* Treat, 39 N. J. L. 150.

47. Awalt *v.* Schooler (Tex. Civ. App.), 128 S. W. 453 (wherein the court said: "It was not necessary for the plaintiff to file a pleading alleging that the attachment had been issued and levied upon the property)." Frank *v.* Brown Hdw. Co., 10 Tex. Civ. App. 430, 31 S. W. 64.

48. Pullman Palace Car Co. *v.* Harrison, 122 Ala. 149, 25 So. 697, 82 Am. St. Rep. 68, a suit against a non-resident for a tort committed outside the

that upon which the attachment was obtained,[49] and where the filing of the writ of attachment is regarded as the commencement of the suit, the cause of action must have accrued at the time the writ was sued out in order to entitle the plaintiff to file a complaint thereon.[50] If the complaint shows that the cause of action is one upon which an attachment is not allowed, an attachment which has been issued in such action will be dissolved upon proper motion therefor.[51]

state, wherein the court said: "It would be an anomaly in judicial procedure, if defendant could be made liable upon a cause of action by suit in attachment, when it would not be liable in the same court, upon the same cause of action by suit commenced by summons and complaint upon personal service, because of the want of jurisdiction in the court to hear and determine the cause. We are unwilling to declare such was the legislative intent in the absence of some expression in the statutes regulating attachment proceedings, strongly indicating such intention to have existed. Especially as such a conclusion is illogical and cannot be maintained upon sound principles of public policy and reasoning." See also Boorum *v.* Ray, 72 Ind. 151.

49. Tunnison *v.* Field, 21 Ill. 108. "The 'debt sued for' or contract alleged in the petition, must be the same debt or contract which the defendant is charged in the affidavit with having fraudulently made." Kansas City Stained Glass, etc., Co. *v.* Robertson, 73 Mo. App. 154, 157.

In Lutterloh *v.* McIlhenny Co., 74 Tex. 73, 11 S. W. 1063, an attachment was sued out upon a note upon which the defendant was held not liable, but the judgment against him was rendered upon an entirely distinct cause of action set up for the first time by a supplemental petition filed long after the issue of the writ. It was held that it was error to enforce the attachment lien, as it would be a radical departure to hold that the writ may be sued out upon one cause of action and the lien acquired by its levy foreclosed and property sold to satisfy a judgment rendered upon a different cause of action. *Compare* Barry *v.* Foyles, 1 Pet. (U. S.) 311, 7 L. ed. 157, wherein Marshall, C. J., said: "In argument, some observations were made on the variance between the manner in which the plaintiff in error was charged in the account filed in the attachment, and in the declaration on which the cause was tried. In the account, he is charged on his *assumpsit*, for a sum due from James D. Barry & Co. The declaration charges him as being originally indebted on a transaction with himself. The court attaches no importance to this variance, because when the attachment was discharged, by the appearance of the defendant, and giving bail, and the plaintiff, in consequence thereof, filed a declaration, to which the defendant pleaded, the cause stood in court, as if the suit had been brought in the usual manner; and no reference can be had to the proceedings on the attachment." In McNulty *v.* Batty, 2 Pin. (Wis.) 53, writ dismissed, 10 How. (U. S.) 72, 13 L. ed. 333, the court said: "As by the act, the plaintiff must particularly set forth in his affidavit the nature and amount of his debt, and as the attachment is a process to compel a non-resident to appear, by means of his property, the law seems to require peculiar strictness in the proceeding, and does not allow an attachment to issue for more than the debt sworn to, nor require the defendant to answer to more than that one debt in that particular suit. By the act, the attaching creditor is to be first paid out of the property attached, which is an additional reason for confining him in his declaration, to the debt sworn to; for if he should be allowed to add counts upon other and different claims, he might recover a general verdict for more than the debt for which the writ was allowed, and would thereby overreach the other creditors who may have filed their declarations."

50. Galloway *v.* Holmes, 1 Dougl. (Mich.) 330. See Thomas *v.* Ellison (Tex.), 116 S. W. 1141.

51. Thomas *v.* Ellison (Tex.), 116 S. W. 1141.

(III.) Grounds of Attachment. — Where the debt sued upon is matured the causes for which the attachment issues is not required to be set out in the complaint,[52] but where the debt is not yet due, and an attachment is allowed on the ground that the debtor is fraudulently disposing of his property, the complaint must allege such fraudulent disposition,[53]

52. Holloway *v.* Herryford, 9 Iowa 353; Carstens *v.* Milo, 40 Wash. 335, 82 Pac. 410. See Doblinger *v.* Dickson, 71 Fed. 635; Harrison *v.* King, 9 Ohio St. 388.

Demurrer to Causes of Attachment. Since a statement of causes upon which an attachment is prayed for is not a part of the petition proper, it cannot be reached by demurrer. A motion to quash, if the averments are insufficient, is the correct proceeding. Holloway *v.* Herryford, 9 Iowa 353.

In Cain *v.* Mather, 3 Port. (Ala.) 224, the court said: "There was a demurrer to the declaration by the defendant, which was sustained in the court below, upon which judgment was rendered for the defendant. The ground of the decision of the circuit court appears to be, that as the defendant is stated in the declaration to have been attached by his goods and chattels, and, as the declaration states the plaintiff's cause of action to be to recover damages for the false warranty of a quantity of jewelry, and thereby sounds in damages only, that the attachment does not lie. We do not think this question is raised by the pleadings in this case. A general demurrer brings only to the notice of the court, matters of substance to the declaration, and though it appears by the declaration, that the defendant was attached by his goods, it may be, for aught that we can know, a judicial attachment, which extends to all kinds of actions. We cannot look behind the declaration, which contains a substantial cause of action."

Variance Between Complaint and Affidavit.—In Hemmi *v.* Grover, 18 N. D. 578, 120 N. W. 561, wherein the debt appears to have been matured, the court said: "The argument of respondent's counsel that because the complaint and affidavit were sworn to on the same day that they must be considered together, and that, if there be any variance between the allegations of the complaint and the affidavit, the complaint must control, is wholly untenable. As before stated, such matters are wholly foreign to a complaint, and, if inserted therein, will be treated as surplusage and given no controlling effect over the positive statements in the affidavit."

Verification of Complaint.—Since an allegation that defendant recently departed from the state and continued to absent himself therefrom for the purpose of defeating and defrauding the plaintiff is not necessary to the plaintiff's cause of action, but goes only to the plaintiff's right to the attachment, the fact that it is not verified does not vitiate the complaint. Carolina Agency Co. *v.* Garlington, 85 S. C. 114, 67 S. E. 225.

53. H. B. Claflin Co. *v.* Simon, 18 Utah 153, 55 Pac. 376, *following* Selz, Schwab & Co. *v.* Tucker, 10 Utah 132, 37 Pac. 249; Carstens *v.* Milo, 40 Wash. 335, 82 Pac. 410; Cox. *v.* Dawson, 2 Wash. 381, 26 Pac. 973.

Sufficiency of Allegations.—"Where the debt is not due, the allegations necessary to make in the affidavit for attachment with reference to the fraud must also be included in the complaint, with the addition that the facts constituting the fraud must be specifically stated and embraced in the complaint in order to constitute it a proper pleading. It is not sufficient to charge fraud in general terms. The nature of the fraud must be set out. . . . The grounds for attachment as stated in the affidavit are not contained in the complaint. This is a defect that cannot be safely overlooked. The mere statement in the complaint of the statutory ground for attachment does not comply with the rules of pleading laid down by this and other courts on this subject. The statement of a conclusion presents no issuable fact, sufficient upon which the defendants can base an answer or denial." H. B. Claflin Co. *v.* Simon, 18 Utah 153, 55 Pac. 376, *following* Selz, Schwab & Co. *v.* Tucker, 10 Utah 132, 37 Pac. 249.

Action Against Joint Defendants.—"It is insisted that the petition is

although in other cases such an allegation has been held unnecessary.[54]

(IV.) Amount of Demand. — The amount of the plaintiff's demand is sometimes required to be stated in the complaint,[55] but such a statement

fatally defective in that it fails to allege that neither of the defendants had sufficient property in this state subject to execution sufficient to satisfy the demand sued on, and that the collection thereof would be endangered by delay in obtaining a judgment or return of no property found. . . . Where one of several co-obligors is about to dispose of his property with a fraudulent intent to cheat his creditors. In this state of case, notwithstanding there may be other co-obligors amply good for the debt, and it is not endangered by delay, etc., the creditor is entitled to avail himself of the remedy or attachment, and all that he has to allege with reference to the particular debtor, to entitle him to the remedy, is that he has done or is about to do some of the acts denounced in subsections 3, 4, 5, 6, 7 and 8 of section 194. In our opinion the petition contains every averment necessary to support a cause of action, and the trial court erred in sustaining a demurrer." Marks *v.* Gause, 24 Ky. L. Rep. 1949, 72 S. W. 732.

"It is not necessary to allege in the petition that the suit is brought by attachment if it appears that the debt is not due. The petition and affidavit will be construed together." Kansas City Stained Glass, etc., Co. *v.* Robertson, 73 Mo. App. 154, 156.

54. Cox *v.* Peoria Mfg. Co., 42 Neb. 660, 60 N. W. 933, wherein the court said: "It is argued that the petition is defective in that it omitted to set forth the fraudulent conduct of the defendants. We are not aware of any provision of statute, or rule of practice, which requires that, in order to maintain an action upon a claim before due, the petition must set out the fraudulent acts of the defendant which are relied upon as the basis for the allowing of an attachment. . . . There is no necessity for setting forth the grounds for an attachment in the petition."

55. Kirkey *v.* Fike, 27 Ala. 383, 62 Am. Dec. 768.

Sufficiency of Allegation.—In Carolina Agency Co. *v.* Garlington, 85 S. C. 114, 67 S. E. 225, the court said: "Does the complaint and affidavit sufficiently 'specify' the amount of the plaintiff's claim? The purpose of that provision is that an excessive levy shall not be made to satisfy an indefinite claim. The amount claimed is sworn to be 'at least' $25,000, and the warrant was issued only for that amount. If the defendant owes the plaintiff more than that amount, how has he been injured by having his property seized for an amount less than he actually owes? Ought he be heard to say that, because he may owe the plaintiff more, and has so managed its affairs and kept its books that it is impossible for plaintiff to say exactly how much he owes it, he shall not be made to pay anything?"

Attachment for Unliquidated Damages.—In a case wherein the ground of attachment was the non-residence of the defendant, and the cause of action, injury to the plaintiff's furniture, because of an overflow of water ascribed to defendant's negligence, the court, on an appeal wherein it reversed an order denying a motion to vacate the attachment said: "A more serious question arises with reference to the amount of damage which the plaintiff claims to have suffered. Upon this subject there is nothing in the complaint except the allegations that the overflow caused 'the said furniture to be damaged, spoiled, and made unfit for use or sale by the plaintiff company, and through the negligence of the defendant, as above set forth, the plaintiff company has suffered damage in the sum of six hundred dollars.' The only other reference in the papers on attachment to the cause of action and extent of damage appears in the affidavit of the plaintiff's secretary, and is couched in this language: 'That the said water flowed in such quantities, and for such a length of time, on the furniture of the plaintiff, as to make a large quantity of said furniture unfit for use and sale, and to seriously injure and damage the same; and that by reason of said negligence of the defendant the plaintiff company has been damaged in the sum of six hun-

has been held unnecessary because of a want of requirement therefor in the statute.[56]

c. *When Complaint Must Be Filed.* — The complaint is usually required to be filed at the term of the court to which the attachment is made returnable,[57] and failure to so file is ground for dismissing the

dred dollars.' There is no indication anywhere how that damage is computed or arrived at. Neither the value of the furniture before nor after the overflow is given. The court is in nowise apprised of the method by which the plaintiff fixed the amount claimed, and, for aught that appears, it is an arbitrary sum. If the damages are merely nominal, attachment will not lie; if substantial, they are ascertainable, and should be set forth by affidavit to satisfy the court within the requirements of the code. 'Where the damages are unliquidated, it is necessary to set out the facts which the plaintiff claims prove the damage, in order that the court may determine whether any damage has been sustained.' . . . The insufficient allegation of damage is fatal to the maintenance of the attachment." Austrian Bentwood Furniture Co. *v.* Wright, 43 Misc. 616, 88 N. Y. Supp. 142.

In an action for false and fraudulent representations, inducing a lease, an attachment will be set aside where the complaint, made a part of the affidavit by reference does not set forth any legal measure of damages. Downing *v.* Nelson, 49 Misc. 446, 447, 97 N. Y. Supp. 1005.

56. Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741.

57. **Ala.**—Allen *v.* Clamrah, 7 Ala. 778, though the attachment was sued out before debt due. **Ga.**—Gallaway *v.* Maxwell, 123 Ga. 208, 51 S. E. 320; Levy *v.* Millman, 7 Ga. 167; Birdsong *v.* Brooks, 7 Ga. 88. **Ill.**—Lawver *v.* Langhans, 85 Ill. 138.

In Lawver *v.* Langhans, 85 Ill. 138, the court said: "Section 25, of the Attachment Act, provides that the declaration shall be filed on the return of the attachment, or at the term of court when the same is returnable. Here, the declaration was filed on the 24th day of December, during the term. This was a compliance with the terms of the act. Under the section the plaintiff had the right to file his declaration on the first day of the term, or upon any succeeding day, as he might elect."

Unmature Cause of Action. — In Beckwith *v.* Baldwin, 12 Ala. 720, it was said: "By a statute passed in 1832, it is enacted that 'It shall not be required of the plaintiff, in any suit by attachment, founded upon a cause of action not due, to file his pleadings before the first term of the court, after such cause of action falls due, and the same may be dated as of the term when filed. (Clay's Dig. 333, §113.) This provision was doubtless intended to enable the plaintiff to declare upon the cause of action as it exists after maturity of the debt or demand, where an attachment has previously issued, so that he set out his 'debt or demand' as past due, instead of becoming *in futuro.*"

Right to Trial.—"To entitle the plaintiff in an attachment cause to a trial at the return term, he must file his declaration at least ten days before the term, as in other cases." Craft *v.* Turney, 25 Ill. 286.

Right to Enter Default.—Under a statute providing that unless the plaintiff files his declaration ten days before the court at which the summons or *capias* is made returnable, the court, on motion of the defendant, shall continue the cause, it has been held that plaintiff in attachment who had not filed his declaration within the ten days would not be allowed to take a default in case of the non-appearance of the defendant. The court said: "He ought not, upon principle, to be allowed to take default till he has attained such a standing in court as would entitle him to proceed coercively, against the defendant. There was certainly some object in requiring the declaration to be filed ten days before the term, and that object could only have been to give that time to the defendant, to determine whether he has a defense to the declaration, and to prepare to make it. If the declaration is not thus filed, the defendant is not bound to pay any further attention to the case at that term. He is not

suit,[58] and makes it impossible to render a valid judgment,[59] though in other cases failure to file the complaint within the prescribed time has been held an irregularity merely and not ground for abating or dismissing the suit.[60]

It has been held that where the law makes it an essential prerequisite to a mode of service that the complaint shall be first filed, it is necessary to a valid judgment against the attached property that the complaint should have been filed before or when the publication and the summons commenced.[61]

Dissolution of Attachment.— Failure to file the complaint within the prescribed time is sometimes held ground for dissolving the attach-

bound to dance attendance upon the clerk's office during all these ten days, and then during the term itself, to see if a declaration is filed during that term, and if it is, to employ counsel to get the cause continued.'' Collins *v.* Tuttle, 24 Ill. 624.

Delay of officer to make a return is no reason for not complying with the statute, especially if the delay of the officer is acquiesced in by the plaintiff. Russell *v.* Faulkner, 89 Ga. 818, 15 S. E. 756.

In foreign attachment a condition precedent to judgment for default. Mellcy *v.* Burtis, 124 Pa. 461, 16 Atl. 747, as to act of 1836.

In Pennsylvania the act of May 10, 1889, P. L. 183, authorizes the plaintiff in foreign attachment '' 'at and after the third term of the court after the execution of the writ, to take judgment against the defendant for default of appearance, unless the attachment before that time be dissolved; provided, fifteen days prior to the entry of said judgment he shall have filed his declaration.' '' Lane *v.* White, 140 Pa. 99, 21 Atl. 437.

Verification of petition three days before it is filed, or the writ of attachment issued, does not indicate bad faith in the plaintiffs. Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557.

In Michigan, the declaration should be filed within twenty days after the return of the writ. Smith *v.* Runnells, 94 Mich. 617, 54 N. W. 375.

58. Stoddard *v.* Miller, 29 Ill. 291; Plato *v.* Turrill, 18 Ill. 273 (where there was a rule to file).

Premature Motion To Dismiss.— White *v.* Hogue, 18 Ill. 150.

The filing of a plea in abatement to the writ before the declaration is filed does not waive the defendant's right to move to dismiss for want of a declaration at the first term of the court. Stoddard *v.* Miller, 29 Ill. 291.

Rule To File.—Although the declaration may be filed at any time before the expiration of the return term of the attachment, the court has a right under its general powers of control to grant a rule on the plaintiff to file his declaration within some reasonable time during the term. White *v.* Hogue, 18 Ill. 150.

59. ''The words of the statute are mandatory—'the plaintiff shall file his declaration at the first term.' '' Callaway *v.* Maxwell, 123 Ga. 208, 51 S. E. 320.

Filing Declaration Before Affidavit of Publication.—Under a statute providing that ''the plaintiff, on filing an affidavit of the publication of the notice hereinbefore required, for six successive weeks, may file his declaration in the suit,'' a judgment is void where the declaration is filed prior to the filing of the affidavit of publication. Nugent *v.* Nugent, 70 Mich. 52, 37 N. W. 706; Steere *v.* Vanderberg, 67 Mich. 530, 35 N. W. 110.

60. Goodspeed *v.* Smith, 161 Mich. 638, 126 N. W. 975, 17 Det. Leg. N. 424 (seasonable filing not being essential to the acquirement of jurisdiction over the person of the defendant); Smith *v.* Runnells, 94 Mich. 617, 54 N. W. 375 (no default having been taken); Stephen *v.* Thayer, 2 Bay (S. C.) 272.

61. Anderson *v.* Coburn, 27 Wis. 558, where the court said: ''There is reason in this requirement. Suppose the defendant had seen the published summons, and had written to the clerk for a copy of the complaint before it was filed, in order that he might know what the cause of action was, and pre-

ment;[62] though in other cases statutes prescribing the time are held to be directory only, and not ground for dissolving the attachment.[63]

d. *If Complaint Subject to Demurrer.* — A defect in the complaint or declaration which would be fatal on demurrer has been held ground for quashing the attachment.[64] Thus where the complaint fails to set forth facts sufficient to constitute a cause of action the court, in the absence of an amendment thereto, or if the complaint is incapable of amendment, is justified in dissolving the attachment,[65] and for striking

pare his defense. Of course he would not have obtained a copy of the complaint, nor been furnished with the means of information as to the nature of the claim made against him.''

62. Jaffray *v.* Purtell, 66 Ga. 226; Birdsong *v.* Brooks, 7 Ga. 88; Lacy *v.* Kenley, 3 La. 16.

63. Perkerson *v.* Snodgrass, 85 Ala. 137, 4 So. 752.

Discretion of Court.—Rock Island Paper Mills Co. *v.* Todd, 37 Ga. 667.

64. Third Nat. Bank *v.* Teal, 5 Fed. 503; Hirsh *v* Thurber, 54 Md. 210.

See generally the titles ''**Complaint, Petition, and Declaration.**''

65. **U. S.**—Vienne *v.* McCarty, 1 Dall. 154, 1 L. ed. 79; Clark *v.* Wilson, 3 Wash. C. C. 560, 5 Fed. Cas. No. 2,841. **Cal.**—Hathaway *v.* Davis, 33 Cal. 161; Pinkiert *v.* Kornblum, 5 Cal. App. 522, 90 Pac. 969 (holding that the amendment must be made before the decision on the motion to dissolve). **Idaho.**—Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821. **Ia.**—Cramer *v.* White, 29 Iowa 336. **Kan.**—Merchants' Nat. Bank *v.* Dabford, 28 Kan. 512; Quinlan *v.* Danford, 28 Kan. 507. **Ky.**—Duncan *v.* Wickliffe, 4 Met. 118. **La.**—Herrmann *v.* Amedee, 30 La. Ann. 393. **Md.**—Dean *v.* Oppenheimer, 25 Md. 368. **Mont.**—Porter *v.* Plymouth Gold Min. Co., 29 Mont. 347, 74 Pac. 938, 101 Am. St. Rep. 569. **N. Y.**—Dudley *v.* Armenia Ins. Co., 115 App. Div. 380, 100 N. Y. Supp. 818. **N. C.**—Knight *v.* Hatfield, 129 N. C. 191, 39 S. E. 807. **Okla.**—Carnahan *v.* Gustine, 2 Okla. 399, 37 Pac. 594. **S. C.** Stevenson *v.* Dunlap, 33 S. C. 350, 11 S. E. 1017. **Va.**—Boyce *v.* McCaw, 76 Va. 740. **Wyo.**—Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743; Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

See Hemmi *v.* Grover, 18 N. D. 578, 120 N. W. 561.

Uniting Legal and Equitable Causes of Action.—Where a plaintiff may unite both legal and equitable causes of action in the same complaint the addition of an equitable cause does not invest the whole action with the character of an equitable action and authorize the setting aside of the attachment on that ground. Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744, wherein the court said: ''The complaint sets out a cause of action for goods sold and delivered by the plaintiffs to the defendant Powers, and demands judgment against him for the amount thereof—and this is, surely, nothing but a legal cause of action, pure and simple, without any feature of equitable cognizance. It is true, that there is another cause of action set out in the complaint, against both of the defendants, which is of an equitable character, to wit: that upon which the relief demanded is that the assignment by John H. Powers to his co-defendant, John W. Fowler, of his entire stock of goods, should be set aside, but that does not invest the whole action with the character of an equitable action; for if, upon the trial, the plaintiffs shall fail to establish their equitable cause of action, that would not prevent them from obtaining judgment against Powers, if they shall establish their claims for goods sold and delivered. . . . It seems to us, therefore, that the circuit judge was in error in holding that this was an action for equitable relief only, and, therefore, not such an action as would enable the plaintiffs to resort to the remedy by attachment. For, as we have seen, the action was founded upon two causes of action—one of a purely legal character, and the other equitable in its character; and, hence, there was error in setting aside the attachment on that ground only.''

Sufficiency of Allegation.—Where an attachment can issue only for a debt or demand arising upon contract a petition is sufficient to support an attachment which alleges that ''said

the declaration from the docket.[66] In other cases, however, it has been held that where no pleading is necessary the attachment will not be dissolved because the complaint is demurrable.[67]

several named sums were received by said defendant from said plaintiff to be loaned by said defendant for said plaintiff, and for use and benefit of said plaintiff." "If the allegations of the petition are true, the defendant received the several sums of money set out in the petition for the purpose of loaning the same for the plaintiff. He assumed the duty, and upon his failure to perform either his agreement or duty, or both, he thereby violated his contract with the plaintiff." Hart *v.* Barnes, 24 Neb. 782, 40 N. W. 322.

On appeal from an order vacating an attachment where the order was sought to be supported on the grounds that it was not made to appear that the plaintiff was the owner of the claim sued upon, the court said: "The plaintiff is the assignee of that claim. A written instrument of assignment was among the papers on which the warrant was issued, and that instrument is executed by Henry H. Bowman, trustee of the Overman Wheel Company. It is true that an instrument so signed would not be sufficient evidence of an assignment made by a corporation, but the claim assigned was an individual claim of Bowman. The allegation of the complaint is that one Henry H. Bowman, 'doing business as the Overman Wheel Company, etc., sold and delivered to the defendant the goods for the value of which the action was brought, and the assignment was a transfer, therefore, of that claim, the original of which is set out in the complaint." Hawkins *v.* Pakas, 39 App. Div. 506, 57 N. Y. Supp. 317.

Allegation That Debt Is Due.—In First Nat. Bank *v.* Wallace (Tex.), 65 S. W. 392, it was said: "Still another ground for quashing the attachment was urged, it being contended that the petition did not show that the debt sued on was due. There was no specific allegation that the debt or judgment was due, but the obtention of the judgment in 1894 was alleged, and a copy of the judgment was attached as an exhibit to, and made a part of, the petition. The said copy shows that execution was awarded for the collection of the judgment. If a judgment, the collection of which by execution is authorized, is not a due demand, it would be difficult to define one."

Where it is not necessary that the petition should state what part of the debt is due or that it is not due, a plea in abatement on the ground of the plaintiff's failure to allege that only a part thereof was due at the institution of the suit should not be sustained. Tootle *v.* Alexander, 13 Tex. Civ. App. 615, 35 S. W. 821.

Where the law authorizes proceedings in attachment when the debt is not presently payable, a petition referring to the debt as "due" but from which it appears that the time for payment of the note on which the suit is brought has not arrived, is not demurrable, although no reference is made to the statute. Kritzer *v.* Smith, 21 Mo. 296.

Allegation of Claim by Third Parties. Where an amended petition alleged that third parties were setting up a claim to the land attached, the court said: "The contention that the general demurrer to the petition should have been sustained cannot be acceded to. The allegation of claim to the land on the part of B. W. Rowland and Groce was very general; but the statement that they were setting up a claim to the land presented a cause of action, and the petition was not subject to general demurrer. Being protected by the rule that every intendment should be indulged in its favor, it must be held that it opened a way for proof that the claim being set up by the two appellants mentioned was one under the parties whose property had been attached." Moody *v.* First Nat. Bank (Tex. Civ. App.), 51 S. W. 523.

Georgia.—The provision of the civil code, which requires that the petition shall set forth a cause of action in orderly and distinct paragraphs numbered consecutively, does not apply to declarations in attachment. Brackett *v.* Americus Grocery Co., 127 Ga. 672, 56 S. E. 762; Fincher *v.* Stanley Electric Mfg. Co., 127 Ga. 362, 56 S. E. 440.

66. Holeman *v.* White, 11 Ark. 237.

67. Beckwith *v.* Baldwin, 12 Ala. 720; Jordan *v.* Hazard, 10 Ala. 221. See Jenks *v.* Richardson, 71 Fed. 365.

On Motion to vacate an attachment the court will not discuss the treat the sufficiency of the complaint with the same elaboration as when the question of its sufficiency is presented on demurrer. In other words such a motion cannot be turned into a demurrer to the complaint.[68]

3. Amendment.— The extent of the right of amendment as against the defendant in an action is not necessarily by any means the extent of the right of amendment as against third parties who have occupied intervening rights in the attached property.[69] Generally it may be said that all proper amendments for the same cause of action may be al-

"Even if the complaint were demurrable in the present case, and if it were necessary as a matter of pleading to allege facts of which the court will take judicial notice, which seems not to be the rule, . . . I do not think that any defect in the complaint ought to be deemed a ground for vacating the warrant of attachment. The validity of an attachment depends upon what is proven by affidavit, not on what is pleaded in the complaint. . . . In fact, no pleading is necessary in order to obtain the attachment; a summons and affidavit alone being essential. . . . No complaint being necessary, any defect in the complaint ought to be treated as harmless for the purposes of an attachment." Shepherd *v.* Shepherd, 51 Misc. 418, 100 N. Y. Supp. 401, *affirmed*, 117 App. Div. 924, 103 N. Y. Supp. 1141 (without opinion).

Compare Jones *v.* Hygienic Soap-Granulator Co., 110 App. Div. 331, 97 N. Y. Supp. 104, as indicating that the attachment will be quashed if the complaint clearly indicates that the plaintiff will fail.

In Thomas *v.* Ellison (Tex.), 110 S. W. 934, it was said: "The affidavit for the attachment is separate and distinct from the pleading, and alleges an indebtedness by defendant to plaintiff for a specific liquidated demand, and contains the proper allegations for the issuance of the writ. If it be true, as contended, that the petition was subject to a general demurrer, still, if the suit was founded on a proper cause of action, the petition could be amended, and the amendment would relate back and support an attachment issued upon filing of the original petition."

68. Atkins *v.* Fitzpatrick, 109 N. Y. Supp. 619. And see Hale Bros. *v.* Milliken, 142 Cal. 134, 75 Pac. 653; Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741; Pinkiert *v.* Kornblum, 5 Cal. App. 522, 90 Pac. 969; Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821.

69. "The intervening rights of third parties are quite as sacred as the plaintiff's right of amendment as against the defendant debtor. The courts have likewise generally recognized subsequent attaching creditors as occupying in this regard a more favored position than voluntary purchasers, so that some amendments which would be allowed against the latter would be held to discharge the attachment as to the former; and it seems to us that the rights of creditors under a general assignment for their benefit are quite as great as those of attaching creditors. The authorities seem to be practically all one way on this question, and we have found no case that goes anywhere near so far as to hold that, as against creditors, a plaintiff may amend by substituting an entirely different and distinct cause of action for the one stated in his original complaint and affidavit." Heidel *v.* Benedict, 61 Minn. 170, 63 N. W. 490, 31 L. R. A. 422, 428.

See generally the titles "**Amendments and Jeofails**," and "**Complaint, Petition and Declaration.**"

"The entry before the justice was, as the judge found, of a general appearance by the Seymour-Danne Company; but, if it had been an appearance merely 'as interveners,' to contest the title to the property, it would not have been an unauthorized change of the action in a proceeding quasi *in rem*, by attachment of property, to permit the plaintiffs to amend their attachment to embrace the same cause of action against the interveners as they had averred against the original defendant." Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, 684.

lowed and made without affecting the attachment.[70] Under the present

70. **U. S.**—Jenks *v.* Richardson, 71 Fed. 365. **Cal.**—Hathaway *v.* Davis, 33 Cal. 161; Pinkiert *v.* Kornblum, 5 Cal. App. 522, 90 Pac. 969. **Ill.**—May *v.* Disconto Gessellschaft, 113 Ill. App. 415, *affirmed*, 211 Ill. 310, 71 N. E. 1001. **Ia.**—Cawker City Bank *v.* Jennings, 89 Iowa 230, 56 N. W. 494; Pride *v.* Wormwood, 27 Iowa 257; Gourley *v.* Carmody, 23 Iowa 212; McCarn *v.* Rivers, 7 Iowa 404. **Kan.**—See Pierce *v.* Myers, 28 Kan. 364, 366. **Ky.**—Moore *v.* Harrod, 101 Ky. 248, 40 S. W. 675, 19 Ky. L. Rep. 406. **Mass.**—Lord *v.* Clark, 14 Pick. 223. **N. H.**—Page *v.* Jewett, 46 N. H. 441. **Ohio.**—Constable & Co. *v.* White, 1 Handy 44. **Ore.**—Meyer *v.* Brooks, 29 Ore. 203, 44 Pac. 281; Suksdorff *v.* Bigham, 13 Ore. 369, 12 Pac. 818. **Pa.** See Sims *v.* Stribler, 14 W. N. C. 29. **Tex.**—Sweetzer *v.* Claflin, 82 Tex. 513, 17 S. W. 769; Pearce *v.* Bell, 21 Tex. 688; Woldert *v.* Nedderhut Packing Pro. Co., 18 Tex. Civ. App. 602, 46 S. W. 378; Tootle *v.* Alexander, 13 Tex. Civ. App. 615, 35 S. W. 821. See Seawell *v.* Lowery, 16 Tex. 47.

In Suksdorff *v.* Bigham, 13 Ore. 369, 12 Pac. 818, the court said: "The attachment is only collateral to the action. The amendment, in such case, has no connection with it, and an exercise of the right cannot possibly mislead a subsequent attaching creditor to his injury, as his rights in the property attached are subject to such right of amendment. The Code provides that any pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had at any time before the period for answering shall expire. (Civil Code, sec. 97.) And thereafter, at certain stages in the action, such amendment may be allowed by the court, upon such terms as may be just and proper. It cannot be unlawful to exercise a privilege accorded by law, especially where it is secured and acted upon in good faith. If the amendment had been made for the purpose of obtaining an undue advantage over the appellants, it would present a different question, but there is not the slightest proof in the case that such was the object. On the contrary, it appears that it was in furtherance of justice, and that ought not to prejudice the said respondents. It is not shown from the record that the amendment included any new cause of action, or embraced any other claim than was contained in the original complaint; and I think it was virtually conceded on the argument that the discrepancy between the amounts claimed in the two resulted from an error in computation, made when the original complaint was drawn."

To Show Maturity of Demand.—Where an attachment was asked for on a petition filed for an amount alleged to be due, but the contract set out therein showed the time for fulfillment of the contract had not expired, and the defendant without demurring answered and counterclaimed, it was held error to refuse leave to the plaintiff to amend his petition to show that, at the time of commencing said action nothing but time was wanting to fix an absolute indebtedness, and that since the commencement, the time for performance had expired, and that plaintiff had a full and complete cause of action. The court said: "A defendant ought not to be allowed by answer to take issue upon a petition—go to a jury upon the testimony, and, after a full hearing, have the benefit of a point, which could have been raised by demurrer—and when, if thus raised, the plaintiff could have obviated the same by an amended pleading. Or if the objection is thus made, the court should be ever ready to allow amendments upon terms just and equitable under the circumstances." Pride *v.* Wormwood, 27 Iowa 257. To much the same effect, see Donnelly *v.* Elser, 69 Tex. 282, 6 S. W. 563. See also Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. 479.

Literal Compliance With Code.—"Here the justness of the claim was substantially set forth in the petition, as well as the sum the plaintiff was entitled to recover, and in these respects there was no defense. The pleading was only defective because under the decisions of this court a literal compliance with the provisions of section 196 of the Code is required. Certainly the substantial rights of the defendant were not affected by an

liberal statutes no amendment which does not change the cause of action is a departure from the affidavit and writ.[71] But plaintiff cannot supply by amendment a cause of action where the complaint states none,[72] or set up, as the basis for judgment, a cause of action entirely

amendment using the language of the Code when the pleadings had already embraced its substance.'' Moore *v.* Harrod, 19 Ky. L. Rep. 406, 40 S. W. 675.

Pending Hearing on Motion To Dissolve.—Hale Bros. *v.* Milliken, 142 Cal. 134, 75 Pac. 653, *citing* Hammond *v.* Starr, 79 Cal. 556, 21 Pac. 971; Hathaway *v.* Davis, 33 Cal. 161.

New Notice Not Necessary.—Where no new cause of action is stated no new warning order or summons is required. Fremd *v.* Ireland, 17 Ky. L. Rep. 1140, 33 S. W. 89.

Petition Subject to Demurrer.—A petition in attachment upon a sufficient cause of action which is so defective in its allegations as not to be good on general demurrer, but which is subsequently cured by amendment, is sufficient to support the attachment sued out thereon. Tarkington *v.* Broussard & Co., 51 Tex. 550.

Diverse citizenship necessary to the jurisdiction of the federal court may be set up by amendment at any time if it in fact existed at the time of bringing the action, though it was not at first alleged. Nevada Co. *v.* Farnsworth, 89 Fed. 164; Bowden *v.* Burnham, 59 Fed. 752, 8 C. C. A. 248.

Correction of Verification.—Lowenstein *v.* Monroe, 52 Iowa 231, 3 N. W. 51.

71. Nelson *v.* Webb, 54 Ala. 436, holding that a complaint setting up a special contract of renting could be amended by adding the common count for use and occupation.

In Hathaway *v.* Davis, 33 Cal. 161, 168, Judge Sanderson said: ''Unless the complaint shows upon its face that the plaintiff has no cause of action with the help of an amendment, the attachment should not be dissolved. If the complaint is defective merely, and can be made good by amendment, the plaintiff should be allowed to amend before the decision of the motion to dissolve; but if the complaint is incurable the attachment must be dissolved. So far as the complaint fails to allege that the costs on appeal were awarded to the plaintiff, it can be amended, conceding it to be defective.''

Clerical Error.—Putnam *v.* Hall, 3 Pick. (Mass.) 445.

Defective Allegations may be corrected. Brown *v.* Howe, 3 Allen (Mass.) 528.

72. **Cal.**—Hathaway *v.* Davis, 33 Cal. 161. **Idaho.**—Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821. **Ohio.**—Dobell *v.* Loker, 1 Handy 574.

''If the complaint fails to state a cause of action and is incurable, the attachment must be dissolved.'' Pinkiert *v.* Kornblum, 5 Cal. App. 522, 90 Pac. 969.

First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25, wherein it appeared from the original petition that neither of the drafts, on which the suit was brought and attachment obtained, had matured at the date of attachment or of the filing of the petition, while in the amended petition it was distinctly alleged that all four of the drafts had matured, that they had been presented for payment, and that they had been duly protested for non-payment. The court said: ''The state of things thus disclosed is as widely different from the position contained in the original pleadings as light differs from darkness. In other words, everything which, under law and jurisprudence, was lacking to justify the proceedings by attachment in the original pleadings, is supplied, by the lapse of time and by the happening of subsequent events, through the proposed amended petition.''

Insufficiency Supplied by Affidavit. In Tarkington *v.* Boussard & Co., 51 Tex. 550, it was held that a demurrable complaint might be amended so as to support the attachment if the affidavit is in proper form. To the same effect, see Thomas *v.* Ellison (Tex. Civ. App.), 110 S. W. 934.

Want of Prayer for Judgment.—Gordon *v.* Maurean, 9 La. Ann. 586.

different from that used to obtain the attachment.[73] Plaintiff should

73. **Cal.**—Hale Bros. *v.* Milliken, 142 Cal. 134, 75 Pac. 653. **Conn.**—Peck *v.* Sill, 3 Conn. 157. **Ga.**—Cox *v.* Henry, 113 Ga. 259, 38 S. E. 856; Green *v.* Jackson, 66 Ga. 250. **Ia.**—Young *v.* Broadbent, 23 Iowa 539. **Md.**—Furness *v.* Read, 63 Md. 1; Boarman *v.* Patterson, 1 Gill 372. **Mass.**—Freeman *v.* Creech, 112 Mass. 180, as to a subsequent purchaser. **Ohio.**—Putnam *v.* Loeb, 2 Ohio C. C. 110, *affirmed*, 26 Wkly. L. Bul. 352; Smead *v.* Chrisfield, 1 Handy 573. **Ore.**—Meyer *v.* Brooks, 29 Ore. 203, 44 Pac. 281; Suksdorff *v.* Bigham, 13 Ore. 369, 12 Pac. 818. **S. C.**—*Ex parte* Chase, 62 S. C. 353, 38 S. E. 718; Correll *v.* Georgia Const. Co., 37 S. C. 444, 16 S. E. 156. **Tex.**—Sweetzer *v.* Claflin, 82 Tex. 513, 17 S. W. 769.

"A party cannot by amendment set up an additional cause of action in an attachment suit and thereby acquire a lien upon the property attached to secure its payment." Parks *v.* Young, 75 Tex. 278, 12 S. W. 986.

In Union Consolidated Min. Co. *v.* Raht, 9 Hun (N. Y.) 208, appeal dismissed, 68 N. Y. 629, where it was clear that the plaintiffs were not entitled to an attachment for the cause of action stated in their original complaint, and for the purpose of meeting this objection, they subsequently amended the complaint by inserting, before the hearing of the motion, the alleged cause of action for the conversion of personal property, it was held that the action did not thereby become one for the wrongful conversion of personal property. The court said: "It still remained an action for the recovery of a large sum of money for the alleged frauds and conspiracies of the several defendants, and the addition of the alleged cause of action for the conversion of the personal property, only changed it into an action for all of the alleged causes. The Code gives an attachment only where the action is distinctly of one of the classes described in the two hundred and twenty-seventh section; and not where these actions are united with several other and different classes. The phrase 'an action for the wrongful conversion of personal property,' is a well understood descriptive one, meaning a suit the object of which is to redress the particular wrong embraced in the description. But when several other causes of action for different torts are joined, as they may be, with the one for wrongful conversion of personal property, the action ceases to be one within the descriptive phrase, and becomes an action for the several purposes and causes specified in the complaint; and to such an action no attachment is given by the Code."

Compare Citizens Nat. Bank *v.* Converse, 105 Iowa 669, 75 N. W. 506, where "after the writ had been sued out, plaintiff filed an amendment to its petition, in which it alleged, as an additional ground for an attachment, 'that the debt was incurred for property obtained under false pretenses.' It further alleged that this ground existed at the time the original petition was filed, but that it was not informed of the fact until after the levy of the writ. Defendant moved to strike this amendment, but his motion was overruled." On appeal therefrom it was held that the amendment was authorized by a statute which provided as follows: " 'This chapter shall be liberally construed and the plaintiff at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ or other proceeding; and no attachment shall be quashed, dismissed or the property attached released, if the defect in any of the proceedings has been, or can be amended so as to show that a legal cause for the attachment existed at the time it was issued; and the court shall give the plaintiff a reasonable time to perfect such defective proceedings; the causes of attachment shall not be stated in the alternative.' "

But in Emerson *v.* Converse, 106 Iowa 330, 76 N. W. 705, it was subsequently held that the court may in the proper exercise of its discretion, refuse to allow such an amendment. In this case after the jury was impaneled, plaintiff filed an amendment to his petition, in which, as an additional ground for attachment, he alleged "that the debt sued on herein is for property obtained under false pretenses." A motion to strike this

not be allowed to change the ground upon which he tried his case.[74] Though a complaint confessedly in tort cannot be amended into one on contract so as to validate an attachment,[75] in many states the same cause of action may be set up in a different form,[76] and if the complaint

amendment from the files was sustained, and on appeal this action of the court was held a proper exercise of its discretion. The court said: "No good reason is given why this matter was not set up at an earlier date. While great liberality should be shown by the courts in the allowance of amendments that are in furtherance of justice, the right is not absolute, and attorneys should not be encouraged to wait until the last moment before presenting their cases."

74. Jaffray *v.* Wolfe, 1 Okla. 312, 33 Pac. 945, where the court said: "The court should only permit such amendments as do not change the cause of action, and which give to the plaintiff no rights which he did not have when the suit was instituted." And see, First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25.

75. Suksdorff *v.* Bigham, 13 Ore. 369, 12 Pac. 818. And see Lane *v.* Beam, 19 Barb. (N. Y.) 51.

Where, however, the writ issued was in trespass on the case, and the short note stated the cause of action as assumpsit, the court said: "For all that part of the appellee's claim, therefore, for the recovery of which an action of debt or covenant was the only remedy, the present proceedings in attachment furnished no remedy. Their short note or declaration, by no amendment which could have been made to it, could be made to embrace claims recoverable only in debt or covenant. It must conform to the writ; of which there could be no amendment, changing the nature of the action. No portion of the claim of the appellees was recoverable under the proceedings before us, except that for which an action of assumpsit was the appropriate remedy." Boarman *v.* Patterson, 1 Gill (Md.) 372.

76. Munns *v.* Donovan Com. Co., 117 Iowa 516, 91 N. W. 789.

Thus where an attachment was issued upon the plaintiff declaring that defendant was indebted as charged in the first count of the petition, on the promissory note therein declared upon, and after the attachment was sued out and levied, and after the defendant had denied that he executed the note, the plaintiff amended, setting up the same cause of action in a second count in the form of an account for money advanced and loaned, which was due and unpaid at the time the action was commenced, and recovered thereon. The court said: "The reason for the amendment is shown by the uncontradicted evidence that the plaintiff prepared the note to cover what is claimed on the account, sent it to the defendant by mail for execution, and received it back by mail, purporting to be duly signed. The defendant denied under oath that he had signed or authorized the signing of his name; and the plaintiff, having no witness to the signing, amended, setting up the account which formed the consideration for the note, alleging that it was due at the commencement of the action, and asking to recover on one or the other count. The cause of action was the indebtedness. If the note was genuine, it evidenced that indebtedness; if not, then the account and the checks or other writings upon which it was based were the evidence. . . . The amendment in this case does show that the cause therein stated, the indebtedness, did exist at the time this action was commenced and the writ issued. The second count of the plaintiff's petition does not state a distinct and different cause of action from that stated in the first, but the same in a different form. It follows, therefore, that the defendant's motion to require the plaintiff to elect on which count it would proceed was properly overruled, and that a recovery upon the second count sustains the plaintiff's right to the attachment so far as there being a debt due is concerned." Cawker City State Bank *v.* Jennings, 89 Iowa 230, 56 N. W. 494, *distinguishing* Young *v.* Broadbent, 23 Iowa 539, wherein the amendment not only set up a distinct cause of action from that originally pleaded, and upon which the attachment was issued, but one that

is "so indefinite and uncertain that its real character in that respect cannot be determined, and the facts of the case are such that an action upon contract for the payment of money will lie, it can be amended so as to uphold an attachment that has been issued in the action."[77]

If the demand is the same, the plaintiff who has sued upon an account stated may, with leave of court, amend by declaring upon the original demand only, or by adding a count upon that demand; as, for example, for goods sold and delivered.[78] And "an amendment changing the form of the action or substituting or adding a new count, will not discharge bail, nor the bailee of goods attached, from his responsibility, provided the action be still for the same deamnd."[79] No amendment can be allowed to change or enlarge the grounds of action to the prejudice of subsequent attaching creditors.[80] The attaching creditor cannot add to his proper demand a sum not due; if he does and payment is taken for the whole, that part of the judgment which is good is vitiated by that which is bad.[81] If the plaintiff at the date

was inconsistent therewith, and which did not exist at the time the attachment was sued out. It was held under the facts of that case, that by the amendment the plaintiff had abandoned his first cause of action, and that the attachment therefore was wrongfully sued out.

Legal and Equitable Causes.—Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744.

In Tilton *v.* Cofield, 93 U. S. 163, 23 L. ed. 858, the court said: "The description of the cause of action was changed, but in the view of equity, and in point of fact, it was substantially the same with that originally described."

Change in Form but Not in Cause. An amendment counting upon the indebtedness mentioned in the affidavit is proper under some statutes though the form is changed from tort to assumpsit. May *v.* Disconto Gessellschaft, 211 Ill. 310, 71 N. E. 1001. In this case the court said: "The amendment was one which the plaintiff, under our statute, had a right to make, by leave of court, and when made it related back to the beginning of the suit. In the original declaration, plaintiff stated his cause of action in the wrong form. An irregularity of this character, which plaintiff, upon leave granted, had the right to correct as against the defendant, cannot be taken advantage of by an intervening creditor or an interpleader whose rights have been acquired *pendente lite*. Ball *v.* Claflin 5 Pick. 303, 16 Am. Dec. 407; Mendes *v.* Freiters, 16 Nev. 388; Moresi *v.* Swift, 15 Nev. 220; Patrick *v.* Montader, 13 Cal. 443; Vibbard *v.* Roderick, 51 Barb. 627; Tierman's Exr. *v.* Woodruff, 5 McLean 136, Fed. Cas. No. 14,027."

77. Suksdorff *v.* Bigham, 13 Ore. 369, 12 Pac. 818.

Collateral Attack.—The objection that the amended complaint stated a cause of action different from that originally declared upon cannot be raised for the first time in a collateral proceeding. Hammon *v.* Starr, 79 Cal. 556, 559, 21 Pac. 971.

78. Mendes *v.* Freiters, 16 Nev. 388. And see Hammond *v.* Starr, 79 Cal. 556, 21 Pac. 971.

79. Laighton *v.* Lord, 29 N. H. 237, 257, *citing* Miller v. Clark, 8 Pick. (Mass.) 412; Ball *v.* Claflin, 5 Pick. (Mass.) 303; Wright *v.* Brownell, 3 Vt. 435.

80. "Any such amendment to the prejudice of the rights of such creditors, will operate to dissolve the attachment of the prior creditor as against them and in that way furnish the remedy for the wrong done." Laighton *v.* Lord, 29 N. H. 237, 257.

Increasing Amount Claimed.—The petition may be amended so as to increase the amount of indebtedness alleged therein to an amount equal to that alleged in the affidavit and writ of attachment. Greer *v.* Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

81. Page *v.* Jewett, 46 N. H. 441, 446, *citing* Peirce *v.* Partridge, 3 Met. (Mass.) 44; Fairfield *v.* Baldwin, 12

of issuing the attachment does not own the claim for which he seized the property, he cannot afterwards purchase such claim and assert it by amendment against the property seized.[82] But an amendment should be allowed even to increase the amount demanded if it is in furtherance of justice and not for the purpose of taking an unfair advantage of others; as, for example, where an amount too small is stated through an error in computation.[83] Even if an amendment introduces a new and additional cause of action, if in the end judgment be taken only upon the demand originally included in and covered by the first declaration, the attachment will not be dissolved.[84]

Though the power to amend by adding or striking out the names of parties plaintiff or defendant is very liberally exercised, under statutes, as between the parties to the action in furtherance of justice, it cannot be exercised with the effect of changing the rights and liabilities of third persons.[85]

D. Plea or Answer.[86] — In an attachment suit as in other actions on the failure of the defendant to file an answer or plea to the complaint or declaration within the time prescribed default may be entered against him and the plaintiff may proceed to judgment,[87] not-

Pick. (Mass.) 388. See also Correll *v.* Georgia Const., etc., Co., 37 S. C. 444, 16 S. E. 156, where the portion of the demand in question became due during the trial.

But in Suksdorff *v.* Bigham, 13 Ore. 369, 12 Pac. 818, note, a rehearing, it was held that, there being no element of fraud, the judgment would be good for the original demand.

Addition of accrued interest held not to discharge surety. Townsend Nat. Bank *v.* Jones, 151 Mass. 454, 24 N. E. 593.

82. Farwell Co. *v.* Wright, 38 Neb. 445, 56 N. W. 984.

83. Suksdorff *v.* Bigham, 13 Ore. 369, 12 Pac. 818.

Conforming to Affidavit.—Grier *v.* Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

84. Seeley *v.* Brown, 14 Pick. (Mass.) 177; Page *v.* Jewett, 46 N. H. 441.

85. Quillen *v.* Arnold, 12 Nev, 234, where sureties were released.

Name of a Plaintiff Struck Out. Johnson *v.* Huntington, 13 Conn. 47.

Holder of legal title added as plaintiff. Fully *v.* Herrin, 44 Miss. 626.

Misjoinder of Defendant.—In Thayer *v.* Treat, 39 N. J. L. 150, where the defendant pleaded in abatement the non-joinder of other defendants, it was held that the defendant was not authorized to amend his declaration by bringing in the omitted defendants under a statutory provision authorizing such an amendment "in any action on contract, *commenced by summons.*" The court said: "My conclusion is, that this statutory provision has no relation to a proceeding begun under the attachment act. The language of the section, in terms, repels such a construction. It says, 'in any action on contract, *commenced by summons,* where the non-joinder,' etc., and thus is made to embrace, very plainly, but a single class of cases." But see Sullivan *v.* Langley, 128 Mass. 235.

Misnomer corrected. Anglo-American, etc., Co. *v.* Turner Casing Co., 34 Kan. 340, 8 Pac. 403. But see Flood *v.* Randall, 72 Me. 439.

86. See generally the title "Answers."

87. Farrington *v.* McDonald, 28 Mo. 581.

Former judgment may be pleaded in bar. United States Bank *v.* Merchants' Bank, 7 Gill (Md.)) 415.

Plea After General Judgment.—In Kimball *v.* Nicol, 58 Ga. 175, it was said: "In attachment, founded on contract, where there has not been notice, replevy, or appearance, to give the court jurisdiction over the defendant's person, and the plaintiff has, nevertheless, procured the court, without the intervention of a jury, to render a general judgment, such judgment

withstanding that he has appeared to resist the ancillary attachment.[88]

In attachment for a debt not due the defendant may file his answer to the merits at any time before the maturity of the demand sued on.[89]

Wanton or illegal proceedings under an attachment, whereby the property has been injured or lost, although otherwise remediable, cannot be pleaded in defense of the action.[90]

An attack upon the validity of the grounds of attachment will not prevent judgment,[91] and a refusal to dissolve the attachment does not impair the efficacy of the defense.[92]

is so far *prima facie* void as that the defendant may, at a subsequent term, file an issuable plea, on oath, to the action, without first moving to set the judgment aside. And while such plea is undisposed of, the plaintiff cannot ignore the appearance and pleading of the defendant, and have the judgment changed, by amendment, into a special judgment against the property attached.''

Legal Defense in a Proceeding in Equity.—In Baker *v.* Oil Tract Co., 7 W. Va. 454, the court said: ''The complainant's demand in the case before us is a legal, and not an equitable demand, and this suit is a proceeding in equity to enforce the legal demand by foreign attachment, based upon a statute, and the defendant is, and should be, entitled to make at least such defenses against the plaintiff's demand, in whole or in part, as he would be entitled if the case were an action at law, leaving out of view equitable defenses.''

Pleading Statute of Limitations.—Wilson *v.* Koontz, 7 Cranch 202, 3 L. ed. 315.

Verification of Answer.—An answer in denial of the ground for attachment stated in the affidavit for the writ is in bar of the proceedings in attachment and need not be sworn to; the fact that it is unverified being no admission of the truth of the affidavit of attachment. McGuirk *v.* Cummings, 54 Ind. 246, *following* Excelsior Fork Co. *v.* Lukens, 38 Ind. 438.

In Young *v.* The Virginia, 1 Handy (Ohio) 156, the court said: ''A difficulty has been suggested, why those persons who represent the boat cannot defend. The answer must be in the name of the boat, and no provision is made for the verification of an answer in such a case. But this I consider to be a sticking in the letter of the statute. When it is held, that, for practical purposes, the owners, or those interested in the boat, are the parties, the difficulty is gone. The pleading, though in form in the name of the boat, may be verified by the party interested in the boat, his agent or attorney.''

88. Schulenberg *v.* Farwell, 84 Ill. 400; Shaw *v.* Folkers, 12 W. N. C. (Pa.) 518.

''An attachment is an ancillary proceeding. While it requires the pendency of an action to support it, still the determination of the attachment rests upon its own facts and not upon the facts of the action. . . . Notwithstanding, therefore, that an action is aided by attachment and that the defendant has appeared to resist the attachment, he is not thereby excused from filing a pleading to the petition, and if he fail to so plead within the time allowed, his default may be entered against him and the plaintiff may in due course proceed to judgment upon his cause of action.'' Stutzner *v.* Printz, 43 Neb. 306, 61 N. W. 620, *overruled* on another point in Herman *v.* Hayes, 58 Neb. 54, 78 N. W. 365.

89. Hamilton *v.* McClelland, 33 Mo. 315.

90. Atkins *v.* Swope, 38 Ark. 528

91. Burrows *v.* Lehndorff, 8 Iowa 96; Com. *v.* Klein, 13 Pa. Super. 528.

Plea in abatement is waived by a plea to the merits filed at the same time. Cannon *v.* McManus, 17 Mo. 345; Hatry *v.* Shuman, 43 Mo. 547; Lindsley *v.* Malone, 23 Pa. 24 (on a question of evidence). See the title ''Abatement, Pleas of.''

92. Smyth *v.* Miller, 174 Pa. 639, 34 Atl. 210, 46 Am. Rep. 607, where the court said: ''The attachment is merely part of the process to secure the alleged fraudulently contracted

E. THE TRIAL. — **1. In General.** — The term at which the attachment suit may be tried is prescribed by the various statutes.[93]

The issues on the merits and the attachment may be tried together.[94]

Appointment of Auditors. — The attachment statute sometimes provides that the court shall appoint auditors to audit and adjust the demands of the plaintiff and of those of the defendant's creditors who have applied to the court for that purpose.[95] Such officers exercise the func-

debt in advance of obtaining judgment for the amount thereof; and, whether the attachment was dissolved or not, it was incumbent on the plaintiffs to establish their claim against the defendant. If they fail to obtain judgment against him, the attachment of course becomes inoperative. Assuming —as we must until the contrary is established either by the verdict of a jury or defendant's own admission— that the facts averred in his affidavit are true, they clearly constitute a defense to plaintiffs' claim as presented in their statement. In substance, the material averments are that the several purchases of goods for recovery of the price of which this suit was brought were made on credits of sixty days each, etc., and that, so far as the goods were not paid for, the term of credit of neither purchase had expired when suit was brought. Affidavits procured by plaintiffs and used in opposition to the rule to dissolve the attachment could not be resorted to for the purpose of disproving or nullifying the averments that neither of the items of plaintiffs' claim was due and payable when suit was brought.''

93. See the statutes of the various states and the title "Trial."

"The statute of 1810, for regulating 'proceedings in suits at law and in chancery,' and which requires process '*in actions at common law*' to be made returnable 'to the first day of the term next after they issue,' does not apply to the statutory remedy by attachment. And, therefore, if, by analogy, ten days after the levy of the attachment should elapse before the trial should be had, without the defendant's consent, still, as the attachment in this case was made returnable to no particular day, the fact that ten days elapsed from the levy to the day set for the trial was all-sufficient." Moore *v.* Hawkins, 6 Dana (Ky.) 289.

Sufficiency of Notice.—Where notice to the defendant is necessary to authorize a trial at the return term, the fact that it is given after the death of the plaintiff and before a revival in the name of his personal representatives do not render it insufficient. Rice *v.* Clements, 57 Ala. 191.

Right To Proceed.—The defendant should be required to proceed with the trial although some of the goods attached have been claimed by a third person and the right of property has not been determined. Richards *v.* Bestor, 90 Ala. 352, 8 So. 301.

94. Voss *v.* Evans Marble Co., 101 Ill. App. 373.

Advancement of Issue.—In Illinois it is discretionary with the court to advance the hearing of the attachment issue. Dickinson *v.* Morgenstern, 111 Ill. App. 543; Page *v.* Dillon, 61 Ill. App. 282.

95. Stewart *v.* Walters, 41 N. J. L. 430. See generally the title "References."

Substitution of Auditors.—Where it appears that the auditors originally appointed are interested in the suit others may be substituted. Anonymous, 16 N. J. L. 355.

Allowance of Exemptions. — Where an auditor is merely ascertaining the claims of the plaintiff and other applying creditors to report on them the exemption demanded by the wife of the defendant cannot be considered or allowed. Westcott *v.* Sharp, 50 N. J. L. 392, 13 Atl. 243.

Applicability of Statute.—A statute requiring reference to an auditor after judgment in an action of account does authorize or require the reference to an auditor of an attachment issue. Dickinson *v.* Morgenstern, 111 Ill. App. 543.

Where reference to a commissioner to ascertain the liens on the attached property is prayed for it appears that the other lienors should be made parties thereto. Wilson *v.* Carrico, 46 W. Va. 466, 33 S. E. 237.

tions of a common law auditor,[96] and the court may, therefore, set aside their report and refer the matter back to them,[97] or may retry the case on the law and facts and enter independent judgment of its own.[98]

Appointment of Trustees. — In Pennsylvania it is provided by statute that in an attachment against absent or absconding debtors trustees shall be appointed,[99] in whom the property of the debtor is vested.[1]

Writ of Inquiry. — Under some of the older statutes the plaintiff in attachment was entitled to a writ of inquiry.[2]

2. Verdict. — A general verdict for the plaintiff will be supported by proof of any one of several alleged grounds for attachment.[3] The

96. Stewart *v.* Walters, 41 N. J. L. 430.

97. Stewart *v.* Walters, 38 N. J. L. 274; Phoenix Iron Co. *v.* New York Wrought Iron Railroad Chair Co., 27 N. J. L. 484; Berry *v.* Callet, 6 N. J. L. 179.

Extending Time To Report.—Taylor *v.* Woodward, 10 N. J. L. 1.

Relief Against Fraud.—In Tomkins *v.* Tomkins, 11 N. J. Eq. 512, the court said: "In the case of foreign attachments, auditors are appointed by the court, before whom the claims are proved. There is no appeal from their decision. If the plaintiff imposes a fictitious claim upon the auditors, or a claim which has been satisfied, and for which the defendant has a receipt—in fine, if he conceals from the auditors any fact which tends to show that his claim is not a valid one, he commits a fraud upon the absent party, against the consequences of which this court will protect him, if it is within its power to do so either by enjoining the enforcement of the claim at law, or, if the judgment is executed, by compelling such restitution to be made as is just under the circumstances of the case."

98. Stewart *v.* Walters, 41 N. J. L. 430.

99. McCready *v.* Guardians of Poor, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667.

Authority to the majority of the three trustees to exercise all the powers is not applicable to a case where less than the full number have accepted and qualified. McCready *v.* Guardians of the Poor, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667.

Action Against Trustees.—The trustees should be called before the court of common pleas to settle their accounts before an action at common law will be supported in favor of a creditor. Wilhelm *v.* Miley, 5 Serg. & R. (Pa.) 137.

The New York statute providing for the appointment of trustees (R. S., part 2, ch. 5, tit. 1, art. 8) has been repealed. Cons. Laws, ch. 12, art. X, sects. 280, 281. See the following cases on the appointment of trustees under the former statute: Wood *v.* Chapin, 13 N. Y. 509; Van Alstyne *v.* Erwine, 11 N. Y. 331; Acker *v.* Witherell, 4 Hill 112; Whitmarsh *v.* Campbell, 2 Paige 67; Lee *v.* Hunter, 1 Paige 519; Hubbell *v.* Hines, 15 Wend. 372; *In re* Bunch, 12 Wend. 280; *In re* Bunch, 9 Wend. 473; *In re* Clark, 3 Denio 167; *In re* Depeyster, 5 Cow. 266; Fosgate *v.* Mahon, 16 Johns. 162; *In re* Coenhoven, 1 Johns. 174; Peck *v.* Randall, 1 Johns. 165; *In re* Faulkner, 1 How. Pr. 207.

1. Bradley's Appeal 89 Pa. 514; Rutter *v.* Gable, 1 Watts & S. (Pa.) 108; Ebert *v.* Spangler, 3 Pen. & W. (Pa.) 389; Ankrim *v.* Woodward, 4 Rawle (Pa.) 345; Henisler *v.* Friedman, 1 Phila. (Pa.) 290.

Liability for Error.—Trustees are not mere ministerial officers, and where they have acted in good faith and in the strict line of their duty should not be held responsible for an error of judgment. Bradley's Appeal, 89 Pa. 574.

2. **U. S.**—McClenachan *v.* McCarty, 1 Dall. 375, 1 L. ed. 183. **Pa.**—Anonymous, 2 Yeates 436. **S. C.**—Harrison *v.* Casey, 1 Brev. 390.

3. Kritzer *v.* Smith, 21 Mo. 296; Eisenhardt *v.* Cabanne, 16 Mo. App. 531; Stewart *v.* Cabanne, 16 Mo. App. 517.

See generally the titles "Findings," "Verdict."

verdict must conform to the proceedings,[4] but it is not necessary that

In Eisenhardt *v.* Cabanne, 16 Mo. App. 531, the court said: "The plaintiff's affidavit here stated five grounds of attachment. . . . The court among other things, instructed the jury as follows: 'The court instructs the jury that if they find for defendant as to all the grounds of attachment assigned in plaintiff's affidavit, their verdict must be: We, the jury, find for the defendant on the plea in abatement in this cause. If they find for the plaintiff as to all said grounds, they will in their verdict say: We, the jury, find for the plaintiff as to all said grounds alleged in plaintiff's affidavit for the attachment herein, and if they find for plaintiff as to some, but not all of said grounds, they will specify the grounds upon which they find for plaintiff, and then state that they find for defendant as to the other grounds assigned in said affidavit.' And the jury returned the following verdict: 'We, the jury, find for plaintiff as to all the grounds alleged in plaintiff's affidavit for the attachment herein.' Judgment was thereupon rendered for the plaintiff. Held that as a general verdict for the plaintiff would be supported by proof of any of the alleged grounds of attachment . . . this practice cannot possibly be prejudicial to the defendant."

Effect of General on Special Finding.—Where an attachment has been obtained on the ground that a debt has been fraudulently contracted a detailed finding of facts on a motion to discharge insufficient to show fraud is not helped out by a general finding which is a summary of that detailed statement. Bullock *v.* Mitchell, 9 Ohio Dec. (Reprint) 687.

4. Crutchfield *v.* Callaway, 54 Ga. 469.

Sufficiency of Verdict.—In an action against husband and wife, where the jury returned a verdict in the following form: "We, the jury, find for the plaintiff, and give him judgment for the sum of $2,154.23, said amount being secured by an attachment lien on land described in plaintiff's petition," the court said: "The verdict, the form of which we have already stated, was sufficiently definite to authorize the entry of judgment against E. A. Merrielles, with a foreclosure of the lien sought in the pleadings against her property exclusively. The verdict will be read in the light of the pleadings, in which no judgment of any character was sought against the husband." Merrielles *v.* State Bank, 5 Tex. Civ. App. 483, 24 S. W. 564.

In Stewart *v.* Cabanne, 16 Mo. App. 517, the jury returned the following verdict: "We, the jury, find that at the date of issuing said attachment, said defendant was about to fraudulently convey and assign his property and effects so as to hinder and delay his creditors, as stated in the affidavit." The court said: "It is claimed by defendant that this verdict is bad, because it uses the word *and* in three places, where the word *or* would have been sufficient, that is that the jury found more than was sufficient to justify the attachment. . . . The defendant here cannot complain, that the jury did not find that he was about fraudulently to convey *or* assign his property *or* effects, so as to hinder *or* delay his creditors, when they found that he was about fraudulently to convey and assign his property and effects, so as to hinder and delay his creditors, because the conjunctive necessarily includes the disjunctive."

Verdict After Intervention.—In Pitkins *v.* Johnson (Tex.), 2 S. W. 459, the court said: "The third assignment complains that the court erred in rendering judgment against the intervenors upon the verdict of the jury, because it was not responsive to the issues joined between the plaintiff and the intervenors, and did not dispose of these issues and was void for uncertainty as to the intervenors. The verdict was in favor of the plaintiff for the full amount of principal and interest claimed to be due upon the notes sued on. The issue between the plaintiff and the intervenors was as to the right of the former to recover on the notes upon which he had brought this suit, and to foreclose his attachment lien on the goods seized. To defeat this recovery and foreclosure it was necessary for the intervenors to show that the notes of Johnson were tainted with fraud. If all were fraudulent,

it should refer to or describe the property attached,[5] or that there should be a finding that the attachment lien should be established and foreclosed upon the attached property,[6] or a finding of a right to exemption.[7]

On attachment for an unmatured debt there must be a finding of the facts alleged as the basis for the attachment.[8]

Where several articles are attached and afterwards replevied under a

the attachment of the intervenors' superseded that of the plaintiff altogether. If all or any were *bona fide* debts of the defendant in attachment, the plaintiff was entitled to have the proceeds of the attached property applied to the payment of such *bona fide* debts before the intervenors could obtain any benefit from their attachments levied upon the same property. The question, then, before the jury, as between the plaintiff and intervenors, was solely as to the *bona fide* or fraudulent character of the plaintiff's notes. If they found the notes to be tainted with fraud, this was, in effect, a finding for the intervenors; if they found that they were not so tainted, they, in effect, found for the plaintiff upon the issue before them. This was the issue submitted by the district judge to the jury; and the form of the verdict which they returned was just such as he told them to find in case they believed that the plaintiff's notes were not tainted with fraud. Perhaps a better form of verdict might have been submitted to the jury; but there was and is no objection raised to the action of the court in authorizing the form of verdict they did return in case of a finding for the plaintiff; and, by rendering such a verdict, they, in effect, found for the plaintiff against the intervenors, as clearly as if they had said so in express words."

Verdict After Separate Actions.—In Buckhalter *v.* Mississippi, etc., R. Co., 32 Miss. 119, the court said: "The plaintiffs below commenced two suits, by attachment, against the defendant; one suit for installments of stock subscribed to the railroad to be completed by the plaintiffs then due, and the other suit for installments of stock not due. A general verdict appears to have been rendered, without reference to the manner in which the suits had been commenced, for the amount claimed by the two suits. No order appears to have been made consolidating the cases; nor does it appear that notice was published, except in one case. Under this state of the case, we are clearly of opinion that the judgment is erroneous."

Finding of Non-Residence.—An affidavit alleging that the defendant is not a resident of the state, but is, on the contrary, a resident of another named state and cannot be found within the state for the purpose of service of summons is sufficient to enable the court to find that "the persons on whom the service of summons is to be made cannot, after due diligence, be found within the state." Coughran *v.* Germain, 15 S. D. 77, 87 N. W. 527, *affirmed*, 17 S. D. 529, 97 N. W. 743.

Verdict Excessive—Renard *v.* Hargous, 2 Duer (N. Y.) 540.

5. Wilson *v.* Stricker, 66 Ga. 575; Hartford Life Ins. Co. *v.* Bryan, 25 Ind. App. 406, 58 N. E. 262.

6. Pitkins *v.* Johnson (Tex.), 2 S. W. 459.

7. Dronillard *v.* Whistler, 29 Ind. 552, wherein the court said: "In an attachment against a non-resident the court found the facts alleged in the plaintiff's complaint to be true; that there was then due from the defendant to the plaintiff one hundred and forty-three dollars and sixty-one cents, and that the defendant was a non-resident of the state. It is claimed that the finding is defective in omitting to find whether the defendant's wife and family remained settled in the county. If they remained so settled, it was a matter of defense."

8. Woods *v.* Tanquary, 3 Colo. App. 515, 34 Pac. 737, wherein the statute provided that if, on a traverse of the affidavit, the plaintiff should fail to substantiate any of the alleged causes of the attachment, the attachment should be dissolved and the action dismissed.

forthcoming bond, the verdict must find the separate value of the attached articles.[9]

Where there is conflicting evidence as to the facts necessary to establish the right to an attachment and the trial court adjudges against its validity the verdict will not be disturbed.[10]

F. THE JUDGMENT. — **1. Lien of Judgment.** — A judgment in the action to which the attachment is ancillary is necessary in order to perfect the attachment lien and entitle the plaintiff to subject the attached property to sale.[11] But a void attachment is not made valid by the

9. Thomason *v.* Wadlington, 53 Miss. 560.

10. Sexey *v.* Adkinson, 34 Cal. 346, 91 Am. Dec. 698.

11. Ill.—Firebaugh *v.* Hall, 63 Ill. 81. Tenn.—Staunton *v.* Harris, 9 Heisk. 579. Vt.—Brandon Iron Co. *v.* Gleason, 24 Vt. 228, 236.

In Moore *v.* Hamilton, 7 Ill. 429, the court said: "It was contended by the counsel for the defendant in error, that the action of *assumpsit* and the attachment were distinct proceedings, and that the latter might be prosecuted to final judgment without noticing the former. In the opinion of the court, this position cannot be sustained. They constitute, in fact, but one case; the attachment is but an adjunct of the original case. It is to be entitled in the pending suit and be in aid thereof. It is only process and a part of the proceedings of the case originally commenced. By the service of the writ of attachment, the defendant is prevented from alienating or carrying away his estate during the pendency of the suit. If the action proceeds to judgment, and the attachment is not in the meantime dissolved, the plaintiff has the benefit of a general judgment against the defendant, and a specific lien on the estate attached for its payment. Before the plaintiff can realize the fruits of the attachment by subjecting the property to sale, he must procure a service of the process in the original action, and obtain judgment therein. The action must be first disposed of. If it fails, the attachment goes with it. If the plaintiff cannot procure a service of process, his proper course is to discontinue his case, and sue out an original attachment."

Judgment Against One Partner.— In Thomas *v.* Brown, 67 Md. 512, 10 Atl. 713, the court said: "The debt due to the plaintiffs was a partnership debt, and the money attached was partnership assets. One partner left the state, and the writ could not be served on him, but it was served on the other partner, who appeared and contested the claim. Upon the absconding of one of the partners, all the assets of the firm in the state devolved, both in law and fact, upon the remaining partner, and in the proceedings he represented the firm, and the judgment against him was sufficient to perfect the attachment."

Judgment for Part of Claim.—"If the plaintiff was entitled to recover any part of its claim it was entitled to judgment for that amount in order to protect itself from any liability on the bond." Moffitt-West Drug Co. *v.* Lyneman, 10 Colo. App. 249, 50 Pac. 736.

Right to Legacy.—Final judgment in an attachment suit is necessary before the attaching creditor is entitled to the award of a legacy after garnishment of executors. *In re* Poulson, 33 Leg. Int. (Pa.) 400.

Judgment as Proof of Debt.—On a bill filed by a creditor to subject funds in the hands of an administrator to which a non-resident debtor was entitled and which could not be reached by attachment the plaintiff relied on a judgment in his favor to prove his debt. It appeared that three attachments had been levied on land of the debtor and judgment taken on all three, but it turned out that the land did not sell for enough to satisfy the former two judgments, which had been levied before the one in question. It was insisted, on the part of the defendant, that the judgment was void, and consequently did not furnish evidence of the debt, because there was no property of the debtor attached, which was necessary to constitute a

subsequent rendition of judgment, as provided by some statutes.[12]

Final judgment for the plaintiff relates back to the levy of the attachment,[13] and the lien of the attachment is merged there-

case in court. In respect to the land, it was insisted, it was not the property of the debtor at the time it was attached under this proceeding, for that the title had been divested by the prior levies which consumed all it had been sold for. The court said: "A levy upon personal property divests the title of the debtor and transfers it to the officer for the purposes of the writ. . . . It is otherwise as to land. The levy does not divest the title of the debtor. . . . The result is, that this land did belong to the debtor at the time of the levy, although there were older levies; so a case was duly constituted in court, and the judgment was valid at the time of its rendition. This being so, it cannot be rendered void by the fact that, at a sale subsequently made, the land did not bring enough to satisfy all the debts in respect to which levies had been made. The validity of a judgment cannot depend upon the accident that a tract of land sells for a large or a small sum." Perry *v.* Mendenhall, 57 N. C. 157.

Judgment after interplea held proper in Adams *v.* Hobbs, 27 Ark. 1.

"Only one judgment is to be entered in the attachment suit, and that judgment includes the debts found to be due to all the creditors respectively, as well those who come in under the attachment as the plaintiff by whom the writ was sued out." Blatchford *v.* Conover, 40 N. J. Eq. 205, 211, 1 Atl. 16; 7 Atl. 354.

12. Holzman *v.* Martinez, 2 N. M. 271; Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408.

13. Ill.—State Nat. Bank *v.* Moran Pack. Co., 68 Ill. App. 25, *affirmed*, 168 Ill. 519, 48 N. E. 82. Ia.—Hill *v.* Baker, 32 Iowa 302, 7 Am. Rep. 193. Kan.—Merwin *v.* Hamker, 31 Kan. 222, 1 Pac. 640. Md.—Western Nat. Bank *v.* National Union Bank, 91 Md. 613, 46 Atl. 960.

"The intrinsic power of the court over the property originates with and relates back to the levy. It is not derived from the judgment ascertaining the debt, but antedates it." Feild *v.* Dortch, 34 Ark. 399.

In Hogue *v.* Corbitt, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232, the court said: "As we understand the last of the claims that is urged by appellant, it is that the judgment was only a general and personal judgment against the defendant, and only became a lie on property of the defendant from and after March 19, 1889,—the date of its rendition; and that since the judgment did not specifically order the sale of the property levied on under the attachment writ, the personal judgment operated to quash the attachment and release the property that had been levied on. This claim is without merit. There was personal service on and appearance by Thornton. In that state of the record the plaintiff was entitled to, and in fact recovered, a judgment *in personam*. The statute (chap. 11, sec. 34) expressly provides that in such case 'execution may issue thereon not only against the property attached, but other property of the defendant.' And in the judgment in question the court in furtherance of the statute, not only awarded 'execution' for the damages and costs, but also made an additional order 'that the plaintiff have a special execution on said judgment.' Neither the writ of attachment nor the levy thereon was ever quashed. The attachment was never dissolved, by giving bond or otherwise. The property was never released. The levy still continued to be a lien up to and at the time of the rendition of judgment, and even after final judgment the attachment lien still remained effectual for the purpose of preserving the priority of lien. Such judgment relates back to the levy."

Lien for Costs.—In Merwin *v.* Hawker, 31 Kan. 222, 1 Pac. 640, the court said: "It may be conceded that the judgment, being based upon service by publication in an attachment action and without any appearance on the part of the defendant, bound only the property attached; but it bound that property, and bound it, not from the time of sale or the time of judgment alone, but also from the time of the levy of the attachment. And it

in.[14] It cures all defects in the commencement and prosecution of the suit as to all parties who had no vested rights in the property at the time of judgment,[15] but does not prevent an intervener from prosecuting his claim to the property or to the proceeds thereof by an independent proceeding,[16] and does not make the attachment operative as a lien upon property which was not, in fact, attached.[17]

A judgment may be enforced against the attached property though in form against the defendant.[18]

bound it, not merely for so much of the judgment as was for the debt, but also that portion of it which was for costs.''

Effect on Lien of Withdrawal of Plea.—Where under a stipulation between the attaching creditor and debtor it was agreed that the plea to the attachment writ should be withdrawn and that a judgment should be entered therein, it was held that such withdrawal did not deprive the creditor of his lien. State Nat. Bank *v.* Moran Pack. Co., 68 Ill. App. 25, *affirmed*, 168 Ill. 519, 48 N. E. 82. See also Adler *v.* Anderson, 42 Mo. App. 189.

Certificate of Lien.—An attaching creditor after recovering judgment may cause to be made and recorded in the town clerk's office a certificate of lien on the land that had been previously attached. Beardsley *v.* Beecher, 47 Conn. 408; Evans *v.* Nova Scotia Gold Mines, Ltd., 40 Nova Scotia 119.

14. Oliver *v.* Wright, 47 Ore. 322, 83 Pac. 870; Evans *v.* Nova Scotia Gold Mines, Ltd., 40 Nova Scotia 119.

The judgment effects a lien, even if there is not a lien by the attachment. Smith *v.* Brown, 14 N. H. 67.

''An execution upon a judgment as the means of giving effect to the lien of the writ of attachment, is not only inconsistent with the procedure established by the attachment act, but is also at variance with statutory provisions restricting the lien of judgments upon lands to the time of actual entry, and giving priority to executions as of the time of the delivery of the record execution to the sheriff. . . . The lien given is the lien of the writ of attachment, and it is clear that it was the legislative intent that that lien should be carried into effect by means of process and procedure in the attachment suit.'' Blatchford *v.* Conover, 40 N. J. Eq. 205, 215.

Expiration of Lien.—In the absence of a provision that the attachment lien shall continue effective for a certain time after judgment the lien will expire if the creditor does not prosecute his suit to judgment and execution with all due diligence, but a delay of six days in issuing execution is not such a delay as destroys the lien and releases the property. Evans *v.* Nova Scotia Gold Mines, Ltd., 40 Nova Scotia R. 119.

15. Cox *v.* White, 2 La. 422.

16. DeLoach Mill Mfg. Co. *v.* Little Rock, etc., Co., 65 Ark. 467, 47 S. W. 118, 67 Am. St. Rep. 942; Hershy *v.* Clarksville Inst., 15 Ark. 128.

A claimant in possession of real estate, condemned to be sold in an attachment suit, and entered to be compensated for improvements thereon is authorized to object to the judgment for any error therein. Webber *v.* Tanner, 23 Ky. L. Rep. 1694, 65 S. W. 848, *modifying* 23 Ky. L. Rep. 1107, 64 S. W. 741.

No judgment until right of an intervener is tried. Richards *v.* Bestor, 90 Ala. 352, 8 So. 30.

17. Kratzenstein *v.* Lehmann, 17 Misc. 64, 39 N. Y. Supp. 838; Oconto Co. *v.* Esson, 112 Wis. 89, 87 N. W. 855.

18. **Ark.**—Parsons *v.* Paine, 26 Ark. 124. **Me.**—Parker *v.* Prescott, 86 Me. 241, 29 Atl. 1007. **Mo.**—Massey *v.* Scott, 49 Mo. 278; Holliday *v.* Mansker, 44 Mo. App. 465.

In Smith *v.* Johnson, 43 Neb. 754, 62 N. W. 217, the court said: ''In regard to the second objection, viz., that no personal judgment could or should have been rendered, and that the remedy afforded should have been confined to a finding of the amount due, and an order subjecting the property to sale, and applying the proceeds to the payment of the debt, it appears, by refer-

Debt Not Due. — In the absence of express authority therefor a valid judgment cannot be rendered on a debt not yet due, although the statute authorizes the levy of the attachment before the debt matures.[19]

ence to the entry which the justice did make, hereinbefore quoted, that he made a finding of the sum due the plaintiff in the action, assessed the amount of the plaintiff's recovery and ordered the sale of the attached property. This was but a judgment in form against the defendants in the suit, and the only relief sought was to subject the attached property to its payment, and for this purpose, as an entry, it was sufficient, both in form and in substance. If void or inoperative in any part or to any degree, it was in its validity as a judgment against the debtors personally and as no attempt was or is being made to so enforce it or to further enforce it than against the property over which the court had obtained jurisdiction by the writ of attachment, its validity or force as a personal judgment against the debtor is not involved, and need not be considered."

In Young *v.* Campbell, 10 Ill. 80 (*followed* in Logsdon *v.* Logsdon, 109 Ill. App. 194), the court said: "The form of the judgment is the same in an attachment suit as in any other, and that, too, whether there be personal service or not; but when there is not such personal service the award should be only of a special execution."

In Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, the court said: "In a case where the debtor has property within the state, which is seized under a writ of attachment issued in the cause at the time the suit is brought, a judgment therein, which, though general in its terms, has the effect of perpetuating the attachment lien, and of subjecting the attached property to the payment of a debt due from the nonresident, is so far in the nature of a proceeding *in rem*, as to uphold a sale of the attached property, and considered for that purpose and to that extent is not void."

Amendment of judgment after the term by striking out the general feature against defendant. Latimer *v.* Sweat, 125 Ga. 475, 54 S. E. 673.

19. **Ala.**—Jones *v.* Holland, 47 Ala. 732; Ware *v.* Todd, 1 Ala. 199. **Kan.**—Miller *v.* Wichita Overall, etc., Mfg. Co., 53 Kan. 75, 35 Pac. 799. **Miss.**—Terry *v.* Curd, etc., Mfg. Co., 66 Miss. 394, 6 So. 229, joint debtors. **Mo.**—Hamilton *v.* McClelland, 33 Mo. 315. **N. M.**—Staab *v.* Hersch, 3 N. M. 153, 3 Pac. 248. **Tenn.**—Howell *v.* Cobb, 2 Coldw. 104, 8 Am. Dec. 591. **Tex.**—King *v.* Frazer, 2 Wills. Civ. Cas. §789; Mack & Co. *v.* James, 1 White & Wills. Civ. Cas. §547.

See Allen *v.* Claunch, 7 Ala. 788; Joseph *v.* Kronenberger, 120 Ind. 495, 22 N. E. 301, *overruled* on other grounds, 132 Ind. 39, 47, 31 N. E. 524.

"The proper course in such a case is, to stay proceedings until the period when the debt becomes due, after which, a judgment can be rendered as in other cases." Ware *v.* Todd, 1 Ala. 199.

In Staab *v.* Hersch, 3 N. M. 153, 3 Pac. 248, the court said: "Under our common-law pleadings and practice, the only consistent mode of procedure in cases of this kind would be to treat the attachment proceedings on debts not due as separate and distinct from any action at law to recover judgment thereon, and to go no further than to create an attachment lien in advance of the commencement of such action; the writ of attachment to contain a citation to the defendant to appear and answer the affidavit; the issues, if any, thus raised in the attachment proceedings, to be speedily tried, and the attachment lien dissolved or continued, according to the verdict of the jury for or against the defendant; if sustained, the attachment to remain a subsisting lien on the property of the debtor, and, upon the maturity of the demand, a declaration to be filed and the defendant cited to plead thereto; if the plaintiff recover judgment, then a writ of *venditioni exponas* to be issued for the sale of the property attached, and the proceeds applied to the satisfaction of the judgment."

Claim maturing before judgment may be included in the verdict and judgment. Devlan *v.* Wells, 65 N. J. L. 213, 47 Atl. 467; Rollins *v.* Kahn, 66 Wis. 658, 29 N. W. 640. See also Brace *v.* Grady, 36 Iowa 352; Kildare Lumb. Co. *v.* Atlantic Bank, 91 Tex.

Judgment In Personam. — Where the defendant has been personally served with process or has entered an appearance, a judgment *in personam* should be entered against him,[20] although the attachment has been dismissed,[21] if the pleadings and evidence authorize it.[22]

Judgment in Rem. — Where there has been no personal service upon the defendant and he has not appeared, the judgment can affect at most only that property of his which is within the jurisdiction,[22] and it is

95, 41 S. W. 64 (amendment of petition to show maturity).

In Mosher *v.* Farmers' etc., Nat. Bank, 51 Neb. 55, 70 N. W. 540, the court said: "As this action was begun aided by an attachment, its commencement before the cause of action declared upon had matured was authorized by statute. . . . The supplemental petition was filed after the note had matured, and distinctly averred that said note meantime had fallen due and that there was due and unpaid the amount of principal and interest which was evidenced by said note. Issues were duly joined on these averments and the condition of the pleadings entitled plaintiff to a judgment if the proofs were sufficient to sustain its averments of fact."

There is no waiver by an offer to pay the amount on the day premature judgment is rendered. Crain *v.* Bode, 5 Wyo. 255, 39 Pac. 747.

Consent of debtor justifies judgment. Crew *v.* McClung, 4 Greene (Iowa) 153.

20. **Ill.**—Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232; Young *v.* Campbell, 10 Ill. 80. **La.**—Rathbone *v.* London, 6 La. Ann. 439, **though he has** given bond and taken the property. **Mo.**—Payne *v.* O'Shea, 84 Mo. 129; Maupin *v.* Virginia Lead Min. Co., 78 Mo. 24; Borum *v.* Reed, 73 Mo. 461; Hubbard *v.* Moss, 65 Mo. 647; D. C. Wise Coal Co. *v.* Columbia Zinc. etc., Co., 143 Mo. App. 587, 128 S. W. 232; Whitman Agr. Assn. *v.* National R., etc. Assn., 45 Mo. App. 90; Holliday *v.* Mansker, 44 Mo. App. 465. **Tex.** Cloud *v.* Smith, 1 Tex. 611. **Va.**—Fisher *v.* March, 26 Gratt. 765.

See Baldwin *v.* McClelland, 152 Ill. 42, 38 N. E. 143; O'Brien *v.* Stephens, 11 Gratt. (Va.) 610.

"**The reason for the law is,** that the defendant may have other property than that attached, and may prefer that it should be sold. In this particular case the action of the court in rendering a special judgment, with directions for a special execution against the attached property, was especially erroneous and inexplicable, in view of the fact that the money was then in the hands of the clerk, with which the judgment could and ought to have been immediately satisfied, without additional costs or delay." Audenreid *v.* Hull, 45 Mo. App. 202.

Judgment against administrator who has replevied the property. Loomis *v.* Allen, 7 Ala. 706.

No judgment against surety not served. Kuntz *v.* Bright, 12 Ind. 313.

Decree Against Corporation. — "Where an attachment is sued out against a non-resident corporation, which has the equitable title to real estate attached in the cause, a personal decree may be rendered against such non-resident corporation, which appears in the cause, but the attached property will not be sold in the absence of the trustees who hold the legal title; they must either be served with process, or if non-residents, an order of publication must issue against them and be duly published." Chapman *v.* Pittsburgh, etc. R. Co., 18 W. Va. 184.

No judgment on a mechanic's lien is necessary where defendant owns the property attached. Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131; Martin *v.* Darling, 78 Me. 78, 3 Atl. 118.

21. Hendrix *v.* Cawthorn, 71 Ga. 742; Philbin *v.* Thurn, 103 Md. 342, 63 Atl. 571.

22. Giving bond to release the property does not authorize judgment. Monroe *v.* Cutler, 9 Dana (Ky.) 93.

23. **Conn.**—Watermann *v.* Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240. **Miss.**—Woolfolk *v.* Cage, 1 Walk. 300. **Neb.**—Nagel *v.* Loomis, 30 Neb. 499, 50 N. W. 441. **N. Y.**—Fitzsimmons *v.* Marks, 66 Barb. 333. **Ore.**—Meyer *v.* Brooks, 29 Ore. 203, 44 Pac. 281.

A statute providing that "when the attachment has been returned to the proper court, the subsequent proceedings shall be in all respects the same

generally provided that under such circumstances only a special judgment against the attached property may be taken.[24] It is not necessary,

as in cases where there is personal service,'' does not authorize a judgment *in personam* against a defendant in an attachment case where there has been no service upon him other than by levy, and where he does not appear and plead to the merits. Fincher *v.* Stanley Electric Mfg. Co., 127 Ga. 362, 56 S. E. 440.

Limited Jurisdiction.—In Farmer *v.* Bascom, 9 B. Mon. (Ky.) 23, the court said: ''Where the demand is purely legal, the fraudulent intention on the part of the debtor to remove his property out of the commonwealth, alone gives jurisdiction to a Court of Equity, and the jurisdiction which it acquires, is prescribed by the statute, and limited in its operation to the property of the debtor. The court, therefore, has jurisdiction only *in rem*, and has no power to decree *in personam.*''

Curator Ad Hoc.—Heber *v.* Abbott, 39 La. Ann. 1112, 3 So. 259.

24. **U. S.**—Westerwelt *v.* Lewis, 2 McLean 511, 29 Fed. Cas. No. 17,446. **Ark.**—Wilson *v.* Spring, 38 Ark. 181; Feild *v.* Dortch, 34 Ark. 399. **Idaho.**—Kerns *v.* McAulay, 8 Idaho 558, 69 Pac. 539. **Ill.**—Tennett-Stribbling Co. *v.* Hargardine-McKittrick Dry-Goods Co., 58 Ill. App. 368. **Ind.**—Henrie *v.* Sweasey, 5 Blackf. 335. **Ia.**—Banta *v.* Wood, 32 Iowa 469; Doolittle *v.* Shelton, 1 Greene 272; Wilkie *v.* Jones, 1 Morris 97. See Mayfield *v.* Bennett, 48 Iowa 194. **La.**—Favrot *v.* Delle Piane, 4 La. Ann. 584. **Miss.**—Tabler *v.* Mitchell, 62 Miss. 437; Sale *v.* French, 61 Miss. 170; Woolfolk *v.* Cage, 1 Walk. 300. **Mo.**—Bryant *v.* Duffy, 128 Mo. 18, 30 S. W. 317; Smith *v.* McCutchen, 38 Mo. 415; Johnson *v.* Holley, 27 Mo. 594; Clark *v.* Holliday, 9 Mo. 711; Posey *v.* Buckner, 3 Mo. 604. **N. J.**—Davis *v.* Megroz, 55 N. J. L. 427, 26 Atl. 1009; Miller *v.* Dungan, 36 N. J. L. 21; Bainbridge *v.* Allen, 70 N. J. Eq. 355, 61 Atl. 706. **N. M.**—Southern California Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345. **N. Y.**—Grevell *v.* Whiteman, 32 Misc. 279, 65 N. Y. Supp. 974; Thomas *v.* Merchants' Bank, 9 Paige 216; Bates *v.* Delavan, 5 Paige 298; Goodkind *v.* Strickland, 3 Daly 420. **Pa.**—Coleman's Appeal, 75 Pa. 441. See Darrach *v.* Wilson, 2 Miles 116. **S. C.**—Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675. See White *v.* Floyd, Speer Eq. 351. **Tex.**—Martin *v.* Cobb, 77 Tex. 544, 14 S. W. 162. **Vt.**—Woodruff *v.* Taylor, 20 Vt. 65. **Va.**—O'Brien *v.* Stephens, 11 Gratt. 610. **Wis.**—Atkinson *v.* Rosalip, 3 Pin. 288, 4 Chand. 12. *Compare* Brown *v.* Tucker, 7 Colo. 30, 1 Pac. 221.

In Oliver *v.* Wright, 47 Ore. 322, 83 Pac. 870, it was held that personal service upon or appearance by the defendant not being referred to, a judgment for plaintiff in an attachment action becomes, when docketed, a lien upon all the real property of the judgment debtor, but does not establish any specific interest in his land.

Approved Form.—In Johnson *v.* Holley, 27 Mo. 594, the court said: ''The judgment was in the following form: 'It is, therefore, considered by the court that the said plaintiffs recover of the said defendant the sum of three hundred and sixty-eight dollars and fifty cents as and for their demand, and also their costs and charges herein expended, and that they have a special execution on the property attached, to-wit: lot No. 9,' etc. . . . This judgment will be construed in reference to the record; and as it will only authorize a special *fieri facias* against the attached property it is substantially good.''

Variance in Name of Defendant.—In Bigelow *v.* Chatterton, 51 Fed. 614, the court said: ''It is further objected that the proceeding of the attachment against L. L. Bigelow gave the court no jurisdiction to enter judgment and sell the lands of Lee L. Bigelow, when there was no appearance to the action. The bill was filed in the name of Lee L. Bigelow, but there is no allegation or proof that that is his name, nor is it alleged that the attachment suit in the state court was not brought against him by his name. The cause of action in the attachment suit was a note signed 'L. L. Bigelow,' and the appellee proved that the appellant made and signed that note and that he was the person sued in that action. Having signed the note by his initials, he cannot, at this day complain that he was sued on that note by those initials.

however, that the judgment should recite that it is valid only against the property attached.[25]

After Discharge in Bankruptcy. — When a defendant in an action has been discharged in bankruptcy and it is made to appear that the plaintiff has an attachment of property which is not dissolved by the proceedings in bankruptcy, the plaintiff is entitled to a special judgment to be enforced against the property attached, and not against the person or other property of the defendant,[26] and a similar rule prevails under insolvency statutes.[27]

But if it was irregular to sue him by his initials, it was a matter in abatement at the most, and did not affect the jurisdiction of the court."

A written notice under some statutes entitles plaintiff to a general judgment against the defendant. Sutton *v.* Gunn, 86 Ga. 652, 12 S. E. 979. See Carithers *v.* Venable, 52 Ga. 389.

Notwithstanding release of the attached property by payment of the purchase money into court. Core *v.* Oil & Oil Land Co., 40 Ohio St. 636.

Attachment of boat authorizes judgment *in rem* only (Hartman *v.* Stone, 19 Ark. 639; Canal Boat Odd Fellow *v.* Stewart, 2 Ind. 240); unless the boat is released on bond (Lane *v.* Leet, 2 Ind. 535; Brayton *v.* Freese, 1 Ind. 121; Jones *v.* Gresham, 6 Blackf. (Ind.) 291).

25. Kerns *v.* McAulay, 8 Idaho 558, 69 Pac. 539, where the court said: "In such cases, after the attached property is exhausted no execution can be legally issued for any unpaid balance on such judgment after the application of the proceeds of the sale of the attached property. We think that it would be better practice in this class of cases for the judgment to recite the fact of the attachment, and contain an order for the disposition of the attached property, and recite that the judgment was valid only in so far as the application of the proceeds of the sale of the property paid or satisfied it."

26. American Agr. Chem. Co. *v.* Huntington, 99 Me. 361, 59 Atl. 515; Stickney, etc. Coal Co. *v.* Goodwin, 95 Me. 246, 49 Atl. 1039, 85 Am. St. Rep. 408; Bosworth *v.* Pomeroy, 112 Mass. 293.

In Bosworth *v.* Pomeroy, 112 Mass. 293, the court said: "The object of this is to enable the plaintiff to avail himself of an existing lien saved to him by the bankrupt law, and which cannot be enforced in any other way. . . . In this case the bill of exceptions shows that the plaintiff attached both real and personal estate of the defendants, more than four months before the institution of the proceedings, in bankruptcy. The lien thus acquired are preserved for his benefit by the provisions of the bankrupt law. There is nothing to show, and it is not claimed, that the attachment upon the real estate was dissolved or lost in any way. It remains an existing lien, and entitles the plaintiff to the qualified judgment ordered in the superior court, without regard to the question whether the attachment of the personal property was dissolved. The evidence offered by the defendants to show that the attachment of the personal property was dissolved by the acts of the parties, was therefore immaterial. As the proper judgment was ordered, the defendants were not aggrieved by its rejection, and it is not necessary to consider whether the reason given therefor was correct."

Construction of Bankruptcy Act.— The language of the Bankruptcy Act of 1898 to the effect that all attachments made within four months prior to the filing of the petition in bankruptcy shall be dissolved, is equivalent to an express provision for the preservation of attachments made more than that time before the filing of the petition. Stickney, etc., Coal Co. *v.* Goodwin, 95 Me. 246, 49 Atl. 1039, *following* Leighton *v.* Kelsey, 57 Me. 85. See the title "**Bankruptcy Proceedings.**"

27. Barber *v.* Mintnon, 1 Day (Conn.) 136. In Gay *v.* Raymond, 140 Mass. 69, 2 N. E. 782, it was said: "Insolvency proceedings commenced more than four months after an attachment do not dissolve it; but they may result in a discharge of the defendant from

2. Direction For Sale.—While it has been said to be the better practice to direct the sale of the attached property,[28] if the defendant has appeared or has been personally served,[29] it is not usually necessary that the judgment should contain such an order,[30] and under some

the debt, which will prevent the plaintiff from recovering judgment against the defendant, and so obtaining an execution upon which the property may be taken. To prevent this result the special judgment against the property attached was devised, so that, when a defendant pleaded a discharge in insolvency and showed a defense to the suit so that no judgment could be had against him, the plaintiff was enabled to enforce his lien under the form of a judgment against the defendant enforceable only against the property attached. The precise form of the proceeding is not material; the substance of it is a judgment for the amount of the debt, to be executed only in preserving and enforcing the lien on the property. The same judgment may be entered, while the question of discharge is pending, on a suggestion of insolvency, and on motion of either party. In this case, after the defendant had been defaulted, upon a suggestion of the insolvency of the defendants by the plaintiffs, and upon their motion, judgment was entered against the defendants for the amount of the debt and costs, to be enforced only against the property attached, and execution was issued reciting the judgment against the defendants for said sums, to be levied only on the property attached. We think that the judgment was a final disposition of the case. It was a final judgment, and it authorized an execution only against the property attached, and cannot be treated as a general judgment against the defendants.''

28. In Pennsylvania Mtg. Inv. Co. *v.* Gilbert, 13 Wash. 684, 45 Pac. 43, 43 Pac. 941, the court said: ''While we are satisfied that it would be a more regular and much better practice to have an order or judgment of the court directing a sale of the property attached, there are several reasons which have induced us to hold that the same was not necessary. The statute does not in express terms require it, and there is room for holding that the same was not essential, although it makes an exception to the general rule that in the enforcement of liens upon real estate it is necessary to have a judgment of the court foreclosing the same. Under such statutes the courts of the different states have arrived at different conclusions in considering whether it was necessary to have a judgment of condemnation of the attached property entered in the action . . . and we are satisfied that it has not been the uniform practice in this territory and state to have such a judgment entered. A holding at this time that it was necessary to do so would tend to the unsettling of titles. Furthermore, in a case like this, where intervening rights accrued after the attachment levy and prior to the execution levy, and there is a question as to whether the attachment had been dissolved prior to obtaining such rights, or whether the same was in force at the time the judgment was entered, it is clear that the entry of a judgment of condemnation or foreclosure as against the attached property by the court would not be binding upon the parties claiming such intervening rights, and they would have the right to litigate it. This, in connection with the foregoing reasons, has led us to construe the statutes relating to the procedure in such matters, where a personal service was had upon the defendant in the attachment suit, as not requiring a special judgment foreclosing the lien upon the property attached.''

29. Borum *v.* Reed, 73 Mo. 461; Jones *v.* Hart, 60 Mo. 351. See Kritzer *v.* Smith, 21 Mo. 296.

30. **Ill.**—Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219. **Ia.**—Kingsbury *v.* Buchanan, 11 Iowa 387. **Miss.**—Sale *v.* French, 61 Miss. 170. **Tex.**—Byers *v.* Brannon, 19 S. W. 1091 (prior to the adoption of the revised statutes); Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921; Wallace *v.* Bogel, 66 Tex. 572, 2 S. W. 96.

In Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, ''there was personal service on and appearance by Thornton. In that state of the record the plaintiff was entitled to, and in fact recovered,

statutes such a judgment is erroneous.[31] In other cases, however, it

a judgment *in personam*. The statute (chapter 11, §34) expressly provides that in such case 'execution may issue thereon, not only against the property attached, but other property of the defendant.' And in the judgment in question the court, in furtherance of the statute, not only awarded 'execution' for the damages and costs, but also made an additional order 'that the plaintiff have a special execution on said judgment.' Neither the writ of attachment nor the levy thereon was ever quashed. The attachment was never dissolved by giving bond or otherwise. The property was never released. The levy still continued to be a lien up to and at the time of the rendition of the judgment. And even after final judgment the attachment lien still remained effectual for the purpose of preserving the priority of lien. Such judgment relates back to the levy. Julliard *v.* May, 130 Ill. 87, 22 N. E. 477; Conn *v.* Caldwell, 1 Gilman, 531; Martin *v.* Dryden, Id. 187; Young *v.* Campbell, 5 Gilmon, 80; Kerr *v.* Swallow, 33 Ill. 379. The case of Wasson *v.* Cone, 86 Ill. 46, is not here in point. That was not an attachment suit commenced in a court of record, under the provisions of the act approved December 23, 1871 (Laws 1871-72, p. 176), but an attachment commenced before a justice of the peace, under the provisions of the act in regard to attachments before justices of the peace, approved February 9, 1872 (Laws 1871-72, p. 185); and the case was not controlled by section 34 of the act of 1871, but by sections 8 and 11 of the act of 1872, the last of which sections requires that, if judgment be given against the defendant, then the justice of the peace 'shall order a sale of the property attached, or so much thereof as will satisfy the judgment and all costs of suit.'"

In Van Diver *v.* Buckley (Miss.), 1 So. 633, it was said: "When the right to attach is admitted, or sustained when denied by plea in abatement, judgment condemning the property levied on to be sold is not required at this stage of the suit, and, if taken and entered, it is a vain and useless proceeding. The legal effect of judgment on the merits against the defendants in attachment is to condemn the property levied on to be sold to pay that judgment; and in that judgment, if any, the formal sentence of condemnation should be made."

Reason of Rule.—In Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 66 N. W. 453, the court said: "Our conclusion is that a judgment in an action aided by an attachment need not direct the sheriff to sell the property seized thereunder, because the law plainly defines his duty, and expressly indicates the successive steps to be taken by said attaching officer in subjecting the property to the satisfaction of the demand."

31. Myers *v.* Mott, 29 Cal. 359, 89 Am. Dec. 49, where the court said: "No provision of the Practice Act is cited that justifies such an order. . . . The principle is cardinal and uniform, that the judgment for the plaintiff must be founded on and authorized by the allegations of the complaint. The attachment and levy formed no part of the pleadings, and were not competent evidence of any fact stated therein, but came before the court incidentally and on a motion that had no relation to the merits of the action. The order is in its nature a decree enforcing a lien, and is as clearly authorized as would have been a decree enforcing a vendor's lien, if it had happened in the case that the plaintiff in proving the consideration of the notes had shown that they were given for the purchase money of certain real property belonging to the estate of the intestate. The impropriety of the judgment is made manifest by supposing that a portion of the attached property is exempt from execution, that another portion is the separate property of the widow of the deceased, and that a portion or all of the real property attached constituted the homestead of the deceased and his wife. Certainly those questions could not be tried without proper issues were framed, and it is impossible to see how the administratrix could have raised them in the suit on the notes, unless she is required to answer not only the complaint, but the sheriff's return to the attachment also. This she would be bound to do, or be precluded thereafter from asserting her claim to the property by the judgment of the court

has been held that such an order is correct,[32] and the failure to make

ordering the property to be sold, if such judgment, based upon the single fact that the property has been seized under attachment, can be maintained. The court, in rendering judgment in an action in which an attachment has been procured and served, has no duty to perform in reference to the attachment proceedings. The sheriff does not act in obedience to the judgment, but to the behests of the statute, in enforcing the attachment lien, by the sale of the property attached."

In Texas.—"The court exceeded its authority in rendering judgment foreclosing the attachment lien. The power exists to merely recite the fact of the issuance and levy of the attachment. Article 214, Rev. St. 1895. The judgment in this respect will be reformed, and as reformed affirmed; appellee to pay costs of appeal. The appellant contends that the evidence shows the property attached to be a homestead and not subject to such seizure. The county court is not, as ruled, empowered to foreclose the lien. It is only empowered to find the fact that such writ issued and was levied. This finding does not operate to decree that the property is legally subject to the levy and sale. The language of the statute that 'such recital shall be sufficient to preserve such lien' merely assumes that the property is subject to seizure. If the property is a homestead and it is attempted to be sold under execution, appellant has his remedy in the proper tribunal." Hamill *v.* Samuels (Tex. Civ. App.), 135 S. W. 746.

In Johnson *v.* Goolsby Lumb. Co. (Tex. Civ. App.), 121 S. W. 883, the court said: "It was further argued at the bar that the court's judgment in effect foreclosed the attachment lien upon the land levied on, and that this constituted fundamental error for which the case should be reversed. The judgment, after reciting the issuance and levy of the writ of attachment upon the land proceeds to adjudge that the lien existing by virtue thereof be 'recognized' and the clerk of the court is directed to issue an execution commanding the sheriff or any constable of Hunt County to sell said land as the law directs, and apply the proceeds of such sale to the payment of the costs incurred in this suit and the plaintiffs' judgment, and that, if after satisfying said costs and judgment any money remains in his hands to pay the same over to Mrs. Johnson, but that, if the sum realized from the sale of the attached property is not sufficient to pay plaintiffs' judgment and the costs of suit, that execution issue for the balance. We are of the opinion this form of the judgment does not warrant a reversal of the case. The judgment contains much more than was necessary to preserve the attachment lien, but it does not purport to foreclose said lien, and such is not, in our opinion, its legal effect. The course directed in the judgment to be pursued for its enforcement is but the course pointed out by law, and which would ordinarily be pursued without express directions given therefor in the judgment."

32. **Ind.**—McCollem *v.* White, 23 Ind. 43, where the only issue was as to the truth of the affidavit. **La.**—Succession of Caldwell, 8 La. Ann. 42. **Md.**—Dawson *v.* Contee, 22 Md. 27. **Tenn.**—See Hillman *v.* Werner, 9 Heisk. 586.

Sale Subject to Another Attachment. Where a judgment directed the sale of real estate subject to an attachment in favor of a plaintiff in another suit, the court said: "This was error also. The action of Howell should have been consolidated or heard with this, and the amount for which the land was liable under his attachment should have been ascertained and a judgment rendered to sell to satisfy both, and but one sale should have been ordered. To sell subject to an attachment the amount of which has not been ascertained, and which did not even appear to have been sustained, and which may never be sustained, was calculated to prejudice the rights of Davidson; for no prudent man would be likely to bid for land subject to a lien for an unknown amount." Davidson *v.* Simmons, 11 Bush (Ky.) 330.

Order for Payment and Deed.—In Brien *v.* Pittman, 12 Leigh (Va.) 379, a case of foreign attachment, the court said: "The court is further of opinion, that it was irregular to direct payment of the money to the creditor, and the execution of a deed to the purchaser,

the order releases the property from the lien of the attachment.[33]

in the decree for sale. Before such direction is given, a report of the sale should be made, to enable the parties interested to show cause against it, and that the court may see that its decree has been properly executed."

Affidavit as to Personalty.—In Payne *v.* Witherspoon, 14 B. Mon. (Ky.) 270, the court said: "No affidavit was filed in this case by the plaintiff or his agent to the effect that the defendant had no personal property, or not enough to satisfy the claim of the plaintiff, in this state, known to the affiant, as required by sec. 272 of the code. Until such an affidavit be filed, no order for the sale of real property attached, can be legally made, and consequently the order of sale in this case was unauthorized and improper."

Sale of real property on credit proper. Brien *v.* Pittman, 12 Leigh (Va.) 379.

Effect of Personal Service.—In Giddings *v.* Squier, 4 Mackey (D. C.) 49, the court said: "No surety was given, none tendered, and here is the mandate of the statute directing the court that they shall not discharge the property without it. The writ is good, the proceeding is regular and according to law. What is next to be done under these circumstances? The next section —sec. 785—provides: 'If the defendant fail to execute such undertaking, the court may sell the thing attached; whenever it is satisfied that it is in the interest of the parties, it should be sold before final judgment.' So that if the attachment is not quashed, if no substantial surety is given, the court is to sell it in the interests of the parties. . . . We think that the property was subject to condemnation and that the court ought to have entered such a judgment and have directed a sale of the property in the interests of the parties."

Jurisdiction To Foreclose Lien.—It has been held that although a court is without jurisdiction over a suit to enforce a lien upon land it nevertheless has jurisdiction to render a judgment enforcing and foreclosing the lien obtained under a writ of attachment. Rowan *v.* Shepard, 2 Wills. Civ. Cas. §295, wherein the court said: "We are of opinion, therefore, that a writ of attachment levied on land, while it thereby becomes a lien upon the property, and is sought to be enforced under a statute which prescribes that it shall be foreclosed, is not a suit in contemplation of law to enforce a lien. We think the proceeding is an initiatory execution, wherein the plaintiff seeks to secure and establish his priority of right as a creditor to the satisfaction of his debt out of any property the defendant may own, as against other creditors. That the effect of the foreclosure is judically to assure him of that right, and is not, in a proper sense, a suit or a decree which determines any lien upon defendant's property in a different or other sense than of securing to the plaintiff preference as against other creditors in respect to the property attached. The lien is derived from the levy of the writ under proper and valid proceedings, and neither the trial nor the decree involves any other question than whether the property is to be subjected to the payment of plaintiff's debt under the lien given as a mere legal result from the levy."

The personal property under the control of the court must be sold before the real estate attached can be properly ordered to be sold. Camden *v.* Haymond, 9 W. Va. 680.

33. Lowry *v.* McGee, 75 Ind. 508

In Wasson *v.* Cone, 86 Ill. 46, the court said: "Neither the justice nor circuit court rendered any judgment for the sale of the attached property, as provided by the 52d section of the Attachment Act. When the court failed to order the sale of the property seized under the writ, it operated as a dismissal of the attachment. It operated to release the property from the levy under the writ of attachment, and the judgment was only personal against the defendant, to be enforced precisely as though there had been no attachment sued out and levied, but service of summons or appearance by the defendant. . . . When the circuit court rendered a personal judgment only, it operated as fully to quash the attachment and release the property as if the previous motion had been allowed, and a formal order entered. The property attached could not be sold, or any process issued for the purpose—unless the judgment had

The usual order where the latter rule prevails is to sell as much as will satisfy the judgment,[34] but a deviation from that form will not be considered an error unless it be apparent that injustice would be done thereby.[35]

Description of Property. — Where the judgment contains an order of condemnation it must specifically describe the property attached and condemned.[36]

Property in Hands of Third Person. — If the attached property is in possession of a person who is not a party to the suit the plaintiff is not entitled, in addition to the judgment against defendant for the debt,

ordered its sale—except under the statute, before judgment rendered, to prevent its loss by perishing. The statute requires the judgment to order its sale, and such an order is essential to its validity after judgment."

34. Harlow *v.* Becktle, 1 Blackf. (Ind.) 237; Starks *v.* Curd, 88 Ky. 164, 10 S. W. 419.

35. Harlow *v.* Becktle, 1 Blackf. (Ind.) 237, wherein it was objected that the court ordered all the attached property to be sold, instead of so much as would satisfy the judgment. The court said: "Such an order might be wrong; and were it manifest that the court had ordered more property to be sold than would discharge the amount due, and that the property was of such a nature that it might be divided without a disadvantage to the defendant, the objection would be good. Two tracts of land were attached, one of 193 acres, the other of 144 acres, to satisfy a judgment of 4,220 dollars; and if either or both of the tracts could be divided without a loss, it is not to be presumed that the whole would be sufficient to discharge the demand."

In Starks *v.* Curd, 88 Ky. 164, 10 S. W. 419, where several tracts of land in different counties had been attached, it was held that the judgment instead of directing the sale of the land in gross should have directed sale by the tract, and only so much thereof as would be sufficient to satisfy debts, interest and costs.

36. Staunton *v.* Harris, 9 Heisk. (Tenn.) 579, wherein the court said: "The judgment of condemnation must be certain and specific, so describing the property attached and condemned as that from the judgment a writ of venditioni exponas may issue deriving its direction and authority from the judgment."

Sufficiency of Description.—In Glasscock *v.* Price (Tex. Civ. App.), 45 S. W. 415, *modified* as to other points, 92 Tex. 271, 47 S. W. 965, the court said: "We do not deem it necessary to consider the sheriff's return upon the attachment, because, in our opinion, if the judgment sufficiently describes the land, against which it attempts to fix a lien, this will be sufficient. The judgment recites that a writ of attachment had been issued and levied upon the land described in the judgment, and in a collateral proceeding like this such recital is conclusive, and it is immaterial as to what may have been the return indorsed by the sheriff upon the writ. The judgment shows that the attachment was levied upon all of M. P. Kelley's interest in the South Side addition to the city of Georgetown, in Williamson county, Tex.; and further states, in effect, that Kelley owned an undivided one-third interest in said addition. The rule is that, when real estate is sold on legal process, it must be described with sufficient certainty to enable a person of common understanding to identify it. . . . It therefore appears that the South Side addition to the city of Georgetown consists of 26 blocks, and is the land specifically described in the plaintiff's petition by metes and bounds, and, as thus described, its identity can readily be ascertained by any surveyor of average skill. The judgment describes the property with sufficient certainty to fix the lien. The cases cited by counsel for appellant are not analogous to this case."

If the levy is on "one-half" of a certain tract, a judgment is uncertain which orders a sale of "the es-

to a further judgment subjecting the attached property to sale so as to give the purchaser title thereto.[37]

3. Amount of Judgment. — If the court has jurisdiction of the parties as well as of the subject-matter, it may render judgment for the amount found due regardless of the extent of the levy,[38] or of the amount stated in the affidavit;[39] but if there is no personal service the court has no jurisdiction to render judgment for a sum greater than that claimed in the affidavit, with accruing interest.[40]

4. Default. — Judgment by default is not authorized unless there has been an actual levy and service of process or notice of the proceeding.[41]

tate heretofore attached." Porter *v.* Byrne, 10 Ind. 146, 71 Am. Dec. 305.

37. Post Glover Elec. Co. *v.* McEntee-Peterson Engineering Co., 128 N. C. 199, 38 S. E. 831, wherein the court said: "The execution is issued by the clerk as a matter of course upon the judgment, and, under it, the property levied upon under the attachment is sold (if liable to sale), and what title the purchaser gets will be determined after the execution sale, for the purchaser buys only the right of the defendant in the attached property . . . as in all other cases of sale under execution. . . . The court will not determine beforehand what title will be conveyed by sale under the execution."

38. Munns *v.* Donovan Com. Co., 117 Iowa 516, 91 N. W. 789.

39. Plato *v.* Turrill, 18 Ill. 273; Pew *v.* Yoare, 12 Mich. 16.

40. Empire Car-Roofing Co. *v.* Macey, 115 Ill. 390, 3 N. E. 417; Hobson *v.* Emporium Real Estate, etc., Co., 42 Ill. 306; Hichins *v.* Lyon, 35 Ill. 150; Tunnison *v.* Field, 21 Ill. 108; Rowley *v.* Berrian, 12 Ill. 198; Henrie *v.* Sweasey, 5 Blackf. (Ind.) 335. *Compare* Moody *v.* First Nat. Bank (Tex. Civ. App.), 51 S. W. 523, where no interest or attorney's fees are claimed in the affidavit for attachment, the judgment will be limited to the amount stated in the affidavit.

"The plaintiff in attachment may recover a less sum than the amount sworn to by him before the justice." Lee *v.* Tinges, 7 Md. 215.

Error Not Waived.—The error in rendering judgment for a larger sum than that named in the affidavit and interest is not waived by the defendant coming into court after judgment, at the same term, to pray an appeal. Forsyth *v.* Warren, 62 Ill. 68.

Not Void.—Palmer *v.* Riddle, 180 Ill. 461, 54 N. E. 227, wherein the court held that such a judgment was admissible in evidence in support of the claim of a plaintiff claiming thereunder in an action of ejectment.

41. **Ala.**—Trammell *v.* Guy, 151 Ala. 311, 44 So. 37. **Ill.**—See Vairin *v.* Edmonson, 10 Ill. 270. **Md.**—See Clark *v.* Bryan, 16 Md. 171.

See generally the titles "**Default**"; "**Judgment.**"

In Woolkins *v.* Haid, 49 Mich. 299, 13 N. W. 598, the court said: "In suits by attachment where no actual service has been obtained nor any real appearance made a scrupulous adherence to the settled course of practice has always been required, and the plaintiff has uniformly been held to a strict compliance with all conditions precedent to a judgment by default."

Judgment Pending Motion to Dismiss.—In Loring *v.* Wittich, 16 Fla. 617, the court said: "The default of Loring was regularly entered, as he had been served with summons and had failed to appear generally and plead. His excuse for this failure was that as he had made a motion to dismiss the attachment, he was advised, and supposed, that no default could be entered against him while that motion was pending. Of course he was mistaken in this. The dismissal of the attachment did not abate the suit, as it was commenced by summons duly served on Loring. Had he tendered a good plea to the merits, or filed an affidavit of merits and offered to go to trial at once upon a material issue, the court might well have set aside the default and permitted him to plead; but this was a matter to be addressed

A judgment by default is void if based upon a void attachment.[42]

Time of Taking. — While under some statutes judgment by default may be taken after proper publication or notice at the return term,[43] under others there can be no such judgment until a specified time after the return of the attachment.[44]

5. Setting Aside. — Judgment may be vacated because rendered on a fatally defective affidavit,[45] but a judgment on the debt will not be annulled because of fraud in obtaining the attachment.[46] The setting aside of the judgment does not necessarily invalidate the attachment.[47]

to the sound discretion of the court. * * * Had there been any substantial irregularity in the entry of the default, it might be asked as a matter of right that the default be set aside and the party be permitted to plead, but as the default was regular it could only be asked as an exercise of the discretion of the court. It has been quite uniformly held that as to orders resting in the discretion of the court, the parties cannot require their reversal by an appellate court."

Filing of Declaration.—Ware *v.* Todd, 1 Ala. 199; Napper *v.* Noland, 9 Port. (Ala.) 218.

Proof of Demand Required in Georgia.—Fincher *v.* Stanley Electric Mfg. Co., 127 Ga. 362, 56 S. E. 440.

In Maryland, under the act of 1886, c. 184, which establishes a new practice in certain cases for the city of Baltimore; judgment by default is not authorized. Sanborn *v.* Mullen, 77 Md. 480, 26 Atl. 872.

In Pennsylvania judgment for want of affidavit of defense cannot be awarded to plaintiff in foreign attachment. Grant *v.* Hickcox, 64 Pa. 334.

Security for abiding future order in case defendant should appear within a specified time, is sometimes required. Md.—Walters *v.* Munroe, 17 Md. 501. **Miss.**—Freeman *v.* Malcom, 11 Smed. & M. 53. **Pa.**—Fitch *v.* Ross, 4 Serg. & R. 557. **Va.**—Brien *v.* Pittman, 12 Leigh 379; Watts' Exrs. *v.* Robertson, 4 Hen. & M. 442.

Notice Must Appear in Record.—Trammell *v.* Guy, 151 Ala. 311, 44 So. 37; Vairin *v.* Edmondson, 10 Ill. 270.

42. Moore *v.* Dickerson, 44 Ala. 485.

43. Kirk *v.* Elmer Dearth Agency, 171 Ill. 207, 49 N. E. 413, *affirming* 68 Ill. App. 468; Crizer *v.* Garren, 41 Miss. 563 (a judgment is good until reversed in a direct proceeding).

44. **Ala.**—Standifer *v.* Toney, 43 Ala. 70. **N. J.**—Plum *v.* Lugar, 49 N. J. L. 557, 9 Atl. 779. **Pa.**—Shuster *v.* Bonner, 7 W. N. C. 17. See Artman *v.* Adams, 11 W. N. C. 339.

Tennessee Statute.—A statute providing that "When the defendant does not appear, the Court may, and the Justice shall, stay final judgment or decree, not exceeding twelve, nor less than six months, from the time of the return," is not peremptory as to the action of the Court, and the legal presumption is that, in refusing the stay, it decided correctly. In Swan *v.* Roberts, 2 Coldw. (Tenn.) 153, 161-162, the court said: "But this, like all other presumptions, may be rebutted; but in the absence of all countervailing facts and circumstances in the record, this court would not feel satisfied in disturbing the judgment for that cause." And see Porter *v.* Porter, 7 Humph. (Tenn.) 168.

45. Alexander *v.* Haden, 2 Mo. 228; Finch *v.* Slater, 152 N. C. 155, 67 S. E. 264.

46. John Henry Shoe Co. *v.* Gilkerson-Sloss Com. Co., 47 La. Ann. 860, 17 So. 340.

Effect of Offer To Pay Debt.—Duty *v.* Sprinkle, 64 W. Va. 39, 60 S. E. 882.

47. Putnam County Chem. Wks. *v.* Jochen, 8 Civ. Proc. (N. Y.) 424.

In Hudson *v.* Tibbetts, 16 Iowa 97, where a judgment by default was set aside because of lack of proof of mailing of notice, the court said: "It is as though a judgment for plaintiff had been reversed in an appellate court, and the cause remanded. In such a case the attachment lien is not lost. It may be assimilated also to a case where a judgment at law is set aside on the ground of fraud, accident or mistake. Such an order remits the parties to their respective rights and liens as they existed before the judg-

G. Execution. — Execution follows the judgment.[48] Statutes prescribing the form of execution are mandatory, and must be followed strictly.[49] General execution cannot be awarded if the defendant was not personally served and did not appear,[50] and a special execution should not be awarded against property upon which there has not been a valid levy.[51] A special provision as to the execution to be issued in an attachment suit is sometimes made by statute.[52] Some statutes

ment. The invalidity of the judgment, for whatever cause, does not defeat the lien, the original demand still exists. All the proceedings leading to the seizure of the property remain unaffected, and the parties are heard again upon the plaintiff's claim. The case is taken up just as if no judgment had been rendered; all rights depending on the preceding steps being unimpaired."

Right To Set Aside.—Under a statute providing that when the defendant is a non-resident or has removed himself or property out of the state, the judgment or decree by default, may be set aside upon application of the defendant and good cause shown, within twelve months thereafter, so as to make his defense, it has been held that where the issuance of the attachment is based upon the ground that defendant is an absconding debtor, he is precluded, and can only sue on the bond. Patterson *v.* Arnold, 4 Coldw. (Tenn.) 364.

If the attachment issues in the alternative because of the non-residence or absconding of the defendant, it is incumbent on him, in order to be entitled to the benefit of a defense under this statute, to show that the true ground of the attachment was the non-residence and not the absconding. Smith *v.* Foster, 3 Coldw. (Tenn.) 139.

"That the defendant has absconded and left the state, and gone beyond the limits thereof, so that the ordinary process of law cannot be served on him," is not an allegation of non-residence, but simply of absconding and going beyond the reach of process. Gill *v.* Wyatt, 6 Heisk. (Tenn.) 88.

48. "The judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in the suit," if there is no service of summons. Hodgkins *v.* Dunham, 10 Cal. App. 690, 103 Pac. 351.

For a general discussion of executions, see the title "Executions."

49. Place *v.* Riley, 98 N. Y. 1, 7 Civ. Proc. 403, *affirming* 32 Hun 17, 4 Civ. Proc. 393.

50. Clymore *v.* Williams, 77 Ill. 618.

51. Clymore *v.* Williams, 77 Ill. 618.

52. As, for example, "that in case judgment be entered for the plaintiff in the attachment suit, the sheriff shall satisfy the same out of the property attached by him, 1. By paying over to the plaintiff proceeds of sales of perishable property, and of real estate received from any garnishee, and proceeds of debts or credits collected by the sheriff, and 2. By selling so much of the attached property, real or personal, on the execution issued on such judgment as shall be sufficient to satisfy the same." And "when real estate has been attached in pursuance of the provisions of this chapter, and judgment shall be rendered for the plaintiff, the execution may, among other things, direct a sale of all the interests which the defendant had in such real estate at the time it was so attached." These provisions were construed in Swift *v.* Agnes, 33 Wis. 228, where the court said: "Construing these statutes together (and certainly they are in pari materia and should be so construed), we are of the opinion that it is optional with the judgment creditor, in an action wherein the property of his debtor has been attached, to issue a special or limited execution, merely directing that the attached property be sold, or to issue an execution in the ordinary form, with the addition thereto of a special direction for the sale of the attached property. In either case the recitals contained in the execution will be the primary fund for the payment of the judgment. The only difference in the two forms of execution is, that if it be special none but the attached property can be sold under it; but if the other form be adopted, the execution may be levied upon property not attached, if that attached be insufficient to pay the judgment." See

provide that if the defendant has been personally served and has appeared, execution may issue against property or defendant other than that attached.[53] Also it is sometimes provided that the release of attached property on bond shall not exempt it from the execution.[54] By some statutes if the defendant dies pending the suit, execution cannot be issued calling for a sale of the property attached.[55]

XVIII.—MISCELLANEOUS PROCEEDINGS SUPPLEMENTING ATTACHMENT. — A. In Federal Courts. — Suitors in the federal courts are entitled to have enforced in their favor all the remedies supplementary to and in aid of writs of attachment authorized by the state law, and the proceedings for that purpose may be at law or in equity, according as the state statute provides.[56]

B. Examination of Defendant. — It is provided by certain statutes that when it appears by the affidavit of the plaintiff, or by the return of an officer to an order of attachment, that no property is known to the plaintiff or the officer on which the order of attachment can be executed, or not enough to satisfy the plaintiff's claim, and that the defendant has property within the state not exempt, the defendant may be required by the court to attend before it, and give information on oath respecting his property.[57]

also Woolworth *v.* Taylor, 62 How. Pr. (N. Y.) 90; Liebman *v.* Ashbacker, 36 Ohio St. 94, where a general execution was issued but was levied only on the attached property.

53. Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219.

Subjection of Joint Property.—In Stewart *v.* Blue Grass Canning Co., 133 Ky. 118, 117 S. W. 401, rehearing denied, 120 S. W. 375, the court said: "This action is controlled by section 209, which provides: 'In an action against joint debtors, in which an interest in joint property is attached under an order of attachment against only a part of them, if judgment be rendered against all of the defendants, and the attachment be sustained, the court may subject the whole of the joint property, then undisposed of, to the satisfaction of the judgment.' Even admitting that the property was improperly attached under the order of attachment against L. Stewart it was properly attached under the attachment against J. A. Stewart, who has been served with process. On October 17, 1904, L. and J. A. Stewart filed their joint answer and thereby entered their appearance to the action. Afterwards judgment was rendered against them, and the attachment sustained. As judgment had been rendered against all of the defendants and the attachment sustained, the court therefore had the power to subject the whole of the joint property then undisposed of to the satisfaction of the judgment."

Fieri facias on a general judgment against the defendant is sometimes authorized. Philips *v.* Stewart, 69 Mo. 149; Foster *v.* Potter, 37 Mo. 525; Kritzer *v.* Smith, 21 Mo. 296.

Where the property taken under an original attachment is not sufficient to pay judgment, execution may be issued for the balance as in other cases. Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257.

54. State *v.* Crow, 11 Ark. 642.

55. Kenrick *v.* Huff, 71 Mo. 570.

56. Senter *v.* Mitchell, 16 Fed. 206.

57. Carpenter *v.* Clements, 122 Iowa 294, 98 N. W. 129; Lutz *v.* Aylesworth, 66 Iowa 629, 24 N. W. 245.

So also by some statutes if it appear by the affidavit of the plaintiff that some person other than the defendant has in his possession property of the defendant, or evidences of debt, such person may be required to attend and give information on oath. Senter *v.* Mitchell, 16 Fed. 206. See Anderson *v.* Parker, 7 R. & G. 242, 7 Can. L. T. 348; Robertson *v.* Williams, 6 R. & G. 393, 6 Can. L. T. 488; Halifax Bkg. Co. *v.* Worrall, 5 R. & G. 76.

The Arkansas statute on which opinion Senter *v.* Mitchell, 16 Fed. 206, was based, did not contain a clause

For a refusal to answer in accordance with such an order the defendant may be punished for contempt.[58]

C. Certificate or Examination of Third Party. — Where a statute provides that upon the application of a sheriff holding a warrant of attachment a debtor of the defendant, or person holding property belonging to him, may be required to furnish the sheriff a certificate designating the amount and description of the property held by him for the benefit of the defendant, and that if he refuse to do so he may be required to attend before the court and be examined on oath,[59] the right of the sheriff to demand a certificate does not depend upon the service by him of the warrant of attachment or a levy under the attachment.[60] Under such a statute it has been held that such third party may be examined though he furnishes a certificate that he has nothing belonging to the defendant,[61] or is not indebted to him,[62]

rendering it necessary to show that the defendant has property within the state not exempt.

"The examination is for the purpose of giving effect to the attachment law, and to compel the defendant to give information respecting his property." Bivins *v.* Harris, 8 Nev. 153.

In New Jersey an auditor has no power to compel a defendant to submit to examination under § 46 of the Attachment Act (Rev. p. 50), where the defendant has entered an appearance under § 38. Jackson *v.* Johnson, 51 N. J. L. 457, 17 Atl. 959.

A statute providing for the examination of persons owing debts to the defendant or having possession of credits or other personal property belonging to him, is not authority for compelling a defendant in a civil action, before judgment, against whose property a writ of attachment has been issued to attend before a referee and submit to an examination as to the situation and condition of his property. *Ex parte* Rickleton, 51 Cal. 316.

58. Carpenter *v.* Clements, 122 Iowa 294, 98 N. W. 129; Lutz *v.* Aylesworth, 66 Iowa 629, 24 N. W. 245. See generally the title "Contempt."

Refusal to answer on claiming constitutional privilege sustained. Brannon *v.* Ruddy, 8 Pa. Co. Ct. 176.

59. Donner *v.* Mercy, 81 App. Div. 181, 80 N. Y. Supp. 1030.

Where a person refuses to give any certificate it is not necessary, in order to secure the examination of such person, to show that the person sought to be examined has property in his hands which would be subject to a levy under the attachment. Donner *v.* Mercy, *supra.*

Effect of Judgment.—The examination should not be denied because a judgment by default has been entered against the defendant. Smoot *v.* Heim, 1 Civ. Proc. (N. Y.) 208, holding on the authority of Thompson *v.* Culver, 24 How. Pr. (N. Y.) 286, that the decision in Schieb *v.* Baldwin, 22 How. Pr. (N. Y.) 278, that a judgment superseded an attachment, should not be followed.

60. Donner *v.* Mercy, 81 App. Div. 181, 80 N. Y. Supp. 1030.

That the right of the sheriff to demand such certificate ceases on the entry of judgment, see Scheit *v.* Baldwin, 22 How. Pr. (N. Y.) 278. But *compare* Thompson *v.* Culver, 24 How. Pr. (N. Y.) 286, wherein it was held that the sheriff's right to collect debts seized under the attachment is not superseded by the judgment.

61. Baxter *v.* Missouri, K. & T. R. Co., 4 Hun (N. Y.) 630; Hopkins *v.* Snow, 4 Abb. Pr. (N. Y.) 368; Rutter *v.* Boyd, 3 Abb. N. C. (N. Y.) 6.

62. American Distributing Co. *v.* Distilling, etc., Co., 24 Civ. Proc. 245, 33 N. Y. Supp. 546, wherein the opinion, as well as those in Glen Cove Starch Co. *v.* Gotthold, and Carroll *v.* Finley, cited *infra*, were rendered after an addition to the statute of a clause giving the right to such a certificate if it appears that there is reason to suspect that it is untrue, or fails to fully set forth the facts, but the opinions in these cases appear to have followed the decisions on the statute as it had

or in which he denies that defendant has any title to the property.[63]

If such statute furthermore provides that there shall be a right to the examination, if there is reason to suspect that the certificate is untrue or fails to fully set forth the facts, the examination may, where a certificate has been given, be based upon the alleged falsity of that certificate,[64] or upon the ground that it is not a *bona fide* compliance with the demand made.[65]

Control of Referee. — A provision that the order for examination may direct an appearance before a referee does not give the court authority, after having appointed a referee to issue an order controlling either the referee or the witness.[66] The examination exhausts the remedy, and

previously stood and not to have been based on the addition thereto.

63. Carroll *v.* Finley, 26 Barb. (N. Y.) 61; Glen Cove Starch Mfg. Co. *v.* Gotthold, 1 Civ. Proc. (N. Y.) 366 (note).

In Hopkins *v.* Snow, 4 Abb. Pr. (N. Y.) 368, the court said: "It is only when the individual refuses to give a certificate designating the amount and description of the property held by him that he can be examined. The question then is, is Mr. Murphy such individual, and has he done this? If he holds the policies which the deponent says he admitted he held four days before the certificate was given, he is such individual, and has not done it. Then he holds the property of the defendant, but has given no certificate designating the amount and description of it. The oath of the witness is proof that Mr. Murphy holds that property; Mr. Murphy's certificate, not given under oath, does not invalidate that proof, and is no evidence of the fact * * * As the matter now stands, he must be examined."

In Westervelt *v.* Marino, 27 App. Div. 267, 50 N. Y. Supp. 632, the court said: "The appellant was thus required to give a certificate, specifying the amount, nature, and description of the property held for the benefit of the defendants, or of the defendant's interest in property so held, or of the debt or demand owing to the defendants, as the case required. In answer to a demand for such a certificate, he simply gave a certificate that he had no funds for an account of the defendants. This certificate fails to set forth the facts required to be shown by the section of the Code cited, and the plaintiffs were entitled to an order for his examination." *Compare* Reynolds *v.* Fisher, 48 Barb. (N. Y.) 146, wherein it was held that the examination should not have been ordered after a certificate had been given stating that the maker thereof had no property of any description belonging to the defendant in his hands or under his control except the interest which the defendant had in his firm the amount of which would depend on the liquidation of the affairs of the partnership.

64. Donner *v.* Mercy, 81 App. Div. 181, 80 N. Y. Supp. 1030.

In Hong Kong, etc., Banking Corp. *v.* Campbell, 58 Hun 610, 13 N. Y. Supp. 122, the court said: "There must be reason to suspect that the certificate given was untrue, or that it fails fully to set forth the facts required to be shown. There should appear at least in the attempted enforcement of such assumed remedy, first, that there is reason to believe the debtor has property belonging to the debtors in the attachment, and that the person proceeded against has not given a truthful certificate in relation to it, or that the certificate itself fails fully to set forth the facts required to be shown."

After the certificate has been furnished, the affidavit presented for an order for examination must show either that the certificate was untrue or failed fully to set forth the facts required to be shown by it. Ives *v.* Lockwood, 65 How. Pr. (N. Y.) 518.

The essential part of the certificate is that showing the amount due the debtor. Almy *v.* Thurber, 99 N. Y. 407, 2 N. E. 99, *affirming* 12 Abb. N. C. 459, 12 Daly 3, 65 How. Pr. 481.

65. Seligman *v.* Falk, 13 Civ. Proc. (N. Y.) 77.

66. "The special term had no power, after the referee had discharged his

the party examined cannot thereafter be compelled to furnish the certificate.[67]

D. Actions by Officer. — Under the provisions of certain statutes the sheriff or marshal is authorized to bring suit, if necessary, for the collection of debts which he has attached as due to the attachment debtor from outside parties,[68] or to obtain possession of property be-

duties under the order appointing him, and had ceased to have any control over the subject-matter, to revive the powers of the referee, and to compel the witness to produce books and papers which the referee had not directed to be produced in the manner prescribed by section 854 of the Code." Guinan *v.* Allen, 40 App. Div. 137, 29 Civ. Proc. 277, 57 N. Y. Supp. 614.

As to examination of witness, see the title "Witness" in the Encyclopædia of Evidence.

67. Buckingham *v.* White, 25 Hun (N. Y.) 441, 1 Civ. Proc. 365; *In re* Crory, 9 Civ. Proc. (N. Y.) 168. And see Chambers *v.* Bentley, 15 Civ. Proc. (N. Y.) 222, wherein the court said: "The only remedy left is under section 655 of the Code of Civil Proceedure, for the sheriff to proceed by action or special proceeding to reduce to his actual possession personal property capable of manual delivery, but of which he has been unable to obtain possession."

68. Minn.—Rohrer *v.* Turrill, 4 Minn. 407; Caldwell *v.* Sibley, 3 Minn. 406. Mo.—Choate *v.* Noble, 31 Mo. 341. N. Y.—O'Brien *v.* Glenville Woolen Co., 50 N. Y. 128; Merchants', etc., Bank *v.* Dakin, 33 How. Pr. 316, *reversed* on other points, 51 N. Y. 519; Andrews *v.* Glenville Woolen Co., 11 Abb. Pr. (N. S.) 78.

Action Pending Motion To Vacate. Such an action may be maintained by the sheriff while a motion is pending to vacate the attachment itself. Nicholls *v.* Hill, 42 S. C. 28, 19 S. E. 1017.

The seizure of books of account does not necessarily entitle the sheriff to maintain suits on the accounts appearing in them. Brower *v.* Smith, 17 Wis. 410, *followed* in Brower *v.* Haight, 18 Wis. 102.

Discontinuance of Action.—In an action by a sheriff to collect insurance policies by virtue of attachments against the party insured, the court said: "The provisions of the Code (§ 232), limiting the right of the sheriff to discontinue this class of actions, except 'at such times, and upon such terms, as the court or judge may direct,' is evidently designed for the protection of the parties interested in the debts attached; and that there shall be no discontinuance, on the part of the sheriff, of actions that will inure to the injury of such parties. I think it is the duty of the sheriff to prosecute these suits to judgment." O'Brien *v.* Merchants' Ins. Co., 16 Abb. Pr. N. S. (N. Y.) 212. To the same effect, Bowe *v.* Knickerbocker L. Ins. Co., 27 Hun (N. Y.) 312.

Defences to Action.—In Nicholls *v.* Hill, 42 S. C. 28, 19 S. E. 1017, the court said: "It needs no authority to sustain this proposition of law as sound, namely, that when under a warrant of attachment choses in action are seized, such choses in action in the hands of the sheriff or other attaching officer are subject to all the defenses which would have obtained if such choses had remained in the hands of the debtor whose property was attached."

Transfer of Claim.—When, in an action to reach a demand alleged to be due the defendant a transfer is set up to defeat the claim of the attaching creditor the latter may inquire into its good faith. Throop Grain Cleaner Co. *v.* Smith, 34 Hun (N. Y.) 91.

It is not ground of demurrer that the petition of the sheriff does not allege that notice had been given, as required by law, to the defendant not to pay over his indebtedness. This is a matter of defense. Choate *v.* Noble, 31 Mo. 341.

Action by Receiver.—Where an attachment has been duly served and debts attached a receiver is not the proper person to bring an action to collect or in aid of the collection, of such debts. Andrew *v.* The Glenville Woolen Co., 11 Abb. Pr. N. S. (N. Y.) 78.

Equitable Assets. — "Debts and choses in action are to be regarded as

longing to the attachment debtor of which he has been unable to obtain possession under the attachment,[69] or to set aside a fraudulent transfer by the debtor.[70] He is sometimes authorized to prosecute the action either in his own name or in that of the plaintiff.[71]

legal assets under the attachment laws, whenever that process acts directly upon the legal title, but whenever they are so situated as to require the exercise of the equitable powers of the court to place them in that situation, they must be treated as they always were, as equitable assets only. Any other rule would transform these laws into a substitute for creditors' bills, and produce great confusion and inequalities among creditors, a result not warranted by the provisions and which I am persuaded, was never designed." Thurber *v.* Blanck, 50 N. Y. 153. See the title "**Creditors' Bills.**"

Effect of Judgment.—The sheriff's right to collect debts attached is not superseded by the judgment. Thompson *v.* Culver, 24 How. Pr. (N. Y.) 286. But *compare* Scheib *v.* Baldwin, 22 How. Pr. (N. Y.) 278, holding that the right of the sheriff to demand a certificate by virtue of the attachment ceased on the entry of judgment.

69. Kelly *v.* Breusing, 32 Barb. (N. Y.) 601, 33 Barb. 123.

Money deposited in court in lieu of bail cannot be the subject of such an action. Anderson *v.* Tompkins, 23 Abb. N. C. 433, 10 N. Y. Supp. 39.

Remedy Upon Interlocutory Motion On a motion for an order to deliver certain bonds to the plaintiff sheriff, or to enjoin defendant trust company from disposing of the same pending the litigation, the court said: "The present action was brought by the creditor and the sheriff in aid of the levy, and prays as the result of a trial a judgment for the delivery of the bonds to the sheriff to be held on the attachment, and eventually applied to the payment of any judgment Thompson may obtain. . . . The only remedy which possibly could be granted upon interlocutory motion would be an injunction compelling the trust company to retain possession until judgment ascertains the rights of the parties." Thompson *v.* Continental Trust Co., 26 Misc. 254, 56 N. Y. Supp. 743.

70. Rinchey *v.* Stryker, 28 N. Y. 45; Harding *v.* Elliott, 91 Hun 502, 25 Civ. Proc. 294, 36 N. Y. Supp. 648.

In Lanning *v.* Streeter, 57 Barb. (N. Y.) 33, where the court said: "In such case the identical thing fraudulently assigned must be attached, and a specific lien acquired by virtue of the levy of the attachment. . . . But when the property so fraudulently assigned has been converted into money by the assignee, or the money has been converted into other property which is claimed by the assignee to belong to him, before the attachment in the action by the creditor is issued, the attachment cannot be levied upon the money or property so held as the proceeds of that assigned, and the sheriff can maintain no action against such assignee, by virtue of the attachment in his hands, to recover such proceeds. In such a case the avails are held by the fraudulent assignee as trustee for the creditors of the assignor, and can be reached only by an action in the nature of a creditor's bill, which a sheriff cannot maintain. This is well settled."

Conditions Precedent. — The cases cited *supra* were decided under a statute giving the sheriff the right to bring such an action before final judgment where there has been no personal service within the state, nor appearance by the defendant, and he has made default.

Service by publication does not by itself, without default by the defendant, meet the requirements of the statute. Whitney *v.* Davis, 148 N. Y. 256, 42 N. E. 661, *affirming* 88 Hun 168, 35 N. Y. Supp. 531.

Creditors' Bills.—A statute which gives the sheriff authority merely to maintain an action to collect the debts and demands, confers no authority to institute actions to reach mere equitable assets, or to bring in other parties for the purpose of attacking transfers of such property as fraudulent. "That is the office of a creditor's bill, founded upon a judgment and execution." Thurber *v.* Blanck, 50 N. Y. 80.

See generally the title "**Creditors' Bills.**"

71. O'Brien *v.* Glenville Woolen Co.,

The sheriff's right of action accrues when he has actually levied upon the debt and subjected it to the attachment, and the right of action cannot survive the attachment itself.[72]

Sufficiency of Complaint. — It is not necessary to allege in the complaint that the action has been brought by the direction of a court or judge.[73] It is sufficient to allege that the defendant has money in his possession belonging to the attachment debtor.[74]

Right To Maintain Suit To Obtain Possession. — A statute giving the sheriff the right to maintain an action for the collection of debts attached does not, in the absence of express authority, authorize him to bring suit to obtain possession of attached property, capable of manual delivery.[75] Some statutes, however, expressly provide for such an action.[76]

50 N. Y. 128; Van Volkenburgh *v.* Bates, 14 Abb. Pr. N. S. (N. Y.) 314, note. But not in the absence of statutory authority. Sublette *v.* Melhado, 1 Cal. 104, 105.

72. O'Brien *v.* Manhattan R. Co., 45 Misc. 643, 91 N. Y. Supp. 69; Lanning *v.* Streeter, 57 Barb (N. Y.) 33.

Effect of Execution.—Thus the action cannot be maintained where the lien of the attachment has been superseded by the lien of an execution issued on a judgment in the attachment suit. Marks *v.* Equitable L. Assur. Co., 109 App. Div. 675, 96 N. Y. Supp. 551; Barton *v.* Albert Palmer Co., 87 App. Div. 35, 83 N. Y. Supp. 1041, *following* Peetsch *v.* Sommers, 31 App. Div. 255, 53 N. Y. Supp. 438. See Dunn *v.* Aker, etc., 26 Misc. 758, 56 N. Y. Supp. 1069.

73. Davidson *v.* Chatham Nat. Bank, 5 Civ. Proc. (N. Y.) 167, 32 Hun 138. See Kelly *v.* Breusing, 32 Barb. (N. Y.) 601, *affirmed*, 33 Barb. 123.

"The plaintiff states that he is sheriff of the city and county of New York, duly elected, qualified and acting, and that statement is clearly sufficient to show his capacity to maintain any action which such sheriff is authorized to bring." Kelly *v.* Breusing, 32 Barb. (N. Y.) 601, 33 Barb. 123.

74. Kelly *v.* Breusing, 32 Barb. (N. Y.) 601, 33 Barb. 123.

A failure to so allege is not cured by a finding to that effect. Lanning *v.* Streeter, 57 Barb. (N. Y.) 33.

Complaint Approved.—Under a statute, authorizing the creditor to bring actions which the sheriff might bring, the court said: "The motion to dismiss the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action was properly denied. It alleges that the defendant had in its possession and control the claim or demand against Naser, belonging to Deneken & Co.; and that by their directions it had been sent through their agents, McCulloch & Co., to the defendant; that it received for Deneken & Co. the amount of it, and that immediately thereafter, and while the sum collected was in its possession, the attachment was levied. . . . The facts are sufficiently alleged that Deneken & Co. owned the claim, and that the amount of it was due them from the defendant. And all other facts requisite to the cause of action were also alleged." Naser *v.* First Nat. Bank, 116 N. Y. 492, 2 N. E. 1077.

75. Caldwell *v.* Sibley, 3 Minn. 406, wherein the court said: "We are not aware of any state in which such a practice prevails, and unless expressly authorized by our statute, it should not be sanctioned, as it would be overturning the well settled rules of law, and lead to much inconvenience in practice. The whole theory of the law upon attachment is based upon the idea that the officer must obtain possession of the property attached; which possession is obtained in the case of real estate, and of personal property not capable of manual delivery, by complying with the provisions of the statute in relation thereto."

76. Hall *v.* Brooks, 89 N. Y. 33, *reversing* 25 Hun 577; Lowenthal *v.* Hodge, 120 App. Div. 304, 310, 105 N. Y. Supp. 120.

The action to reduce property into possession cannot be maintained where neither the property nor its custodian

Right To Sell. — The sheriff may, under the order of the court, sell an unliquidated claim against third parties belonging to the attachment debtor,[77] or a judgment obtained in a suit brought in aid of the attachment.[78]

Right of Action for Wrongful Removal of Goods. — An officer who has levied an attachment may maintain an action against the persons who have wrongfully removed the property attached.[79]

E. ACTIONS BY PLAINTIFF. — Under a provision that actions authorized to be brought by the sheriff may be prosecuted by the plaintiff, the plaintiff may maintain the action in his own name.[80] An action by the attaching creditor in the name of himself and the sheriff jointly is sometimes expressly provided for.[81]

Where Action To Be Brought. — The action may be brought in any court where the defendant may be found.[82]

are within the jurisdiction. Lowenthal *v.* Hodge, 120 App. Div. 304, 105 N. Y. Supp. 120.

77. Arkenburgh *v.* Arkenburgh, 114 App. Div. 436, 99 N. Y. Supp. 1127.

78. Arkenburgh *v.* Arkenburgh, 114 App. Div. 436, 99 N. Y. Supp. 1127.

79. Marshall *v.* Marshall, 2 Houst. (Del.) 125.

"The right of plaintiff in attachment to follow the property attached into the hands of third persons, who have acquired rights from the owner after the attachment, depends upon the reality of the sheriff's possession under the attachment. . . . And we take it also to be correct doctrine that the possession of the keeper appointed by the sheriff is the possession of the sheriff. But when, as in the present case, that keeper is the plaintiff in attachment himself, who suffers the property attached to be taken out of his possession by the wife of the defendant into a parish distant from his own residence, and there to remain for months while the defendant is openly and to his perfect knowledge, offering it for sale, and finally sells it without the plaintiff in attachment interposing any obstruction or taking any steps to regain possession, as keeper, for the sheriff although he had ample opportunity to do so; the case is clearly within the rule of the Roman law quoted by Judge Story . . . 'creditor, qui permittit rem venire, pignus dimittit.'" Whann *v.* Hufty, 12 La. Ann. 280.

See *supra*, XVI.

80. Mechanics', etc. Bank *v.* Dakin, 51 N. Y. 519 (*reversing* 28 How. Pr. 502, 50 Barb. 587, 33 How. Pr. 316, and *overruling* Lupton *v.* Smith, 3 Hun 1, 48 How. Pr. 261, 5 Thomp. & C. 274; Van Volkenburgh *v.* Bates, 14 Abb. Pr. [N. S.] 314n); Skinner *v.* Stuart, 39 Barb. 206, 24 How. Pr. 489, 15 Abb. Pr. 391, *reversing* 13 Abb. Pr. 442.

Action by some only of a number of attaching creditors does not conclude the others or operate as a bar to their claim as attaching creditors. O'Brien *v.* Glenville Woolen Co., 50 N. Y. 128.

81. Barton *v.* Albert Palmer Co., 87 App. Div. 35, 83 N. Y. Supp. 1041, 1042.

Leave of court is sometimes a prerequisite, and when it is it should be obtained from the judge or court in which the action is to be commenced. Rogers *v.* Ingersoll, 103 App. Div. 490, 93 N. Y. Supp. 140, *affirmed* in 185 N. Y. 592, 78 N. E. 1111.

Notice of Application.—The defendant cannot complain because notice of application by the plaintiff for leave to bring the action was not given to the sheriff. Dunn *v.* Arkenburgh, 31 Civ. Proc. 67, 49 App. Div. 518, 62 N. Y. Supp. 861, *affirmed* in 165 N. Y. 669, 59 N. E. 1122.

It is not necessary that notice should be given to the defendant of an application for leave to bring the action, although under special circumstances such a condition might properly be imposed. Hall *v.* Tevis, 139 App. Div. 36, 124 N. Y. Supp. 48.

Valid attachment is essential to recovery. Ross *v.* Ingersoll, 53 App. Div. 86, 65 N. Y. Supp. 753.

82. Brandenstein *v.* Helvetia Swiss Fire Ins. Co., 159 Fed. 589, *affirmed*, 168 Fed. 1020, 92 C. C. A. 614.

Defenses. — In an action brought to enforce the lien created by an attachment, the party whose debt is attached can defend upon any ground of defense he may have.[83]

Action To Subject Property to Attachment. — There is no such thing as a right of action, either by the creditor or sheriff, to make a proper case for issuing an attachment, or to place property in a situation to be subject to the process.[84]

F. INJUNCTION: — Injunctions have been granted in aid of an attachment to restrain waste on the attached property;[85] to enjoin the sale of the attached property under execution,[86] or under an alleged

83. Brandenstein *v.* Helvetia Swiss Fire Ins. Co., 159 Fed. 589, *affirmed,* 168 Fed. 1020, 92 C. C. A. 614.

Attachment and Garnishment. — There is a substantial difference between the process by attachment and the garnishee process. Under the latter the debtor of the defendant is required to answer in the original suit, and judgment is entered in that suit not only against the defendant but the party garnished; under the attachment process, no judgment is entered against the third party in the original suit, but after judgment against the defendant a separate suit must be brought to enforce the lien created by the attachment. Brandenstein *v.* Helvetia Swiss Fire Ins. Co., 159 Fed. 589, *affirmed,* 168 Fed. 1020, 92 C. C. A. 614.

84. Thurber *v.* Blanck, 50 N. Y. 80.

In Greenleaf *v.* Mumford, 35 How. Pr. (N. Y.) 148, the court said: "It is the code which subjects property to attachment. Whoever heard, until recently, of an action either by a sheriff or creditor in aid of the code, to subject property to attachment—to make that attachable under the code, which was not attachable under the code."

85. Camp *v.* Bates, 11 Conn. 51, 27 Am. Dec. 707; Moulton *v.* Stowell, 16 N. H. 221.

86. **Colo.**—Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505. **Ill.**—Shufeldt *v.* Boehm, 96 Ill. 560. **Neb.**—Northfield Knife Co. *v.* Shapleigh, 24 Neb. 635, 39 N. W. 788. **Tex.**—Blum *v.* Schram, 58 Tex. 524.

Contra, Rollins *v.* Van Baalen, 56 Mich. 610, 23 N. W. 332.

The disposal of the proceeds of a sale of property under execution will be enjoined in favor of attaching creditors. Conover *v.* Ruckman, 23 N. J. Eq. 303; Tannenbaum *v.* Rosswag, 6 N. Y. Supp. 578. *Contra,* Martin *v.* Michael, 23 Mo. 50.

In Heyneman *v.* Dannenberg, 6 Cal. 376, wherein an injunction was granted, the court said: "The debt and insolvency of the defendant as well as every other material allegation of the bill, except that of fraud, are confessed by the answer; and it would be requiring the plaintiffs to do a vain act, if they should be compelled to await their judgment at law, and a return of execution, when it is acknowledged that the only effect would be a return of *nulla bona,* and that the property, which they have attached in the meantime, would have passed into the hands of *bona fide* purchasers under color of a judicial sale, and be lost to them forever. Fraud is one of the primary subjects of equity jurisdiction; and it is not to be supposed that a Court of Chancery would refuse to entertain jurisdiction in a case like the present, where the sole issue was one of fraud, and where by such refusal the fraud complained of would be most successfully consummated."

Reason for Injunction.—In Wood *v.* Stanberry, 21 Ohio St. 142, the court said: "The remedy which an injunction affords them [attachment creditors] is complete, and no other process or proceeding is adequate to the preservation of their rights or their just compensation for injuries, if the sale under the execution is permitted. They cannot appear in the case of Stanberry *v.* Purviance and ask the court to recall the execution, for the reason that they are not parties therein; and, for the same reason, they cannot, upon the return of the execution, ask the court to control the proceeds of the sale for their benefit; nor can they, by proceedings in error, stay the execution or reverse the judgment upon which

fraudulent distress for rent,[87] or under other attachments;[88] to restrain the disposal of the attached property by an alleged fraudulent claimant thereof,[89] to enjoin the foreclosure of a mortgage,[90] and to enjoin the prosecution against the sheriff of other claims to the attached property.[91] Injunctions have been refused to prevent the dissolution of a defendant corporation,[92] and to restrain a garnisheed receiver from paying to any other person the sum due to the attachment creditor;[93] and it has been held that a bill in equity cannot be maintained as ancillary to an action at law for the purpose of preserving and enforcing an attachment lien where it has previously been decided that the attachment was inoperative and gave the complainant no lien.[94]

XIX. PROCEEDINGS FOR VACATING ATTACHMENT. — A. Irregularities in General. — Generally for some irregularity of a fatal character apparent on the face of the proceedings or failure to comply with the statute, a motion to dissolve the attachment will be

it was issued. They cannot recover the possession of the property attached from the sheriff—the possession is rightfully in him, nor can they maintain trespass against him, for the reason that the execution, being regular on its face, is his justification. If the property be sold under the execution and delivered to purchasers, an order of sale under their attachment will be fruitless; an action against the purchaser, if insolvent, will afford no redress, and if solvent, will impose burdens and expenses upon them for which no compensation can be made. In short, there is no other adequate remedy, and therefore the case is a proper one for an injunction.''

Reason for Rule Refusing Injunction. In Shufeldt *v.* Boehm, 96 Ill. 560, the court said: ''While great hardships, as in the present case, may and doubtless do occur under the operation of the rule which forbids the interposition of a court of equity in cases of this character until a judgment at law is first obtained, yet, the rule itself is founded upon the wisest policy. If the property of an honest, struggling debtor could be tied up by injunctions upon mere unadjusted legal demands, he would be constantly exposed to the greatest hardships and grossest frauds, for which the law would afford no adequate remedy. By taking his property out of his hands before the claim is due, or before its justice has been established by a judgment ,in many cases would be to deprive him of the means of payment, and even of the means of defending himself against a vexatious and oppressive suit. In other cases, to prevent ruin to his business pending such litigation, he would be forced into unconscionable compromises involving losses he would be unable to bear. Moreover, such a rule as that contended for would be a constant temptation to selfish and avaricious creditors to endeavor, by the institution of such suits, to obtain an unjust advantage over other creditors, and, by reason thereof, litigation would be greatly increased, to the detriment of business generally, and to the ruin of many honest, struggling debtors. Every consideration, therefore, of public policy demands a strict adherence to the rule which forbids the institution of such suits.''

87. Cogburn *v.* Pollock, 54 Miss. 639.

88. Moore *v.* Holt, 10 Gratt. (Va.) 284; Erskine *v.* Staley, 12 Leigh (Va.) 406.

89. Joseph *v.* McGill, 52 Iowa 127, 2 N. W. 1007; Falconer *v.* Freeman, 4 Sandf. Ch. (N. Y.) 565. See Williams *v.* Michenor, 11 N. J. Eq. 520. *Compare* Griffin *v.* Nitcher, 57 Me. 270.

90. Meacham Armes Co. *v.* Swarts, 2 Wash. Ter. 412, 7 Pac. 859.

91. National Park Bank *v.* Goddard, 131 N. Y. 494, 30 N. E. 566.

92. Cleveland City Forge Co. *v.* Taylor Bros., 54 Fed. 85.

93. Kimball *v.* Lee, 43 N. J. Eq. 277, 10 Atl. 285.

94. Montgomery *v.* McDermott, 99 Fed. 502, *affirmed* in 103 Fed. 801, 43 C. C. A. 348.

entertained,[95] although a plea in abatement[96] or a rule to show cause

95. **Ala.**—Blankenship *v.* Blackwell, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175; De Bardeleben *v.* Crosby, 53 Ala. 363; Hall *v.* Brazleton, 40 Ala. 406; The Farmer *v.* McCraw, 31 Ala. 659; Cotton *v.* Huey & Co., 4 Ala. 56; Planters' etc. Bank *v.* Andrews, 8 Port. 404; Lowry *v.* Stowe, 7 Port. 483. **Ill.** House *v.* Hamilton, 43 Ill. 185. **Ind.**—Cooper *v.* Reeves, 13 Ind. 53. **Ia.**—Tidrick *v.* Sulgrove, 38 Iowa 339; Gates *v.* Reynolds, 13 Iowa 1; Pomroy *v.* Parmlee, 9 Iowa 140, 74 Am. Dec. 328; Carothers *v.* Click, 1 Morr. 54. **Md.**—Stone *v.* Magruder, 10 Gill & J. 383; Campbell *v.* Morris, 3 Har. & M. 535. **N. Y.**—*Ex parte* Chipman, 1 Wend. 66; Rowles *v.* Hoare, 61 Barb. 266; Morgan *v.* Avery, 7 Barb. 656, 2 Code Rep. 91. **N. C.**—Bear *v.* Cohen, 65 N. C. 511. **Ohio.**—Harrison *v.* King, 9 Ohio St. 388. **S. C.**—Bates *v.* Killiam, 17 S. C. 553; Metts *v.* Piedmont, etc. L. Ins. Co., 17 S. C. 120. **S. D.**—Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068. **Tenn.**—Bryan *v.* Norfolk, etc. R. Co., 119 Tenn. 349, 104 S. W. 523. **Tex.**—Hill *v.* Cunningham, 25 Tex. 25; Wright *v.* Smith, 19 Tex. 297. **W. Va.**—Simmons *v.* Simmons, 56 W. Va. 65, 48 S. E. 833; Tingle *v.* Brison, 14 W. Va. 295; Capehart *v.* Dowery, 10 W. Va. 130.

"**The power of quashing writs** is limited to proceedings that are irregular, defective or improper. Crawford *v.* Stewart, 38 Pa. St. 34. If it appears on the face of the record that the proceedings are void or grossly irregular, or where it is clearly shown that a valid cause of action in this form does not exist, the court may, on motion of the defendant or of the garnishee in his behalf, quash the writ." Steel *v.* Goodwin, 113 Pa. 288, 6 Atl. 49.

In North Carolina the remedy is now by motion. Hale *v.* Richardson, 89 N. C. 62; Toms *v.* Warson, 66 N. C. 417; Clark *v.* Clark, 64 N. C. 150.

The usual and better practice is a direct and specific motion to quash the attachment. But special exceptions are sufficient. Cox *v.* Reinhardt, 41 Tex. 591.

Motion Proper Remedy—Not Demurrer.—Brace *v.* Grady, 36 Iowa 352; Holloway *v.* Herryford, 9 Iowa 353; Hunt *v.* Collins, 4 Iowa 56.

Plea in Abatement Treated as Motion.—Simmons *v.* Simmons, 56 W. Va. 65, 48 S. E. 833.

In Maryland irregularities may be availed of either by a motion to quash or by a plea in abatement. Clark *v.* Meixsell, 29 Md. 221; Lambden *v.* Bowie, 2 Md. 334.

In New York under the present code the procedure for setting aside an attachment for any cause is by motion. Code of Civ. Proc. §682.

Bond and Affidavit Under Different Acts.—Where a plaintiff made an affidavit entitling him to a specific attachment and gave a bond under the general attachment law it was held that he was entitled to neither and that the general attachment granted should be quashed. Edwards *v.* Cooper, 28 Ark. 466.

Substantial Compliance Sufficient.—If an examination of the entire record shows that there has been a substantial compliance with the statute the attachment will not be dismissed. Best *v.* British, etc., Co., 128 N. C. 351, 38 S. E. 923; Grant *v.* Burgwyn, 79 N. C. 513.

Errors in Record.—It is error to quash a writ of attachment, on allegations impeaching a record, by an affidavit alleging alterations thereof, while permitting the record to stand. The proper practice would be for the court to inquire, as it had power to do, into the impeachment of the record and amend or correct it if tampered with, and upon the record if amended quash the writ if warranted. A record may not be inferentially impeached. Sheip *v.* Price, 3 Pa. Super. 1, 39 W. N. C. 278.

Alabama.—In an action by a partnership, commenced by attachment, if the individual names of the several partners are not stated in the writ, bond, or affidavit, the defect is good matter for a plea in abatement; but in an action against a partnership, the statute (Rev. Code §2538) dispenses with the necessity of stating the partners' names. Sims *v.* Jacobson, 51 Ala. 186.

96. Formerly in North Carolina. Leak *v.* Moorman, 61 N. C. 168; Cherry *v.* Nelson, 52 N. C. 141; Evans *v.* Andrews, 52 N. C. 117.

has been held to be the proper remedy.[97] Where the objection to the attachment is based upon an extrinsic defect, that is, a defect which must be sustained or rebutted by evidence *aliunde*, the procedure usually adopted for attacking the attachment is by a plea in abatement.[98] A writ of certiorari is not the proper remedy in the first instance where there is no error or irregularity complained of below.[99]

The attachment will not be set aside for what are plainly clerical errors,[1] or mistakes of third parties not prejudicing the substantial interests of the defendant,[2] or irregularities not connected with the granting of the attachment.[3]

B. Before What Tribunal. — The motion for dissolution of an attachment is usually made before the court from which the attachment issued.[4] In some jurisdictions the motion may be heard and disposed

97. Roelofson *v.* Hatch, 3 Mich. 277; Hartman *v.* Wallach, 17 Pa. Co. Ct. 88.

98. **Ala.**—Loomis *v.* Allen, 7 Ala. 706; Calhoun *v.* Cozens, 3 Ala. 21; Jackson *v.* Stanley, 2 Ala. 326; Lowry *v.* Stowe, 7 Port. 483. **Ark.**—Hecht *v.* Wassell, 27 Ark. 412. **Mich.**—Roelofson *v.* Hatch, 3 Mich. 277. **Pa.**—Meyers *v.* Rauch No. 2, 4 Pa. Dist. 333. **Tenn.** Bryan *v.* Norfolk & W. R. Co., 104 S. W. 523. **Tex.**—Hill *v.* Cunningham, 25 Tex. 25; Caldwell *v.* Lamkin, 12 Tex. Civ. App. 29, 33 S. W. 316; Waples-Platter Grocer Co. *v.* Basham, 9 Tex. Civ. App. 638, 29 S. W. 1118. **W. Va.** Tingle *v.* Brison, 14 W. Va. 295.

Sufficiency of Sureties.—First Nat. Bank *v.* Wallace (Tex. Civ. App.), 65 S. W. 392.

Authority of Agent To Make Affidavit.—Messner *v.* Lewis, 20 Tex. 221; Wright *v.* Smith, 19 Tex. 297; Messner *v.* Hutchins, 17 Tex. 597; C. B. Carter Lumb. Co. *v.* DeGrazier, 3 Wills. Civ. Cas. §176 (authority of officer of corporation); Tingle *v.* Brison, 14 W. Va. 295.

99. Ayres *v.* Bartlett, 14 N. J. L. 330.

1. **La.**—Citizens' Bank *v.* Hancock, 35 La. Ann. 41. **Mich.**—Drew *v.* Dequindre, 2 Dougl. 93. **W. Va.**—Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

Omission To State Place of Trial.—The omission from the summons of the place where the trial is desired to be had is not a jurisdictional defect, but at most an irregularity which may be corrected on motion. Such a defect does not afford a sufficient ground for vacating the attachment. Thomson *v.* Tilden, 24 Misc. 513, 53 N. Y. Supp. 920.

"Cash" instead of "each" does not justify quashing. Hard *v.* Stone, 5 Cranch C. C. 503, 11 Fed. Cas. No. 6,046.

2. Gapen *v.* Stephenson, 18 Kan. 140; Cory *v.* Lewis, 5 N. J. L. 846.

3. **Failure to attach an assignment of accounts** to a petition alleging that the plaintiff was the owner of the account. McCarn *v.* Rivers, 7 Iowa 404.

Misjoinder of a defendant. Albers *v.* Bedell, 87 Mo. 183.

Irregularities in Obtaining Judgment.—Murdock *v.* Steiner, 45 Pa. 349.

Want of Bill of Particulars.—Pharr *v.* Estey Piano, etc., Co., 7 Ga. App. 262, 66 S. E. 618.

4. Holmes *v.* Marshall, 145 Cal. 777, 79 Pac. 534, 104 Am. St. Rep. 86, 69 L. R. A. 67; Claflin & Co. *v.* Steenbock & Co., 18 Gratt. (Va.) 842.

Courts have full power to inquire into the abuse and misuse of attachment process without statutory authority. **N. J.**—Branson *v.* Shinn, 13 N. J. L. 250. **N. Y.**—Morgan *v.* Avery, 7 Barb. 656. **S. D.**—Bradley *v.* Armstrong, 9 S. D. 267, 68 N. W. 733.

In Holmes *v.* Marshall, *supra*, the court said: "Section 556, Code Civ. Proc., provides that the writ may be discharged when the same was improperly or irregularly issued. This was not a dissolution of the writ of attachment, but an order setting aside the levy as to the exempt property. It would be strange if a court were so impotent that it could not set aside the erroneous levy of its own writ upon exempt property. Any other rule would compel the injured party to bring a suit for damages, which not only would lead to delay, but might in the end prove futile."

of by a judge at chambers.[5] In some states it may be made before a different judge,[6] or a different court.[7]

C. Various Reasons for Which Discharge May Be Asked. — **1. Lack of Jurisdiction in General.** — An attachment is properly discharged where it appears that it was granted by a court or judge not having jurisdiction to grant attachments,[8] or not having jurisdiction of the case in which the attachment was issued.[9] or if no jurisdiction has been acquired of either the person or property of the defendant.[10]

Discretion of Court.—Ala.—DeBardeleben *v.* Crosby, 53 Ala. 363. Md.—Campbell *v.* Morris, 3 Har. & M. 535. Pa.—Holland *v.* White, 120 Pa. 228, 13 Atl. 782.

Nebraska.—As to jurisdiction of the county court, see George F. Dittman Boot, etc. Co. *v.* Graff, 3 Neb. (Unof.) 165, 91 N. W. 188.

In Rhode Island no court can "dissolve an attachment of real estate, when regularly and properly made, except that under the provisions of Gen. Laws R. I. c. 253, §10, the court to which the writ is returnable, in case the damages laid therein are excessive, or if the property attached greatly exceeds in value the amount of damages laid in the writ, may release a portion of the property attached." Wood *v.* Watson, 20 R. I. 223, 37 Atl. 1030.

5. Bash *v.* Howald (Okla.), 112 Pac. 1125.

In New York the statute distinguishes between applications to the court and to the judge in the matter of notice and time of hearing. Ruppert *v.* Haug, 87 N. Y. 141, 62 How. Pr. 364.

6. Dunlap *v.* Dillard, 77 Va. 847.

Circuit court commissioner in Michigan. See Schall *v.* Bly, 43 Mich. 401, 5 N. W. 651; Smith *v.* Collins, 41 Mich. 173, 2 N. W. 177; Heyn *v.* Farrar, 36 Mich. 258 (as to application to commissioner in another county when commissioner in home county is disqualified); Vinton *v.* Mead, 17 Mich. 388; Albertson *v.* Edsall, 16 Mich. 203; Agens *v.* Smith, 2 Mich. N. P. 310.

7. **Higher Court Has Jurisdiciton.** Bank of Commerce *v.* Rutland, etc., R. Co., 10 How. Pr. (N. Y.) 1.

District judge where attachment allowed by probate judge. Buck *v.* Panabaker, 32 Kan. 466, 4 Pac. 829.

Different Court in Same Circuit.—Benedict *v.* Ralya, 1 S. D. 167, 46 N. W. 188.

In Mellen *v.* Battey, 22 R. I. 395, 48 Atl. 141, in an action of assumpsit for breach of promise of marriage defendant's real estate was attached, and he moved in the common pleas division for dissolution on the ground that attachment was not authorized in such an action. The motion was denied and the case was sent to the supreme court on a petition for a new trial. The court said: "This court cannot entertain a petition for new trial until the case has been tried or in some way disposed of by the common pleas division. In other words, a case cannot be brought here piecemeal. It must come as a whole, and only after final adjudication upon some question which for the time being, at any rate, is decisive of the rights of the parties, so far as the common pleas division is concerned. Taylor *v.* Loomis, 21 R. I. 277, 43 Atl. 180."

8. **Ky.**—Worthington *v.* Damarin, 5 Ky. L. Rep. 684. **Miss.**—Lawrence *v.* Featherston, 10 Smed. & M. 345. **N. Y.** Rowles *v.* Hoare, 61 Barb. 266.

9. Buck *v.* Panabaker, 32 Kan. 466, 4 Pac. 829; *In re* Aycinena, 1 Sandf. (N. Y.) 690.

10. **U. S.**—Seidenbach *v.* Hollowell, 5 Dill. 382. **Ga.**—Beaseley *v.* Lennox-Haldeman Co., 116 Ga. 13, 42 S. E. 385; Henry *v.* Lennox-Haldeman Co., 116 Ga. 9, 42 S. E. 383. **N. Y.**—Ladenburg *v.* Commercial Bank, 87 Hun 269, 32 N. Y. Supp. 821, *reversing* 24 Civ. Pro. 234, 32 N. Y. Supp. 873, *affirmed* in 146 N. Y. 406, 42 N. E. 543, without opinion.

Residence or non-residence of defendant is a jurisdictional question. Evans *v.* Andrews, 52 N. C. 117.

If want of ownership by a non-resident defendant is shown there is no jurisdiction. Guild *v.* Richardson, 6 Pick. (Mass.) 364.

Though in some states jurisdictional questions may be raised by motion,[11] in others a plea in abatement is necessary.[12]

Want of Ownership. — Motion to vacate the attachment on the ground that defendant does not own the property attached will not ordinarily be entertained, as that would be to try a question as to the right of property when the proper parties are not before the court,[13] although a trustee may move to dissolve the attachment on the ground that the property attached is trust property.[14]

2. Objections Relating to the Affidavit. — Where the affidavit is clearly defective or insufficient because of failure to comply with the requirements of the statute,[15] the attachment will usually be dissolved

11. Fowler *v.* Dickson (Del.), 74 Atl. 601.

12. De Jarnette *v.* Dreyfus, 166 Ala. 138, 51 So. 932.

13. **Ala.**—Spokane Exch. Bank *v.* Clement, 109 Ala. 270, 19 So. 814; Sims *v.* Jacobson, 51 Ala. 186; King *v.* Bucks, 11 Ala. 217. **Ia.**—Tidrick *v.* Sulgrove, 38 Iowa 339. **Kan.**—Mitchell *v.* Skinner, 17 Kan. 563. **La.**—See Rhine *v.* Logwood, 10 La. Ann. 585. *Contra,* Schlater *v.* Broaddus, 3 Mart. (N. S.) 321. **Mass.**—Guild *v.* Richardson, 6 Pick. 364. **Minn.**—Rosenberg *v.* Burnstein, 60 Minn. 18, 61 N. W. 684. **Neb.**—Kneeland *v.* Weigley, 76 Neb. 276, 107 N. W. 574; McDonald *v.* Marquardt, 52 Neb. 820, 73 N. W. 288. **N. Y.**—Vogelman *v.* Lewit, 48 Misc. 625, 96 N. Y. Supp. 207. **N. C.**—Fonshee *v.* Owen, 122 N. C. 360, 29 S. E. 770. **Ohio.**—Langdon *v.* Conklin, 10 Ohio St. 439; Northern Bank of Kentucky *v.* Nash, 1 Handy 153; Emerson *v.* Love, 2 Ohio Dec. (Reprint) 348; Kelley *v.* Bender, 12 Ohio Cir. Dec. 183. **Ore.**—First Nat. Bank *v.* Mullaney, 29 Ore. 268, 45 Pac. 796. **Pa.**—Miller *v.* Paine, 2 Kulp 304; Mechanics' Nat. Bank *v.* Miners' Bank, 13 W. N. C. 515. **S. D.**—Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397. **Tenn.**—*Contra,* Harris *v.* Taylor, 3 Sneed 536, 67 Am. Dec. 576.

Where Defendant Has Used Property as Own.—In Kelly *v.* Baker, 26 App. Div. 217, 49 N. Y. Supp. 973, it was claimed by the defendant that the levy was improper and should be vacated. It appeared that the sheriff levied upon two bank accounts standing in the defendant's name in certain savings banks in this city, which the defendant claimed to not to belong to her personally but as executrix of the will of one S., deceased. From the facts set out in the opposing affidavits, however, it appears that the defendant was not only the executrix of S., but was her residuary legatee, and that she had a beneficial interest in the estate of S., after the payment of all debts and expenses of administration, much larger than the amount of the plaintiff's claim. The court said: "But this is not of much importance. The defendant has received that money, and undertaken to deal with it as her own. That being so, it is not necessary to examine in this case whether she actually owns the money, or whether she is bound to account to some other person or estate for it."

Attachment of Real Estate Alone Giving Jurisdiction.—Where the statute allowed a judgment *in personam* to be given against an absent defendant upon service of writ of attachment upon his real estate within the state it was held that he could plead in abatement that he did not own the property attached. Gardner *v.* James, 5 R. I. 235.

Partnership property attached in suit against one partner. Curran *v.* William Kendall Boot, etc. Co., 8 N. M. 417, 45 Pac. 1120.

A third party cannot move on this ground. Metts *v.* Piedmont, etc. L. Ins. Co., 17 S. C. 120.

14. Brenizer *v.* S. C. Royal Arcanum, 141 N. C. 409, 53 S. E. 835, 6 L. R. A. (N. S.) 235.

15. **Affidavit in Alternative Insufficient.**—Leak *v.* Moorman, 61 N. C. 168; Goodyear Rubber Co. *v.* Knapp, 61 Wis. 103, 20 N. W. 651.

If an affidavit is made outside the state and the clerk's certificate fails to state that it was made before a judge of a court of record, as the statute requires, the attachment should

or quashed,[16] unless amended in a case where the defect is not juris-

be quashed. Coward *v.* Dillinger, 56 Md. 59.

Irregularity Affecting Part of Writ. The whole writ should not be discharged for an irregularity or even impropriety in respect of one or more demands stated therein when the demands properly included are clearly separated and distinguished in the writ itself from the former. The defendant's remedy is by motion to discharge, modify, or amend the writ as to the demands irregularly inserted therein. Wilson *v.* Barbour, 21 Mont. 176, 53 Pac. 315.

The warrant will not be vacated even though the defendant rebuts the *prima facie* showing as to one ground if he admits the truth of the affidavit as to the other. Carolina Agency Co. *v.* Garlington, 85 S. C. 114, 67 S. E. 225, *citing* Roddey *v.* Erwin, 31 S. C. 36, 9 S. E. 729.

Insufficient Statement of Amount Claimed.—Espey *v.* Heidenheimer, 58 Tex. 662.

If the plaintiff has united in his affidavit several causes of action, some of which are stated with sufficient precision to sustain the attachment, and some of which are not so stated, a motion to vacate *in toto* should be denied. Netter *v.* Trenton Whisk Broom Wks., 140 App. Div. 287, 125 N. Y. Supp. 141.

Failure of Affidavit To State Cause of Action Cause for Dismissal.—Pomeroy *v.* Ricketts, 27 Hun (N. Y.) 242.

Affidavit on information and belief, sources of information not being given, calls for discharge of the attachment. Brewer *v.* Tucker, 13 Abb. Pr. (N. Y.) 76.

Failure To Show a Statutory Ground. U. S.—Clark *v.* Wilson, 3 Wash. C. C. 560, 5 Fed. Cas. No. 2,841. **Cal.**—Sparks *v.* Bell, 137 Cal. 415, 70 Pac. 281. **Ga.**—Blackwell *v.* Compton, 107 Ga. 764, 33 S. E. 672. **Idaho.**—Ross *v.* Gold Ridge Min. Co., 14 Idaho 687, 95 Pac. 821. **Ill.**—Clark *v.* Roberts, 1 Ill. 285. **Ia.**—Allerton *v.* Eldridge, 56 Iowa 709, 10 N. W. 252. **La.**—Palmer *v.* Hightower, 47 La. Ann. 17, 16 So. 560. **Mo.**—Graham *v.* Bradbury, 7 Mo. 281. **Neb.**—Sorenson *v.* Benedict, 24 Neb. 347, 38 N. W. 827; Simmons Hdw. Co. *v.* Benedict, 24 Neb. 346, 38 N. W. 827; Bliss *v.* Benedict, 24 Neb. 346, 38 N. W. 827; Peru Plow, etc., Co. *v.* Benedict, 24 Neb. 340, 38 N. W. 824; Walker *v.* Hagerty, 20 Neb. 482, 30 N. W. 556. **N. J.**—Clark *v.* Likens, 26 N. J. L. 207; Brundred *v.* Del Hoyo, 20 N. J. L. 328; City Bank *v.* Merrit, 13 N. J. L. 131. **N. Y.**—Jacobs *v.* Hogan, 85 N. Y. 243; McBride *v.* Illinois Nat. Bank, 128 App. Div. 503, 112 N. Y. Supp. 794; Franke *v.* Havens, 102 App. Div. 67, 92 N. Y. Supp. 377; Rallings *v.* McDonald, 76 App. Div. 112, 78 N. Y. Supp. 1040; McQueen *v.* Middletown Mfg. Co., 16 Johns. 5; Lenox *v.* Howland, 3 Caines 257. **N. C.**—Bear *v.* Cohen, 65 N. C. 511; Deaver *v.* Keith, 61 N. C. 428; Webb *v.* Bowler, 50 N. C. 362. **Ohio.**—Egan *v.* Lumsden, 2 Disney 168. **S. C.**—Addison *v.* Sujette, 50 S. C. 192, 28 S. E. 948. **S. D.**—Pearsons *v.* Peters, 19 S. D. 162, 102 N. W. 606. **Tex.**—Thomas *v.* Ellison, 102 Tex. 354, 116 S. W. 1141. **Va.**—Mantz *v.* Hendley, 2 Va. 808. **Wash.**—Carstens *v.* Milo, 40 Wash. 335, 82 Pac. 410. **Wis.**—Blockwood *v.* Jones, 27 Wis. 498; Elliott *v.* Jackson, 3 Wis. 649; Morrison *v.* Ream, 1 Pin. 244.

Withdrawal of Grounds for Attachment.—Where the grounds of the petition on which the attachment is based are withdrawn, the attachment will be dissolved. *In re* Huck, 51 La. Ann. 1368, 26 So. 543.

Demurrer Not Proper.—Beckwith *v.* Baldwin, 12 Ala. 720.

Rule To Show Cause.—Fisher *v.* Consequa, 2 Wash. C. C. 382, 9 Fed. Cas. No. 4,816; Harmon *v.* Jenks, 84 Ala. 74, 4 So. 260; Adair *v.* Stone, 81 Ala. 113, 1 So. 768; Drakford *v.* Turk, 75 Ala 339; Rich *v.* Thornton, 69 Ala. 473; Johnston *v.* Hannah, 66 Ala. 127; Dryer *v.* Abercrombie, 57 Ala. 497; Watson *v.* Auerbach, 57 Ala. 353; Brown *v.* Coats, 56 Ala. 439; Gill *v.* Downs, 26 Ala. 670; Beckwith *v.* Baldwin, 12 Ala. 720; Hazard *v.* Jordan, 12 Ala. 180; Jordan *v.* Hazard, 10 Ala. 221.

16. **Ark.**—Delano *v.* Kennedy, 5 Ark. 457. **Cal.**—Fisk *v.* French, 114 Cal. 400, 46 Pac. 161. **Idaho.**—Murphy *v.* Zaspel, 11 Idaho 145, 81 Pac. 301. **Kan.**—Robinson *v.* Burton, 5 Kan. 293; Reyburn *v.* Brackett, 2 Kan. 227, 83 Am. Dec. 457. **Md.**—Clark *v.* Meixsell, 29 Md. 221. **Mich.**—Howell *v.*

dictional.[17] Immaterial errors or omissions may be supplied by the other papers in the proceedings or by the context of the affidavit.[18] Errors which can be so corrected and which are plainly clerical should

Muskegon Cir. Judge, 88 Mich. 361, 50 N. W. 306. **Miss.**—Wharton *v.* Conger, 9 Smed. & M. 510. **Mo.**—Owens *v.* Johns, 59 Mo. 89. **N. Y.**—Berkermann *v.* Chambers, 47 Misc. 289, 95 N. Y. Supp. 914; Acker *v.* Saynisch, 25 Misc. 415, 54 N. Y. Supp. 937, *affirmed*, 26 Misc. 836, 56 N. Y. Supp. 1025; Gammann *v.* Tompkins, 2 Edm. Sel. Cas. 227. **Pa.**—Biddle *v.* Black, 99 Pa. 380; Sheip *v.* Price, 3 Pa. Super. 1, 39 W. N. C. 278. **S. D.**—Citizens' Bank *v.* Corkings, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891. **Va.** Sims *v.* Tyrer, 96 Va. 5, 26 S. E. 508; Anderson *v.* Johnson, 32 Gratt. 558. **Wis.**—Bowen *v.* Slocum, 17 Wis. 181, *overruled* on another point, 42 Wis. 417.

Defect Supplied by Complaint.—In Fleming *v.* Byrd, 78 S. C. 20, 58 S. E. 965, the court said: "It is true, that, when the motion to dissolve an attachment is on the ground that the affidavit is not sufficient to sustain an attachment, the plaintiff cannot supplement the defective affidavit by facts stated in the complaint, unless it is verified and made a part of the affidavit. Addison *v.* Sujette, 50 S. C. 192, 28 S. E. 948; Chitty *v.* Railroad, 62 S. C. 526, 40 S. E. 944. But a different question is presented when the motion to dissolve is on the ground that the cause of action set forth in the affidavit is not the cause of action alleged in the complaint. The former is an attack upon the regularity of the attachment proceedings, and must be tested by the papers before the clerk when he issues the writ. The latter is an attack upon the truth of the affidavit, and is, therefore, a motion to dissolve on the ground that it was improvidently issued, in which case the defendant may rely upon the complaint for the purpose of showing that the cause of action stated in the affidavit is not the true one."

17. **Ill.**—Campbell *v.* Whetstone, 4 Ill. 361. **Ia.**—Graves *v.* Cole, 1 Greene 405. **Kan.**—Robinson *v.* Burton, 5 Kan. 293. **Mich.**—Drew *v.* Dequindre, 2 Doug. 93. **Miss.**—McClanahan *v.* Brack, 46 Miss. 246. **Mo.**—Henderson *v.* Drace, 30 Mo. 358.

Contra, Winters *v.* Pearson, 72 Cal. 553, 14 Pac. 304.

In Kahn *v.* Hollander, 124 N. Y. Supp. 1071, the plaintiff claimed the right to amend his affidavit after a motion to vacate made upon the original papers. Lehman, J., said: "While in the case of Ladenburg *v.* Commercial Bank, 87 Hun 269-274, 33 N. Y. Supp. 821, the defects were jurisdictional, the court stated without limitations that: 'The rule seems to be thoroughly well settled that, where a motion is made to vacate an attachment upon the papers upon which it was granted, the attachment must stand or fall according to the sufficiency of those papers.' Conceding, without deciding, that where the defect is not jurisdictional the court has at all times the right to allow an amendment, this right is wholly within the court's discretion, and after the defendants have moved to vacate the attachment upon the original papers, and the plaintiff has rested upon the sufficiency of the papers until a decision has been rendered against him, an amendment to meet the decision should not be lightly granted."

Must Be Actually Amended.—Goodyear Rubber Co. *v.* Knapp, 61 Wis. 103, 20 N. W. 651.

Admission by Defendant as Cure for Defects.—Vogelman *v.* Lewit, 48 Misc. 625, 96 N. Y. Supp. 207.

18. **La.**—Citizens' Bank *v.* Hancock, 35 La. Ann. 41. **Miss.**—McClanahan *v.* Brack, 46 Miss. 246. **N. Y.**—Vogelman *v.* Lewit, 48 Misc. 625, 96 N. Y. Supp. 207. **N. D.**—Hilsbish *v.* Asada, 125 N. W. 556.

Failure To Verify Copies of Affidavit.—An attachment was not vacated on the ground that copies of the affidavit and complaint served on the defendant were not verified. Mazurette *v.* Richard Carle Amusement Co., 49 Misc. 604, 99 N. Y. Supp. 1109.

Irregularities in Unnecessary Affidavits.—Irregularities in affidavits not required by statute will not be cause for vacating the attachment. Thorn *v.* Alvord, 32 Misc. 456, 66 N. Y. Supp. 587, *affirmed* in 54 App. Div. 638, 67 N. Y. Supp. 1147.

be disregarded as not affecting the substantial rights of the adverse party.[19] Such irregularities are not reached by an appeal,[20] or writ of error.[21]

Falsity of Affidavit.— Generally the attachment will be dissolved upon a showing that the affidavit upon which it issued was untrue,[22]

Kansas.—It has been held in Kansas that the attachment will not be vacated for defective affidavit if the evidence introduced at the hearing supplied the defect. Hodson *v.* Tootle, 28 Kan. 317.

Omission of Affiant's Name.—The omission of affiant's name from the body of the affidavit is not cause for setting aside the attachment, it appearing that he signed the affidavit. Rudolph *v.* McDonald, 6 Neb. 163.

19. Hilsbish *v.* Asada (N. D.), 125 N. W. 556, *citing* Brock *v.* Fuller Lumb. Co., 153 Fed. 272, 82 C. C. A. 402.

20. Ledoux *v.* Smith, 4 La. Ann. 482; Morgan *v.* Avery, 7 Barb. (N. Y.) 656.

21. **Ala.**—Watson *v.* Auerbach, 57 Ala. 353; Burt *v.* Parish, 9 Ala. 211. **Ill.**—Archer *v.* Claflin, 31 Ill. 306. **Miss.**—Thompson *v.* Raymon, 7 How. 186.

Motion.—**La.**—Erwin *v.* Commercial Bank, 3 La. Ann. 186. **Miss.**—Ford *v.* Hurd, 4 Smed. & M. 683. **Tenn.**—McReynolds *v.* Neal, 8 Humph. 12.

Plea in Abatement.—Wright *v.* Smith, 66 Ala. 545; Johnston *v.* Hannah, 66 Ala. 127; Free *v.* Hukill, 44 Ala. 197; Free *v.* Howard, 44 Ala. 195; Kirkman *v.* Patton, 19 Ala. 32; Jones *v.* Pope, 6 Ala. 154. See Didier *v.* Galloway, 3 Ark. 501.

22. **Ark.**—Ward *v.* Carlton, 26 Ark. 662; Taylor *v.* Ricards, 9 Ark. 378. **Cal.**—Fisk *v.* French, 114 Cal. 400, 46 Pac. 161. **Ill.**—Ridgway *v.* Smith, 17 Ill. 33. **Kan.**—Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292. **La.**—Brumgard *v.* Anderson, 16 La. 341; Palmer *v.* Hightower, 47 La. Ann. 17, 16 So. 560; Thomas *v.* Dundas, 31 La. Ann. 184; Hoss *v.* Williams, 24 La. Ann. 568; Gordon *v.* Baillio, 13 La. Ann. 473. **Md.**—Clark *v.* Meixsell, 29 Md. 221. **Mich.**—Folsom *v.* Teichner, 27 Mich. 107. **Minn.**—Drought *v.* Collins, 20 Minn. 374; Nelson *v.* Gibbs, 18 Minn. 541. **Miss.**—Roach *v.* Brannon, 57 Miss. 490. *Contra,* Smith *v.* Herring, 10 Smed. & M. 518. **Neb.**—Peru Plow, etc., Co. *v.* Benedict, 24 Neb. 340, 38 N. W. 824. **N. J.**—Bisbee *v.* Bowden, 55 N. J. L. 69, 25 Atl. 855; Morrel *v.* Fearing, 20 N. J. L. 670; Branson *v.* Shinn, 13 N. J. L. 250; City Bank *v.* Merrit, 13 N. J. L. 131; Weber *v.* Weitling, 18 N. J. Eq. 441. *Contra,* Mercantile Nat. Bank *v.* Pequonnock Nat. Bank, 58 N. J. L. 300, 33 Atl. 474. **N. Y.**—McGrath *v.* Sayer, 19 App. Div. 321, 46 N. Y. Supp. 113; Orwin *v.* Raymond, 58 Misc. 319, 110 N. Y. Supp. 1100; Aspell Wholesale Grocery Co. *v.* Meeker, 54 Misc. 55, 104 N. Y. Supp. 493; Pierce *v.* Martin, 89 N. Y. Supp. 434. **N. C.**—Hale *v.* Richardson, 89 N. C. 62; Bear *v.* Cohen, 65 N. C. 511. *Contra,* O'Neal *v.* Owens, 2 N. C. 365. **N. D.**—Sonnesyn *v.* Akin, 12 N. D. 227, 97 N. W. 557. **Ohio.**—Egan *v.* Lumsden, 2 Disn. 168. **Pa.**—Moyer *v.* Kellogg, 1 W. N. C. 134. **R. I.**—Kelley *v.* Force, 16 R. I. 628, 18 Atl. 1037. **S. C.**—Bates *v.* Killian, 17 S. C. 553; Blake *v.* Hawkes, 2 Hill 631; Degnans *v.* Wheeler, 2 Nott & McC. 323. **S. D.**—Dye *v.* Bank, 16 S. D. 248, 92 N. W. 28; Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068. **Tenn.**—Harris *v.* Taylor, 3 Sneed 536, 67 Am. Dec. 576. **Wis.**—Davidson *v.* Hackett, 49 Wis. 186, 5 N. W. 459. *Compare* Mayhew *v.* Dudley, 1 Pin. 95. **Can.**—Getchell *v.* Stuyvesant, 40 Nova Scotia 359.

Even though the property might be later subject to judgment. Garlinghouse *v.* Mulvane, 40 Kan. 428, 19 Pac. 798.

"The affidavit charged that appellant had disposed of her property with intent to defraud her creditors, etc., and the fact that it was made three days before filing the bond and application for *scire facias* and the issuance of attachment constituted no ground for quashing the attachment proceedings. Campbell *v.* Wilson, 6 Tex. 379; Wright *v.* Ragland, 18 Tex. 293." Coleman *v.* Zapp (Tex. Civ. App.), 135 S. W. 730.

Insufficient in form or substance and not true in fact. Wilcox *v.* Smith, 4 S. D. 125, 55 N. W. 1107, construing S. D. Comp. Laws, §5011.

Evidence on Motion To Dissolve.— By New York Code Civ. Proc. §683,

even though the plaintiff believed it to be true.[23] This is so in some states though the merits of the case are incidentally determined.[24] In some states the question is raised by plea in abatement,[25] in others by a motion;[26] while some states allow either a motion to quash or a plea in abatement.[27] Sometimes the objection is taken by a traverse

the falsity of the affidavit may be shown on such motion.

Though Evidence Would Support Causes Not Alleged.—Dumay *v.* Sanchez, 71 Md. 508, 18 Atl. 890.

A debtor is not bound to contest the truth of the affidavit setting forth statutory grounds for an attachment. State Nat. Bank *v.* John Moran Packing Co., 68 Ill. App. 25, *affirmed*, 168 Ill. 519, 48 N. E. 82.

23. **Mich.**—Folsom *v.* Teichner, 27 Mich. 107. **Mo.**—Rheinhart *v.* Grant, 24 Mo. App. 154. **Neb.**—Citizens' State Bank *v.* Baird, 42 Neb. 219, 60 N. W. 551. **N. J.**—Brundred *v.* Del Hoyo, 20 N. J. L. 328. **S. C.**—Degnans *v.* Wheeler, 2 Nott & McC. 323. **Va.** Claflin *v.* Steenbock, 18 Gratt. 842. **Wis.**—Davidson *v.* Hackett, 49 Wis. 186, 5 N. W. 459.

The plaintiff's affidavit is not conclusive on the fact of residence. Clark *v.* Likens, 26 N. J. L. 207.

24. Clark *v.* Montfort, 37 Kan. 756, 15 Pac. 899; Bundrem *v.* Denn, 25 Kan. 430; Carnahan *v.* Gustine, 2 Okla. 399, 37 Pac. 594. But see Herrmann *v.* Amedee, 30 La. Ann. 393; Miller *v.* Chandler, 29 La. Ann. 88; Macarty *v.* Lepaullard, 4 Rob. (La.) 425.

25. **Ala.**—Blankenship *v.* Blackwell, 124 Ala. 355, 27 So. 551; Brown *v.* Coats, 56 Ala. 439. **Ill.**—Bates *v.* Jenkins, 1 Ill. 411. **Ind.**—Collins *v.* Nichols, 7 Ind. 447. **Miss.**—Montague *v.* Gaddis, 37 Miss. 453. **Pa.**—Altz *v.* Raish, 4 Kulp 375. **S. C.**—Havis *v.* Trapp, 2 Nott & M. 130. **Tenn.**—Templeton *v.* Mason, 107 Tenn. 625, 65 S. W. 25; McCown *v.* Drake, 7 Heisk. 447; Harris *v.* Taylor, 3 Sneed 536, 67 Am. Dec. 576; Isaacks *v.* Edwards, 7 Humph. 456, 46 Am. Dec. 86; Tarbox *v.* Tonder, 1 Tenn. Ch. 163. **W. Va.**—Miller *v.* Fewsmith Lumb. Co., 42 W. Va. 323, 26 S. E. 175; Stevens *v.* Broun, 20 W. Va. 450.

Plea in Nature of Plea in Abatement.—Cannon *v.* McManus, 17 Mo. 345; Hatry *v.* Shuman, 13 Mo. 547; Searcy *v.* Platte County, 10 Mo. 269; Dider *v.* Courtney, 7 Mo. 500; Graham *v.* Bradbury, 7 Mo. 281; Swan *v.* O'Fallon, 7 Mo. 231; Mense *v.* Osburn, 5 Mo. 544.

26. **Fla.**—Reese *v.* Damato, 44 Fla. 683, 33 So. 459. **Kan.**—Wm. W. Kendall, Boot, etc., Co. *v.* August, 51 Kan. 53, 32 Pac. 635; Meyer Bros. Drug Co. *v.* Malm, 47 Kan. 762, 28 Pac. 1011; Johnson *v.* Laughlin, 7 Kan. 359. **Ky.** Talbot *v.* Pierce, 14 B. Mon. 195. **La.**—Reed *v.* Ware, 2 La. Ann. 498. **N. C.**—Hale *v.* Richardson, 89 N. C. 62. **Ore.**—Watson *v.* Loewenberg, 34 Ore. 323, 56 Pac. 289. **Pa.**—Netter & Co. *v.* Hosch, 1 Pa. Co. Ct. 452. **S. D.** Hornick Drug Co. *v.* Lane, 1 S. D. 129, 45 N. W. 329. **Wash.**—Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

Motion supported by affidavits or testimony. Cheyenne First Nat. Bank *v.* Swan, 3 Wyo, 356, 23 Pac. 743; Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

Louisiana.—An objection that the affidavit is untrue and the attachment premature may be made on motion to dissolve, and the defendant is not limited to raising such objection by exceptions in the suit. Read *v.* Ware, 2 La. Ann. 498, where the court said: "Such motions involve, to a partial extent, the consideration of the merits of the cause; but the practice has arisen from a consideration of the stringent nature of the remedy. It is very clearly sanctioned by the 258th article of the Code of Practice, by which the defendant is permitted to prove, in a summary manner, after having given due notice in writing to the adverse party, that the allegations on which the order for attachment had been obtained were false; and where this is done, the code directs that the attachment shall be dissolved, and the party will be allowed to proceed in his defense as in ordinary suits."

An objection to the truth of the writ may be taken by exception or by rule to show cause. Poutz *v.* Reggio, 26 La. Ann. 305.

27. Drake *v.* Avanzini, 20 Colo. 104, 36 Pac. 846; Dumay *v.* Sanchez, 71 Md. 508, 18 Atl. 890; Clarke *v.* Meixsell, 29 Md. 221; Lambden *v.* Bowie, 2 Md.

in the answer.[28] In some jurisdictions, however, the truth of the affidavit is not a traversable fact, and, therefore, the defendant will not be allowed to show that the affidavit is untrue as a ground for dissolving the attachment,[29] but will be left to an action on the plaintiff's bond.[30]

3. Defects in the Writ.[31]— The writ may be quashed if it is materially defective,[32] or if it varies materially from the summons,[33] or affidavit.[34] But errors in form,[35] or mere clerical errors of the officer issuing the attachment are not sufficient grounds for sustaining a motion to quash.[36]

334; Barr *v.* Perry, 3 Gill (Md.) 313; Campbell *v.* Morris, 3 H. & McH. (Md.) 553.

28. **Ind.**—Fleming *v.* Dorst, 18 Ind. 493; Foster *v.* Dryfus, 16 Ind. 158; McFarland *v.* Birdsall, 14 Ind. 126. **S. D.** Deering, Wilmam & Co. *v.* Warren, 1 S. D. 35, 44 N. W. 1068. **Wis.**—Gallum *v.* Weil, 116 Wis. 236, 92 N. W. 1091; Armstrong *v.* Blodgett, 33 Wis. 284.

In bar and not in abatement and to be tried with other issues. U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832.

Where Attachment Not Essential to Jurisdiction.—Tarbox *v.* Tonder, 1 Tenn. Ch. 163.

29. **Ala.**—DeJarnette *v.* Dreyfus, 166 Ala. 138, 51 So. 932; Garner *v.* Johnson, 22 Ala. 494; Jones *v.* Donnell, 9 Ala. 695; Middlebrook *v.* Ames, 5 Stew. & P. 158. **Ia.**—Sturman *v.* Stone, 31 Iowa 115; Berry *v.* Gravel, 11 Iowa 135; Andrus *v.* Clark, 8 Iowa 475; Veiths *v.* Hagge, 8 Iowa 163; Burrows *v.* Lehndorff, 8 Iowa 96; Churchill *v.* Fulliam, 8 Iowa 45; Bowen *v.* Gilkison, 7 Iowa 503; Sample *v.* Griffith, 5 Iowa 376; Sackett *v.* Partridge, 4 Iowa 416. *Compare* Crew *v.* McClung, 4 Greene 153. **Tex.**—Norvell-Shapleigh Hdw. Co. *v.* Hall Novelty, etc., Wks., 91 S. W. 1092; Gimbell *v.* Gomprecht, 89 Tex. 497, 35 S. W. 470; Dwyer *v.* Testard, 65 Tex. 432; Cloud *v.* Smith, 1 Tex. 611; Mallette *v.* Ft. Worth Pharmacy Co., 21 Tex. Civ. App. 267, 51 S. W. 859; Waples-Platter Grocer Co. *v.* Basham, 9 Tex. Civ. App. 638, 29 S. W. 1118.

A recent amendment to the Alabama Code allows the defendant to put in issue the grounds for the attachment. (Note to 2966, Code 1907). De Jarnette *v.* Dreyfus, 166 Ala. 138, 51 So. 932.

30. **Ark.**—Taylor *v.* Ricards, 9 Ark. 378. **Ia.**—Veiths *v.* Hagge, 8 Iowa 163; Burrows *v.* Lehndorff, 8 Iowa 96; Sackett *v.* Partridge, 4 Iowa 416. **Miss.** Smith *v.* Herring, 10 Smed. & M. 518. **Tex.**—Gimbel *v.* Gomprecht, 89 Tex. 497, 35 S. W. 470; Dwyer *v.* Testard, 65 Tex. 432; Mallette *v.* Ft. Worth Pharmacy Co., 21 Tex. Civ. App. 267, 51 S. W. 859; Waples-Platter Grocer Co. *v.* Basham, 9 Tex. Civ. App. 638, 29 S. W. 1118.

31. See generally *supra*, XI.

32. **Ia.**—Barber *v.* Swan, 4 Greene 352. **Me.**—Mansur *v.* Coffin, 54 Me. 314. **Vt.**—Park *v.* Brownson, 14 Vt. 211.

Allegations Which Are Unnecessary. The court is not justified in vacating the order of attachment because the warrant contains allegations not required by statute. Fox *v.* Mays, 46 App. Div. 1, 61 N. Y. Supp. 295.

In New York it is held that it is not sufficient to discharge an attachment *ex parte* that it is obtained in a county different from the county in which the action is triable. Farquehar *v.* Wisconsin Condensed Milk Co., 30 Misc. 270, 62 N. Y. Supp. 305.

33. Musgrave *v.* Brady, 1 Morris (Iowa) 456.

34. Woodley *v.* Shirley, Minor (Ala.) 14.

35. Reynolds *v.* Damrell, 19 N. H. 394; Askew *v.* Stevenson, 61 N. C. 288.

36. Drew *v.* Dequindre, 2 Doug. (Mich.) 93.

In Byrd *v.* Hopkins, 8 Smed. & M. (Miss.) 441, an attachment was issued commanding the sheriff to hold the estate attached in his hands, so that the same might be liable to further proceedings thereupon, according to law, "at a court to be held at Mississippi city, of the county of Harrison aforesaid, upon the Monday immediately

A defect in the writ may be waived by moving to set aside the levy on othergrounds,[37] or by giving bond to have the property released,[38] or by a plea in abatement.[39]

Issue on a Legal Holiday. — An attachment will be dissolved because issued on Sunday,[40] unless, as has been held, the debtor is about to remove from the state and there is danger of miscarriage of justice.[41]

preceding the first Monday in October next.'' It was held on a motion to quash the attachment, that the omission of the word ''circuit'' before the word ''court,'' the attachment being in all other particulars regular, was immaterial; that the nature and character of the attachment, and the statement of the time and place sufficiently identified the court to which it was returnable.

37. Wolf *v.* Cook, 40 Fed. 432.

38. See *infra*, this section.

39. See *infra*, this section.

40. Matthews *v.* Ansley, 31 Ala. 20; Cotton *v.* Huey & Co., 4 Ala. 56; Fifield *v.* Wooster, 21 Vt. 215. See also Pearson *v.* French, 9 Vt. 349.

Where the attachment was issued on Sunday, but it appeared on the face of the writ that it was issued on Monday, it was held that the court would not order the clerk to amend the writ to show the correct date and then quash the writ for irregularity. Matthews *v.* Ansley, 31 Ala. 20.

In Nebraska under a statute which prohibits any judicial business on Sundays or legal holidays, it is held that an order made by a district or county judge on a legal holiday allowing an attachment in an action on a debt not due is void on the ground that the granting of such an order is a judicial act. Merchants' Nat. Bank *v.* Jaffray, 36 Neb. 218, wherein the court said: ''Where the application is made the court or judge must determine judicially that the action is one of those contemplated by the statute, and that the showing is sufficient to entitle the plaintiff to an attachment.'' But it was held in Whipple *v.* Hill, 36 Neb. 720, that the above statute did not prohibit a county judge from issuing, on a legal holiday, an order of attachment on a debt past due since that was a purely ministerial, and not a judicial act.

The proper remedy is by motion to set aside the process for irregularity and not by a plea in abatement. Cotton *v.* Huey & Co., 4 Ala. 56.

Writ not void because delivered to officer after sunset on Sunday under the statute condemning activities up to sunset. Johnson *v.* Day, 17 Pick. (Mass.) 106.

41. **Ala.**—Matthews *v.* Ansley, 31 Ala. 20; Cotton *v.* Huey & Co., 4 Ala. 56. **Ia.**—Richards *v.* Schrieber, 98 Iowa 422, 67 N. W. 569. **Mo.**—Updyke *v.* Wheeler, 37 Mo. App. 680.

A Texas statute provides that ''no civil suit shall be commenced, nor shall any process be issued or served, on Sunday or on any legal holiday, except in case of injunction, attachment or sequestration.'' In Schow *v.* City Nat. Bank (Tex. Civ. App.), 40 S. W. 166, an appeal was taken from a judgment quashing a garnishment proceeding because the affidavit and bond were filed on Sunday, though the writ itself was issued and served on the Monday following, and though the original suit was already pending when the affidavit and bond were filed. The court said: ''In the first place, the garnishment was merely ancillary to, and a part of, the principal case, which had already been commenced before the affidavit and bond were filed. It was the extension of a pending suit, rather than the commencement of a new one. Nor was the filing of the affidavit and bond the issuance of the process. . . . The main clause of the article quoted is, therefore, not applicable. In the second place, as garnishment is but a species of attachment, the excepting clause is broad enough to cover, and was evidently intended to cover, a garnishment proceeding.''

The Nevada statute provides that the writ may be issued on Sunday, upon the plaintiff, or some person in his behalf, setting forth in the affidavit required by law for obtaining said writ additional averments, as follows: ''That the affiant has good reason to believe, and does believe, that it will be too late for the purpose of acquiring a lien by said writ to wait till a subsequent day for the issuance of the same. And all proceedings in-

4. Matters Relating to Service and Return. — Defective service goes to the jurisdiction,[42] and is cause for dismissal of the attachment,[43] as is also a failure to return the writ to court.[44] But formal omissions in the return as to the manner of service are not usually sufficient to secure a vacation of the attachment.[45] The propriety of service may be raised by motion,[46] or, in some jurisdictions, by plea in abatement.[47]

Service by Fraud or Violence. — If service is secured by fraud or violence or abuse of official power practiced by the officer or the plaintiff it will be set aside on motion.[48]

stituted, and writs issued, and official acts done on any of the days above specified, under and by virtue of this section, shall have all the validity, force and effect of proceedings commenced on other days.'" Levy *v.* Elliott, 14 Nev. 435.

42. De Jarnette *v.* Dreyfus, 166 Ala. 138, 51 So. 932; Weil *v.* Gallun, 75 App. Div. 439, 78 N. Y. Supp. 300.

43. **La.**—Lehman *v.* Broussard, 45 La. 346, 12 So. 504. **Mich.**—Stearns *v.* Taylor, 27 Mich. 88. **N. H.**—Blake *v.* Smith, 67 N. H. 182, 38 Atl. 16.

Failure To Serve in Time.—Paul *v.* Bird, 25 N. J. L. 559.

Failure to serve certified copy on one indebted to the defendant. Weil *v.* Gallun, 75 App. Div. 439, 78 N. Y. Supp. 300.

Failure To Post Notice.—Wilson *v.* Ray, T. U. P. Charlt. (Ga.) 109.

Failure To Advertise.—Ford *v.* Wilson, Tapp. (Ohio) 274.

Waiver of defects by giving a replevy bond. Wharton *v.* Conger, 9 Smed. & M. (Miss.) 510.

A failure to plead does not waive the want of authority of the officer to serve the writ. Kelly *v.* Paris, 10 Vt. 261, 33 Am. Dec. 199.

No ground that name of verifying officer is not set out in the copy served. Mazurette *v.* Richard Carle Amusement Co., 49 Misc. 604, 99 N. Y. Supp. 1109.

44. Munroe *v.* St. Germain, 69 N. H. 200, 42 Atl. 900.

Defect cured before motion by filing at the second term. August Bank *v.* Conrey, 28 Miss. 667.

45. **Ga.**—Connolly *v.* Atlantic Contracting Co., 120 Ga. 213, 47 S. E. 575. **Mass.**—Nims *v.* Spurr, 138 Mass. 209. **Mich.**—Paddock *v.* Smith, 2 Mich. N. P. 114.

Presumption That Officer Served Properly.—Connolly *v.* Atlantic Contracting Co., 120 Ga. 213, 47 S. E. 75.

A clerical error as to date of return. Mechanics' Nat. Bank *v.* Miners' Bank, 13 W. N. C. (Pa.) 515.

Return Not Sworn To.—Mechanics' Nat. Bank *v.* Miners' Bank, 13 W. N. C. (Pa.) 515.

Uncertain Description of Property. Green *v.* Pyne, 1 Ala. 235; Seers *v.* Blakefly, 1 Root (Conn.) 54. *Contra*, Messner *v.* Lewis, 20 Tex. 221.

Failure To Take Possession.—In Mechanics' Nat. Bank *v.* Miners' Bank, 13 W. N. C. (Pa.) 515, the court said: "If the sheriff did not take such property attached as was capable of manual seizure into his possession, the plaintiff may have reason to complain, but I cannot see how the defendant is injured thereby, or that this neglect of the sheriff is any cause for setting aside the service."

46. Finch *v.* Slater, 152 N. C. 155, 67 S. E. 264; Ferguson *v.* Gilbert & Co., 17 S. C. 26.

Rule to show cause and not by motion. Falk *v.* Wurzburger, 3 Kulp (Pa.) 321.

47. In the discretion of the court. Coughlin *v.* Angell, 68 N. H. 352, 44 Atl. 525; Rowen *v.* Taylor, 1 Pin. (Wis.) 235 (failure to publish).

48. **Ia.**—Pomroy *v.* Parmelee, 9 Iowa 140, 74 Am. Dec. 328. **La.**—Paradise *v.* Farmers', etc., Bank, 5 La. Ann. 710. **Mass.**—Deyo *v.* Jennison, 10 Allen 410. **N. Y.**—Rowles *v.* Hoare, 61 Barb. 266; Metcalf *v.* Clark, 41 Barb. 45. **Tenn.**—Timmons *v.* Garrison, 4 Humph. 148.

Property Wrongfully Seized Outside of Sheriff's Jurisdiction.—When the sheriff of one county took possession of property in another, pretending that he seized it by virtue of a writ of attachment, and carried it back to his

5. Variance. — A variance between the different papers upon which the attachment is based is a sufficient reason for dissolving the attachment.[49] But the contrary is the rule if the variance is im-

own county where he made a formal levy, under a writ in his possession when the property was taken, it was held that the levy was illegal and the property should be discharged. Pomroy *v.* Parmelee, 9 Iowa 140.

Possession Fraudulently Obtained in Another State.—Where a creditor fraudulently obtains possession in another state, of property of his debtor, who resided there, and brings it clandestinely into this state, without the consent or knowledge of the debtor, and immediately attaches it, the attachment will be dissolved. The fraudulent act of the plaintiff cannot give jurisdiction to our courts. Powell *v.* McKee, 4 La. Ann. 108.

Property Brought Into State by Fraud.—In Kizer *v.* George, 10 Ohio Dec. (Reprint) 218, 19 Wkly L. Bul. 257, it appeared from the evidence that the defendants were non-residents; engaged in the coal business in a city of a certain state, and that plaintiff was their employe, among whose duties was that of attending to the delivery of the coal bought or ordered by customers. Being informed that the defendants were on the point of making a general assignment, the plaintiff by collusion with a person engaged in business in the city, and in pretended discharge of his duties as such employe, directed the delivery in a city in an adjoining state of two cart loads of coal, and in pursuance of this direction there were brought into the latter city two carts and teams which were there attached. The act was done by plaintiff without the knowledge or consent of the defendants, and with the intent on the part of plaintiff of bringing the property within the jurisdiction of the court for the purpose of exposing and subjecting it to attachment. It was held that the attachment should be discharged.

In Pakas *v.* Steel Ball Co., 34 Misc. 811, 68 N. Y. Supp. 397, "The plaintiff not finding any property of the defendant within that jurisdiction which might be made to respond to his attachment, and without first disclosing the situation to a business associate, caused a consignment of goods to be made by the defendant to this business acquaintance, upon the plea that his relations with the defendant were not of such a character as that he could have any dealings with the defendant direct, but would be responsible for any consignment upon the friend's order. As a consequence, the defendant shipped to the third party a quantity of goods C. O. D., and upon their arrival here the same were levied upon under the plaintiff's attachment. The matter being brought to the attention of the court upon a notice of motion for an order vacating the attachment, and for such other and further relief as might be just, the attachment was permitted to stand, and the levy vacated and set aside, with costs."

49. Ga.—Simpson *v.* Holt, 89 Ga. 834, 16 S. E. 87. Tex.—Joiner *v.* Perkins, 59 Tex. 300; Sanger *v.* Texas Gin, etc., Co. (Tex. Civ. App.), 47 S. W. 740; Moore *v.* Corley (Tex. App.), 16 S. W. 787. W. Va.—Simmons *v.* Simmons, 56 W. Va. 65, 48 S. E. 833, 107 Am. St. Rep. 890.

In Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210, it was claimed that there was a variance between the affidavit and the petition in that the affidavit stated that the debt was due for property obtained under false pretenses, while the petition allege that the defendant "represented to plaintiffs that he was the owner of the two notes, of $6,000 each, mentioned in his obligation to them, when, in fact, he had for a valuable consideration assigned them to the First National Bank of Corsicana, which false pretense, knowingly made, induced plaintiffs to advance for him the sum of money sued for, $3,700." The court held that this was not inconsistent with the affidavit, and did not show it to have been false.

A variance between the amount stated in the affidavit and the amount stated in the writ is cause for dissolution. Finch *v.* McVean, 6 Cal. App. 272, 91 Pac. 1019.

"The affidavit for attachment does not set forth the same cause of action found in the complaint. This affidavit may have been sufficient on its face

material[50] (as is abundantly illustrated by several recent cases cited

to warrant the clerk in issuing the writ (see Newell *v.* Whitworth, 16 Mont. 243, 40 Pac. 866), but the court must look to the complaint to ascertain whether it states a cause of action in contract, express or implied. The fundamental question is whether the complaint states such a cause of action. As this complaint does not, the attachment was properly discharged.'' Kyle *v.* Chester, 42 Mont. 522, 113 Pac. 749.

A variance between the writ of attachment and the bond and affidavit. Goldsticker *v.* Stetson, 21 Ala. 404. To the same effect, see Wright *v.* Snedecor, 46 Ala. 92.

50. ''Where the affidavit in an attachment suit described the plaintiffs as ''Peet, Sims & Co.,'' and the writ described them as 'Eleazer Peet, Philip Sims and John Lorathe, partners, etc., under the name of Peet, Sims & Co.,' it was held that there was no such variance as would abate the writ.'' Mandel *v.* Peet, 18 Ark. 236; Hall *v.* Parry (Tex. Civ. App.), 118 S. W. 561; First Nat. Bank *v.* Wallace (Tex. Civ. App.), 65 S. W. 392.

Where the amount stated in the petition and in the affidavit were the same, the fact that the total of the sums set out in the schedule affixed to the affidavit was different than the amount stated in the petition and affidavit was held not sufficient to vacate the attachment. Donnelly *v.* Elser, 69 Tex. 283, 6 S. W. 563.

Where the amount claimed in the affidavit for attachment was one thousand dollars—the same as that contained in the declaration, the mere fact that the aggregate of the particular items of damage specified elsewhere in the declaration exceeded one thousand dollars did not render the declaration bad as claiming more than the amount sworn to in the attachment affidavit. Brackett *v.* Americus Grocery Co., 127 Ga. 672, 56 S. E. 762.

It was held in Stewart *v.* Heidenheimer, 55 Tex. 644, 648, that a variance in the affidavit of three dollars less than the amount claimed in the petition, the writ issuing for the smaller amount, was immaterial. See also Rainwater-B. Hat Co. *v.* O'Neal, 82 Tex. 337, 18 S. W. 570, a mistake of a small amount, clearly arising from miscalculation of interest.

A variance between the account sworn to at the time of issuing the attachment, and that filed with the original declaration, is immaterial where the account filed with the original declaration was filed under the ''Rule Day Act,'' but the defendant was never summoned nor was the act called into operation. Stewart *v.* Chappell, 98 Md. 527, 57 Atl. 17.

Where the ground for the attachment alleged in the affidavit was that the defendant was a non-resident it was held that there was no variance where the complaint stated that the defendant was a non-resident temporarily staying in the state, as a person may be a non-resident within the meaning of the statute and at the same time be within its boundaries. Hall *v.* Parry (Tex. Civ. App.), 118 S. W. 561.

In Duty *v.* Sprinkle, 64 W. Va. 39, 60 S. E. 882, the court said: ''Inconsistency between the declaration and the affidavit, or variance of the affidavit from the declaration, is the ground upon which the motion to quash the attachment is based. The declaration sets up a negotiable promissory note for the sum of $334.95, and admits a credit thereon of $101.45. The affidavit sets forth the nature of the plaintiff's claim in the following terms: 'For amount due upon a promissory note bearing date May 4, 1895, due 120 days after date, with interest, for $334.95, payable to the order of M. K. Duty, and signed by the said M. K. Sprinkle and D. A. Sprinkle, which note is subject to a credit of $101.45, as of date April 10, 1897.' The declaration and affidavit vary only in respect to the extent of descriptive matter; the former describing the note fully and the latter only partially. So far as the affidavit describes it, the terms of the description are in perfect agreement with those employed in the declaration. From both the cause of action appears to be a certain promissory note, and each so describes it that the defendant may know with certainty the nature of the demand upon which the proceedings is founded. They are not in any sense inconsistent. That a promissory note may be negotiable, though not so described, and that one described as negotiable is nevertheless a promissory

in the note below), or if the defendant waives the defect, as, by going to trial.[51]

Property Exempt From Attachment. — It is not a sufficient or proper ground for motion to vacate an attachment that the property levied upon was not subject to attachment,[52] unless the statute makes such provision.[53]

Excessive Claim. — The fact that the defendant is not liable for the full amount claimed is not a ground for dissolving the attachment.[54]

note, is perfectly obvious, and, if the other words of descriptions in the two instruments harmonize, there can be no doubt, in a legal sense or otherwise, of the identity of the cause of action. But, if a slight, unsubstantial variance be admitted, it does not invalidate the attachment. Authority is cited in Simmons *v.* Simmons, 56 W. Va. 65, 67, 48 S. E. 833, 107 Am. St. Rep. 890, holding that the difference between the affidavit and the declaration must be substantial in order to have that effect. In that case the difference was radical and vital. The declaration stated a conditional demand and the affidavit an absolute one. Here the departure, if any, consists of mere failure to describe the instrument sued on with an equal degree of completeness as to detail in the declaration and the affidavit." See also *supra*, IX.

51. **Waiver of Variance.**—Where an attachment affidavit varies from an amended petition in the statement of the specific kind of an account in suit, and the defendant, by answering the amended petition and taking part in a trial of the issues joined has waived the right to further object to the error, if any, in allowing the amended petition to be filed, in which it was claimed that a new cause of action was introduced, in that in the amended petition an account different in its particular character from that pleaded in the original petition was declared upon. It was held, that inasmuch as a reference to the petition would disclose the precise nature of the account, and, hence, the action could be pleaded in bar of a second attachment on the same account, the court did not err in overruling a motion to discharge the attachment on the ground, in substance, that it did not state the nature of plaintiff's claim as contained in the amended petition. Grotte *v.* Nagle, 50 Neb. 363, 69 N. W. 973. See also *infra*, XX, F.

52. **Minn.**—Davidson *v.* Owens, 5 Minn. 69. **Neb.**—Quigley *v.* McEvony, 41 Neb. 73, 59 N. W. 767. **N. Y.**—Herman *v.* Bailey, 20 Misc. 94, 45 N. Y. Supp. 88, *affirming* 19 Misc. 709, 43 N. Y. Supp. 1155. **S. D.**—Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109. **Utah.**—Northwestern Wheel, etc., Co. *v.* Salt Lake City Copper Mfg. Co., 11 Utah 404, 40 Pac. 702. **Wash.**—Holman *v.* Cooper, 48 Wash. 24, 92 Pac. 781.

Demurrer Is Not Proper.—Mitchell *v.* Sutherland, 74 Me. 100.

53. **Under a code provision** that "a motion may be made to discharge the attachment, or any part thereof, at any time before trial for insufficiency of statement of cause thereof, or other cause making it apparent of record, that the attachment should not have been issued, or should not have been levied upon all, or part of the property held," it was held that the attachment would be dissolved when the attached property was exempt. Hastings *v.* Phoenix, 59 Iowa 394, 13 N. W. 346. But the case should be made clear and satisfactory. McLaren *v.* Hall, 26 Iowa 297.

54. **Ga.**—Brewer *v.* Ainsworth, 32 Ga. 487. **Idaho.**—Finney *v.* Moore, 9 Idaho 284, 74 Pac. 866. **Ia.**—Lord *v.* Gaddis, 6 Iowa 57. **Md.**—Dawson *v.* Brown, 12 Gill & J. 53. **N. J.**—Garbett *v.* Mountford, 54 Atl. 872. **N. Y.**—Guarantee Sav., etc., Co. *v.* Moore, 35 App. Div. 421, 54 N. Y. Supp. 787. **Tex.**—Woldert *v.* Nedderhut Packing, etc., Co., 18 Tex. Civ. App. 602, 46 S. W. 378; Hereford Cattle Co. *v.* Powell, 13 Tex. Civ. App. 496, 36 S. W. 1033. But see Delmas *v.* Monson, 61 Miss. 314; Dolan *v.* Armstrong, 35 Neb. 339, 53 N. W. 132; Mayer *v.* Zingre, 18 Neb. 458, 25 N. W. 727.

Effect of Failure To Recover Amount Claimed.—The mere fact that the plaintiff does not recover on the whole of the claim as sued, is not a good ground for quashing the attachment

The remedy of the defendant is a motion for a reduction of the amount for which the attachment was issued,[55] or an action on the plaintiff's bond.[56] It has been held, however, that if the plaintiff, by adopting the wrong measure of damages, claims too much, the attachment must be set aside,[57] and also that if part of the causes of action were dismissed the attachment would be dissolved as the affidavit would not then show the amount the affiant believed the plaintiff entitled to recover.[58]

6. Matters Relating to the Bond. — The attachment may be dissolved if there are any substantial defects in the bond given by the plaintiff to secure the attachment,[59] such as defects in amount,[60] or

pro tanto. Sakkett *v.* Partridge, 4 Iowa 416.

Part of Property May Be Released. If the damages claimed are excessive or the property attached greatly exceeds the amount of the damages claimed the court may release part of the property attached. Wood *v.* Watson, 20 R. I. 223, 37 Atl. 1030.

Part of Debt Not Due.—An attachment will not be dissolved if part of the debt is not due as it will be good to that extent. **Neb.**—Grotte *v.* Nagle, 50 Neb. 363, 69 N. W. 973. **Pa.**—Lewis *v.* Lehman, 5 Pa. Dist. 364. **Wis.**—Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036.

Compare Weissinger *v.* Studebaker Bros. Mfg. Co., 73 Miss. 480, 18 So. 915, holding that the attachment will be dissolved where only part of the claim is due unless the plaintiff amends.

One debt due, other not due—sustained as to one, dissolved as to the other. Danforth *v.* Carter, 1 Iowa 546.

That term of credit has not expired is a defense to the action. Steele *v.* Raphael, 59 Hun 626, 13 N. Y. Supp. 664.

55. Guarantee Sav., etc., Co. *v.* Moore, 35 App. Div. 421, 54 N. Y. Supp. 787; Cohen *v.* Walker, 38 Misc. 114, 77 N. Y. Supp. 105.

"**Where a part of the debt is due,** and part not due, the writ must stand as to the former, and be dismissed or modified, on proper motion, as to the latter." Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036.

56. Lord *v.* Gaddis, 6 Iowa 57.

57. Thorn *v.* Alvord, 32 Misc. 456, 66 N. Y. Supp. 587, *affirmed* in 54 App. Div. 638, 67 N. Y. Supp. 1147; Smith *v.* Swenson, 26 Misc. 151, 56 N. Y. Supp. 783; Golden Gate Co. *v.* Jackson, 14 Abb. N. C. (N. Y.) 323.

58. First Nat. Bank *v.* Van Doren, 68 Neb. 142, 93 N. W. 1017.

59. **Ark.**—Delano *v.* Kennedy, 5 Ark. 457. **Cal.**—Tibbet *v.* Sue, 122 Cal. 206, 54 Pac. 741. **La.**—Bonner *v.* Brown, 10 La. Ann. 334. **Mo.**—Owens *v.* Johns, 59 Mo. 89. **Pa.**—Sheip *v.* Price, 3 Pa. Super. 1, 39 W. N. C. 278; Meyers *v.* Rauch, 4 Pa. Dist. 333. See also *supra,* X.

Objection Must Be Taken in Lower Court.—Bretney *v.* Jones, 1 Greene (Iowa) 366.

Where the original bond had disappeared with the original papers in the case, it was held to be error to dissolve the attachment. Gribble *v.* Ford (Tenn. Ch.), 52 S. W. 1007.

In Pennsylvania under the Act of 1869, it was held that a defective bond would not be ground for quashing the writ of attachment where there had been a personal service, but that the attachment might be dissolved for such cause. Hall *v.* Kintz, 12 Pa. Co. Ct. 90.

60. Lehman *v.* Broussard, 45 La. 346, 12 So. 504; Zachariae *v.* Swanson, 34 Tex. Civ. App. 1, 77 S. W. 627.

Where the statute required a bond to be in "not exceeding double the amount of the plaintiff's claim," it was held that a bond in the same amount as the claim was sufficient. Gapfen *v.* Stephenson, 18 Kan. 140. See also *supra,* X.

Insignificant Defect. — Where the justification of the surety was only three dollars less than the amount required which was several thousand dollars, it was held that the maxim *de minimus non curat lex* was applicable and that the attachment would not be dissolved. Aldrich *v.* Columbia R. Co., 39 Ore. 263, 64 Pac. 455.

time or manner of execution.[61] Likewise the attachment will be set aside if the plaintiff fails to file any bond.[62] Mere clerical errors in the bond, however, are not sufficient grounds for dissolution.[63] In some states the attachment will not be quashed because of a defective bond until the plaintiff is given an opportunity to amend.[64] Thus, it has been held that a motion to dismiss or quash is the correct procedure where the bond is defective,[65] or wanting.[66]

D. Who May Ask for Discharge. — Generally the defendant may move to dissolve the attachment,[67] and may appear specially for that purpose alone,[68] although it has been held that a general ap-

61. Root *v.* Monroe, 5 Blackf. (Ind.) 594; Osborn *v.* Schiffer, 37 Tex. 434.

Parol Evidence To Vary.—If the condition of a bond in domestic attachment, recite that the plaintiff has sued out the attachment, etc., parol evidence is not admissible to prove that the bond was executed before the issuing of the writ; but if the writ itself shows that it issued after the execution of the bond, the recital to the contrary in the condition of the bond, will be no ground for quashing the writ. Summers *v.* Glancey, 3 Blackf. (Ind.) 361.

Presumption of Power To Execute Bond.—A bank cannot be compelled upon a motion to quash an attachment issued by it, to show that it had power to execute a bond, nor can the defendant in that way show that the bank did not possess that power under its charter; but such authority is presumed to exist as an incident to the ordinary power of suing and being sued. Augusta Bank *v.* Conrey, 28 Miss. 667.

62. Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504.

63. Hewes *v.* Cooper, 115 Mass. 42; Henderson *v.* Drace, 30 Mo. 358.

64. **Ala.**—Lowe *v.* Derrick, 9 Port. 415; Planters', etc. Bank *v.* Andrews, 8 Port. 404; Lowry *v.* Stowe, 7 Port. 483. **Ga.**—Oliver *v.* Wilson, 29 Ga. 642. **Ia.**—Churchill *v.* Fulliam, 8 Iowa 45; Bretney *v.* Jones, 1 Green 366. **Mo.**—Henderson *v.* Drace, 30 Mo. 358; Beardslee *v.* Morgan, 29 Mo. 471; Tevis *v.* Hughes, 10 Mo. 380. **N. Y.**—Kissam *v.* Marshall, 10 Abb. Pr. 424. **Okla.**—Wells *v.* McCrady, 24 Okla. 295, 103 Pac. 605. See also *supra*, X, I, 3.

65. *Ex parte* McKissack, 107 Ala. 493, 18 So. 140; Alabama Bank *v.* Fitzpatrick, 4 Humph. (Tenn.) 311.

66. Messner *v.* Hutchins, 17 Tex. 597; Roos *v.* Lewyn, 5 Tex. Civ. App. 593, 23 S. W. 450.

67. **Kan.**—Ferguson *v.* Smith, 10 Kan. 396. **Md.**—Lambden *v.* Bowie, 2 Md. 334; Campbell *v.* Monis, 3 Har. & M. 535. **N. C.**—Toms *v.* Warson, 66 N. C. 417. **S. C.**—Harper *v.* Scuddy, 1 McMull. 264.

The motion of one of two defendants will not be denied because the other who has no right joins in the motion. Seidenbach *v.* Hollowell, 5 Dill. (U. S.) 382.

Executor.—Wilson *v.* Wilson's Admr., 1 Hen. & M. (Va.) 16.

Failure To Make Affidavit Denying Claim.—Under a statute requiring the defendant in an action on contract to make a counter affidavit that there is not as he verily believes, any sum due from him to the plaintiff, etc., it was held that a defendant who failed to make such affidavit was not thereby debarred from moving to quash the attachment sued out thereon by plaintiff, or from filing a plea in abatement denying the existence of the grounds for the attachment stated by plaintiff in his affidavit. Miller *v.* Fewsmith Lumber Co., 42 W. Va. 323, 26 S. E. 175.

Right to dissolution lost by consent to the sale. Wickman *v.* Nalty, 41 La. Ann. 284, 6 So. 123.

Not Necessary To Replevin Property. Deaver *v.* Keith, 61 N. C. 428; Webb *v.* Bowler, 50 N. C. 362.

68. **U. S.**—Hankinson *v.* Page, 31 Fed. 184. **Ill.**—Johnson *v.* Buell, 26 Ill. 66. **Ind.**—Carson *v.* The Talma, 3 Ind. 194. **Ia.**—Pittman *v.* Searcey, 8 Iowa 352. **N. Y.**—Monette *v.* Chardon, 16 Misc. 165, 37 N. Y. Supp. 2; Manice *v.* Gould, 1 Abb. Pr. (N. S.) 255. **S. C.**—Harper *v.* Scuddy, 1 McMull. 264. **Can.** Massey *v.* Carter, 2 Sask. L. Rep. 148.

pearance is required.[69] And the defendant alone can move on certain grounds.[70]

Defendant Without Interest. —While a defendant may not move for a discharge of the attachment on the ground that the property seized does not belong to him, he may make his motion on the ground that the affidavit upon which the attachment is based is untrue.[71] In some jurisdictions, however, it is held that if the defendant is not the owner of the attached property or is not entitled to its return upon dissolution of the attachment he cannot move to have it quashed;[72] but if he is entitled to a portion of the attached property there can be no doubt of his right to move.[73]

Joint Defendants. — One only of several defendants may move to discharge the attachment,[74] at least to the extent of his interest therein.[75]

When the defendants are partners one of them may move for a complete vacation of the attachment,[76] but on the ground that it was erroneously issued against his co-defendants as they alone can take advantage of such error.[77]

Motion Before Appearance.—Sawyer-Masset Co. *v.* Carter, 2 Sask. L. Rep. 148, 9 West. L. Rep. 675; Getchell *v.* Stuyvesant, 40 Nova Scotia, 359.

69. **U. S.**—Feurer *v.* Stewart, 82 Fed. 294, construing Washington code. **Ind.**—Will *v.* Whitney, 15 Ind. 194, dictum. **Wash.**—Holman *v.* Cooper, 48 Wash. 24, 92 Pac. 781.

70. **Ala.**—McCain Bros. *v.* Street, 136 Ala. 625, 33 So. 872 (failure to sign the affidavit, that not being a fatal defect); Cockrell *v.* McGraw, 33 Ala. 526. **Ind.**—Schoppenhast *v.* Bollman, 21 Ind. 280. **Ia.**—Williams *v.* Walker, 11 Iowa 77. **Neb.**—Wagner *v.* Wolf, 75 Neb. 780, 106 N. W. 1024, falsity of the affidavit. **N. Y.**—Isham *v.* Ketchum, 46 Barb. 43; Ketchum *v.* Ketchum, 1 Abb. Pr. (N. S.) 157.

71. **U. S.**—Salmon *v.* Mills, 49 Fed. 333, 47 U. S. App. 101, 1 C. C. A. 278. **Ga.**—Falvey *v.* Adamson, 73 Ga. 493. **Neb.**—Kountze *v.* Scott, 52 Neb. 460, 72 N. W. 585, *reversing* on rehearing, 49 Neb. 258, 68 N. W. 479; South Park Imp. Co. *v.* Baker, 51 Neb. 392, 70 N. W. 952; Kilpatrick-Koch Dry Goods Co. *v.* Bremers, 44 Neb. 863, 62 N. W. 1105. **Ohio.**—Bernhard *v.* Schwartz, 22 Ohio C. C. 147, 12 Ohio Cir. Dec. 183; Northern Bank *v.* Nash, 1 Handy 153.

In Claussen & Co. *v.* Esterling, 19 S. C. 515, the court said: "The attachment was issued on an allegation of fraud by the defendant, and the only question involved below was the truth of that allegation. If, because that allegation being found untrue, the attachment is vacated and incidentally thereby the property is released, that is a result which does not concern the defendant. He certainly should not be compelled to submit to the charge of fraud, when he has the means of overthrowing it, simply because if he should do so, some one else may be benefited."

72. **Kan.**—People's Nat. Bank *v.* Morris, 71 Kan. 849, 80 Pac. 586. **Mich.**—Gore *v.* Ray, 73 Mich. 385, 41 N. W. 329; Johnson *v.* DeWitt, 36 Mich. 96 (overruled on another point in Drs. K. & K. U. S. Med. & Surg. Assn. *v.* Post, etc. Job Prtg. Co., 58 Mich. 487, 25 N. W. 477); Macumber *v.* Bean, 22 Mich. 395; Price *v.* Reed, 20 Mich. 72. **N. Y.**—Furman *v.* Walter, 13 How. Pr. 348.

73. Patterson *v.* Goodrich, 31 Mich. 225.

74. Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

75. Walts *v.* Nichols, 32 Hun (N. Y.) 276.

76. Walts *v.* Nichols, *supra*.

Under a Michigan Statute.—Edwards *v.* Hughes, 20 Mich. 289.

77. Warren *v.* Winterstein, 114 Mich. 647, 72 N. W. 600.

Mortgage. — It has been held that an attachment defendant may contest the fraudulent grounds for the attachment, notwithstanding the attached property is mortgaged,[78] and for more than its value.[79]

Effect of Indemnity Bond. — That the plaintiff has given a bond of indemnity to the sheriff, does not prevent the defendant from moving to dissolve the attachment.[80]

Effect of Subsequent Levies of Execution or Attachment. — The defendant may move to dissolve a wrongful attachment, notwithstanding levy of an execution upon the attached property in favor of a third person,[81] or the levy of subsequent attachments.[82]

Effect of Judgment in Main Action. — A motion by the defendant to dissolve is not superseded by the rendition of a judgment in the main case in favor of the plaintiff.[83]

Assignment for Benefit of Creditors. —The defendant's assignee for the benefit of creditors may as a rule intervene and ask to have the attachment dissolved, though he is not a party to the original action, regardless of whether the assignment was made prior or subsequent to the attachment.[84]

78. P. Cox. Mfg. Co. *v.* August, 51 Kan. 59, 32 Pac. 636; Hosea *v.* McClure, 42 Kan. 403, 22 Pac. 317; Smith-Fraser Boot, etc. Co. *v.* Derse, 41 Kan. 150, 21 Pac. 167; Grimes *v.* Farrington, 19 Neb. 44, 26 N. W. 618.

79. Skinner *v.* First Nat. Bank, 59 Neb. 17, 80 N. W. 42; Symns Grocery Co. *v.* Snow, 58 Neb. 516, 78 N. W. 1066; McCord, Brady & Co. *v.* Bowen, 51 Neb. 247, 70 N. W. 950; Dayton Spice-Mills Co. *v.* Sloan, 49 Neb. 622, 68 N. W. 1040; Kilpatrick-Koch Dry Goods Co. *v.* Bremers, 44 Neb. 863, 62 N. W. 1105; McCord-Brady Co. *v.* Krause, 36 Neb. 764, 55 N. W. 215.

80. Whitelegge *v.* DeWitt, 12 Daly (N. Y.) 319.

81. Drs. K. & K. U. S. Med. & Surg. Assn. *v.* Post, etc., Prtg. Co., 58 Mich. 487, 25 N. W. 477, *overruling* Johnson *v.* DeWitt, 36 Mich. 95; Fenton State Bank *v.* Whittle, 41 Mich. 365, 1 N. W. 957.

82. Sheldon *v.* Stewart, 43 Mich. 574, 5 N. W. 1067; Schall *v.* Bly, 43 Mich. 401, 5 N. W. 651.

83. Gore *v.* Ray, 73 Mich. 385, 41 N. W. 329; Calvert Lithographic, etc., Co. *v.* Drs. K. & K. U. S. Med. etc., Assn., 61 Mich. 336, 28 N. W. 111.

84. **U. S.**—Boltz *v.* Eagon, 34 Fed. 445. **Kan.**—P. Cox. Mfg. Co. *v.* August, 51 Kan. 59, 32 Pac. 636; Wichita Wholesale Grocery Co. *v.* Records, 40 Kan. 119, 19 Pac. 346. **N. Y.**—Merriam *v.* Wood, etc. Lithographing Co., 19 App. Div. 329, 46 N. Y. Supp. 484; Niagara Falls Paper Co. *v.* Sterling, 25 Civ. Proc. 251, 39 N. Y. Supp. 171. **Pa.**—See Lawrence *v.* Yard, 15 W. N. C. 190, 191.

In Kansas this has been held to apply to a motion made by successive assignees. Hillyer *v.* Biglow, 47 Kan. 473, 28 Pac. 150.

Application by Defendant and Assignee.—Res Adjudicata.—In New York the statute permits the defendant or his assignee to make the motion, but the right does not necessarily extend to both. Unless a rehearing be granted the denial of the motion made by one is binding on the other, on account of privity. Strauss *v.* Vogt, 23 Civ. Proc. 251, 24 N. Y. Supp. 483.

In Wisconsin permission of the court must first be obtained. Howitt *v.* Blodgett, 61 Wis. 376, 21 N. W. 292.

In South Carolina the authority permitting an assignee to move to vacate is granted by §§255 and 256 of the code as amended in 1883; it can be made only after the validity of the assignment has been determined. Bryce *v.* Foot, 25 S. C. 467. The court will not on the motion try title to real estate. Copeland *v.* Piedmont, etc. L. Ins. Co., 17 S. C. 116.

Estoppel.—The assignee may not make a motion to vacate the attachment after a motion made by the defendant has been denied and the assignee has thereupon brought an action against the sheriff "to recover the value of the property on the ground

Assignor for Benefit of Creditors. — One who has made a general assignment for the benefit of his creditors may move for a dissolution of the attachment for want of statutory grounds,[85] but not to protect the property.[86]

Receiver. — A receiver of a corporation may move for dissolution of an attachment under statutes giving such right to any person who after the attachment issues, acquires an interest in, or lien upon the property attached.[87]

Purchaser. — A prior *bona fide* purchaser from the defendant may make a motion for the dissolution of an attachment,[88] but the decisions are not uniform as to the right of a subsequent purchaser to make the motion.[89]

that the sheriff had by such levy 'detained and converted said money to his own use.'" Marx *v.* Ciancimino, 59 App. Div. 570, 69 N. Y. Supp. 672.

Assignee Estopped by Stipulation To Move for Discharge.—National Park Bank *v.* Whitmore, 7 N. Y. St. 456.

Allegation of Title.—Where the moving party alleges in his affidavit that he is the assignee of the debtor, such allegation is sufficient to establish his right to make the motion in the absence of any denial by the plaintiff. Merriam *v.* Wood, etc., Lithographing Co., 19 App. Div. 329, 46 N. Y. Supp. 484.

85. **Minn.**—Winona First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. 799; Richards *v.* White, 7 Minn. 345. **N. Y.** Rowles *v.* Hoare, 61 Barb. 266 (*citing* Dickinson *v.* Benham, 20 How. Pr. 343, 19 How. Pr. 410); Blossom *v.* Estes, 59 How. Pr. 381; Claflin *v.* Baere, 57 How. Pr. 78; Gasherie *v.* Apple, 14 Abb. Pr. 64; Brewer *v.* Tucker, 13 Abb. Pr. 76. **Pa.**—Holland *v.* Atzerodt, 1 York 69. **S. D.**—Tolerton & Stetson Co. *v.* Casperson, 7 S. D. 206, 63 N. W. 908; Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397. **Wis.**—Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122; Keith *v.* Armstrong, 65 Wis. 225, 26 N. W. 445.

86. Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397. See the title "Assignment for Benefit of Creditors."

87. National Shoe, etc., Bank *v.* Mechanics' Nat. Bank, 89 N. Y. 440; People's Bank *v.* Mechanics' Nat. Bank, 62 How. Pr. (N. Y.) 422; Compton *v.* Schwabacher Bros. & Co., 15 Wash. 306, 46 Pac. 338.

A receiver must, however, show that he was duly appointed and has qualified and thus acquired an interest or lien in the property. Belmont *v.* Sigua Iron Co., 12 App. Div. 441, 42 N. Y. Supp. 122.

Temporary Receiver May Move.—The motion may be made by a temporary receiver appointed in the action wherein the attachment was granted. Knorr *v.* New York State Mut. Ben. Assn., 79 Hun 83, 29 N. Y. Supp. 508.

The receiver of a foreign corporation may appear specially for the purpose of moving to vacate the attachment. Morgan *v.* New York Nat. Bldg., etc. Assn., 73 Conn. 151, 46 Atl. 877.

Trustee in Insolvency.—Where the party against whom the attachment was issued is subsequently adjudged insolvent, his trustee may intervene and move to quash. Palmer *v.* Hughes, 84 Md. 652, 36 Atl. 431.

Proceeding by State Receiver in Federal Court.—A receiver appointed by a state court may proceed by rule to set aside an attachment. Remington Paper Co. *v.* Louisiana Prtg., etc. Co., 56 Fed. 287.

The New York Code of Civ. Proc. §682, limits the right of intervention by strangers to cases where interest in the property has been acquired from the defendant subsequent to the levy, and a receiver of a bank who acquires title subsequent thereto cannot move to vacate the attachment merely because the property had been seized under an attachment against the bank. Key West Bldg., etc. Assn. *v.* Key West Bank, 18 N. Y. Supp. 390, *affirmed* in 63 Hun 633, 18 N. Y. Supp. 390.

88. Wallace *v.* Maroney, 6 Mackey (D. C.) 221; United States *v.* Howgate, 2 Mackey (D. C.) 408.

89. **Subsequent Purchaser May Make**

Subsequent Lienors. — Generally creditors who have acquired liens subsequent to the attachment, may move for dissolution on the ground that it was improperly or improvidently issued,[90] but they cannot interfere for the purpose of making objections, merely technical, which the defendant himself has waived.[91]

Motion.—Trow's Prtg., etc. Co. *v.* Hart, 85 N. Y. 500, *affirming* 9 Daly (N. Y.) 413.

Subsequent Purchaser May Not Make Motion.—Wagner *v.* Wolf, 75 Neb. 780, 106 N. W. 1024.

Part Interest.—A person having a part interest only may make the motion, but the relief in such case will be limited to such part. Trow's Prtg. etc. Co. *v.* Hart, 85 N. Y. 500, *affirming* 9 Daly (N. Y.) 413.

90. **Kan.**—Bank of Santa Fe *v.* Haskell County Bank, 54 Kan. 375, 38 Pac. 485; Dolan *v.* Topping, 51 Kan. 321, 32 Pac. 1120; Wichita Nat. Bank *v.* Wichita Produce Co., 8 Kan. App. 40, 54 Pac. 11. **Ky.**—Reisert *v.* Van Cleve, 9 Ky. L. Rep. 401. **Mass.**—Swift *v.* Crocker, 21 Pick. 241. **Miss.** Henderson *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70. **N. J.**—Mercantile Nat. Bank *v.* Pequonnock Nat. Bank, 58 N. J. L. 300, 33 Atl. 474; National Papeterie Co. *v.* Kinsey, 54 N. J. L. 29, 23 Atl. 275. **N. Y.**—Van Camp *v.* Searle, 147 N. Y. 150, 41 N. E. 427; Altworth *v.* Flynn, 29 Misc. 106, 60 N. Y. Supp. 235. **Ohio.**—Harrison *v.* King, 9 Ohio St. 388. **S. D.**—Citizens' Bank *v.* Corkings, 9 S. D. 614, 70 N. W. 1059. **W. Va.**—Miller *v.* White, 46 W. Va. 67, 33 S. E. 332; Pendleton *v.* Smith, 1 W. Va. 16. **Wis.**—Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100; Hawes *v.* Clement, 64 Wis. 152, 25 N. W. 21.

Contra, Glaser *v.* First Nat. Bank, 62 Ark. 171, 34 S. W. 1061.

A subsequent attaching creditor may present the objection that the case of one who has taken out a prior attachment is not one for which the law provides the remedy of attachment, and he may also show that by fraud or collusion an attachment was allowed to be taken, but he cannot be heard to allege what would be merely error in the proceedings. Goble *v.* Howard, 12 Ohio St. 165.

When the judgment obtained on a prior attachment has not been extinguished by actual application of the property or its proceeds, a subsequent attaching creditor may still move to dissolve the attachment. A mere levy under an execution is not however such an application. Woodmansee *v.* Rogers, 82 N. Y. 88, *affirming* 20 Hun 285, 53 How. Pr. 98.

Creditor Attaching After Insolvency. Though a defendant after his property is attached take advantage of the insolvency laws, a subsequent judgment creditor who lays an attachment by way of execution may nevertheless move to set aside the first attachment. Clarke *v.* Meixsell, 29 Md. 221.

In Iowa the remedy of a third person claiming a lien upon or interest in the attached property is not by motion to discharge the atachment, but by petition under §3016 of the code, authorizing a claimant "to present his petition verified by oath, setting forth the facts upon which his claim is founded." Ryan *v.* Heenan, 76 Iowa 589, 41 N. W. 367; Tidrick *v.* Sulgrove, 38 Iowa 339.

91. **Ark.**—Baker *v.* Ayers, 58 Ark. 524, 25 S. W. 834. **Mo.**—Van Arsdale *v.* Krum, 9 Mo. 397. **N. Y.**—Van Camp *v.* Searle, 147 N. Y. 150, 41 N. E. 427; Ketchum *v.* Ketchum, 1 Abb. Pr. (N. S.) 157. **Ohio.**—Root *v.* Columbus etc. R. Co., 45 Ohio St. 222, 12 N. E. 812; Goble *v.* Howard, 12 Ohio St. 165. **S. C.**—*Ex parte* Perry Stove Co., 20 S. E. 980 (holding distinctly that the former rule upon this point has not been changed by the South Carolina code); Ferguson *v.* Gilbert & Co., 17 S. C. 26; Wigfall *v.* Byne, 1 Rich. 412. **Tex.**—Goodbar *v.* Sulphur Springs City Nat. Bank, 78 Tex. 461, 14 S. W. 851; Bateman Bros. *v.* Ramsey, 74 Tex. 589, 12 S. W. 235.

A subsequent attaching creditor is not entitled to the same latitude of objection to the proceedings of a prior attaching creditor as the defendant in the action. On the contrary, anything may be waived by the defendant which is substantially no injustice to the creditors, or is not intended to guard their rights. They can take no advantage of what may properly be regarded as

Regularity on Part of Junior Attaching Creditor. — It must affirmatively appear from the papers on the application made by a subsequent attaching creditor, that his own proceedings are regular,[92] but the ob-

informalities or irregularities in the proceedings, though constituting good grounds for objection on the part of the defendant. Under a subsequent attachment, objection cannot be sustained that a proper undertaking was not filed in the prior attachment, or that the facts were defectively stated in the affidavit, but an objection that the case itself was one in which the law does not allow an attachment stands on a like principle as a want of jurisdiction, and would be equally available to the subsequent attaching creditor as collusion or fraud. Ward *v.* Howard, 12 Ohio St. 158.

In New York "under the old code it was held that a subsequent attaching creditor could not move to set aside a prior attachment (See sec. 241 of the Code of Procedure; Ketchum agt. Ketchum, 1 Abbott [N. S.], 157). But under section 682 of the Code of Civil Procedure, 'the defendant or a person who has acquired a lien upon or interest in his property after it was attached, may, at any time before the actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action, apply to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief together or in the alternative.'" People's Bank *v.* Mechanics' Nat. Bank, 62 How. Pr. 422. See Jacobs *v.* Hogan, 85 N. Y. 243; Gere *v.* Gundlach, 57 Barb. 13; Isham *v.* Ketchum, 46 Barb. 43, 1 Abb. Pr. (N. S.) 157.

An application based on the insufficiency of the affidavits on attachment may be made under §682 of the New York Code of Civ. Proc. Steuben County Bank *v.* Alberger, 75 N. Y. 179, *reversing* 14 Hun 379, 55 How. Pr. 481; Thalheimer *v.* Hays, 42 Hun (N. Y.) 93.

Defects in service and return of an attachment are waived by the general appearance of the defendants in the attachment proceedings, and such defects cannot be made the ground for a dissolution of the attachment at the instance of succeeding attachment creditors. First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421.

Contra.—Parties who claim to be subsequent attaching creditors cannot come into court and dispute the validity of a prior attachment on mere motion. Ludington *v.* Hull, 4 W. Va. 130.

92. **Ky.**—Spaulding *v.* Simms, 4 Met. 285. **Miss.**—Scharff *v.* Chaffee, 68 Miss. 641, 9 So. 897. **N. Y.**—Hamerschlag *v.* Cathoscope Electrical Co., 16 App. Div. 185, 44 N. Y. Supp. 668; McDonald *v.* Sterling, 5 App. Div. 489, 38 N. Y. Supp. 1081; Ladenburg *v.* Commercial Bank, 2 App. Div. 477, 37 N. Y. Supp. 1085; National Broadway Bank *v.* Barker, 60 Hun 578, 20 Civ. Proc. 338, 14 N. Y. Supp. 529; Manufacturers' Nat. Bank *v.* Hall, 60 Hun 466, 15 N. Y. Supp. 208, *affirmed* in 129 N. Y. 663, 30 N. E. 65; Hodgman *v.* Barker, 60 Hun 156, 20 Civ. Proc. 341, 14 N. Y. Supp. 574, *affirmed* in 128 N. Y. 601, 27 N. E. 1029; Everitt *v.* Everitt Mfg. Co., 58 Hun 604, 11 N. Y. Supp. 508; Delmore *v.* Owen, 44 Hun 296, *affirmed* in 110 N. Y. 679, 18 N. E. 482; Grob *v.* Metropolitan Collecting Agency, 30 Misc. 314, 63 N. Y. Supp. 513; Dayton *v.* McElwee Mfg. Co., 22 Civ. Proc. 227, 19 N. Y. Supp. 46; Macdonald *v.* Kiefendorf, 22 Civ. Proc. 105, 18 N. Y. Supp. 763; Corn Exch. Bank *v.* Marckwalk, 57 N. Y. Supp. 458; Central Nat. Bank *v.* Ft. Ann Woolen Co., 24 N. Y. Supp. 640, *affirmed* in 27 N. Y. Supp. 1114 on opinion below, and in 143 N. Y. 624, 37 N. E. 827, on opinion in 24 N. Y. Supp. 640; Pitts *v.* Scribner, 19 N. Y. Supp. 519; Williams *v.* Waddell, 5 Civ. Proc. 191; Williams *v.* Kulla, 11 N. Y. St. 283; Tim *v.* Smith, 65 How. Pr. 199, 93 N. Y. 87.

Ohio.—Ward *v.* Howard, 12 Ohio St. 158. **Pa.**—*Compare* Eby *v.* Guest, 94 Pa. 160. **S. D.**—Bradley *v.* Interstate Land & C. Co., 12 S. D. 28, 80 N. W. 141. **W. Va.**—Miller *v.* White, 46 W. Va. 67, 33 S. E. 332.

In Grob *v.* Metropolitan Collecting Agency, 30 Misc. 314, 63 N. Y. Supp. 513, the court said: "'He is bound to show that he has an outstanding lien which he could enforce against the property of the defendant if the warrant of attachment should be set aside

jection that the moving papers of the junior attaching creditor do not show that the junior attachment is valid cannot be raised for the first time on appeal when the appellant had every opportunity to present it in the lower court.[93]

Other Parties Intervening. — Under some statutes persons having an interest in the attached property, though acquired subsequent to the attachment and not originally parties to the action, may apply to have the attachment dissolved.[94] Other jurisdictions grant the right to

and unless he does establish the existence of such a lien on his part, he has no standing in court to move to vacate the plaintiff's attachment, no matter how defective the papers may be upon which that attachment is granted.' ''

In Knudson *v.* Matuska, etc. Co., 1 How. Pr. N. S. (N. Y.) 152, 7 Civ. Proc. 86, the court held that the affidavit did not sufficiently show that the junior attaching creditor had a good and valid lien upon the property attached, enabling him to attack and vacate the prior attachment.

93. MacDonald *v.* Kieferdorf, 22 Civ. Proc. 105, 18 N. Y. Supp. 763.

94. Dennis *v.* Kolm, 131 Cal. 91, 63 Pac. 141; McEldowney *v.* Madden, 124 Cal. 108, 56 Pac. 783; Kimball *v.* Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111; Harvey *v.* Foster, 64 Cal. 296, 30 Pac. 849; Coghill *v.* Marks, 29 Cal. 673; McComb *v.* Reed, 28 Cal. 281, 87 Am. Dec. 115; Speyer *v.* Ihmeis, 21 Cal. 280, 81 Am. Dec. 107. See also Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569, which is referred to in Potlatch Lumb. Co. *v.* Runkel, 16 Idaho 192, 101 Pac. 396, 23 L. R. A. (N. S.) 536, as the leading California case. **Ga.**—Garnett *v.* Taylor, 88 Ga. 467, 14 S. E. 869; Krutina *v.* Culpepper, 75 Ga. 602; Hines *v.* Kimball, 47 Ga. 587. **Idaho.**—Potlatch Lumb. Co. *v.* Runkel, 16 Idaho 192, 101 Pac. 396, 23 L. R. A. (N. S.) 536. **Kan.**—Dearborn *v.* Vaughan, 46 Kan. 506, 26 Pac. 1038; Long *v.* Murphy, 27 Kan. 375; Wichita Wholesale Grocery Co. *v.* Records, 40 Kan. 119, 19 Pac. 346; Knight *v.* Rhodes, 10 Kan. App. 38, 61 Pac. 869; Harding *v.* Guaranty Loan, etc., Co., 3 Kan. App. 519, 43 Pac. 835. **Mass.**—Peirce *v.* Richardson, 9 Met. 69, a mortgagee under a mortgage prior to the attachment however cannot move. **N. M.**—C. J. L. Meyer & Sons Co. *v.* Black, 4 N. M. 352, 16 Pac. 620. **N. Y.**—Steuben County Bank *v.* Alberger, 75 N. Y. 179, 78 N. Y. 252; Smith *v.* Davis, 29 Hun 306. *Compare* Bacon *v.* Abbey Press, 43 Misc. 345, 87 N. Y. Supp. 165, holding that when a third party claims ownership of the property attached his remedy is by replevin or action for conversion and not by intervention for the purpose of dissolving the attachment. **Wash.**—Perkins *v.* Bailey, 38 Wash. 46, 80 Pac. 177, 107 Am. St. Rep. 831; Langert *v.* Brown, 3 Wash. Ter. 102, 13 Pac. 704. **W. Va.**—Capehart *v.* Dowery, 10 W. Va. 130.

The Tennessee statute has been construed to admit of intervention only for the purpose of dissolving the attachment on the ground of ownership of the attached property by the intervenor. Bradshaw *v.* Georgia Loan & Trust Co. (Tenn. Ch. App.), 59 S. W. 785.

''Since a very early day, in Maryland, the right of one claiming title to, or an interest in, property that has been attached, to intervene in the cause and controvert the truth of the grounds of the attachment stated in the plaintiff's affidavit, has been firmly established. Campbell *v.* Morris, 3 H. & McH. 552; Ranahan *v.* O'Neale, 3 G. & J. 298, 301; Stone *v.* Magruder, 10 G. & J. 383, 386; Carson *v.* White, 6 Gill 17, 26; Clarke *v.* Meixsell, 29 Md. 221, 227. The same practice has obtained in the Supreme Court of the District of Columbia, and has been repeatedly sanctioned by that court in General Term. United States *v.* Howgate, 2 Mackey, 408; Wallace *v.* Maroney, 6 Mack. 221, 223; Reynolds *v.* Smith, 18 D. C. 27. Twice since the organization of this court the right of intervention has passed unquestioned. Robinson *v.* Morrison, 2 App. D. C. 105, 120; Matthai *v.* Conway, 2 App. D. C. 45, 50. The point must now be regarded as settled.'' Daniels *v.* Solomon, 11 App. Cas. (D. C.) 163.

Creditors Claiming Interest May Move.—Farmers' Nat. Bank *v.* Na-

those possessing legal liens, such as subsequent attaching creditors or subsequent mortgagees.[95] This right of an interested party to intervene is frequently conceded when fraud or collusion in obtaining the attachment or want of jurisdiction is alleged whether provision therefor is made by statute or not.[96] In other jurisdictions it is held that

tional Bank, 4 Ky.. L. Rep. (abstract) 451; Elkins Nat. Bank *v.* Simmons, 57 W. Va. 1, 49 S. E. 893.

Effect of Replevin by Claimant.—That the claimant subsequent to making the application to discharge the attachment secured possession of the attached property by replevin, does not prevent the hearing and decision of the motion. Kendall Boot, etc. Co. *v.* August, 51 Kan. 53, 32 Pac. 635.

Motion by Prior Attaching Creditor. Under such a statute it is held that a prior attaching creditor may move to dissolve a subsequent attachment on the property. Barton *v.* Hanauer, 4 Kan. App. 531, 44 Pac. 1007.

Mortgagee May Move for Dissolution.—Symms Grocer Co. *v.* Lee, 9 Kan. App. 574, 58 Pac. 237.

Right of Husband Where Homestead Owned by Wife.—A husband in joint possession with his wife, of land belonging to her, but used as a family homestead, has as head of the family, such an interest in the land as entitles him to complain of an unlawful interference with it; and in a proceeding in which an attachment has been levied on such land as his own, he has an interest sufficient to entitle him to move to dissolve the attachment. Rowe *v.* Kellogg, 54 Mich. 206, 19 N. W. 957.

Issuance by Unauthorized Officer.—An attachment which on its face shows that it was issued by a justice having no authority to grant it, or if it fail to show that he had such authority, it is of no consequence in what way the defect is brought to the attention of the court, or at whose motion it is quashed. Devall *v.* Taylor, 1 McMull. L. (S. C.) 460.

Persons Summoned as Garnishees.—Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404.

95. Peters *v.* Conway, 4 Bush 565; H. B. Claflin Co. *v.* Feibelman, 44 La. Ann. 518, 10 So. 862; Field *v.* Harrison, 20 La. Ann. 411. See Pierce *v.* Masse, 7 Mart. N. S. (La.) 196; Lee *v.* Bradlee, 8 Mart. O. S. (La.) 20, 55 (in which it is held that intervention will be permitted for the purpose of establishing ownership, but cannot show irregularity in the proceedings).

In Missouri the right to intervene is limited to claim of ownership, and then only for personalty. Henry Petring Grocer Co. *v.* Eastwood, 79 Mo. App. 270.

"The formality and regularity of the proceedings, the rightful issuing of the attachment, in the absence of fraud and collusion between plaintiff and defendant, are matters pertaining exclusively to the defendant. The intervener is limited to the assertion of his own rights, to show that the property attached is his, that he has a superior privilege on it, or, as is alleged in this case, that the plaintiff and defendant perpetrated a fraud in the issuing of the attachment, in order to defeat his pursuit of the property. He has nothing to do with the irregularity of the affidavit, the insufficiency of the attachment bond, and other irregularities in the proceedings. Flemming and Baldwin *v.* Shields, 21 An. 118; Lee et als. *v.* Bradlee, 8 M. 55; 8 R. 123; Carroll & Co. *v.* Bridewell, 27 An. 239, 3 An. 222; 19 An. 462." Gilkeson Sloss Com. Co. *v.* Bond & Williams, 44 La. Ann. 841, 11 So. 220.

96. **U. S.**—Gumbel *v.* Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. ed. 374. **D. C.**—Reynolds *v.* Smith, 7 Mackey 27; Wallace *v.* Maroney, 6 Mackey 221; United States *v.* Howgate, 2 Mackey 408, 419. **N. H.**—Clough *v.* Curtis, 62 N. H. 409; Kimball *v.* Wellington, 20 N. H. 439; Blaisdell *v.* Ladd, 14 N. H. 129; Buckman *v.* Buckman, 4 N. H. 319. **N. J.**—National Papeterie Co. *v.* Kinsey, 54 N. J. L. 29, 23 Atl. 275.

In Arkansas it is limited to jurisdictional errors; the failure to file a bond on attachment is not such an error and cannot be taken advantage of by anyone other than the defendant. Austin *v.* Goodbar Shoe Co., 60 Ark. 444, 28 S. W. 1086.

In Maryland an interested party may move to quash for any apparent

one not a party to the action cannot move to dissolve the attachment.[97]

Court. — The court may dismiss the attachment of its own motion when it is clear from the face of the papers that the statutory grounds for the attachment were not shown.[98]

E. The Motion.—**1. Time When Application May Be Made.** — It has been held in some cases that the motion must be made before a general appearance[99] or plea to the merits;[1] and within the time pre-

defect in the proceedings. Clarke *v.* Meixsell, 29 Md. 221; Campbell *v.* Morris, 3 H. & McH. 552.

In Massachusetts provision for relief in such cases is statutory. Lodge *v.* Lodge, 5 Mason 407, 15 Fed. Cas. No. 8,460; Swift *v.* Crocker, 21 Pick. 241; Carter *v.* Gregory, 8 Pick. 164. And see Gumbel *v.* Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. ed. 374.

97. Cartwright *v.* Bamberger, 90 Ala. 405, 8 So. 264; May *v.* Courtnay, 47 Ala. 185. See Rea *v.* Longstreet, 54 Ala. 291. *Compare* Planters, etc. Bank *v.* Andrews, 8 Port. 404, that it might be done for defects apparent on the face of the proceedings. **Del.**—Pennsylvania Steel Co. *v.* New Jersey Southern R. Co., 4 Houst. 572. **Ind.**—Risher *v.* Galpin, 29 Ind. 53. **La.**—Williams *v.* Walker, 11 Iowa 77. **Mich.** Hale *v.* Chandler, 3 Mich. 531. **Neb.**—Danker *v.* Jacobs, 79 Neb. 435, 112 N. W. 579; Meyer *v.* Keefer, 58 Neb. 220, 78 N. W. 506; Deere *v.* Eagle Mfg. Co., 49 Neb. 385, 68 N. W. 504; Kimbro *v.* Clark, 17 Neb. 403, 22 N. W. 788; Haines *v.* Stewart, 3 Neb. (Unof.) 216, 91 N. W. 539. **N. C.**—Bank of Fayetteville *v.* Spurling, 52 N. C. 398. **Ohio.**—Gates *v.* Pennsylvania Land & L. Co., 9 Ohio C. C. 378; Vallette *v.* Kentucky Trust Co., 2 Handy 1. **Pa.** Sailor Planing & L. Mill Co. *v.* Moyer, 35 Pa. Super. 503, where the dissolution of the attachment will end the suit. **S. C.**—Metts *v.* Piedmont, etc., L. Ins. Co., 17 S. C. 120; Copeland *v.* Piedmont, etc., L. Ins. Co., 17 S. C. 116. See, however, Devall *v.* Taylor, 1 McMull. L. 460, holding that the court will not inquire at whose instance it was quashed, when on its face the attachment shows it was issued by a justice unauthorized to grant it. **Tex.** Goodbar *v.* City National Bank, 78 Tex. 461, 14 S. W. 851; Bateman *v.* Ramsey, 74 Tex. 592, 12 S. W. 235; Nenney *v.* Schluter, 62 Tex. 328; Pool *v.* Sanford, 52 Tex. 633; Roos *v.* Lewyn, 5 Tex. Civ. App. 593, 23 S. W. 450, 24 S. W. 538. **Wis.**—First Nat. Bank of Madison *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421. **Wyo.**—Stanley *v.* Foote, 9 Wyo. 335, 63 Pac. 940.

In Cockrell *v.* McGraw, 33 Ala. 526, it was held that a stranger to the record who had an interest in the question and motion could not move to have the attachment quashed for matter dehors the record.

Defendant's wife claiming the attached property, it has been held, on the ground that the affidavit was insufficient (National Bank of Republic *v.* Tasker, 1 Pa. Co. Ct. 173); and to protect her homestead (Whitman *v.* Willis, 51 Tex. 421. See also Stoddart *v.* Garhart, 35 Tex. 299; Baxter *v.* Dear, 24 Tex. 17, 76 Am. Dec. 89).

98. Deaver *v.* Keith, 61 N. C. 428; Webb *v.* Bowler, 50 N. C. 362; Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308.

99. **Ill.**—Brewster *v.* James, 3 Ill. 464; Beecher *v.* James, 3 Ill. 462. **Ind.** Collins *v.* Nichols, 7 Ind. 447. **Mich.**—Roelofson *v.* Hatch, 3 Mich. 277. **N. J.**—Cord *v.* Newlin, 71 N. J. L. 438, 59 Atl. 22; Watson *v.* Noblett, 65 N. J. L. 506, 47 Atl. 438; Connelly *v.* Lerche, 56 N. J. L. 95, 28 Atl. 430. **Pa.**—Atlas Steamship Co. *v.* U. S. Foreign, etc., Fruit Co., 2 Pa. Co. Ct. 123.

Exception to Rule.—The rule does not apply where the ground on which the attachment was granted is not one for which an attachment can be issued, or against a person not subject to the attachment. Sullivan *v.* Moffat, 68 N. J. L. 211, 52 Atl. 291; Moore *v.* Richardson, 65 N. J. L. 531, 47 Atl. 424; Heckscher *v.* Trotter, 48 N. J. L. 419, 5 Atl. 581.

Application for removal to federal court does not prevent putting in issue the grounds of the attachment. Friedlander, etc., Co. *v.* Pollock & Co., 5 Coldw. (Tenn.) 490.

1. **Ala.**—Wolffe *v.* State, 79 Ala. 201, 58 Am. Rep. 590; Drakford *v.*

scribed for answering the summons;[2] while others hold that the right to make the motion is not waived by appearance,[3] plea to the merits,[4] or answer.[5] A number of decisions hold that the motion can be made at any time before the trial on the merits,[6] or even before the entry of final judgment;[7] and if the affidavit is not insufficient, the attach-

Turk, 75 Ala. 339; Watson *v.* Auerbach, 57 Ala. 353; Brown *v.* Coats, 56 Ala. 439; Steamboat Farmer *v.* McCraw, 31 Ala. 659; Gill *v.* Downs, 26 Ala. 670; Hazard *v.* Jordan, 12 Ala. 180. **La.**—Hughes *v.* Mattes, 104 La. 218, 28 So. 1006; Ealer *v.* McAllister, 14 La. Ann. 821; Myers *v.* Perry, 1 La. Ann. 372. See also Irish *v.* Wright, 8 Rob. 428. **Miss.**—Bishop Bros. *v.* Fennerty, 46 Miss. 570. **N. C.**—Symons *v.* Northern, 49 N. C. 241; Garmon *v.* Barringer, 19 N. C. 502. **Pa.** Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. 161; Malone *v.* Lindsley, 1 Phila. 288; Atlas S. S. Co. *v.* U. S., etc., Fruit Co., 2 Pa. Co. Ct. 123; Backer *v.* Saurman, 9 W. N. C. 403. **S. C.**—Callender *v.* Duncan, 2 Bailey 454; Stoney *v.* M'Neill, Harp. 156; Gray *v.* Young, Harp. 38.

The filing of an affidavit of defense will prevent the making of the application. Loewenstein *v.* Sheetz, 7 Phila. (Pa.) 361; Yost *v.* Ginley, 2 Leg. Rec. (Pa.) 372.

2. Wallace *v.* Lewis, 9 Mont. 399, 24 Pac. 22; Vaughn *v.* Dawes, 7 Mont. 360, 17 Pac. 114; Johnson *v.* Luckado, 12 Heisk. (Tenn.) 270.

The interposing of a demurrer does not extend the time. Vaughn *v.* Dawes, 7 Mont. 360, 17 Pac. 114.

A change of venue does not extend the time. Wallace *v.* Lewis, 9 Mont. 399, 24 Pac. 22.

3. Michels *v.* Stork, 44 Mich. 2, 5 N. W. 1034; Hyde *v.* Nelson, 11 Mich. 353; Simmons *v.* Simmons, 56 W. Va. 65, 48 S. E. 833, 107 Am. St. Rep. 890; Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681.

Under a statute providing that "whenever the defendant shall have appeared in the action, he may apply, upon reasonable notice to the plaintiff, to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment," it was held that the application need not be made at the time of appearance, but could be made at any time after appearance. Goldfield Mohawk Min. Co. *v.* Mackenzie & Co., 31 Nev. 359, 102 Pac. 967; Goldfield Mohawk Min. Co. *v.* Frances-Mohawk Min., etc., Co., 31 Nev. 348, 102 Pac. 963.

When Cause Is Insufficient.—General appearance does not waive the objection that attachment was granted for insufficient cause. Franke *v.* Havens, 102 App. Div. 67, 92 N. Y. Supp. 377.

4. Hyde *v.* Nelson, 11 Mich. 353; Simmons *v.* Simmons, 56 W. Va. 65, 48 S. E. 833; Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681.

5. **An answer denying the fraud** is not an estoppel to ask for dissolution of the attachment for irregularities. Harrisburg Boot, etc., Co. *v.* Johnson, 3 Pa. Dist. 433.

6. Pollock *v.* Murray, 38 Fla. 105, 20 So. 815; Kennedy *v.* Mitchell, 4 Fla. 457; Clark *v.* Tull, 113 Iowa 143, 84 N. W. 1030.

May Make Motion After Impaneling Jury.—Forbes *v.* Porter, 25 Fla. 363, 6 So. 62.

In Minnesota the defendant may make the motion before the time for answering expires or at any time thereafter if he has answered, and before trial and the insufficiency of the answer pleaded will not of itself determine the right to make the motion, at least so long as the answer is allowed to stand. Winona First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. 799.

7. **Ark.**—Ward *v.* Carlton, 26 Ark. 662. **Kan.**—Guest *v.* Ramsey, 50 Kan. 709, 33 Pac. 17; Smith-Frazer Boot, etc., Co. *v.* Derse, 41 Kan. 150, 21 Pac. 167; Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292; Quinlan *v.* Danford, 28 Kan. 507. **Ky.**—Taylor *v.* Smith, 17 B. Mon. 536. **Neb.**—Hilton *v.* Ross, 9 Neb. 406, 2 N. W. 862; Rudolfh *v.* McDonald, 6 Neb. 163. **Ohio.**—Edwards Co. *v.* Goldstein, 80 Ohio St. 303, 88 N. E. 877. **Wyo.**—Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

A defendant at any time before

ment has been vacated even after judgment.[8] Other cases hold that a motion is too late if made after trial,[9] or judgment.[10] In at least one jurisdiction the statute allows the motion to be made at any time before the actual application of the attached property to satisfy the judgment.[11] It is sometimes said that the motion should be made at the return term or as soon thereafter as possible, and this is frequently

judgment under section 5562, Revised Statutes, may move for a discharge of an attachment under which his property has been taken, although he has previously given bond for its discharge under section 5545, Revised Statutes. Leavitt & Milroy Co. *v.* Rosenberg Bros. & Co. (Ohio), 93 N. E. 904.

Failure To Rule Before Judgment. The Nebraska statute permits the motion to be made before final judgment, and when made within the prescribed time the court may take it under advisement and rule upon the motion even after judgment. Moline *v.* Curtis, 38 Neb. 520, 57 N. W. 161.

But where the motion is merely filed before judgment, but not submitted until after judgment it is too late. Herman Bros. *v.* Hayes, 58 Neb. 54, 78 N. W. 365, *overruling* Stutzner *v.* Printz, 43 Neb. 306, 61 N. W. 620.

Stranger Holding Title.—A stranger to the suit, holding the title to real property, may even after judgment apply for a release of the land from the levy and to set aside the sale. Knight *v.* Rhoades, 10 Kan. App. 38, 61 Pac. 869.

8. Black *v.* Scanlon, 48 Ga. 12; Goodyear Rubber Co. *v.* Knapp, 61 Wis. 103, 20 N. W. 651 (explaining Jarvis *v.* Barrett, 14 Wis. 591); Butler *v.* Wagner, 35 Wis. 54; Miller *v.* Munson, 34 Wis. 579; Landon *v.* Burke, 33 Wis. 452, 458.

The motion should not be made, however, until after a motion to strike out the judgment. Boarman *v.* Patterson & Israel, 1 Gill (Md.) 372.

9. **Ind.**—Foster *v.* Dryfus, 16 Ind. 158. **La.**—Enders *v.* Clay, 8 Rob. 30; Watson *v.* McAllister, 7 Mart. (O. S.) 368. **Mich.**—Crane *v.* Hardy, 1 Mich. 56. **Mo.**—Winemiller *v.* Peterson, 65 Mo. App. 594. **Wis.**—Jarvis *v.* Barrett, 14 Wis. 591.

Motion During Trial Timely.—The motion to dissolve the attachment may be made during the trial under a court rule "which required all points should be contained in the answer, and that no objections to an attachment will be heard which are not set forth in the answer. Shewell *v.* Stone, 12 Mart. O. S. (La.) 386.

In Indian Territory by statute the right to be heard on motion is not answered by subsequent pleading and trial on merits. Salmon *v.* Mills, 49 Fed. 333, 4 U. S. App. 101, 1 C. C. A. 278.

After Jury Impaneled.—A motion made after the jury were impaneled and sworn and the pleadings read was held to be too late. Fort Mill Savings Bank *v.* Alexander, 86 S. C. 8, 67 S. E. 955.

10. **U. S.**—Whitesides *v.* Oakman, 1 Dall. 294, 1 L. ed. 143. **Ga.**—Dow *v.* Smith & Co., 8 Ga. 551. **Ind.**—Trent *v.* Edmonds, 32 Ind. App. 432, 70 N. E. 169. **Minn.**—McDonald *v.* Clark, 53 Minn. 230, 54 N. W. 1118. **Pa.** See Penman *v.* Gardiner, 4 Yeates 6. **W. Va.**—Smith *v.* Parkersburg Co-Op. Assn., 48 W. Va. 232, 37 S. E. 645.

Abandoned Motion Renewed After Judgment. — Where the defendant "abandoned his motion to discharge the attachment, and took no steps looking to the preparation of his defense on this issue until after personal judgment was rendered, and after the submission of the cause on motion to sustain the attachment and direct the garnishee to pay over the funds attached in its hands," it was not an abuse of discretion on the part of the trial judge, at that late date, to have refused to entertain the motion. Hoobler *v.* Howland, 19 Ky. L. Rep. 1473, 43 S. W. 486.

Default by Defendant.—It is too late to move for the dissolution after default by the defendant. Loomis *v.* Allen, 7 Ala. 706; Roelofson *v.* Hatch, 3 Mich. 277.

11. **New York.**—McBride *v.* Illinois Nat. Bank, 128 App. Div. 503, 112 N. Y. Supp. 794; Andrews *v.* Schofield, 27 App. Div. 90, 50 N. Y. Supp. 132; V. G. Pfluke Co. *v.* Papulias, 42 Misc. 18, 85 N. Y. Supp. 543; Story *v.* Arthur, 35 Misc. 244, 71 N. Y. Supp.

required by the rules of practice.[12] It may be made even before the

776; Thalheimer *v.* Hayes, 14 Civ. Proc. 232; Rowles *v.* Hoare, 61 Barb. 266; Thompson *v.* Culver, 38 Barb. 442, 15 Abb. Pr. 97, 24 How. Pr. 286; Trows Printing, etc., Co. *v.* Hart, 9 Daly, 413, *affirmed* in 85 N. Y. 500; Bowen *v.* Medina First Nat. Bank, 34 How. Pr. 408; Zeregal *v.* Benoist, 7 Robt. 199, 33 How. Pr. 129. See *contra*, Spencer *v.* Rogers Locomotive Wks., 13 Abb. Pr. 180.

This right is said to be anomalous, but the construction is demanded by the provisions of the statute. Parsons *v.* Sprague, 100 N. Y. 632, 30 Hun 19.

When Laches no Bar.—Where there was a delay of over three years in making a motion, but it appeared the delay was caused by awaiting the result of an appeal by another creditor from a motion vacating the attachment, it was held that the laches was not such as to require a refusal of the motion. Thalheimer *v.* Hayes, 14 Civ. Proc. (N. Y.) 232. See also Kahle *v.* Muller, 57 Hun 144, 11 N. Y. Supp. 26.

Time When Application Made.—The application is made when the party brings his motion to a hearing and does not relate back to the time of serving of his notice. V. G. Pfluke Co. *v.* Papulias, 42 Misc. 18, 85 N. Y. Supp. 543.

Motion Allowed Four Years After Judgment.—Drury *v.* Russell, 27 How. Pr. (N. Y.) 130.

After Judgment in Favor of Defendant.—Under a statute declaring that an attachment is "annulled" upon judgment for the defendant and providing further that "a stay of proceedings suspends the effect of the annulment and the reversal or vacating of the judgment revives the warrant," it was held that a motion to vacate the attachment was not proper while the stay was effective or until reversal of the judgment. McKean *v.* National L. Assn., 24 Misc. 511, 28 Civ. Proc. 146, 53 N. Y. Supp. 980, 6 Ann. Cas. 179.

Judge's Report Not Filed.—A motion to set aside an attachment was denied without prejudice where the judge's report of the proceedings had not been filed. *In re* Walsworth, 1 How. Pr. (N. Y.) 61.

Mere Levy Insufficient.—Actual Application of Proceeds Necessary.—Woodmansee *v.* Rogers, 82 N. Y. 88.

Effect of Lapse of Time Before Moving.—Where the statute expressly gives the defendant the right to move at any time before the attached property is applied to the payment of the judgment entered in the action in which the attachment is granted, the mere lapse of time is no objection to the granting of the motion. Andrews *v.* Schofield, 27 App. Div. 90, 50 N. Y. Supp. 132; Story *v.* Arthur, 35 Misc. 244, 71 N. Y. Supp. 776.

The motion may be made and formal order entered even after the attachment is withdrawn. Corn Exch. Bank *v.* Bossio, 8 App. Div. 306, 40 N. Y. Supp. 994.

12. **U. S.**—Miltenberger *v.* Lloyd, 2 Dall. 79, 1 L. ed. 297. **Ala.**—Hall *v.* Brazelton, 40 Ala. 406; Gill *v.* Downs, 26 Ala. 670. **Ga.**—Parker *v.* Brady, 56 Ga. 372; Irvin *v.* Howard, 37 Ga. 18; Neal *v.* Bookout, 30 Ga. 40. See De Leon *v.* Heller, 77 Ga. 740. **Ill.**—Brewster *v.* James, 3 Ill. 464; Beecher *v.* James, 3 Ill. 462. **Ind.**—Root *v.* Monroe, 5 Blackf. 594.

Motion Should Be Made at Earliest Opportunity.—Collins *v.* Nichols, 7 Ind. 447; Lawrence *v.* Jones, 15 Abb. Pr. (N. Y.) 110.

The rule that a dilatory objection to discharge the attachment must be made at the earliest opportunity or the delay excused, has no application to motions for relief affecting the substantial rights of the parties. Swezey *v.* Bartlett, 3 Abb. Pr. N. S. (N. Y.) 444; Wade *v.* Wade's Admr., 81 Vt. 275, 69 Atl. 826.

Return Term of One Day.—Where the return term consisted of only one day it was held that it was not too late to make the motion at the succeeding term. Kearney *v.* McCullough, 5 Binn. (Pa.) 389.

Longer Time Allowed To Absent Defendant.—Morris *v.* Turner, 5 Pa. L. J. 465, 3 Clark 423.

Should Be Made Before Continuance. Archer *v.* Claflin, 31 Ill. 306.

A delay of eighteen months in moving to vacate an attachment is laches, and in such a case it is not substantial error for the court to permit affidavits

return term upon giving reasonable notice to the plaintiff,[13] and a defendant may move, though no levy has yet been made under the attachment, on the ground that it was improperly or irregularly issued.[14]

Effect of Plea In Abatement. — A plea in abatement waives the right to move for dissolution of the attachment in some states,[15] and in others it does not waive such right.[16]

Where Jurisdictional Question Raised. — Where the motion goes to questions of jurisdiction it may be made at any time.[17]

On Appeal. — It is too late to raise objections to irregularities in the appellate court.[18]

to be read in opposition to the motion as to occurrences in the action since the granting of the attachment. Haebler *v.* Bernharth, 9 N. Y. Supp. 725.

Under a statute giving a defendant the right to move to dissolve the attachment within a specified time, such requirement is complied with when sufficient cause is shown in the application, and it is filed within the requirement in the proper court. Delays and continuances on the part of the court will not divest a party of the right invested by his application. Bledsoe *v.* Wright, 2 Baxt. (Tenn.) 471.

A Subsequent Term.—Where an action was begun by trustee process on a cause of action for which that was not the proper proceeding, it was held that it would be dismissed at any subsequent term. Tarbell *v.* Bradley, 27 Vt. 535.

Where the defendants appear in opposition to the writ within the time fixed by statute, they are bound by the rules of the court relating to dilatory pleas. Wade *v.* Wade's Admr., 81 Vt. 275, 69 Atl. 826.

Discretionary With Trial Court.—It is within the discretion of the court to entertain the motion to dismiss, although filed out of time where the limitation of the time of filing is but a provision of its rules. Wade *v.* Wade's Admr., 81 Vt. 275, 69 Atl. 826.

13. Wilson *v.* Lewis Cook Mfg. Co., 88 N. C. 5; Palmer *v.* Bosher, 71 N. C. 291.

Need Not First File Answer or Demurrer.—Merchants' Nat. Bank *v.* Danford, 28 Kan. 512; Quinlan *v.* Danford, 28 Kan. 507.

14. Cal.—Sparkas *v.* Bell, 137 Cal. 415, 70 Pac. 281. **La.**—Hicks *v.* Duncan, 4 Mart. (N. S.) 314. **Minn.**—Winona First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. 799. **N. Y.**—Andrews *v.* Schofield, 27 App. Div. 90, 50 N. Y. Supp. 132, 5 N. Y. Ann. Cas. 311.

15. Archer *v.* Claflin, 31 Ill. 306.

Plea Does Not Waive Subsequent Defects.—Stoddard *v.* Miller, 29 Ill. 291.

Waiver of Objections.—The objections to a writ of attachment issued in aid of a suit, that the caption of the writ and affidavit does not correspond with the title of the suit; that the cause of action set forth in the petition is improperly described in the affidavit and writ, are waived by the filing of a plea in the nature of a plea in abatement. Henderson *v.* Drace, 30 Mo. 358.

16. Harrisburg Boot, etc., Co. *v.* Johnson, 3 Pa. Dist. 433.

17. Binns *v.* Williams, 4 McLean 580, 3 Fed. Cas. No. 1,423; Jarvis *v.* Barrett, 14 Wis. 591.

In Maryland a substantial defect in the attachment proceedings goes to the question of jurisdiction, and will be entertained at any stage even during the trial of the cause. Evesson *v.* Selby, 32 Md. 340; Stone *v.* Magruder, 10 Gill & J. 383; Bruce *v.* Cook, 6 Gill & J. 346.

18. Horton *v.* Miller, 84 Ala. 537, 4 So. 370; Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987.

On an appeal by an intervener he cannot raise the objection for the first time in the appellate court, that the attachment was invalid because written notice thereof was not served on the attachment defendant. Hipsley *v.* Price, 104 Iowa 282, 73 N. W. 584.

2. How Many Motions May Be Made. — Before a second motion to vacate the attachment on grounds which might have been raised on the first motion will be entertained, leave of the court in some jurisdictions must be obtained.[19] In other states a second motion is allowed on grounds which might have been, but were not, urged on the first motion.[20]

3. Notice. — Generally notice of the motion must be given the plaintiff,[21] although an *ex parte* motion is sometimes permitted when based upon the application and proofs upon which the warrant of attachment was granted.[22]

Notice to other creditors is not necessary.[23]

19. **Kan.**—Hillyer *v.* Biglow, 47 Kan. 473, 28 Pac. 150. **Neb.**—Stutzner *v.* Printz, 43 Neb. 306, 61 N. W. 620; Livingston *v.* Coe, 4 Neb. 379. **Wash.**—Sheppard *v.* Guisler, 10 Wash. 41, 38 Pac. 759.

In Hoyt *v.* Benner, 18 La. Ann. 691. "A rule was taken to set aside an attachment for the reason that no United States internal revenue stamp had been affixed to the affidavit or petition. The rule was dismissed. The defendants afterwards filed a peremptory exception on the general ground that the provision of the United States internal revenue law had not been complied with. It was held that the dismissal of the rule judicially established the fact, that the law requiring a stamp had been complied with, and if any other provision of the revenue law was relied on by the defendant, he should have specially set forth the non-compliance."

A refusal of a motion to vacate an attachment upon the offer of the defendant to deposit stock with the court as security is not *res judicata* of the right to have the attachment set aside on a denial of non-residence. Brady *v.* Oaffroy, 37 Wash. 482, 79 Pac. 1004.

Objection Not Taken on First Motion Waived.—Norton *v.* Dow, 10 Ill. 459.

Second motion by assignee not allowable on grounds set up by assignor. Strauss *v.* Vogt, 23 Civ. Proc. 251, 24 N. Y. Supp. 483.

The New York Code of Civil Procedure provides that an application to vacate an attachment "'may be founded only upon the papers upon which the warrant was granted . . . or that it may be founded upon proof by affidavit on the part of the defendant . . . in which case the plaintiff may show any matter in avoidance thereof, which he might show upon the trial.'" It was held "under these two sections, if a defendant has elected to move upon affidavits and upon the merits to vacate an attachment, he can, after being defeated upon such motion, turn around and allege that the affidavits on which the attachment was granted disclosed no grounds for quashing the same." National Park Bank *v.* Whitmore, 7 N. Y. St. 456.

20. Steuben County Bank *v.* Alberger, 83 N. Y. 274, 61 How. Pr. 227; Hawkins *v.* Pakas, 44 App. Div. 395, 60 N. Y. Supp. 1108; Thalheimer *v.* Hays, 42 Hun (N. Y.) 93.

Order Interlocutory.—An order overruling such a motion is interlocutory. Elkins Nat. Bank *v.* Simmons, 57 W. Va. 1, 49 S. E. 893; Simmons *v.* Simmons, 56 W. Va. 65, 48 S. E. 833, 107 Am. St. Rep. 890.

21. **Kan.**—Guest *v.* Ramsey, 50 Kan. 709, 33 Pac. 17. **S. C.**—Savings Bank *v.* Sprunt, 86 S. C. 8, 67 S. E. 955; China *v.* Courtney, 85 S. C. 182, 67 S. E. 234; Cureton *v.* Dargan, 12 S. C. 122. **Wash.**—Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

Notice Required When Based on New Affidavits.—Thalheimer *v.* Hays, 42 Hun (N. Y.) 93.

Because Property Exempt.—Chaflin *v.* Lisso, 31 La. Ann. 171.

Imperfect notice not void if plaintiff not misled or injured in any way. Blake *v.* Sherman, 12 Minn. 420.

Notice to attorney if plaintiff not in the county. Cleland *v.* Clark, 111 Mich. 336, 69 N. W. 652.

22. Thalheimer *v.* Hays, 42 Hun (N. Y.) 93.

23. Boyes *v.* Coppinger, 2 Yeates (Pa.) 277.

The notice should designate the grounds upon which it is made,[24] but such specification is not required when the motion is based upon jurisdictional defects,[25] or upon the ground that the attachment was im-

24. **U. S.**—Nevada Co. *v.* Farnsworth, 89 Fed. 164. **Cal.**—Freeborn *v.* Glazer, 10 Cal. 337. **Mont.**—Omaha Upholstering Co. *v.* Chauvin-Faut Furniture Co., 18 Mont. 468, 45 Pac. 1087. **N. Y.**—Van Wickle *v.* Weaver Coal, etc., Co., 88 App. Div. 603, 85 N. Y. Supp. 82; Kloh *v.* New York Fertilizer Co., 86 Hun 266, 33 N. Y. Supp. 343; Thorn *v.* Alvord, 32 Misc. 456, 66 N. Y. Supp. 587, *affirmed* in 54 App. Div. 638, 67 N. Y. Supp. 1147; Weehawken Wharf Co. *v.* Knickerbocker Coal Co., 24 Misc. 683, 53 N. Y. Supp. 982, *reversing* 22 Misc. 559, 758, 49 N. Y. Supp. 1001, 1150; Marietta First Nat. Bank *v.* Bushwick Chem. Wks., 17 Civ. Proc. 229, 6 N. Y. Supp. 318; Stevens *v.* Middletown, 14 Wkly. Dig. 126. **S. C.**—Coker *v.* Barfield, 73 S. C. 179, 53 S. E. 174; Whitfield *v.* Hovey, 30 S. C. 117. **Utah.**—Cupit *v.* Park City Bank, 10 Utah 294, 37 Pac. 564, *affirmed* in rehearing, 11 Utah 427, 40 Pac. 707.

Where the notice of motion stated that the motion would be made upon the affidavits served with the notice, and the papers upon which the attachment was issued, sufficiently presented the grounds intended to be relied on, and it appeared from the affidavits served and from the papers of the plaintiffs, that the defendant was sued on a partnership debt with his copartner; that he owned no property in the state, except an interest in the partnership effects, and that this interest had been attached, and notice was given that upon these papers a motion would be made to vacate said attachment, it was held that it sufficiently appeared that the motion would be made upon the ground "that the interest of the non-resident copartner in the partnership effects could not legally be the subject of an attachment in such an action." Whitfield *v.* Hovey, 30 S. C. 117, 8 S. E. 840.

"The recital in the warrant of attachment that the action is for 'wrongful detention,' rather than wrongful conversion, in view of the allegations of the complaint and the warrant on which the affidavit was granted, is an irregularity, and not a jurisdictional defect." Rallings *v.* McDonald, 76 App. Div. 112, 78 N. Y. Supp. 1040.

Clerical Error.—Motion was denied because in the copy served of an order to "show cause why an order should not be entered *dismissing*, etc., a pen-mark was drawn through the word "*dismissing.*" This was held "too finical for the practical proceedings in courts of justice." Harrison Mach. Works *v.* Hosig, 73 Wis. 184, 41 N. W. 70.

Warrant Not Reciting Grounds.—A failure of the warrant of attachment to sufficiently recite the grounds of the attachment is an irregularity which must be specified in the notice of motion. Ennis *v.* Untermyer, 93 App. Div. 375, 87 N. Y. Supp. 695.

Attachment Wrongfully Made.—Where the property is brought into the jurisdiction by misrepresentation of the plaintiff he cannot be heard to object that notice of the motion for discharge of the attachment is insufficient. Pakas *v.* Steel Ball Co., 34 Misc. 811, 68 N. Y. Supp. 397.

Objection is waived if not invoked at the proper time. First Nat. Bank *v.* Brunswick Chemical Wks., 53 Hun 635, 17 Civ. Proc. 229, 6 N. Y. Supp. 318, *affirming* 5 N. Y. Supp. 824; *affirmed* in 119 N. Y. 645, 23 N. E. 1149, without opinion. Coker *v.* Barfield, 73 S. C. 179, 53 S. E. 174.

It cannot be made for the first time on appeal. MacDonald *v.* Kieferdorf, 18 N. Y. Supp. 763.

25. Nevada Co. *v.* Farnsworth, 89 Fed. 164; Rallings *v.* McDonald, 76 App. Div. 112, 78 N. Y. Supp. 1040; Weehawken Wharf Co. *v.* Knickerbocker Coal Co., 24 Misc. 683, 53 N. Y. Supp. 982, *reversing* 22 Misc. 559, 758, 49 N. Y. Supp. 1001, 1150.

Where an affidavit is made upon positive knowledge under circumstances from which it is evident that the affiant had no personal knowledge, in the absence of additional facts, the defect is one of substance and not an irregularity merely. Martin *v.* Aluminum Compound Plate Co., 44 App. Div. 412, 60 N. Y. Supp. 1010.

A failure to serve a certified copy

providently issued,[26] which raises a pure question of fact.

Time of Notice. — The attachment statutes or rules of practice usually specify the number of days the notice must be given before the return day.[27] If at the time of giving notice there is no statutory provision directing how notice should be given a reasonable notice is all that is required.[28] What is reasonable depends upon the circumstances and conditions existing at the time in the matter to be presented.[29]

4. Form. — In the motion the facts relied upon should be set out;[30]

of the attachment on the garnishee as the statute requires is a jurisdictional defect and not a mere irregularity. Weil *v.* Gallun, 75 App. Div. 439, 78 N. Y. Supp. 300.

26. Addison *v.* Sujette, 50 S. C. 192, 28 S. E. 948; Lipscomb *v.* Rice, 47 S. C. 14, 24 S. E. 925.

"Where the defendant gives notice of motion to dissolve an attachment, and the notice recites that the motion will be based upon an affidavit, served therewith, which denies the truth of the attachment affidavit, the notice sufficiently shows that the ground for the motion to dissolve is that the attachment affidavit is false." Jones *v.* Hoefs, 14 N. D. 232, 103 N. W. 751.

Whether an attachment is improvidently issued is to be determined by a consideration of the evidence presented in the affidavits both *pro* and *con*, and presents a pure question of fact whether the evidence found in the affidavits is sufficient to sustain the issuance of an attachment. Lipscomb *v.* Rice, 47 S. C. 14, 24 S. E. 925.

Motion on Merits—Not Necessary To Specify Irregularities.—McBride *v.* Illinois Nat. Bank, 128 App. Div. 503, 112 N. Y. Supp. 794; Norden *v.* Duke, 106 App. Div. 514, 94 N. Y. Supp. 878, reargument denied, 47 Misc. 473, 95 N. Y. Supp. 940; Andrews *v.* Schofield, 27 App. Div. 90, 50 N. Y. Supp. 132.

27. Cleland *v.* Clark, 111 Mich. 336, 69 N. W. 652.

Under the California statute (Code Civ. Proc. §§1005, 1015) there must be ten days' notice, but it may be served on the attorney for the plaintiff. Finch *v.* McVean, 6 Cal. App. 272, 91 Pac. 1019. See generally the statutes of the several states, and the title "Motions."

28. Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

29. Sterling Mfg. Co. *v.* Hough, 49 Neb. 618, 68 N. W. 1019.

Four Days Held Sufficient.—Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886.

Ten Days Notice Reasonable.—Blake *v.* Sherman, 12 Minn. 420.

30. **Ala.**—Blair *v.* Cleveland, 1 Stew. 421. **Cal.**—Donnelly *v.* Struven, 63 Cal. 182; Loucks *v.* Edmondson, 18 Cal. 204; Freeborn *v.* Glazer, 10 Cal. 337. **Ia.**—Crouch *v.* Crouch, 9 Iowa 269. **Kan.**—Ferguson *v.* Smith, 10 Kan. 396. **Mich.**—Osborne *v.* Robbins, 10 Mich. 213; Anonymous, 2 Mich. N. P. 118. **Mont.**—Omaha Upholstering Co. *v.* Chauvin-Faut Furn. Co., 18 Mont. 468, 45 Pac. 1087; Vaughn *v.* Dawes, 7 Mont. 360, 17 Pac. 114. **Ohio.** Hare *v.* Cook, 27 Ohio C. C. 289. **Utah.** Cupit *v.* Park City Bank, 10 Utah 294, 37 Pac. 564. **Wash.**—Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

Where a motion to dissolve is general, and does not distinguish in its specifications, defects as to the matured and non-matured portions of plaintiff's demands, and the affidavit is not defective as to both, the court should overrule the motion as a whole. Danforth *v.* Carter, 1 Iowa 546.

Specifying Grounds. — The question whether the attachment was irregularly and improvidently issued will be considered under a notice of motion to vacate upon the grounds "that said attachment has been improvidently issued, *and* is without warrant of law." Addison *v.* Sujette, 50 S. C. 192.

Phraseology of Motion.—A motion to set aside the "order" of attachment was held to be sufficient to authorize a discharge of the attachment where the proceedings showed that the plaintiffs had full notice that the defendants desired upon said motion that their property should be discharged from the attachment and also had full notice upon what grounds the defendants desired such discharge; and the property was discharged on one of those grounds. Shedd *v.* McConnell, 18 Kan. 594.

conclusions of law are not sufficient,[31] as illustrated in the note.

Allegations of Ownership. — It is sometimes required that the motion or petition for the discharge of an attachment should show that the property of the moving party has been attached,[32] and that he has a right to the possession of the same,[33] but this may sufficiently appear from clear and distinct allegations of present ownership.[34] It is the more general rule, however, that the moving party need not allege in his petition that he is the owner of the attached property as the creditor by attaching the property as that of the debtor is estopped to deny that fact.[35]

Description of Property Attached. — A motion to dissolve an attachment which fails to describe the property attached is insufficient and should be dismissed.[36]

Entitling Motion. —It is not necessary that the motion be entitled in the original cause.[37]

Verification is sometimes required,[38] and sometimes not.[39]

Waiver. — The defendant should urge all the objections he intends

Where the debtor does not deny the averment that he has no property subject to execution, but denies that the collection of the demand would be endangered by delay, the presumption arises from the debtor's insolvency that the collection of the debt is endangered by delay. Steitler *v.* Hellenbush's Exr., 23 Ky. L. Rep. 174, 61 S. W. 701, relying upon Johnson's Assignee *v.* Bank (Ky.), 56 S. W. 710; Dunn's Trustee *v.* McAlpin, 90 Ky. 78, 13 S. W. 363.

Where two attachments were issued upon the same grounds, and a motion to vacate is made, the fact that the notice of motion is in the singular is immaterial, when on the argument the attention of the defendant was not called thereto, and all parties treated the motion to discharge as being addressed to the two writs. Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

31. It is not enough to allege "'that the affidavit in the said cause is insufficient on its face.'" Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

So also an allegation "that the affidavit and proceedings for attachment are informal, defective, and not according to law." Payne *v.* First Nat. Bank, 16 Kan. 147. *Contra,* Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 3 N. E. 135; Bowman *v.* Wade, 54 Ore. 347, 103 Pac. 72.

32. Zook *v.* Blough, 42 Mich. 487, 4 N. W. 219; Macumber *v.* Beam, 22 Mich. 395; Osborne *v.* Robbins, 10 Mich. 277; Chandler *v.* Nash, 5 Mich. 409.

33. Johnson *v.* De Witt, 36 Mich. 95.

34. **Where an allegation of ownership is distinctly made,** and there is nothing in the case indicating that any other person has acquired any right in opposition thereto, the legal presumption that the owner of property is entitled to the possession of the same may very fairly be indulged, for the purpose of giving jurisdiction. Zook *v.* Blough, 42 Mich. 487, 4 N. W. 219.

Right to restoration need not be alleged. First Nat. Bank *v.* Steele, 81 Mich. 93, 45 N. W. 579; Smith *v.* Collins, 41 Mich. 173, 2 N. W. 177.

35. Holmes *v.* Langston, 99 Ga. 555, 27 S. E. 155.

36. Osborne *v.* Robbins, 10 Mich. 277.

It is not enough to allege that "property to the value of more than $3,000 was attached, and is now in the possession of the sheriff." Nelson *v.* Hyde, 10 Mich. 521.

37. Heyn *v.* Farrar, 36 Mich. 258.

38. Osborne *v.* Robbins, 10 Mich. 277.

39. Wm. W. Kendall Boot, etc., Co. *v.* August, 51 Kan. 53, 32 Pac. 635.

to make in support of his motion, and in omitting to raise other objections he waives them.[40]

Affidavits in support of the motion should be positive,[41] and not am-

40. Norton *v.* Dow, 10 Ill. 459; Hillyer *v.* Biglow, 47 Kan. 473, 28 Pac. 150.

By denying the grounds for the attachment the debtor waives the right to move for dissolution for irregularities. *In re* Leonard, 3 How. Pr. (N. Y.) 312.

41. **U. S.**—Jenks *v.* Richardson, 71 Fed. 365. **Kan.**—Keith *v.* Stetter, 25 Kan. 100. **N. C.**—Evans *v.* Andrews, 52 N. C. 117. **Okla.**—Dunn *v.* Claunch, 13 Okla. 577, 13 Pac. 143. **Ore.**—Watson *v.* Loewenberg, 34 Ore. 323, 56 Pac. 289. **S. D.**—Lindquist *v.* Johnson, 12 S. D. 486, 81 N. W. 900. **Wyo.** Bank of Commerce *v.* Latham, 8 Wyo. 316, 57 Pac. 184.

Should Be as Positive as an Answer. The denials of the traversing affidavit should be as direct and positive as if the affidavit were an answer to a complaint in an ordinary action, and must be tested by the same rules of pleading. Bowman *v.* Wade, 54 Ore. 347, 103 Pac. 72; Watson *v.* Loewenberg, 34 Ore. 323, 56 Pac. 289; Hansen *v.* Doherty, 1 Wash. 461, 25 Pac. 297.

A denial on information and belief is not sufficient against a positive affidavit from the plaintiff. Carolina Agency Co. *v.* Garlington, 85 S. C. 114, 67 S. E. 225; George Norris Co. *v.* S. H. Levin's Sons, 81 S. C. 36, 61 S. E. 1103; Barnhart *v.* Foley, 11 Utah 191, 39 Pac. 823.

Illustration of Sufficient Denials.—Patterson *v.* Goodrich, 31 Mich. 225.

Where the application set out that the defendant had not assigned, disposed of, or concealed, or attempted to assign, dispose of, or conceal her property, or any portion thereof, with intent to defraud her creditors, it was held that the allegation was sufficient to cover any and all property of the defendant whether individual or joint. Cottrell *v.* Hatheway, 108 Mich. 619, 66 N. W. 596.

Where a warrant of attachment was issued upon an affidavit charging that defendant "has sold, assigned, and disposed of a portion of his property with intent to defraud his creditors, and is about to sell and dispose of other of his property with like intent," a statement in defendant's affidavit, on motion to discharge, "that he has never entertained any notion of selling and disposing of, or assigning any of, his property with intent to defraud his creditors," is not a good denial of the second allegation of the attachment affidavit, but a denial "that he intended to sell or dispose of his property only in the regular course of trade, at retail," was held to be sufficient to throw the burden of proof upon the plaintiff. Noyes *v.* Lane, 1 S. D. 125, 45 N. W. 327.

Where the plaintiff's "affidavit for attachment, after stating the formal matters required in such cases, and particularly describing certain real property, alleged the ground of attachment as follows: 'Which said real estate the defendant is about to convert into money for the purpose of placing it beyond the reach of his creditors,'" an affidavit by the defendant "in support of his motion to dissolve was held to be sufficient which averred among other things: 'That [the defendant] has at no time attempted to sell any of his property for the purpose of placing it beyond the reach of his creditors, or at all; that he has at all times desired his creditors to receive the full amount to which they are entitled,'" etc. The court said: "While the respondent did not in express terms controvert the averments of the attachment affidavit, he did deny that he at any time attempted to sell any of his property, and we fail to see how a person can convert real property into money except through the medium of a sale. In our opinion there was a direct and explicit denial of the ground of attachment set forth in the original affidavit." Watson *v.* Shelton, 56 Wash. 426, 105 Pac. 850.

When the affidavit on which the attachment is issued alleges that the defendant "is" about to dispose of his property to defraud creditors, a statement in the affidavit on the motion to vacate denying that defendant "is" about to dispose of his property

biguous,[42] and as broad as the charge.[43] If two or more grounds are alleged for the attachment the denial should be in the disjunctive.[44]

Service of Affidavit. — The practice varies as to the necessity for a service of affidavits on the opposite party.[45]

5. Trial — a. *A Question of Law.* — The defendant has a right to

is sufficient, as the affidavit relates retrospectively to the time when the suit was instituted or the affidavit for attachment made. Park *v.* Armstrong, 9 S. D. 269, 68 N. W. 739; Finch *v.* Armstrong, 9 S. D. 255, 68 N. W. 740.

On an application for dissolution of an attachment by one of two joint defendants a denial by such defendant of intent to assign, dispose of, or conceal the property is sufficient to cover all property owned by the defendants whether individually or jointly with a co-defendant. Cottrell *v.* Hatheway, 108 Mich. 619, 66 N. W. 596.

Verified Answer as Affidavit.—Upon a motion to dissolve an attachment a defendant may properly use his verified answer as an affidavit, so far as its contents are pertinent. Nelson *v.* Munch, 23 Minn. 229.

New York Rules of Practice.—Under the general rules of practice in the New York Supreme Court the affidavit of the moving party must state the present condition of the action, whether at issue, and, if not yet tried, the time apointed for holding the next term when the action is triable. If the rule is not complied with the motion will be refused although the condition of the action is shown by the plaintiff's answering affidavit. Sanger *v.* Conner, 95 App. Div. 521, 88 N. Y. Supp. 1054; Cole *v.* Smith, 84 App. Div. 500, 82 N. Y. Supp. 982.

This objection cannot be made for the first time on appeal. Austrian Bentwood Furniture *v.* Wright, 43 Misc. 616, 88 N. Y. Supp. 142.

42. Bane *v.* Keyes, 115 Mich. 244, 73 N. W. 230.

43. **Fla.**—Reese *v.* Damato, 44 Fla. 683, 33 So. 459. **Kan.**—Shedd *v.* McConnell, 18 Kan. 594. **Mich.**—Stock *v.* Reynolds, 121 Mich. 356, 80 N. W. 289.

A denial of a part of the allegations operates to confess those not denied (**Ark.**—Weibel *v.* Beakley, 119 S. W. 657. **S. C.**—Carolina Agency Co. *v.* Garlington, 85 S. C. 114, 67 S. E. 225. **S. D.**—Hornick Drug Co. *v.* Lane, 1 S. D. 129, 45 N. W. 329), but should go only to the statutory grounds alleged by the plaintiff. (Jenks *v.* Richardson, 71 Fed. 365; Foley-Wadsworth Imp. Co. *v.* Porteous, 8 S. D. 74, 65 N. W. 429 [holding that when the plaintiff's affidavit upon which the attachment was issued, alleged the debt for which the action was brought to be due, an averment that the debtor is about to remove his property with the "intent of hindering and delaying" creditors is immaterial as such averment is ground for attachment only on a claim not due]).

44. **Mich.**—Bane *v.* Keys, 115 Mich. 244, 73 N. W. 230. **S. D.**—Foley-Wadsworth Implement Co. *v.* Porteous, 8 S. D. 74, 65 N. W. 429. **Wash.**—Hansen *v.* Doherty, 1 Wash, 461, 25 Pac. 297. **Wyo.**—Cheyene First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

A denial in the alternative is good. Iowa First Nat. Bank *v.* Steele, 81 Mich. 93, 45 N. W. 579.

45. In North Carolina, it is not required when the motion is for causes appearing in the affidavit on attachment. Palmer *v.* Bosher, 72 N. C. 371.

Under the Kansas Code (Civil Code, §534), the plaintiff is entitled to notice of the affidavits that will be used by the defendant on the hearing, but where it appeared that the affidavit was made and filed in the court four days before the time set for the first hearing, and seventeen days prior to the final hearing of the same: and at the first hearing the plaintiff had evidently become aware of the filing of defendant's affidavit, and he asked a continuance in order to obtain evidence with which to resist defendant's affidavit and motion, and when the hearing occurred, no other proof was offered than the affidavit which has been referred to, it was held that under these circumstances, the omission and failure of the defendant to specify in his notice that an affidavit would be used could not have prejudiced the plaintiff. Meyer Bros. Drug Co. *v.* Malm, 47 Kan. 762, 28 Pac. 1011.

a summary trial of his motion for dissolution.[46] A motion to discharge or dissolve an attachment is for the decision of the court and not of the jury,[47] although the court, for its better information and satisfaction, may frame and submit proper issues to a jury.[48]

Constitutional provisions protecting the right of trial by jury do not cover the trials of motions to discharge attachments.[49]

46. Salter *v.* Duggan, 4 La. Ann. 280; Hintermeister *v.* Ithaca Oregon, etc., Co., 3 Kulp (Pa.) 490.

Reason of Rule.—"The motive of the law is obvious. The severity of the remedy by attachment—the stringent nature of the process—and the possible consequences to ensue from its enforcement if the defendant should be compelled to await the ordinary routine of the courts when their terms, as in the rural parishes, are separated by wide intervals—all suggest the propriety and even the necessity of allowing a summary trial. It often happens that the trial of these motions involves the merits to some extent, but that is no reason why the summary trial of the motions should be refused. . . . Unforeseen and very serious consequences might result from such denial, and in the present instance, the defendant claims, have resulted from it." Allen *v.* Champlin, 32 La. Ann. 511.

Delay in Taking Depositions.—Under the Pennsylvania practice where a rule to dissolve the attachment has been obtained and one party delays in taking depositions the proper practice is to order the case on the list and ask the court to dispose of it and the court will determine whether the other side is entitled to further time or not. Gleason *v.* Chambers, 1 W. N. C. (Pa.) 112.

The rendition of a judgment in the main action does not bar the defendant's right to a hearing on a motion for dissolution made before the judgment was rendered. Gore *v.* Ray, 73 Mich. 385, 41 N. W. 329.

Where a motion was made to discharge the attachment for irregularities in the bond, and also on a traverse of the affidavit it was held that the defendant had a right to a decision of the motion and the question of the regularity of the bond even after a trial of the issue on the affidavit. Forbes *v.* Porter, 25 Fla. 363, 6 So. 62.

47. **Ala.**—Busbin *v.* Ware, 69 Ala. 279. **Ga.**—Rahn *v.* Hull, 94 Ga. 303, 21 S. E. 567. **Kan.**—Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292. **Ky.**—Talbot *v.* Pierce, 14 B. Mon. 195. **Md.**—Gover *v.* Barnes, 15 Md. 576; Lambden *v.* Bowie, 2 Md. 334; Campbell *v.* Morris, 3 Har. & M. 535. **Mich.**—Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 438, 17 N. W. 790, 18 N. W. 206. **N. C.**—Pasour *v.* Lineberger, 90 N. C. 159. **Pa.**—Walls *v.* Campbell, 125 Pa. 346, 17 Atl. 422, 23 W. N. C. 506; Harrisburg Boot, etc., Co. *v.* Johnson, 3 Pa. Dist. Ct. 433; Fisher *v.* Fisher, 2 Woodw. Dec. 321. **S. C.**—Lipscomb *v.* Rice, 47 S. C. 14, 24 S. E. 925. **Wash.**—Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

In Claflin & Co. *v.* Steenbock & Co., 18 Gratt. (Va.) 842, the plaintiffs and the defendant were requested by the court to state whether they desired a jury to be impanelled to ascertain the issue of fact arising under the motion. The plaintiffs declined to express any desire upon the subject, and the defendants stated that they did not wish a jury impanelled, but desired that the matter should be heard by the court without the intervention of a jury; which was accordingly done, the court being of opinion that it was not proper, under the circumstances, to have a jury.

A reference is sometimes granted to determine disputed questions of fact. Killiare *v.* Washington, 2 N. Y. Code Rep. 78 (reference to determine residence); Netter & Co. *v.* Hosch, 1 Pa. Co. Ct. 452.

"**If the defect does not appear** from the proceedings, evidence may be received in support or discharge of the rule, but the sufficiency of the evidence should be passed on by the court." Harmon *v.* Jenks, 84 Ala. 74, 4 So. 260.

48. Harmon *v.* Jenks, 84 Ala. 74, 4 So. 260; Pasour *v.* Lineberger, 90 N. C. 159. And see, *In re* Leonard, 3 How. Pr. (N. Y.) 312.

49. **United States Constitution.**—The right to trial by jury, guaranteed

b. *The Issues.* — The court may determine whether the statutory grounds for the attachment exist,[50] and usually the truth of the allegations of the plaintiff's affidavit,[51] but in deciding upon such a motion the court will not, as a general rule, pass upon the merits of the main action,[52] though what can be of no ultimate advantage

by article 7 of the constitution of the United States, extends only to "suits at common law." An attachment is a special proceeding, auxiliary to an action at common law, and can in no proper sense be considered as a "suit at common law." Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

The North Carolina Constitution, Art. IV., §13, provides that "In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury." In construing this section the court said: "It is mistaken view of the constitution . . . to insist that by virtue of it a party to an action has a right to have every question of fact arising in it submitted to a jury. Such a view of it is not only utterly impracticable, but the legislation and practice in the courts of this and other states having a like constitutional provision, practically contravene and deny such a construction. Neither the language nor the spirit of the constitution requires so absurd a thing. The clause, cited has reference to '*issues of fact*' raised by a proper pleading, or in some proceeding where a substantial right comes directly and finally in question." Pasour *v.* Lineberger, 90 N. C. 159.

50. Walton *v.* Chadwick, 6 Misc. 293, 26 N. Y. Supp. 789; First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

May Determine Question of Residence.—Johnstone *v.* Kelly (Del.), 74 Atl. 1099; Aspell Wholesale Grocery Co. *v.* Meeker, 54 Misc. 55, 104 N. Y. Supp. 493; Prentiss *v.* Butler, 13 N. Y. Supp. 757, 37 N. Y. St. 605; Weitkamp *v.* Loehr, 21 Jones & S. (N. Y.) 79; Ricette *v.* Mapleson, 22 Wkly. Dig. 215.

Whether Defendant Insane When He Left State.—Chambers, etc., Glass Co. *v.* Roberts, 4 App. Div. 20, 38 N. Y. Supp. 301.

Whether Cause of Action Arose Wholly Within State.—On a motion to dissolve an attachment, the court may enquire whether the cause of action arose wholly within the state, and such inquiry is not confined to the trial of the issues joined upon the pleadings. Stone *v.* Boone, 24 Kan. 337.

51. Herrmann *v.* Amedee, 30 La. Ann. 393; Boscher *v.* Roullier, 4 Abb. Pr. (N. Y.) 396. See *supra*, XVIII., C, 2.

It was alleged in a petition that the defendants acted conjunctively, the first named buying on credit and turning over goods to the second, to be disposed of by him for the joint benefit of both, and it was held proper, on a motion to dissolve, to consider whether or not the alleged privity between the defendants existed. Standard Stamping Co. *v.* Hetzel, 44 Neb. 105, 62 N. W. 247.

52. **U. S.**—Perry *v.* Sharpe, 8 Fed. 15. **Alaska.**—Seattle First Nat. Bank *v.* Fish, 2 Alaska 344. **Kan.**—McPike *v.* Atwell, 34 Kan. 142, 8 Pac. 118; Moffett *v.* Boydstun, 4 Kan. App. 406, 46 Pac. 24. **La.**—Herrmann *v.* Amedee, 30 La. Ann. 393; Miller *v.* Chandler, 29 La. Ann. 88; Macarty *v.* Lepaullard, 4 Rob. 425; Turner *v.* Collins, 1 Mart. (N. S.) 369. **Mich.**—Ruggles *v.* Muskegon Circuit Judge, 124 Mich. 472, 83 N. W. 149; Stock *v.* Reynolds, 121 Mich. 356, 80 N. W. 289. **Mont.**—Newell *v.* Whitwell, 16 Mont. 243, 40 Pac. 866. **Neb.**—McDonald *v.* Marquard, 52 Neb. 820, 73 N. W. 288; Olmstead *v.* Rivers, 9 Neb. 234, 2 N. W. 366. **Nev.**—Kuehn *v.* Paroni, 20 Nev. 203, 19 Pac. 273. **N. J.**—Anspach *v.* Spring Lake, 58 N. J. L. 136, 32 Pac. 77. **N. Y.**—Jones *v.* Hygienic Soap Granulator Co., 110 App. Div. 331, 97 N. Y. Supp. 104; Norden *v.* Duke, 106 App. Div. 514, 94 N. Y. Supp. 878, reargument denied, 47 Misc. 473, 95 N. Y. Supp. 940; United Press *v.* A. S. Abell Co., 87 App. Div. 630, 84 N. Y. Supp. 426; Delafield *v.* J. K. Armby Co., 58 App. Div. 432, 68 N. Y. Supp. 998, *reversed*, 62 App. Div. 262, 32 Civ. Proc. 132, 71 N. Y. Supp. 14; Goodyear *v.* Commercial F. Ins. Co., 58 App Div.

to plaintiff will not be allowed if it is entirely clear as

611, 68 N. Y. Supp. 756; Romeo *v.* Garofalo, 25 App. Div. 191, 49 N. Y. Supp. 114, *affirming* 21 Misc. 166, 47 N. Y. Supp. 91; Furbush *v.* Nye, 17 App. Div. 325, 45 N. Y. Supp. 214, 4 Ann. Cas. 241; Kirby *v.* Colwell, 81 Hun 385, 30 N. Y. Supp. 880; Johnson *v.* Hardwood Door, etc. Co., 79 Hun 407, 29 N. Y. Supp. 797; Stearns Paper Co. *v.* Johnson, 63 Hun 633, 18 N. Y. Supp. 490; Brown *v.* Wigton, 63 Hun 633, 18 N. Y. Supp. 490; Lowenstein *v.* Salenger, 62 Hun 622, 17 N. Y. Supp. 70; Atkins *v.* Fitzpatrick, 57 Misc. 341, 109 N. Y. Supp. 619; Aspell Wholesale Grocery Co. *v.* Meeker, 54 Misc. 55, 104 N. Y. Supp. 493; Story *v.* Arthur, 35 Misc. 244, 71 N. Y. Supp. 776; Thorn *v.* Alvord, 32 Misc. 456, 66 N. Y. Supp. 587, *affirmed* in 54 App. Div. 638, 67 N. Y. Supp. 1147; Peck *v.* Brooks, 31 Misc. 48, 64 N. Y. Supp. 546, *affirmed* without opinion, 51 App. Div. 640, 64 N. Y. Supp. 1145; Walton *v.* Chadwick, 6 Misc. 293, 26 N. Y. Supp. 789; Lawson *v.* Lawson, 12 Civ. Proc. 437; Foley *v.* Virtue, 8 Abb. Pr. N. S. 407. **N. C.**—Knight *v.* Hatfield, 129 N. C. 191, 39 N. E. 807. **Pa.**—Fisher *v.* Fisher, 2 Woodw. 321. **S. C.** *Ex parte* Rountree, 57 S. C. 75, 35 S. E. 386. **Wis.**—Gallun *v.* Weil, 116 Wis. 236, 92 N. W. 1091. **Wyo.**—Collins *v.* Stanley, 15 Wyo. 282, 88 Pac. 620, 23 Am. St. Rep. 1022.

Where a motion is made to vacate an attachment upon contesting affidavits, and the decision of the motion can have no effect upon the merits of the action, because it does not involve any question presented by the issues raised upon the pleadings, the question raised by the motion may be decided upon the affidavits. Chambers, etc. Glass Co. *v.* Roberts, 4 App. Div. 20, 38 N. Y. Supp. 301.

When, on a motion to dissolve, on the ground that a charge of misrepresentation and deceit is untrue, affidavits on the merits, pro and con, can be considered only for the purpose of ascertaining whether the proceeding has been taken in good faith, and whether there is respectable evidence which would warrant a jury in finding a verdict in favor of the plaintiffs, and not for the purpose of determining on which side of the controversy the evidence preponderates. Perry *v.* Sharpe, 8 Fed. 15.

Sufficiency of Security.—On a motion to discharge an attachment on the ground that the plaintiff had other security, the value of the lien or its sufficiency to cover the amount of the claim it was intended to secure, are not matters to be enquired into, as if security was given an attachment should not issue in the first instance. Beaudry *v.* Vache, 45 Cal. 3.

Application to Release Excessive Levy.—"Where the grounds of attachment are not denied, and it is sought to release property from an excessive levy, the only question for the court to determine is, whether too much property has been taken under the attachment to satisfy the claim or damages alleged. The court is not to investigate what amount of recovery the plaintiff is likely to obtain upon a trial, but only whether the property taken is more than sufficient to satisfy the claim of plaintiff. If property is taken upon attachment in excess of the amount of damages claimed, the court, after an investigation as to the value of such property, may discharge the attachment as to so much of the property attached as is in excess in value of the damages alleged. But to go further, and to discharge the property upon an inquiry as to the probable result of the action upon a trial of the merits of the case, might in some cases work gross injustice to a plaintiff." Tucker *v.* Green, 27 Kan. 355.

Aside from jurisdictional defects in the affidavit, the question presented on proceedings to dissolve an attachment is one purely of fact, and is confined to the inquiry whether the plaintiff had a good and legal cause for suing out such writ. Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879.

Indebtedness of garnishee will not be determined. Weil *v.* Gallun, 75 App. Div. 439, 78 N. Y. Supp. 300.

May Show Facts To Explain Transaction.—While, on a motion to dissolve an attachment, the merits of a cause of action cannot be questioned, yet this rule will not prevent the defendant, on such motion, from stating any pertinent fact to explain the transaction out of which the suit arose, even if in doing so he makes it

matter of law that the plaintiff cannot recover in the action.[53] The sufficiency of the pleadings in the original action cannot be considered.[54] On such a motion the defendant cannot disprove the

appear that the sum claimed is too large. Hamilton *v.* Johnson, 32 Neb. 730, 49 N. W. 703.

The validity of an assignment will not be determined, the attachment having been granted because of allegations of fraudulent transfer. German Bank *v.* Folds, 9 S. D. 447, 69 N. W. 823.

The validity of a levy made by serving notice on one in possession can be tested only by proceedings to enforce it. Simpson *v.* Jersey City Contracting Co., 47 App. Div. 17, 61 N. Y. Supp. 1033, 30 Civ. Proc. 131, *affirmed* in 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796.

Motion by one not party heard by a judge in chambers. Moffett *v.* Boydstun, 4 Kan. App. 406, 46 Pac. 24.

Finding on Merits.—A decision by the court of a question involved in the main action does not affect the issue in the action. Shawnee, etc., Bank Co. *v.* Miller, 24 Ohio C. C. 198.

Trial of Merits Not Obviated.—If such a procedure were permitted it would permit the practice of taking opinions of the appellate court upon questions of law in advance of the trial at *nisi prius* thus making the higher court a court of original jurisdiction, instead of a court for the correction of errors. S. K. Martin Lumber Co. *v.* Menominee Cir. Judge, 116 Mich. 354, 74 N. W. 649.

Pertinent facts showing origin of transactions may be shown. Hamilton *v.* Johnson, 32 Neb. 730, 49 N. W. 703.

53. U. S.—Seeley *v.* Missouri, etc. R. Co., 39 Fed. 252. **Mont.**—Newell *v.* Whitwell, 16 Mont. 243, 40 Pac. 866. Elling *v.* Kirkpatrick, 6 Mont. 119, 9 Pac. 900. **N. J.**—Anspach *v.* Spring Lake, 58 N. J. L. 136, 32 Atl. 77. **N. Y.** Jones *v.* Hygienic Soap Granulator Co., 110 App. Div. 331, 97 N. Y. Supp. 104; Goodyear *v.* Commercial F. Ins. Co., 58 App. Div. 611, 68 N. Y. Supp. 756; Guarantee Sav. Loan, etc., Co. *v.* Moore, 35 App. Div. 421, 54 N. Y. Supp. 787; Romeo *v.* Garafalo, 25 App. Div. 491, 49 N. Y. Supp. 114, *affirming* 21 Misc. 166, 47 N. Y. Supp. 91; Lowenstein *v.* Salinger, 62 Hun 622, 17 N. Y. Supp. 70; Aspell Wholesale Grocery Co. *v.* Meeker, 54 Misc. 55, 104 N. Y. Supp. 493; Story *v.* Arthur, 35 Misc. 244, 71 N. Y. Supp. 776; Sterns Paper Co. *v.* Johnson, 44 N. Y. St. 916, 18 N. Y. Supp. 490. **N. C.** Knight *v.* Hatfield, 129 N. C. 191, 39 S. E. 807.

54. U. S.—Jenks *v.* Richardson, 71 Fed. 365. **Cal.**—Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741. **Ohio.**—Constable *v.* White, 1 Handy 45.

Sufficiency of Complaint.—On a motion to dissolve an attachment, the sufficiency of the complaint can only be enquired into to determine whether it shows the action to be founded upon contract, express or implied; whether it states facts sufficient to constitute a cause of action against the defendants; and, if facts sufficient are not stated, whether it appears therefrom that it can be so amended as to state a cause of action upon contract. Hale Bros. *v.* Milliken, 142 Cal. 134, 75 Pac. 653; Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741.

"On a motion to vacate an attachment the complaint is not to be tested as on a demurrer, nor is a trial on the merits to be had. Jones *v.* Hygienic Soap Co., 110 App. Div. 331, 97 N. Y. Supp. 104." Ludwig *v.* Pusey & Jones Co., 128 N. Y. Supp. 72. And see Hale Bros. *v.* Milliken, 142 Cal. 134, 75 Pac. 653.

In Goldmark *v.* Magnolia Metal Co., 28 App. Div. 264, 51 N. Y. Supp. 68, the court said: "Upon a motion to vacate an attachment, the sufficiency of the complaint is not to be discussed and treated with the same elaboration as when the question of its sufficiency is presented upon a demurrer. Undoubtedly, it is the duty of the court to examine the pleading with a view to seeing if it is frivolous, or so barren of substantial averments that no reasonable arguments can be urged in its support. But it would add greatly to the labors of the judges at special term if, upon every motion, the sufficiency of a pleading would be brought in question, and should then be disposed of with the same elaboration as upon a demurrer."

debt,[55] or prove that he owed only a part of it,[56] or that the debt was not due,[57] or that the property was exempt from attachment;[58] nor try the title to the property attached;[59] nor the question of excessive levy,[60] nor the rights of mortgagees who are not parties.[61] Under some statutes the question to be determined is whether the defendant has done the things alleged,[62] while under others the question is whether there was good reason to believe that he had done or was about to do the things alleged.[63] In some jurisdictions, however, it is held that while the court cannot inquire into the validity or justice of the cause of action, yet it may inquire into the truthfulness of the grounds of attachment set forth in the affidavit, and, if this inquiry incidentally refers to some of the allegations of the petition, this circumstance does not compel the court or judge to refuse consideration of the motion or suspend the decision until the final trial of the cause.[64]

55. **La.**—Fisher *v.* Taylor, 2 Mart. (O. S.) 113. **Mich.**—Stock *v.* Reynolds, 121 Mich. 356, 80 N. W. 289. **Neb.**—McDonald *v.* Marquardt, 52 Neb. 820, 73 N. W. 288.

56. Omaha Upholstering Co. *v.* Chauvin-Fant Furniture Co., 18 Mont. 468, 45 Pac. 1087.

57. **Mont.**—Omaha Upholstering Co. *v.* Chauvin-Fant Furniture Co., 18 Mont. 468, 45 Pac. 1087. **Neb.**—Olmstead *v.* Rivers, 9 Neb. 234, 2 N. W. 366. **Pa.**—H. B. Claflin Co. *v.* Weiss Bros., 16 Pa. Co. Ct. 247.

58. **Mich.**—Cook *v.* Hitt, 2 Mich N. P. 263. **Minn.**—Davidson *v.* Owens, 5 Minn. 69. **Utah.**—Northwestern Wheel etc., Co. *v.* Salt Lake City Copper Mfg. Co., 11 Utah 404, 40 Pac. 702.

In Idaho the only grounds upon which an attachment can be discharged are that it was improperly or irregularly issued, and on motion to discharge the homestead character of the property cannot be tried. Mason *v.* Lieuallen, 4 Idaho 415, 39 Pac. 1117.

59. **Ala.**—Exchange Nat. Bank *v.* Clement, 109 Ala. 270, 19 So. 814. **Ia.** Rausch *v.* Moore, 48 Iowa 611, 30 Am. Rep. 412. **Neb.**—Mahoney *v.* Salsbury, 83 Neb. 488, 120 N. W. 144, 131 Am. St. Rep. 660; McDonald *v.* Marquardt, 52 Neb. 820, 73 N. W. 288; South Park Imp. Co. *v.* Baker, 51 Neb. 392, 70 N. W. 952. **N. C.**—Foushee *v.* Owen, 122 N. C. 360, 29 S. E. 770. **Ohio.**—Northern Bank *v.* Nash, 1 Handy 153.

60. Fenwick Shipping Co. *v.* Clarke Bros., 133 Ga. 43, 65 S. E. 140; Branshaw *v.* Tinsley, 4 Tex. Civ. App. 131, 23 S. W. 184.

61. McCord, etc., Co. *v.* Krause, 36 Neb. 764, 55 N. W. 215, a chattel mortgage.

"On the hearing of a motion by a defendant to discharge an attachment allowed in an action against him on the ground that he had fraudulently disposed of his property with intent to defraud creditors, the allege fraudulent transaction being the conveyance by mortgage of certain property, the validity of such mortgage is not put in issue and cannot be determined." Landauer *v.* Mack, 43 Neb. 430, 61 N. W. 597.

62. Blanchard *v.* Brown, 42 Mich. 46, 3 N. W. 246.

63. **Florida.**—"The act of Dec. 20, 1859, amending the attachment laws, provides that the applicant shall make oath that the amount of the debt or sum demanded is actually due, and that he has reason to believe that the defendant will fraudulently part with his property before judgment can be recovered against him. Upon a motion to dissolve an attachment issued under this provision, the issue to be tried is not confined within the spirit of the law to facts which had come to the knowledge of the affiant. The object of the law was to give a remedy when there was in fact reason to believe that the defendant would fraudulently part with his property within the time specified." Zinn *v.* Dzialynski, 13 Fla. 597.

64. Bundrem *v.* Denn, 25 Kan. 430. And see **Kan.**—Clark *v.* Montfort, 37 Kan. 756, 15 Pac. 899. **Okla.**—Carnahan *v.* Gustine, 2 Okla. 399, 37 Pac. 594. **S. C.**—Williamson *v.* Eastern L.

c. *Right To Open and Close.* — The party suing out the attachment having the burden of sustaining it is entitled to open and close the argument on the hearing of a motion to vacate.[65]

d. *Burden of Proof.* — Where the plaintiff's affidavit shows *prima facie* a right to an attachment, the attachment will not be set aside until overthrown by opposing affidavits or other evidence of the moving party.[66] If the defendant's affidavit denies positively the existence of the facts alleged in the attachment affidavit, the burden of proof is upon the plaintiff to sustain the attachment by a preponderance of the evidence,[67] and if the plaintiff fails to prove the existence

& B. Assn., 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822.

65. Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943; Jordan *v.* Dewey, 40 Neb. 639, 59 N. W. 88; Olds Wagon Co. *v.* Benedict, 25 Neb. 372, 41 N. W. 254. See generally the title, "Open and Close."

In trials by the court without the assistance of a jury, it is not reversible error to deny the party holding the affirmative leave to open and close the argument, where it is apparent from the record that he has not been prejudiced thereby. Citizens' State Bank *v.* Baird, 42 Neb. 219, 60 N. W. 551.

66. **Ky.**—Powell *v.* Cummins, 7 Ky. L. Rep. 361. **Mich.**—Genesee Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 17 N. W. 790. **N. Y.**—Herman *v.* Bailey, 19 Misc. 709, 43 N. Y. Supp. 1155, *affirmed* in 20 Misc. 94, 45 N. Y. Supp. 88; Owl Cigar Co. *v.* Lidgerwood, 7 Misc. 742, 27 N. Y. Supp. 932, *affirmed* in 11 Misc. 728, 32 N. Y. Supp. 1148; Pach *v.* Orr, 15 Civ. Proc. 176, 1 N. Y. Supp. 760, judgment modified in 112 N. Y. 670, 20 N. E. 415; First Nat. Bank *v.* Bushwick Chem. Wks., 5 N. Y. Supp. 824, judgment *affirmed* in 53 Hun 635, 17 Civ. Proc. 229, 6 N. Y. Supp. 318.

Where an affidavit for an attachment for a fraudulent disposition of property, unexplained, sufficiently establishes the charge that the defendants have removed, secreted, or disposed of their property, out of the ordinary course of trade, a motion to vacate the attachment will be denied when no explanation is given by the defendant. Wickham *v.* Stern, 9 N. Y. Supp. 803.

An attachment was obtained because the defendant had no property liable to execution sufficient to satisfy the claim, and the motion was denied because though the defendant was a witness he did not testify that he had property sufficient to satisfy the claim. Druddy *v.* Heite, 17 Ky. L. Rep. 1182, 33 S. W. 1107.

Where a junior attaching creditor moved to vacate an attachment on the ground that the affidavit of the senior attachment creditor did not show nonresidence of the debtor, it was held that the attachment would not be vacated as the affidavit of the moving party did not show facts sufficient to sustain the allegation on which his attachment was based, that of non-residence of the debtor. Corn Exchange Bank *v.* Marckwald, 28 Civ. Proc. 412, 57 N. Y. Supp. 458.

67. **U. S.**—Strauss *v.* Abrahams, 32 Fed. 310. **D. C.**—Daniels *v.* Solomon, 11 App. Cas. 163. **Ga.**—Kenney *v.* Wallace, 87 Ga. 724, 13 S. E. 744. **Ind.** Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203; Bradley *v.* State Bank, 20 Ind. 528. **Kan.**—Mitchell *v.* Carney, 41 Kan. 139, 21 Pac. 158; Wichita Wholesale Grocer Co. *v.* Records, 40 Kan. 119, 19 Pac. 346; Becker *v.* Langford, 39 Kan. 35, 17 Pac. 648; Conner *v.* Rice County Comrs., 20 Kan. 575; Shedd *v.* McConnell, 18 Kan. 594. **Ky.**—Rapp *v.* Shoemaker, 11 Ky. L. Rep. 401; Hayner *v.* Viley, 8 Ky. L. Rep. 606, 2 S. W. 681; Ackerman *v.* Bohm, 4 Ky. L. Rep. 893. **La.**—Adams *v.* Day, 14 La. 503; Thomas *v.* Dundas, 31 La. Ann. 184. **Mich.**—Gore *v.* Ray, 73 Mich. 385, 41 N. W. 329; Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 17 N. W. 790, 18 N. W. 206; Macumber *v.* Bean, 22 Mich. 395. **Minn.** Schoeneman *v.* Sowle, 102 Minn. 466, 113 N. W. 1061; Jones *v.* Swank, 51 Minn. 285, 53 N. W. 634. **Neb.**—Geneva Nat. Bank *v.* Bailor, 48 Neb. 866, 67 N. W. 865; Jordan *v.* Dewey, 40 Neb. 639, 59 N. W. 88; Dolan *v.* Armstrong, 35 Neb. 339, 53 N. W. 132; Olds Wagon Co. *v.* Benedict, 25 Neb.

of such grounds the motion to dissolve must be granted even if there is no defense to the action on the merits.[68] Thus, the plaintiff has the burden of showing that the defendant has disposed of and secreted his property,[69] or that he has made, or is making, a fraudulent disposition thereof;[70] that he is a non-resident,[71] or is about to remove per-

372, 41 N. W. 254; Steele *v.* Dodd, 14 Neb. 496, 16 N. W. 909; Hilton *v.* Ross, 9 Neb. 406, 2 N. W. 862; George *v.* Ditman Boot, etc., Co. *v.* Graff, 3 Neb. (Unof.) 165, 91 N. W. 188. **N. Y.**—Chambers, etc., Glass Co. *v.* Roberts, 4 App. Div. 20, 38 N. Y. Supp. 301; Rosenzweig *v.* Wood, 30 Misc. 297, 63 N. Y. Supp. 447; O'Reilly *v.* Freel, 37 How. Pr. 272. **N. D.**—Jones *v.* Hoefs, 14 N. D. 232, 103 N. W. 751. **Ohio.**—Seville *v.* Wagner, 46 Ohio St. 52, 18 N. E. 430; Coston *v.* Paige, 9 Ohio St. 397; Shawnee Sav. Bank *v.* Miller, 24 Ohio C. C. 198; Bradley *v.* Wacker, 13 Ohio C. C. 530, 7 Ohio Cir. Dec. 566. **Okla.**—Dunn *v.* Claunch, 13 Okla. 577, 76 Pac. 143; Williams *v.* The Farmers G. & G. Co., 13 Okla. 5, 73 Pac. 269. **Pa.**—Sharpless *v.* Ziegler, 92 Pa. 467; Holland *v.* Atzerodt, 1 Walk. 237; Ferris *v.* Carlton, 8 Phila. 549; Boxes *v.* Coppinger, 2 Yeates 277; Wells *v.* Hogan, 2 Pa. Dist. 98; Lycoming Rubber Co. *v.* Evans, 8 Kulp 35; Terry *v.* Knoll, 3 Kulp 272; Miller *v.* Paine, 2 Kulp 304; Easterline *v.* Jones, 2 Kulp 121; Butcher *v.* Fernean, 1 Kulp 401; Adams *v.* Bailey, 17 W. N. C. 399; Bradley *v.* Harker, 15 W. N. C. 403; Matthews *v.* Dalsheimer, 10 W. N. C. 371; Sutton *v.* McAskie, 1 Chest. Co. 489. *Contra*, Gibson *v.* McLaughlin, 1 Browne 292. **S. C.**—Lipscomb *v.* Rice, 47 S. C. 14, 24 S. E. 925. **S. D.**—Chaffee *v.* Runkel, 11 S. D. 333, 77 N. W. 583; Jones *v.* Meyer, 7 S. D. 152, 63 N. W. 773; Wilcox *v.* Smith, 4 S. D. 125, 55 N. W. 1107; Wyman *v.* Wilmarth, 1 S. D. 172, 46 N. W. 190; Benedict *v.* Ralya, 1 S. D. 167, 46 N. W. 188; Noyes *v.* Lane, 1 S. D. 125, 45 N. W. 327. **Tex.**—Rabb *v.* White (Tex. Civ. App.), 45 S. W. 850. **Utah.**—Deseret Nat. Bank *v.* Little, 13 Utah 265, 44 Pac. 930; Godbe-Pitts Drug Co. *v.* Allen, 8 Utah 117, 29 Pac. 881. **Va.**—Clinch River Mineral Co. *v.* Harrison, 91 Va. 122, 21 S. E. 660; Burruss v. Trant, 88 Va. 980, 14 S. E. 845; Sublett *v.* Wood, 76 Va. 318; Wright *v.* Rambo, 21 Gratt. 158. **Wash.**—Bender *v.* Rinker, 21 Wash. 633, 59 Pac. 503. **Wyo.**—Collins *v.* Stanley, 15 Wyo. 282, 88 Pac. 620, 123 Am. St. Rep. 1022.

68. Jones *v.* Hoefs, 14 N. D. 232, 103 N. W. 751.

Waiver.—Where the defendant, without objection, introduces evidence after denying the attachment affidavit, he waives his legal right to have the attachment dismissed at that time. Dunn *v.* Claunch, 13 Okla. 577, 76 Pac. 143.

Evidence Insufficient To Sustain Burden of Proof.—Nicholson *v.* Erickson, 56 Wash. 419, 105 Pac. 836.

69. Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879.

70. **U. S.**—Strauss *v.* Abrahams, 32 Fed. 310. **Kan.**—Champion Mach Co. *v.* Updyke, 48 Kan. 404, 29 Pac. 573; McPike *v.* Atwell, 34 Kan. 142, 8 Pac. 118. **Ky.**—Talbot *v.* Pierce, 14 B. Mon. 195. **Mich.**—Rickel *v.* Strellinger, 102 Mich. 41, 60 N. W. 307; Iroseo County Sav. Bank *v.* Barnes, 100 Mich. 1, 58 N. W. 606; Powers *v.* O'Brien, 44 Mich. 317. **Minn.**—Schoeneman *v.* Sowle, 102 Minn. 466, 113 N. W. 1061. **Mo.**—Noyes *v.* Cunningham, 51 Mo. App. 194. **Neb.**—Grimes *v.* Farrington, 19 Neb. 44, 26 N. W. 618; Steele *v.* Dodd, 14 Neb. 496, 16 N. W. 909; Fallon *v.* Ellison, 3 Neb. 63. **N. Y.** Durkin *v.* Paten, 97 App. Div. 139, 89 N. Y. Supp. 622; J. H. Mohlman Co. *v.* Landwehr, 87 App. Div. 83, 83 N. Y. Supp. 1073. **Ohio.**—Morton *v.* Sterrett, 3 Ohio Dec. (Reprint) 173. **Okla.**—Williams *v.* Farmers' Gin, etc. Co., 13 Okla. 5, 73 Pac. 269. **Pa.**—Flagg *v.* Mitchell, 19 Pa. Co. Ct. 32, 5 Pa. Dist. 774; Netter *v.* Harding, 18 Pa. Co. Ct. 353, 6 Pa. Dist. 169. **S. D.**—German Bank *v.* Folds, 9 S. D. 295, 68 N. W. 747; Park *v.* Armstrong, 9 S. D. 269, 68 N. W. 739; Trebilcock *v.* Big Missouri Min. Co., 9 S. D. 206, 68 N. W. 330. **Wash.**—Nicholson *v.* Erickson, 56 Wash. 419, 105 Pac. 836.

Circumstances Creating Strong Suspicion.—Durkin *v.* Paten, 97 App. Div. 139, 87 N. Y. Supp. 622.

71. **Ark.**—Krone *v.* Cooper, 43 Ark. 547. **Ind.**—McGuirk *v.* Cummins, 54 Ind. 246. **N. Y.**—Irwin *v.* Raymond, 58 Misc. 319, 110 N. Y. Supp. 1100.

manently from the state;[72] that he is about to remove his property from the state,[73] or that there was fraud in contracting or incurring the liability.[74] A mere reiteration of the general statement in his original affidavit in the language of the statute, or a statement of mere opinion or belief is not sufficient.[75] Where there is no substantial conflict between the plaintiff's affidavit and the affidavit of the defendant supporting the motion, the attachment should be sustained;[76] and so also where the affidavit of the defendant is fully answered by the affidavits produced on behalf of the plaintiff.[77] But if the plaintiff offers no further evidence to overcome a positive denial of the allegtions of his affidavit by the defendant, the attachment should be vacated.[78]

72. Tyler *v.* Bowen, 124 Iowa 452, 100 N. W. 505; Sowers *v.* Leiby, 4 Pa. Co. Ct. 223.

73. Wrompelmeir *v.* Moses, 3 Baxt. (Tenn.) 467.

74. Kan.—Champion Mach Co. *v.* Updyke, 48 Kan. 404, 29 Pac. 573. Mich.—Genesee County Sav. Bank *v.* Michigan Co., 52 Mich. 164, 438, 17 N. W. 790, 18 N. W. 206. Mo.—Third Nat. Bank *v.* Cramer, 78 Mo. App. 475. Neb.—Malcom Sav. Bank *v.* Cronin, 80 Neb. 231, 116 N. W. 150, *affirmed*, on rehearing, 80 Neb. 228, 114 N. W. 158; Fallon *v.* Ellison, 3 Neb. 63. Pa.—Hall *v.* Kintz, 13 Pa. Co. Ct. 24, 2 Pa. Dist. 615; Butcher *v.* Fernan, 1 Kulp 401. S. D.—Wyman *v.* Wilmarth, 1 S. D. 172, 46 N. W. 190.

Fraud is never presumed, and the burden of proof rests on the party asserting its existence. Mich.—Brace *v.* Burden, 104 Mich. 356, 62 N. W. 568. Mo.—Third Nat. Bank *v.* Cramer, 78 Mo. App. 476. N. J.—Kipp *v.* Salyer, 64 N. J. L. 160, 44 Atl. 843. Okla.—Kemper, etc. Dry Goods Co. *v.* Fischel, 4 Okla. 250, 44 Pac. 205. Pa.—Butcher *v.* Fernan, 1 Kulp 401. See also the title "Fraud."

But plaintiff's counter affidavits clearly showing fraud are not overcome by general denials in the defendant's affidavit. Rosenberg *v.* Burnstein, 60 Minn. 18, 61 N. W. 684.

Fraud Not Inferred From Mere Breach of Contract.—Powers *v.* O'Brien, 44 Mich. 317, 6 N. W. 679.

If the circumstances are consistent with innocence, courts will not ascribe fraud. Abraham *v.* Strauss, 32 Fed. 310; Grosvenor *v.* Sickle, 47 Hun 634, 2 N. Y. Supp. 40.

When it is a crime to dispose of property with intent to defraud creditors, in a suit on an attachment upon that ground, "when the evidence is capable of an interpretation which makes it as consistent with the innocence of the accused party as with his guilt, the meaning must be ascribed to it which accords with his innocence rather than which imputes to him a criminal intent." Stringfield *v.* Fields, 7 Civ. Proc. (N. Y.) 356, 13 Daly 171.

The fact that a load of wool came from a factory of a woolen company, engaged solely in the manufacture of wool into cloth and not in the sale of unmanufactured wool, and was delivered to an express company to be shipped away, is not inconsistent with an entire honesty of purpose. Central Nat. Bank *v.* Ft. Ann. Woolen Co., 24 N. Y. Supp. 640, *affirmed* in 76 Hun 610, 27 N. Y. Supp. 1114, 143 N. Y. 624, 37 N. E. 827.

75. Jones *v.* Swank, 51 Minn. 285, 53 N. W. 634.

76. Newell *v.* Whitewell, 16 Mont. 243, 40 Pac. 866.

77. Cahen *v.* Mahoney (Cal.), 12 Pac. 300.

"Where the allegations of plaintiff's affidavits dispute the affidavits furnished on the part of the defendant, and the papers upon which the attachment was granted are sufficient, and the evidence of plaintiff is fairly preponderating, the attachment should be upheld." Walton *v.* Chadwick, 6 Misc. 293, 26 N. Y. Supp. 789. And see Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

78. Gaulbert *v.* Atwater, 2 W. N. C. (Pa.) 644.

When an affidavit upon which an attachment has been issued states that the payment of the sum claimed "has not been secured by any mortgage or lien upon real or personal property," and counter affidavit filed in support

And if the plaintiff's affidavit states a general conclusion and defendant's affidavit contains a statement of specific facts in denial which the plaintiff fails to contradict, the defendant's affidavit must be taken as establishing the truth of what it contains.[79]

While the rules of evidence will not permit the uncontradicted testimony of a witness whose credibility is unimpeached, and unaffected by inherent improbability, to be disregarded, the judge or jury may refuse to credit the affidavit of a witness who is a party in interest, though it be wholly uncontradicted, and his credibility not otherwise impeached.[80] Positive statements override allegations made upon information and belief.[81]

Irregularity in the Proceedings. — If the defendant alleges irregularity in granting the attachment he is bound to prove the fact of such irregularity, as irregularity in the proceedings of courts or their officers will not be presumed.[82]

e. *Nature of the Evidence.* — The usual custom is to hear the motion upon affidavits,[83] or depositions which answer the statutory defi-

of a motion to discharge the writ states facts showing that the note was originally secured, the attachment will be discharged when no supplemental affidavit has been filed by the plaintiff. Gessner *v.* Palmateer, 89 Cal. 89, 26 Pac. 789, 24 Pac. 608, 13 L. R. A. 187.

In Maryland.—Lambden *v.* Bowie, 2 Md. 334, holding some further proof necessary on the part of the defendant.

In New Jersey a rule to show cause may be obtained on the defendant's affidavit. Phillipsburgh Bank *v.* Lackawanna R. Co., 27 N. J. L. 206; Shadduck *v.* Marsh, 21 N. J. L. 434. And see Anspach *v.* Spring Lake, 58 N. J. L. 136, 32 Atl. 77.

79. Barbieri *v.* Ramelli, 84 Cal. 174, 24 Pac. 113.

Where the deposition of the plaintiff taken at the instance of the defendant contradicted his affidavit in many ways and the defendant's affidavit fully denied the plaintiff's affidavit it was held that the motion to set aside the attachment should be allowed. Green *v.* Embry, 18 Kan. 320.

When a motion to discharge an attachment is supported and opposed by affidavits on both sides, and in the affidavits filed in support of the attachment there is absolutely no evidence to support, or that tends remotely to support, the truth of any of the alleged causes for attachment, it will be discharged. Chappell *v.* Comins, 44 Kan. 743, 25 Pac. 216.

80. Dietlin *v.* Eagan, 22 Civ. Proc. 398, 19 N. Y. Supp. 392.

81. Wessels *v.* Boettcher, 142 N. Y. 212, 36 N. E. 883.

82. Cureton *v.* Dargan, 12 S. C. 122.

83. **D. C.**—Barbour *v.* Page Hotel Co., 2 App. Cas. 174. **Kan.**—Tyler *v.* Safford, 24 Kan. 580; Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292. **Minn.**—Jones *v.* Swank, 51 Minn. 285, 53 N. W. 634. **Mont.**—Newell *v.* Whitwell, 16 Mont. 243, 40 Pac. 866. **N. J.**—*Contra*, State *v.* Quick, 45 N. J. L. 308. **N. Y.**—Houghton *v.* Ault, 16 How. Pr. 77; Furman *v.* Walter, 13 How. Pr. 348; Bank of Commerce *v.* Rutland, etc. R. Co., 10 How. Pr. 1. **N. C.**—Hale *v.* Richardson, 89 N. C. 62. **Wash.**—Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

A statutory provision that "either party may take proof by deposition, to be read on the trial of the attachment, or by the permission of the court the witnesses may be orally examined in court," does not authorize the use of affidavits as evidence on the trial of a motion to discharge an attachment. Newton *v.* West, 3 Met. (Ky.) 24.

Affidavits Used in Other Cases.—Hallock *v.* Van Camp, 55 Hun 1, 8 N. Y. Supp. 588.

Affidavits were properly received in support of the attachment which consisted in part of copies of affidavits, and extracts from others, made and filed in another action against the same defendants brought by others, where there was inability to obtain af-

nition of affidavits,[84] but the court may call witnesses[85] and have them examined and cross-examined orally in its presence.[86]

The affidavit used to obtain attachment is not conclusive of the truth of the allegations therein made;[87] but if the motion to set aside the attachment is made upon the original papers, the averments contained in the affidavits and papers upon which the attachment was issued must be liberally construed in favor of the plaintiff and every legitimate inference from the facts shown must be drawn in his

fidavits in this action from persons whose affidavits were made in the other suit, and the copies and extracts were made under the restraints of oaths administered for that purpose. Whitney *v.* Hirsch, 39 Hun (N. Y.) 325.

Should File Affidavits Within Reasonable Time.—"Where the grounds for issuing of an attachment are alleged in the language of the statute, and the defendant denies by affidavit the truth of the averments made to obtain such attachment, and moves to dissolve the same, the court before whom the proceeding is pending should, by an order, require the plaintiff in attachment, within a reasonable, fixed time, to file such affidavits or other evidence as he desires or relies upon to sustain the averments made by him to obtain the issuing of the attachment writ; and the defendant, in a reasonable, fixed time thereafter, to file such affidavits or other evidence as he desires or relies upon to traverse, explain, or avoid the case made by the plaintiff's evidence; and the plaintiff, in a reasonable, fixed time thereafter, to file such affidavits or other evidence as is applicable in rebuttal." Jordan *v.* Dewey, 40 Neb. 639, 59 N. W. 88.

For rules as to the admissibility and sufficiency of evidence, see the title "Attachment," 2 ENCYCLOPÆDIA OF EVIDENCE.

84. Hanna *v.* Barrett, 39 Kan. 446, 18 Pac. 497; Netler *v.* Hosch, 1 Pa. Co. Ct. 452.

Deposition of Creditors.—Gibson *v.* McLaughlin, 1 Browne (Pa.) 292.

Depositions Taken on Notice Admissible as Affidavits.—Talbot *v.* Pierce, 14 B. Mon. (Ky.) 195.

85. Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292; Hale *v.* Richardson, 89 N. C. 62.

Evidence in Discretion of Court.—Kountze *v.* Scott, 52 Neb. 460, 72 N. W. 585; Dittman Boot, etc. Co. *v.* Graff, 3 Neb. (Unof.) 165, 91 N. W. 188. And see Campbell *v.* Morris, 3 H. & McH. (Md.) 535.

Oral Testimony Required on Request of Either Party.—Robinson *v.* Morrison, 2 App. Cas. (D. C.) 129.

Kentucky.—Where an attachment issues upon a proceeding by ordinary petition, the defendant may examine the party upon whose affidavit the attachment was issued, on motion to quash the attachment, and he may be further examined by plaintiff (Code of Prac. sec. 570), and where the examination has been by both parties no objection is available for want of notice. Talbot *v.* Pierce, 14 B. Mon. (Ky.) 158.

86. Tyler *v.* Safford, 24 Kan. 580; Schwartz *v.* Atkin, 12 Pa. Co. Ct. 373. See the title "Depositions."

Right To Cross-Examine Parties.—Under a statute, which provided "that a provisional remedy is granted upon an affidavit, and a motion is made to discharge it, the party against whom it is granted may require the production of the affiant for cross-examination, and if the affiant is not produced his affidavit shall be suppressed, and, if produced he may be examine by either party," it was held that it is only where the affidavit might be used as evidence that it can be suppressed; and that if an attachment be issued on an affidavit, and the grounds of attachment be controverted, the affidavit cannot be used as evidence, and should not be suppressed because of plaintiff's failure to produce affiant for cross-examination. Churchill *v.* Hill, 59 Ark. 54, 26 S. W. 378.

One Mode of Proof Excludes the Other. Hansen *v.* Doherty, 1 Wash. 461, 25 Pac. 297.

87. **Cal.**—Sparks *v.* Bell, 137 Cal. 415, 70 Pac. 281. **Ind.**—Waring *v.* Fletcher 152 Ind. 620, 52 N. E. 203. **La.**—Gordon *v.* Paillio, 13 La. Ann. 473. **Mich.**—Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886. **N. J.**—Shadduck *v.* Marsh, 21 N. J. L. 434; Brundred *v.*

favor,[88] and if they establish a *prima facie* case sufficient to support the warrant, in the absence of any satisfactory answer or explanation, it should not be set aside.[89] In such a case no further or additional affidavits can be used by the plaintiff in support of the attachment;[90]

Del Moyo, 20 N. J. L. 328; Branson *v.* Shinn, 13 N. J. L. 250. **N. C.**—Hale *v.* Richardson, 89 N. C. 62. **Pa.**—Boyes *v.* Coppinger, 2 Yeates 277.

Prima Facie Proof.—Walker *v.* Barrelli, 32 La. Ann. 467.

88. **N. Y.**—Coakley *v.* Rickard, 136 App. Div. 489, 121 N.Y. Supp. 280; Brandley *v.* American Butter Co., 130 App. Div. 410, 114 N. Y. Supp. 896, *reversing* 60 Misc. 547, 112 N. Y. Supp. 1030; Stewart *v.* Lyman, 62 App. Div. 182, 70 N. Y. Supp. 936; Everitt *v.* Park, 88 Hun 368, 34 N. Y. Supp. 827, 2 Ann. Cas. 205; Leiser *v.* Rosman, 57 Hun 580, 10 N. Y. Supp. 415; Reedy Elev. Co. *v.* American Grocery Co., 24 Misc. 678, 53 N. Y. Supp. 989, *reversing* 23 Misc. 520, 51 N. Y. Supp. 874, and *affirming* 48 N. Y. Supp. 619; Wickham *v.* Stern, 18 Civ. Proc. 63, 9 N. Y. Supp. 803; Ross *v.* Wigg, 6 Civ. Proc. 263; Rothschild *v.* Mooney, 13 N. Y. Supp. 125, 36 N. Y. St. 565; Jaffray *v.* Nast, 10 N. Y. Supp. 280, 32 N. Y. St. 250. **Okla.**—Dunn *v.* Claunch, 13 Okla. 577, 76 Pac. 143. **Tex.**—Norvell-Shapleigh Hdw. Co. *v.* Hall Novelty, etc. Wks. (Tex. Civ. App.), 91 S. W. 1092.

89. Coakley *v.* Rickard, 136 App. Div. 489, 121 N. Y. Supp. 280; Leiser *v.* Rosman, 57 Hun 586, 10 N. Y. Supp. 415; Rothschild *v.* Mooney, 13 N. Y. Supp. 125, 36 N. Y. St. 565; Ross *v.* Wigg, 6 Civ. Proc. (N. Y.) 263.

90. Steuben County Bank v. Alberger, 75 N. Y. 179, *reversing* 14 Hun 379 (a leading case); Fox *v.* Mays, 46 App. Div. 1, 61 N. Y. Supp. 295; Ladenburg v. Commercial Bank, 87 Hun 269, 33 N. Y. Supp. 821; Lewisohn *v.* Kent, etc. Co., 87 Hun 257, 33 N. Y. Supp. 826; Head *v.* Wollner, 53 Hun 615, 6 N. Y. Supp. 916; Buhl v. Ball, 41 Hun 61; Smith *v.* Arnold, 33 Hun 484; Acker *v.* Saynisch, 25 Misc. 415, 54 N. Y. Supp. 937, *affirmed*, in 26 Misc. 836, 56 N. Y. Supp. 1025; Nevada Bank *v.* Cregan, 17 Misc. 241, 40 N. Y. Supp. 1065; Thames, etc. Ins. Co. *v.* Dimmick, 22 N. Y. Supp. 1096; Appleton *v.* Speer, 57 Super. Ct. 119, 6 N. Y. Supp. 511; Pach *v.* Orr, 15 Civ. Proc. 176, 1 N. Y. Supp. 760; Trow's Printing, etc. Co. *v.* Hart, 60 How. Pr. 190; Hill *v.* Bond, 22 How. Pr. 272; Sutherland *v.* Brodner, 11 How. Pr. (N. S.) 188; Rowles *v.* Hoare, 61 Barb. 266; Genin *v.* Tompkins, 12 Barb. 265; Brewer *v.* Tucker, 13 Abb. Pr. 76; Gilbert *v.* Tompkins, 2 Edm. Sel. Cas. 232; Cammann *v.* Tompkins, 2 Edm. Sel. Cas. 227; Richter *v.* Wise, 6 Thomp. & C. 70; Myers *v.* Whiteheart, 24 S. C. 196.

Change in relation of parties may be shown. Pach *v.* Orr, 15 Civ. Proc. 176, 1 N. Y. Supp. 760, *following* Dickinson *v.* Benham, 12 Abb. Pr. (N. Y.) 158.

To Identify Affidavits.—Hallock *v.* Van Camp, 8 N. Y. Supp. 588.

In Steuben County Bank *v.* Alberger, 75 N. Y. 179, 184, "the claim is that the lienor, having made an affidavit showing the existence of her lien, which was attached to the motion papers, and referred to in the notice of motion, the motion was one 'founded upon proof, by affidavit, on the part of the defendant,' and entitled the plaintiff to support the attachment by new affidavits. We are of opinion that this did not make the motion one 'founded upon proofs, by affidavit, on the part of the defendant,' within the meaning of the section. Such a construction would make it impossible for a lienor to move, on the papers on which the warrant was granted, under the first clause of the section. The affidavit was made to show the right to move of the party making the motion, and to give her a standing in court. The fact proved was wholly extrinsic to the merits of the controversy."

Filing new affidavit nunc pro tunc does not avoid the rule. Buel *v.* Van Camp, 53 Hun 631, 6 N. Y. Supp. 365; Sutherland *v.* Bradner, 1 How. Pr. N. S. (N. Y.) 188, 34 Hun 519, 7 Civ. Proc. 90.

Use of Affidavit for Rule To Show Cause.—Brewer *v.* Tucker, 13 Abb. Pr. (N. Y.) 76.

Challenging Lien of Intervener.—The rule forbidding the introduction of additional affidavits when the motion is made on the original papers does not preclude the plaintiff "from showing that the party making the motion has no such standing as per-

although if the original affidavit is in fact sufficient the reading of new affidavits is not a substantial error.[91]

The plaintiff cannot be permitted to offer evidence to sustain his attachment, upon other and different grounds from those upon which he first predicated his right to it.[92]

Motion on New Papers.— If the application is made upon new papers the plaintiff upon the hearing may oppose the same by affidavits,[93]

mits him to question the sufficiency of the papers on which the attachment was issued." V. G. Pfluke Co. *v.* Papulias, 42 Misc. 18, 85 N. Y. Supp. 543.

In Pennsylvania supplemental affidavits are not allowed at any time. Eldridge *v.* Robinson, 4 Serg. & R. 548; Blair *v.* D. M. Osborne, 17 Pa. Co. Ct. 545, Talheim *v.* Hoover, 4 Pa. Co. Ct. 545, 5 Pa. Dist. 278; Talheim *v.* Hoover, 4 Pa. Co. Ct. 172. *Contra,* Ferris *v.* Carlton, 8 Phila. 549.

91. Haebler *v.* Bernharth, 58 Super. Ct. 165, 9 N. Y. Supp. 725.

92. **La.**—First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25. **N. Y.**—Acker *v.* Saynisch, 25 Misc. 415, 54 N. Y. Supp. 937, *affirmed* in 26 Misc. 836, 56 N. Y. Supp. 1025; New York, etc., Bank *v.* Codd, 11 How. Pr. 221; Lawson *v.* Lawson, 12 Civ. Proc. 437. **S. C.**—Myers *v.* Whiteheart, 24 S. C. 196.

Not Cured by Subsequent Events.— First Nat. Bank. *v.* Moss, 41 La. Ann. 227, 6 So. 25.

Compare Gwalter *v.* New York Seal Plusk, etc. Co., 64 Hun 635, 22 Civ. Proc. 214, 19 N. Y. Supp. 49, wherein it appeared that the attachment was secured on affidavits disclosing a cause of action for goods sold and delivered to a foreign corporation, and that the defendant moved for a dissolution of the attachment on the ground that the goods were sold on a credit which had not expired at the commencement of the action. The plaintiff was allowed to meet the defendant's affidavit by affidavits showing fraud in the original sale.

93. **Kan.**—Johnson *v.* Laughlin, 7 Kan. 359. **Ky.**—Talbot *v.* Pierce, 14 B. Mon. 195. **La.**—First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25. **Minn.**—Nelson *v.* Munch, 23 Minn. 299. **N. Y.** Pedersen Mfg. Co. *v.* Water Automobile Co., 124 App. Div. 321, 108 N. Y. Supp. 886; Heilbronn *v.* Herzog, 17 App. Div. 416, 45 N. Y. Supp. 268; Hamerschlag *v.* Cathoscope Elec. Co., 16 App. Div. 185, 44 N. Y. Supp. 668; Chambers, etc. Glass Co. *v.* Roberts, 4 App. Div. 20, 38 N. Y. Supp. 301; Acker *v.* Saynisch, 25 Misc. 415, 54 N. Y. Supp. 937, *affirmed* in 26 Misc. 836, 56 N. Y. Supp. 1025; Herman *v.* Bailey, 20 Misc. 94, 45 N. Y. Supp. 88, *affirming* 19 Misc. 709, 43 N. Y. Supp. 1155; Pach *v.* Orr, 15 Civ. Proc. 176, 1 N. Y. Supp. 760; Coffin *v.* Stitt, 5 Civ. Proc. 261; Rowles *v.* Hoare, 61 Barb. 266; Genin *v.* Tompkins, 12 Barb. 265; Brewer *v.* Tucker, 13 Abb. Pr. 76; Houghton *v.* Ault, 8 Abb. Pr. 89, 16 How. Pr. 77; Hill *v.* Bond, 22 How. Pr. 272; Furman *v.* Walter, 13 How. Pr. 348; New York, etc. Bank *v.* Codd, 11 How. Pr. 221; Gilbert *v.* Tompkins, 2 Edm. Sel. Cas. 232; Cammann *v.* Tompkins, 2 Edm. Sel Cas. 227; St. Amant *v.* DeBeixcedon, 3 Sandf. 703. **N. C.**—Hale *v.* Richardson, 89 N. C. 62. **S. C.**—*Ex parte* Chase, 62 S. C. 353, 38 S. E. 718; Myers *v.* Whiteheart, 24 S. C. 196. **S. D.**—Pierce *v.* Berg, 7 S. D. 578, 64 N. W. 1130. **Wash.**—Windt *v.* Baniza, 2 Wash. 147, 26 Pac. 189.

If the matters relied upon to dissolve the attachment do not appear upon the face of the record, it is in fact necessary for the moving party to introduce evidence of those facts or his motion will be denied. Goldman *v.* Floter, 142 Cal. 388, 76 Pac. 58; Henderson *v.* Travis, 6 La. Ann. 174.

Failure To Contradict.—If the affidavit of plaintiff states a general conclusion which is sufficient to justify the issuance of the writ, but the affidavit of defendant contains a statement of specific facts, which, if true, show that there is no ground for the attachment, and the plaintiff fails to contradict these statements or to state any other facts, the defendant's affidavit must be taken as establishing the truth of what it contains and the attachment must be dissolved. Barbieri *v.* Ramelli, 84 Cal. 174, 24 Pac. 113.

Motion on Affidavits and Judgment.

or oral testimony,[94] as is provided by statute in some states.

Rebutting Affidavits by Defendant. — In the exercise of a sound discretion the court may permit the defendant to read affidavits rebutting the affidavits of the plaintiff read upon such hearing.[95]

Waiver. — Where the attachment debtor does not object to the reading of affidavits by the plaintiff upon the trial of the motion, he cannot raise the objection for the first time on appeal.[96]

Continuance. — The court may, upon proper showing, grant a continuance in order to allow either party to bring in additional evidence.[97]

f. *The Judgment.*[98] — The order should follow the motion,[99] and should recite the papers upon which the motion was made,[1] unless the papers submitted were improper,[2] and should state whether the discharge applies to the whole of the property attached, or to party only; and, if so, to what part.[3] But it need not contain directions as to the manner of the redelivery of the property unless they are called for by special circumstances.[4] If the statute allows amendment to cor-

If the motion is made after judgment upon affidavits and judgment and the defendant does not limit the purposes for which the judgment may be used, the facts recited in the judgment are available to the plaintiff in support of the attachment. Belmont *v.* Liqua Iron Co., 80 App. Div. 537, 80 N. Y. Supp. 771.

Affidavits on Unimportant Points. — The right of the plaintiff to introduce new proof does not depend upon the directness or force of the defendant's proof. If it is proof at all, the new proofs are admissible. Godfrey *v.* Godfrey, 75 N. Y. 434.

94. **N. C.**—Hale *v.* Richardson, 89 N. C. 62. **S. C.**—Myers *v.* Whiteheart, 24 S. C. 196. **Wash.**—Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

Denial on Information and Belief. A verified motion on information and belief is not sufficient against a positive affidavit of the plaintiff, and, therefore, the plaintiff cannot offer additional affidavits or parol evidence, and consequently the defendant cannot offer additional parol evidence. Barnhart *v.* Foley, 11 Utah 191, 39 Pac. 823.

95. Nelson *v.* Munch, 23 Minn. 229. See Carson *v.* Getchell, 23 Minn. 571.

96. Godfrey *v.* Godfrey, 75 N. Y. 434; Chambers, etc., Glass Co. *v.* Roberts, 4 App. Div. 20, 38 N. Y. Supp. 301; Kibbie *v.* Wetmore, 31 Hun (N. Y.) 424; Pach *v.* Orr, 15 Civ. Proc. 176, 1 N. Y. Supp. 760.

97. Snelling & Co. *v.* Bryce, 41 Ga. 513; Hanna *v.* Barrett, 39 Kan. 446, 18 Pac. 497. See the title "Continuances."

98. See the title "Judgment."

99. Watson *v.* Paschall, 73 S. C. 412, 53 S. E. 646.

The question of reasonable cause for suing out the attachment need not be noted in the order of dissolution. Hendelman *v.* Kahan, 48 Wash. 549, 93 Pac. 1074.

1. American Audit Co. *v.* Industrial Federation, 87 App. Div. 275, 84 N. Y. Supp. 369.

2. Ferguson *v.* Commonwealth Rubber Co., 4 App. Div. 611, 38 N. Y. Supp. 375.

3. Ellsworth *v.* Scott, 3 Abb. N. C. (N. Y.) 9.

Where the order on the motion to dissolve the attachment sustained the motion in full, but the reasons given for sustaining it related only to part of the property, it was held that the whole attachment was dissolved by the order despite the reasons assigned. Theo. Ascher Co. *v.* Jack, 134 Mo. App. 511, 114 S. W. 1111.

May Dissolve as to Part of Debt Not Due.—Danforth *v.* Carter, 1 Iowa 546.

4. Ellsworth *v.* Scott, 3 Abb. N. C. (N. Y.) 9.

On an application by an execution creditor for vacating an attachment the order should not provide for a delivery of the property by the sheriff but merely for vacating the attachment as the sheriff is to keep the property and sell it under the execution.

rect defects in the proceedings upon which the motion is based, the order should allow the plaintiff a designated time to amend.[5] Two writs levied upon the same property in the same cause, and in force at the same time, are in effect but one attachment, and may be dissolved by one order.[6] An order sustaining or dissolving an attachment should be filed with the clerk of the court, to become, with the motion, a part of the record.[7]

Conditions. — If apparent ground existed for the attachment, the judgment vacating it may be upon condition that no action be brought on the undertaking,[8] but, without warrant in the statute, it cannot stipulate that the defendant appear or accept service of summons as a condition to discharge of the attachment,[9] or for the payment of the sheriff's fees in the attachment.[10]

Conclusiveness. — A judgment granting or refusing an order discharging the attachment determines the right to the lien on the grounds set out,[11] but this rule of *res judicata* does not apply to new facts set out in a subsequent affidavit.[12] As a general rule the doctrine of *res judicata* is not applicable to orders made on motion,[13]

Union Distilling Co. *v.* Union Pharmaceutical Co., 56 Super. Ct. 417, 6 N. Y. Supp. 539.

5. Graves *v.* Cole, 1 Greene (Iowa) 405; Wells *v.* Danford, 28 Kan. 487.

6. Pennsylvania Mtg. Invest. Co. *v.* Gilbert, 18 Wash. 667, 52 Pac. 246.

7. Gillespie *v.* Lovell, 7 Kan. 419.

Costs Taxed Upon Attaching Creditor.—Union Distilling Co. *v.* Union Pharmaceutical Co., 56 Super. Ct. 417, 6 N. Y. Supp. 539.

8. Nyack, etc., Gaslight Co. *v.* Tappan Zee Hotel Co., 53 Hun 633, memo., 6 N. Y. Supp. 113.

Plaintiff having in good faith brought his attachment, being misled by expressions of defendant, must not be harrassed with costs upon a motion to dissolve the attachment. Quay *v.* Robbins, 1 W. N. C. (Pa.) 154.

9. Burns *v.* Bowers, 3 W. N. C. (Pa.) 64.

10. Union Distilling Co. *v.* Union Pharmaceutical Co., 56 Super. Ct. 417, 6 N. Y. Supp. 539.

11. **Mich.**—Gray *v.* York, 44 Mich. 415, 6 N. W. 874. **Ohio.**—Strauss *v.* Cooch, 47 Ohio St. 115, 24 N. E. 1071. **Pa.**—Com. *v.* Sisler, 196 Pa. 147, 46 Atl. 420; Slingluff *v.* Sisler, 196 Pa. 121, 46 Atl. 419. And so the question cannot be reviewed by a jury either on the trial of the issue in the main action or in a separate proceeding. Walls *v.* Campbell, 125 Pa. 346, 17 Atl. 422.

Conclusive on Collateral Proceedings.—Com. *v.* Burns, 14 Pa. Super. 248.

Right of Voluntary Transferee After Attachment.—One who by voluntary transfer acquires rights in personal property after a writ of attachment has been levied thereon is bound by an adjudication in the attachment case of the validity of such attachment. Nagle *v.* First Nat. Bank, 57 Neb. 552, 77 N. W. 1074.

12. Bingham *v.* Keylor, 25 Wash. 156, 64 Pac. 942.

13. Brinkman Co. Bank *v.* Gustin, 63 Kan. 758, 66 Pac. 990; Bank of Santa Fe *v.* Haskell County Bank, 59 Kan. 354, 53 Pac. 132; Blair *v.* Anderson, 58 Kan. 97, 48 Pac. 562, 62 Am. St. Rep. 606; Miami County Nat. Bank *v.* Barkalow, 53 Kan. 68, 35 Pac. 796.

Not Res Judicata as to Persons Not Parties. — Compton *v.* Schwabacher Bros. & Co., 15 Wash. 306, 46 Pac. 338.

Reason for Rule.—In Stapleton *v.* Orr, 43 Kan. 170, 23 Pac. 109, Holt, J., in giving the reason for this rule, said: "In actions of this nature it is conceded that the evidence would be substantially the same, so far as the allegations of fraud are concerned, on a motion to dissolve and vacate an attachment, as it would be on the trial of the action upon its merits; yet the manner of introducing the evidence might be different, and the trial upon the motion unlike the one upon the pleadings. On a motion to vacate an attachment affidavits are ad-

especially where the order is made by a judge at chambers[14] upon an *ex parte* hearing.[15] And it has been pointed out "that the rule to be applied in the determination of the question as to whether a decision made upon motion shall or shall not be held an adjudication of the question passed upon depends more upon the substance and condition of the decision than upon the form of the proceeding."[16]

g. *Rehearing.* — The court has power to grant a rehearing upon a motion to dissolve an attachment and to rescind the order of dissolution previously made.[17] It should not be allowed to bring to the attention of the court facts newly arisen which tend to establish the applicant's contention.[18]

F. Plea or Answer.[19] — **1. Nature of the Procedure.** — In some jurisdictions the proper method of procedure to obtain a dissolution of the attachment is by a plea in abatement, or a plea in the nature of a plea in abatement, or a traverse of the plaintiff's affidavit in the answer.[20] A plea so traversing the allegations of the affidavit is a

missible—very often the only evidence admitted. In this case, however, the evidence was given orally in court. Upon the trial of an action upon the issues joined, it may be by the court alone or by the court and a jury, as to all the issues of fact or certain questions of fact submitted to them by the court, or as in this case, all the issues of law and fact may be submitted to a referee. If an order dissolving an attachment should be the final determination of the case, then the plaintiffs would be deprived of a trial in the due and regular way. They could not have their evidence submitted to a jury or referee; it would be disposing of the cause in a collateral and summary manner, as the proceedings in attachment are simply auxiliary to the action itself."

Status of Property.—Johnson *v.* Bartek, 56 Neb. 422, 76 N. W. 878, as to exemption. And see Quigley *v.* McEvony, 41 Neb. 73, 59 N. W. 767.

14. Dunlap *v.* Dillard, 77 Va. 847.

Order Made After Release Filed. An order made by a judge at chambers discharging an attachment levied by one assuming to act as an officer, but not qualified to make such levy, which order is made after the plaintiff has filed a release of the attachment, and in the absence of counsel for plaintiff, without contest, is not an adjudication against the right of the plaintiff to cause the property to be seized under a subsequent order of attachment, based upon the original affidavit filed at the commencement of the action. Brinkman Co. Bank *v.* Gustin, 63 Kan. 758, 66 Pac. 990.

15. Brinkman Co. Bank *v.* Gustin, 633 Kan. 758, 66 Pac. 990.

16. Brinkman Co. Bank *v.* Gustin, 63 Kan. 758, 66 Pac. 990.

17. **Kan.**—Guernsey *v.* First Nat. Bank, 63 Kan. 203, 65 Pac. 250. **N. Y.** Webb *v.* Groom, 6 Robt. 532. **Tex.**—Woldert *v.* Nedderhut Pack., etc. Co., 18 Tex. Civ. App. 602, 46 S. W. 378.

Rehearing on Showing of Perjury and Fraud.—Guernsey *v.* First Nat. Bank, 63 Kan. 203, 65 Pac. 250.

Special Findings.—Where an attachment had previously been dissolved upon a full hearing of the merits, there existed no requirement that upon request, sustained by affidavits, additional special findings should be made, and it was not erroneous on motion to strike such affidavits from the files. Standard Stamping Co. *v.* Hetzel, 44 Neb. 105, 62 N. W. 247.

18. Webb *v.* Groom, 6 Robt. (N. Y.) 532.

19. See generally the title "Abatement, Pleas of."

20. A "statutory plea" in the nature of a plea in abatement to abate the attachment. B. F. Coombs & Bro. Com. Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139.

Though the better practice is to file a separate traverse, a petition to remove an attachment which in terms denies all the material allegations of the petition for attachment, and which closes with a prayer that it should be used and considered as a traverse of the

plea in abatement.[21] In a few states the affidavit is not traversable for the purpose of abating the writ and vacating the lien.[22]

2. Pendency of Another Action. — The pendency of one attachment may be pleaded in abatement of a subsequent attachment between the same parties for the same cause of action in the same county,[23] and of a subsequent proceeding on the original debt by bail writ,[24] but it is not ground for abating a subsequent action *in personam* to recover the same claim for the remedies are cumulative, one being *in rem* and the other *in personam*.[25] A subsequent action *in personam* will not abate because of a prior pending attachment in the court of another state.[26] It has been held that the pendency of an

ground of attachment, may be treated as a traverse. Cooley *v.* Abbey, 111 Ga. 439, 36 S. E. 786.

Objection to Sureties Taken by Plea. First Nat. Bank *v.* Wallace (Tex. Civ. App.), 65 S. W. 392.

A statute so providing as to attachments at law does not apply to an attachment in equity in aid of a mortgage foreclosure. Weston *v.* Jones, 41 Fla. 188, 25 So. 888.

A plea alleging exemption is a plea in abatement. Smith *v.* Moore, 1 Ind. 228.

21. **Colo.**—Worrall *v.* Hare, 1 Colo. 91. **Fla.**—Reese *v.* Damato, 44 Fla. 683, 33 So. 459. **Ga.**—Cooley *v.* Abbey, 111 Ga. 439, 36 S. E. 786. **Ill.**—Boggs *v.* Rindskoff, 23 Ill. 65; Eddy *v.* Brady, 16 Ill. 306. **Ind.**—Excelsior Fork Co. *v.* Lukens, 38 Ind. 438. **La.**—John Henry Shoe Co. *v.* Gilkerson-Sloss Com. Co., 47 La. Ann. 860, 17 So. 340. **Mo.** Rees *v.* Augustine, 24 Mo. App. 671; Hazeltine *v.* Ausherman, 29 Mo. App. 451. **Va.**—Mantz *v.* Nendley, 2 Hen. & M. 308. **W. Va.**—Miller *v.* Fewsmith Lumb. Co., 42 W. Va. 323, 26 S. E. 175. **Wis.**—Gallun *v.* Weil, 116 Wis. 236, 92 N. W. 1091.

Not Under the Present Illinois Statute.—Logan *v.* Sibley, 67 Ill. App. 579.

22. See *supra*, XIX, C, 2.

23. Dean *v.* Massey, 7 Ala. 601. **Kan.** Smith-Frazer, etc. Co. *v.* Dorse, 41 Kan. 150, 21 Pac. 167. **Miss.**—James *v.* Dowell, 7 Smed. & M. 333. **N. J.**—Harris *v.* Linnard, 9 N. J. L. 58. **S. C.** Ferst *v.* Powers, 58 S. C. 411, 36 S. E. 749.

Compare Savary *v.* Taylor, 10 B. Mon. (Ky.) 334, where a second attachment in another county was held not barred by former attachment which was not sufficient to satisfy the debt. See also Crossman *v.* Universal Rubber Co., 127 N. Y. 34, 27 N. E. 400.

See generally the title "**Another Action Pending.**"

Consolidating an action begun in the city court of New York with one in the supreme court does not make necessary a vacation of the attachment therein. Gospel *v.* Robinson Mach. Co., 118 App. Div. 160, 103 N. Y. Supp. 5.

Successful Attachments. — Where land has been attached a second attaching creditor should delay his proceedings until the first attachment suit is determined. Barnard *v.* Fisher, 7 Mass. 71.

24. Clark *v.* Tuggle, 18 Ga. 604; Challiss *v.* Smith, 25 Kan. 563.

25. Gibson *v.* Huie, 14 La. 124; Swartz *v.* Lawrence, 12 Phila. (Pa.) 181. See also Churchill *v.* Goldsmith, 64 Mich. 250, 31 N. W. 187.

The judgment is *in rem* and not *in personam*. No action can be maintained on the judgment, the record not affording *prima facie* evidence of indebtedness. The plaintiff's remedy may therefore be but partial and incomplete. Branegan *v.* Rose, 8 Ill. 123. *Contra*, Raynolds *v.* McClure, 13 Ala., 159; McKinsey *v.* Anderson, 4 Dana (Ky.) 62.

26. **Ark.**—Moore *v.* Emerick, 38 Ark. 203. **La.**—Clampett *v.* Newport, 8 La. Ann. 124. **N. Y.**—Sargent *v.* Sargent Granite Co., 6 Misc. 384, 26 N. Y. Supp. 737, 31 Abb. N. C. 131; Trubee *v.* Alden, 6 Hun 75; Osgood *v.* Maguire, 61 Barb. 548; Hecker *v.* Mitchell, 5 Abb. Pr. 453; Nason Mfg. Co. *v.* Rankin Lace Mfg. Co., 1 City Ct. 455. **Pa.**—Parsons *v.* Col. Ins. Co., 2 Phila. 21, 13 Leg. Int. 12.

The reasoning proceeds upon the false assumption that the attachment

attachment in a state court may be pleaded in abatement of a second suit in federal courts.[27]

3. Time When Plea May Be Filed.[28] — A defendant should avail himself of matter in abatement at the earliest opportunity.[29] It is too late if made after the appeal is brought into the appellate court,[30] or after a general continuance,[31] or after judgment.[32]

After Plea to the Merits.— In some jurisdictions a plea in abatement or traverse of the attachment may be made after a plea to the merits[33]

gives the creditor security and that he will be able to obtain satisfaction of his debt out of the property attached if he obtains judgment in the suit. The creditor may fail to sustain his attachment even though he get judgment for the debt. Barber *v.* Glick, 20 Ill. App. 408.

27. Nelson *v.* Foster, 17 Fed. Cas. No. 10,105; Lawrence *v.* Remington, 6 Biss. 44, 15 Fed. Cas. No. 8,141; Hacker *v.* Stevens, 4 McLean 535, 11 Fed. Cas. No. 5,887.

28. See generally the title "Abatement, Pleas of."

29. "After appearing to the action, a continuance by agreement, a trial, an appeal, and another continuance, it was too late to make the objection in any form." Collins *v.* Nichols, 7 Ind. 447.

Before Seizure.—Braunsdorf *v.* Fellner, 69 Wis. 334, 34 N. W. 121.

Three Years' Delay Too Great.— Wallace *v.* Gallatin First Nat. Bank, 95 Tex. 103, 65 S. W. 180.

After Replevin.—Ga.—Perryman *v.* Pope, 94 Ga. 672, 21 S. E. 715; Brumby *v.* Rickoff, 94 Ga. 429, 21 S. E. 232. **Miss.** James *v.* Dowell, 7 Smed. & M. 333. **Tenn.**—Chambers *v.* Haley, Peck 159.

Return Term.—Archer *v.* Claflin, 31 Ill. 306.

Within First Two Days of Return Term.—Hamilton *v.* McClelland, 33 Mo. 315.

Special Appearance.—"A plea in abatement can only be pleaded in proper person; and it would be a contradiction in terms to hold that the appearance of a defendant, to make such a plea, waived his right to make it." Boon *v.* Rahl, 1 Heisk. (Tenn.) 12.

Missouri.—A defendant in attachment does not waive his right to plead in abatement by taking an order for "leave to plead on the third Monday of the present term, or answer the 22nd day of January, 1876." Such an order preserves to him the right to elect whether he will plead in abatement or answer to the merits. Beattie *v.* Stocking, 70 Mo. 196.

Right So to Plead Not Waived by Bail Bond.—Lehman *v.* Berdin, 5 Dill. 340, 15 Fed. Cas. No. 8,215, (construing Arkansas law); Childress *v.* Fowler, 9 Ark. 159.

During Trial.—Whether such a plea shall be allowed during trial is within the discretion of the court, and there can be a review only when there is an abuse of discretion. Havens *v.* Gard, 131 Ind. 522, 31 N. E. 354.

30. Blankenship *v.* Blackwell, 124 Ala. 355, 27 So. 551.

31. Archer *v.* Claflin, 31 Ill. 306.

32. Loomis *v.* Allen, 7 Ala. 706.

33. Pollock *v.* Murray, 38 Fla. 105, 20 So. 815; Wallace *v.* Gallatin First Nat. Bank, 95 Tex. 103, 65 S. W. 180, *overruling* on this point Hart *v.* Kanady, 33 Tex. 720, and First Nat. Bank *v.* Wallace (Tex. Civ. App.), 65 S. W. 392.

In Ripley *v.* Axtec Min. Co., 6 N. M. 415, wherein the defendant was defaulted for lack of an answer to the declaration although he had traversed the allegations of the affidavit for the writ, the court said: "The doctrine holding that pleading to the merits is a waiver of a plea in abatement, etc., has no application to a cause of this kind. The several defenses are not tendered to the same pleading. The affidavit for the writ is in no proper or technical sense a pleading at all. The fact that the statute authorizes an answer thereto, controverting the truth of its statements, does not make it so; and, even if it did, the answer to the affidavit has no connection with the cause of action upon which the plaintiff seeks a recovery as to have any ruling made upon its sufficiency or insufficiency, of the statements contained in the declaration. Why, then, in the absence of any statutory re-

or answer; in other jurisdictions the contrary rule prevails.[34] On the

quirement, should pleading to the one interfere with, retard, or injuriously affect pleading to the other? We see no reason for so holding, and we can not approve it. In a well considered case in the supreme court of the state of Illinois—Hawkins *v.* Albright, et al., 70 Ill. 87—it is held that, 'as the defenses which may exist to the right to attach property have no necessary connection with the defenses to the cause of action, the right to plead in abatement is not upon the condition of abandoning all other defenses, but, on the contrary, all other legitimate defenses to the merits may be interposed at the same time.' The answer to the statutory averments contained in the affidavit is not authorized for the purpose of testing plaintiff's right of recovery in the action, but merely for the purpose of imposing upon the plaintiff the burden of showing that he had a statutory right of holding defendant's property as security for any judgment that he might ultimately obtain in the action."

Compare, Curran *v.* Kendall Boot & Shoe Co., 8 N. M. 417, 45 Pac. 1120, holding that when after a demurrer to a plea in abatement, the defendant pleads to the merits, he is deemed to have abandoned this plea in abatement.

In Drake *v.* Brander, 8 Tex. 351, the court said: "If these exceptions had gone to the plaintiffs' right of action, they ought to have been overruled, as the statute giving the defendant the privilege in his answer 'to plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause,' has this proviso, 'that he shall file them all at the same time and in due order of pleading.' See Dig., art 688. To allow an exception to the action after full answer on the merits would be entirely to disregard this proviso, as in the order of pleading no exception to the action can be made after an issue to the country on the merits of the plaintiff's petition. All exceptions that would go to the action should be presented first. But this exception, under our practice, does not go to the action, and the plaintiff could still have gone on with his suit if the bond had been quashed. The most that could have been claimed by the defendant would have been a discharge from the attachment and the levy made under it. The cause of action set out in the petition would have been left unaffected by the decision on the insufficiency of the bond required by law for obtaining the auxiliary writ of attachment. The defendant had a right therefore, to attack the sufficiency of the bond after he had answered to the merits and joined issue on the averments of their indebtedness contained in the petition.'" See also Wallace *v.* Gallatin First Nat. Bank, 95 Tex. 103, 65 S. W. 180.

In West Virginia, a defendant in an action on contract, who fails or declines to make the counter affidavit prescribed by section 46 of chapter 125, that there is not, as he verily believes, any sum due from him to the plaintiff, etc., is not thereby debarred from moving to quash the attachment sued out thereon by plaintiff, or from filing a plea in abatement denying the existence of the grounds for the attachment stated by plaintiff in his affidavit. Miller *v.* Fewsmith Lumb. Co., 42 W. Va. 323, 26 S. E. 175.

The Missouri Rule is now in accord with the text. In B. F. Coombs & Bro. Com. Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139, the court reviewed the earlier decisions and, relying upon Little *v.* Harrington, 71 Mo. 390; Phillips *v.* Bliss, 32 Mo. 27, said: "The attachment issue is collateral to the principal cause of action, and both may be treated as severable parts of the case. An answer to the main issue or cause of action should not be held to confess the grounds of attachment, when the defendant likewise denies those grounds in the manner prescribed by law."

Earlier decisions were McDonald *v.* Fist, 60 Mo. 172; Fordyce *v.* Hathorn, 57 Mo. 120; Green *v.* Craig, 47 Mo. 90; Bourgoin *v.* Wheaton, 30 Mo. 215; Cannon *v.* McManus, 17 Mo. 345; Hatry *v.* Shuman, 13 Mo. 547; Fugate *v.* Glasscock, 7 Mo. 577; Audenreid *v.* Hull, 45 Mo. App. 202; Haseltine *v.* Ausherman, 29 Mo. App. 451; Sharkey *v.* Williams, 20 Mo. App. 681; Thompson *v.* Bronson, 17 Mo. App. 456.

34. **Ala.**—Brown *v.* Coats, 56 Ala. 439. **Ky.**—Meggs *v.* Shaffer, Hard. 65.

other hand a plea in abatement is not waived by filing a plea to the merits,[35] as the two pleas are perfectly consistent, the former going to the declaration and the latter to the writ.[36]

4. Sufficiency of Plea. — The rule is well settled and prevails in most jurisdictions that a plea in abatement or traverse of an attachment should not only be framed with the greatest accuracy,[37]

Pa.—Utz *v.* Raish, 4 Kulp 375. **R. I.** Gardner *v.* James, 5 R. I. 235.

35. **Ga.**—Parker *v.* Brady, 56 Ga. 372. **Ill.**—Hawkins *v.* Albright, 70 Ill. 87. **Tenn.**—Chattanooga Third Nat. Bank *v.* Foster, 90 Tenn. 735, 18 S. W. 267.

In B. F. Coombs & Bro. Com. Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139, the court said: "We can discern no substantial ground upon which to maintain a distinction between a plea to abate an attachment and a plea of matter intended to abate an ordinary civil action, with respect to the right to plead the same without thereby waiving the right to defend upon the merits also. The reasons which permit the one, under our system of pleading, should likewise permit the other."

Tennessee.—Plea accompanied by answer. Pique *v.* Young, 85 Tenn. 263, 1 S. W. 889.

And see Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080.

36. Parker *v.* Brady, 56 Ga. 372.

The effect of the statute is to make every attachment case virtually two suits—one *in rem* and another *in personam*. Bates *v.* Crow, 57 Miss. 676, holding that such a statute changed the rule in Lewenthall *v.* State, 55 Miss. 589, that the filing of a plea to the merits operates as a waiver of a plea in abatement of the writ. See also Third Nat. Bank *v.* Foster, 90 Tenn. 735, 18 S. W. 267, where it was said: "The plea and answer are not the same matter. One is to jurisdiction of the court to appropriate defendant's property; the other is personal defense to the merits of the suit."

37. **Ala.**—Bell *v.* Allen, 76 Ala. 450. **Ark.**—Clark *v.* Latham, 25 Ark. 16. **Colo.**—Midland Fuel Co. *v.* Schuessler, 18 Colo. App. 386, 71 Pac. 894. **Ill.** Parsons *v.* Hankey, 45 Ill. 296. **N. H.** Keniston *v.* Chesley, 52 N. H. 564.

Illustrations of Sufficient Pleas.— Under section 1656, Fla. Rev. St., defendant's affidavit to the effect that he was not at the time plaintiff's attachment affidavit was filed indebted to plaintiff in the sum demanded, or any part thereof, tenders a proper traverse of the attachment affidavit as to the debt or sum demanded. Weston *v.* Jones, 41 Fla. 188, 25 So. 888.

Where the attachment was on the ground of non-residence a plea admitting the non-residence but alleging that the debt was not due was held to be sufficient. Mack *v.* Jacobs, 70 Miss. 429, 12 So. 444.

In Klepper *v.* Powell, 6 Heisk. (Tenn.) 503, wherein the bill for attachment charged that "complainant is informed, and so charges that the defendant is not an inhabitant of Tennessee, but has so absconded and concealed himself that the ordinary process of law can not be served on him," it was held that a plea of defendant "that he departed from the State of Tennessee for a temporary purpose only, and with the intention of returning, and that he is not a non-resident of the State of Tennessee, and was not when the bill was filed, within the intendment and meaning of the attachment laws," and also, "that he is not absconding or concealing himself, and was not when the bill was filed, within the intendment and meaning of the attachment laws," was sufficient.

Illustration of Insufficient Pleas.— Under attachment laws making absconding within the state alone a sufficient ground for an attachment, whether the plaintiff or defendant, or both, be resident or non-resident within the state, a plea to process of attachment, "that the defendant is a resident citizen of another state, and never was within this state, with the intention of residing here," is bad, for when the affidavit and proceedings are regular and sufficient on their face the touch of the parts changed cannot be contested by pleas in abatement. Middlebrook *v.* Ames, 5 Stew. & P. (Ala.) 158.

and should be certain to every intent and purpose, but in addition

A denial that the bond was approved by the clerk before it was issued, is not sufficient. It should describe the bond as the attachment bond. Clark *v.* Latham, 25 Ark. 16.

In Clark *v.* Latham, 25 Ark. 16, the plea was that the writ was not signed by the clerk, with his own proper hand, nor by his lawful deputy. The court said: "This may all be true, and yet if the clerk directed another to sign his name to the writ, in his presence, and for him, and he, the clerk, should thereupon fix his seal of office to it, and send it forth to be executed as his act, although his name was not signed with his own proper hand, we should hold it to be valid."

An affidavit in attachment alleged that the defendant in attachment, on a certain date, was and still is indebted to affiant in a certain sum of money, and that the same was on the date mentioned, and still is, actually due and that affiant on said date had reason to believe that said defendant would fraudulently part with his property before judgment could be obtained against him; and that said defendant was on said date fraudulently disposing of his property, and that on said date said defendant was secreting his property. Defendant filed a traverse affidavit that on the date mentioned he did not intend to fraudulently part with his property before judgment could be obtained against him, nor did he contemplate fraudulently parting with his property before judgment could be obtained against him; that he was not on the date mentioned fraudulently disposing of his property; that he was not on the date mentioned secreting his property. The trial court ruled that the traverse affidavit was sufficient. It was held that the ruling was erroneous, as the defendant should have traversed the averment in the attachment affidavit that affiant had reason to believe in the grounds of attachment stated. Reese *v.* Damato, 44 Fla. 683, 33 So. 459.

In Walker *v.* Welch, 13 Ill. 674, wherein the affidavit on which the writ issued stated that "the said Walker was removing and about to remove his property from the state of Illinois, to the injury of said Welch and McCully," and the defendant pleaded in abatement that "he was not removing from the state of Illinois, nor was he removing his property from said state of Illinois, to the injury of said plaintiffs," the court said: "The plea was clearly defective. Its allegations might all be strictly true, and the plaintiffs have good cause for suing out the attachment. The important charge in the affidavit was, that the defendant was about to remove his property beyond the limits of the state, to the injury of the plaintiffs. And that fact coupled with an existing indebtedness, constituted a sufficient foundation for the attachment. This charge was not negatived by the plea. It denied that the defendant was removing from the state. He might be an actual resident of the state, and there still be good cause for attaching his estate. The plea alleged, in addition, that he was not removing his property from the state. That was no answer to the charge that he was about to remove his property from the state. It might be true that he was not removing his effects, and the plaintiffs yet be entitled to the process of attachment. The plea was bad in substance, and obnoxious to the demurrer."

A plea "that the defendant had not at the time when said attachment was made and has not since had any right, title or interest in or to any of the property attached in said cause," was held to be insufficient because "it fails to exclude the possibility that the chattels were in the possession of the defendant under circumstances that made them attachable as its property," the court saying, "They were so attachable if they had previously been the property of the defendant and had been sold to another without change of possession. The defendant might have parted with all his right, title and interest in and to the property by a sale valid as between the parties, and still be held the owner for the purposes of attachment. The plea does not present an issue which if disposed of upon traverse would be determinative of the question raised. All the facts alleged might be true, and yet the attachment of the property give

to this it must not be repugnant,[38] or double,[39] and in accordance with the usual rule, should give plaintiff a better writ.[40] It should put in issue the truth of all the material allegations of the affidavit,[41] as of the time when the affidavit was made,[42] and should

the court cognizance of the suit." American Oak Leather Co. *v.* Evans Bell, etc., Co., 70 Vt. 118, 39 Atl. 633.

Action Against One Joint Debtor.—In an attachment against one person on a debt founded on a joint and several note a plea in abatement is not sufficient which alleges that at the time of the attachment the other joint maker was a resident of the county and possessed of sufficient property to satisfy the debt. Higgins *v.* Pence, 2 Ind. 566.

A plea tendering no issue, is frivolous and may be stricken from the files on motion, and it is not error to ignore it. Southern Cal. Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345.

Plea May Be Made by Attorney.—Guild *v.* Richardson, 6 Pick. (Mass.) 364.

Traverse Made by Assignee for Benefit of Creditors.—Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122; Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 119, 30 N. W. 241.

Assignor for Benefit of Creditors May Traverse.—Keith *v.* Armstrong, 65 Wis. 225, 26 N. W. 445.

Administrator of Defendant.—Guild *v.* Richardson, 6 Pick. (Mass.) 364.

38. Parsons *v.* Hankey, 45 Ill. 296.

39. Boon *v.* Rahl, 1 Heisk. (Tenn.) 12, saying that a plea negativing causes not alleged would be double.

A plea is not bad for duplicity, which alleges several facts dependent upon each other, tending to one point and triable upon one issue. State Bank *v.* Hinton, 12 N. C. 397.

A plea is not double which traverses the allegation that the defendant left the state, with an intention to remove his effects, to defraud creditors. Eddy *v.* Brady, 16 Ill. 306.

40. Mohr *v.* Chaffe, 75 Ala. 387.

See the title "**Abatement, Pleas of.**"

A plea in abatement to a defective summons should be that the summons is not in the form prescribed by law, and should then specify the particular defect. Keniston *v.* Chesley, 52 N. H. 564.

41. Garrett *v.* Tinnen, 7 How. (Miss.) 465; Houston *v.* Woolley, 37 Mo. App. 15.

42. Midland Fuel Co. *v.* Schuessler, 18 Colo. App. 386, 71 Pac. 894; James *v.* Hall, 1 Swan (Tenn.) 297.

In Wehle *v.* Kerbs, 6 Colo. 197, the attachment affidavit alleged that the defendant "is about to fraudulently conceal or remove or dispose of his property or effects, so as to hinder or delay his creditors." The defendant's affidavit filed six days subsequently was in the following words: "It is not true that defendant ever did or has fraudulently concealed or removed or disposed of, or is about to fraudulently conceal or delay his creditors." The court held that this affidavit did not deny that the defendant was about to perpetrate this fraud six days before, when the attachment was sued out.

The defendant pleaded, "that he was not a non-resident at the time the writ issued," and it appeared by the record, that the affidavit was filed, and the writ issued and bore date, on the same day; it was held that the plea was certain. Parsons *v.* Case, 45 Ill. 296.

In McFarland *v.* Claypool, 128 Ill. 397, 21 N. E. 587, the affidavit alleged that the defendant "conceals himself or stands in defiance of an officer, so that process can not be served upon him, and has within two years last past fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors, and has, within two years last past, fraudulently concealed or disposed of his property so as to hinder and delay his creditors, and is about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors." A plea in abatement was filed by the defendant, in the following language: "That he did not conceal himself and did not stand in defiance of an officer so that process could not be served upon him; that he has not within two years last past fraudulently conveyed or assigned his effects or a part thereof so as to hinder and de-

exclude every conclusion against the pleader.[43] Each fact alleged in the affidavit need not be specifically denied; a general denial in the usual form is sufficient.[44] But if the plea sufficiently traverses the causes for which the attachment is sued out it is not objectionable because of unnecessary explanatory matter appended to it.[45]

Craving Oyer.[46] — In some states oyer of the writ and affidavit must be prayed,[47] in others not.[48]

Amendments. — While courts do not regard favorably the amendment of such pleas,[49] yet an amendment is sometimes allowed,[50] especially

lay his creditors; has not within two years last past fraudulently concealed or disposed of his property so as to hinder and delay his creditors, and was not about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder and delay his creditors.'' The court said: ''It is too manifest to admit of argument, that the plea was fatally defective. Its averments were in the present tense, and can therefore be held to apply only to the two years next preceding the day on which it was filed, or at most to the two years next preceding the day on which it was sworn to by the defendant. There remained a portion of the two years covered by the attachment affidavit to which the plea did not apply, and for that reason it was not a complete traverse of the affidavit. Both the plea and affidavit might be true.''

A plea alleging that ''the defendants are resident citizens of this state'' is insufficient, as this in terms applies to the date of the plea, and not to the time of issuing the writ or of service on the defendants. Bowman *v.* Stowell, 21 Vt. 309, 313.

43. **Denial of authority to sign bonds** must negative ratification. Mandel *v.* Peet, 18 Ark. 236.

44. Armstrong *v.* Blodgett, 33 Wis. 284. And see Ross *v.* Fowler, 42 Miss. 293.

45. Ross *v.* Fowler, 42 Miss. 293.

A traverse of the allegation that the defendant absconds is not obnoxious because it sets forth a place where the defendant was publicly living when the attachment issued. Oliver *v.* Wilson, 29 Ga. 642.

46. See generally the title, ''**Profert and Oyer.**''

47. **Alabama.**—In Tommey *v.* Gamble, 66 Ala. 469, the court said: ''Whatever may have been the rule of the common law, the practice has long been settled in this state, that where defects in a writ are presented by plea in abatement, the defendant must crave oyer of such writ, and set it out of his plea. And defects in the attachment, bond or affidavit may under the provisions of the statute, be reached in the same way.—Code of 1876, §3314; Banks *v.* Lewis, 4 Ala. 599. Where this practice is not followed, the plea in abatement is bad, and subject to demurrer on that ground.''

To the same effect is Garner *v.* Johnson, 22 Ala. 494.

48. **Ill.**—Eddy *v.* Brady, 16 Ill. 306. **Mass.**—Guild *v.* Richardson, 6 Pick. 364. **Tenn.**—Kincaid *v.* Frances, Cooke 49.

49. See the title ''**Abatement. Pleas of.**''

50. In Cayce *v.* Ragsdale, 17 Mo. 32, the plaintiff ''filed his affidavit, and sued out an attachment. The affidavit after setting forth the amount of the debt, etc., proceeds thus: 'Affiant further states that he has good reason to believe, that the said Thomas Ragsdale has absented himself from his usual place of abode in the state of Missouri, so that the ordinary process of law cannot be served upon him.' The writ being served on the defendant, he appeared and filed his plea, in the nature of a plea in abatement, which plea is as follows: 'And the said defendant comes and says that, at the time stated in the affidavit in this cause, he had not absented himself from his usual place of abode in this state, so that the ordinary process of law could be served upon him, and the said plaintiff had no good reason to believe so; and of this he puts himself upon the country,' etc. The plaintiff demurred to this plea, because it does not put in issue the truth of the facts alleged in the affidavit, and it does

where the errors are of a clerical nature. A motion to amend the plea is addressed to the sound discretion of the trial court,[51] and only a plain and arbitrary abuse of power will justify the appellate court in reversing the ruling of the lower court denying the amendment.[52]

5. The Issues. — The issue in abatement of an attachment is distinct from that upon the cause of action,[53] even though the plea denies all the facts stated in the affidavit for attachment.[54] Generally speaking such a plea puts in issue nothing but the truth of the allegations of the affidavit,[55] or the regularity of the proceedings for ob-

not aver that process could be served; and because the plea is absurd, uncertain and insufficient. The court sustained the demurrer, and the defendant prayed the court for leave to amend his plea by inserting the word 'not' between the words 'could' and 'be' therein, so as to make it read 'could *not* be served,' etc." It was held that the amendment should be allowed, the court saying, "Was this not obviously a clerical omission? Does it not appear manifestly that the defendant intended to put the truth of the affidavit in issue? The plea in this case is said to be in the nature of a plea in abatement; and there are authorities which sustain the court in refusing to permit amendments to pleas in abatement, after a demurrer has been sustained. Such is the ruling at common law by the courts on this subject. But such pleas were strictly pleas in abatement, which were never favored by the courts. Though this plea is by our statute called a plea in the nature of a plea in abatement it does not fall strictly within all the rules concerning such pleas at common law. It is in the nature of a plea on abatement, for if found true, the plaintiff must dismiss his action. . . . The present case presents no circumstances authorizing the refusal to permit a word to be inserted in the plea, which it is plain was the pleader's intention should be there. It could have operated in no wise to the plaintiff's injury; if he had good cause from the facts before him to sue out his attachment, he could have sustained it before a jury; if he had inconsiderately or improperly used this writ, without sufficient facts to authorize it, he ought to suffer for it by having his suit dismissed. It is consistent with the spirit of our laws, that amendments in furtherance of justice be freely admitted and allowed."

Amendment Not Allowed After Demurrer.—Livengood *v.* Shaw, 10 Mo. 273.

51. Midland Fuel Co. *v.* Schuessler, 18 Colo. App. 386, 71 Pac. 894.

52. Midland Fuel Co. *v.* Schuessler, 18 Colo. App. 386, 71 Pac. 894.

53. Coombs Com. Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139.

The Colorado Code "prescribes that the attachment issues shall be presented by the affidavit in attachment and the traverse." Midland Fuel Co. *v.* Schuessler, 18 Colo. App. 386, 71 Pac. 894.

54. Rees *v.* Augustine, 24 Mo. App. 671.

55. **Ill.**—House *v.* Hamilton, 43 Ill. 185. **Miss.**—Roach *v.* Brannon, 57 Miss. 490; Cocke *v.* Kuykendall, 41 Miss. 65. **Mo.**—Chenault *v.* Chapron, 5 Mo. 438. **W. Va.**—Stevens *v.* Brown, 20 W. Va. 450. **Wis.**—Littlejohn *v.* Jacobs, 66 Wis. 600, 29 N. W. 545.

Where the traverse denied that the defendants had within two years preceding the filing of the affidavit, fraudulently conveyed or assigned their property or effects or any part thereof, with intent to hinder and delay creditors the issue was on the question of a fraudulent transfer and not whether there had been such a delivery of property to a vendee as would pass title to a purchaser as against execution creditors. Schwabacker *v.* Rush, 81 Ill. 310.

Validity of Levy.—The plea in abatement does not reach the validity of a levy made in another county. House *v.* Hamilton, 43 Ill. 185.

Misnomer Not Reached.—Swan *v.* O'Fallon, 7 Mo. 231.

taining the attachment.[56] The merits of the action are not raised by this plea.[57] Thus, the plea in abatement should not put in issue the existence[58] or maturity,[59] or amount,[60] of the debt; or cross-demands between the parties;[61] or the authority to make the affidavit.[62]

6. The Trial. — The plea in abatement or traverse of the attachment affidavit should be tried either before,[63] or with the main case,[64] un-

56. In McMechan *v.* Hoyt, 16 Ark. 303, the defendant in attachment pleaded in abatement, that the plaintiff did not file an attachment bond before suing out his writ; the plaintiff replied, setting out a bond purporting to be executed by S. & C., the defendant rejoined that the bond was not the deed of said C.; the proof showed that the bond was the deed of C. alone, but sufficient to indemnify the defendant. It was held that the true issue was, whether a good and sufficient bond had been filed, and not whether it was the bond of S. and C.

The belief of the plaintiff as to the truth of the grounds for the attachment is not the issue. Mack *v.* Jacobs, 70 Miss. 429, 12 So. 444; Dider *v.* Courtney, 7 Mo. 500.

57. Chouteau *v.* Boughton, 100 Mo. 406, 13 S. W. 877; Sauerwein *v.* Renard, Champagne Co., 68 Mo. App. 29; Stevens *v.* Brown, 20 W. Va. 450.

58. Switzer *v.* Carson, 9 Mo. 740; Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122; Littlejohn *v.* Jacobs, 66 Wis. 600, 29 N. W. 545.

In John E. Hall Commission Co. *v.* Crook, 87 Miss. 445, 40 So. 1006, the court said: "The demurrer to defendant's first plea in abatement was properly sustained. That plea sought by way of plea in abatement to deny that defendant was indebted to plaintiffs. This is not permissible. The debt can only be denied by a plea in bar. It is true that if there be no debt the attachment has been wrongfully sued out. But the trial of this question is reserved under our practice for the trial on the merits, since it ends the whole proceeding; otherwise, there might be two trials of this one issue in the same cause, and each might result differently."

59. Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

60. Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122; Littlejohn *v.* Jacobs, 66 Wis. 600, 29 N. W. 545; Hawes *v.* Clement, 64 Wis. 152, 25 N. W. 21.

61. Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122.

62. Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241.

63. **Ga.**—Parker *v.* Brady, 56 Ga. 372. **Ill.**—Page *v.* Dillon, 61 Ill. App. 282, holding that this is warranted by the statute, the parties consenting or the court ordering. **Mo.**—Coombs Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139. **N. M.**—Southern Cal. Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345. **Wis.**—Bassett *v.* Hughes, 48 Wis. 23, 3 N. W. 770; Davidson *v.* Hackett, 45 Wis. 208; Main *v.* Bell, 33 Wis. 544.

Earliest Practicable Period.—Robb *v.* Parker, 4 Heisk. (Tenn.) 58.

64. **Ga.**—Parker *v.* Brady, 56 Ga. 372. **Ill.**—Voss *v.* Evans Marble Co., 101 Ill. App. 373. **Ind.**—Excelsior Fork Co. *v.* Lukens, 38 Ind. 438; Maple *v.* Burnside, 22 Ind. 139; Foster *v.* Dryfus, 16 Ind. 158.

An attachment is not an independent proceeding. United States Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832.

In Bradley *v.* The Bank, etc., 20 Ind. 531, it was further held that, "the issues on the attachment were properly made up for trial, at the time of the trial of the merits of the cause of action, and hence we must hold that they were then tried."

Not error to refuse a separate trial when issues ready and there need be no delay. Lite *v.* Overton, 12 Heisk. (Tenn.) 675.

In Price *v.* Bescher, 12 Heisk. (Tenn.) 372, the court said: "It would have been the better practice to submit the issues on the plea in abatement to the causes of attachment separately to a jury, before the trial of the main suit, as it would have enabled the court, if the attachment were sustained, to render a complete judgment, and to order a sale of the property to satisfy the plaintiff's debt."

In Florida, "upon a traverse in attachment of the debt or sum demanded,

less continued for cause when the main case is ready.[65] But nothing which works a continuance of the traverse only should postpone the main case.[66]

Waiver. — The right to have the causes tried together or in their proper order may be waived by a failure to object before the trial.[67]

Right to Jury. — In some jurisdictions upon a plea in abatement being filed, the defendant is entitled to have the issues of fact raised thereby submitted to a jury,[68] while in others the statute provides for a trial by the court.[69]

7. Burden of Proof. — The onus is upon the attaching creditor to show the existence and the truth of the alleged grounds of his attachment when the issue is raised by a plea in abatement or traverse in the answer,[70] unless the conduct of the defendant has been such as

it is the duty of the court, under Section 1656, Rev. St., upon seasonable application, in all cases where the issues have not already been made up in the main suit, to require the formal pleadings in the main suit to be made up, and the issues therein settled by special order, without reference to the time fixed by the rules or statutes for pleading in regular course, in order that the issues in the main case thus made up may be submitted to the court or jury along with the issues raised by the traverse of the special ground of attachment alleged." Weston *v.* Jones, 41 Fla. 188, 25 So. 888.

In Georgia, when an attachment case comes on for trial and there is a pending traverse of the ground of attachment, not previosly disposed of, the whole case should be tried together. Perryman *v.* Pope, 94 Ga. 672, 21 S. E. 715. See Brumby *v.* Rickoff, 94 Ga. 429, 21 S. E. 232.

65. Parker *v.* Brady, 56 Ga. 372.

66. Parker *v.* Brady, *supra.*

67. Maple *v.* Burnside, 22 Ind. 139. In Bassett *v.* Hughes, 48 Wis. 23, 3 N. W. 770, the court said: "It is too late for the respondent to allege that the judgment in the action was irregularly entered, after the same has been affirmed in this court upon appeal. If he desired to have the judgment set aside for the purpose of having a trial of his traverse, he should either have moved the court below to set the same aside for that reason, before he took his appeal to this court, or else, upon his appeal to this court, he should have asked a reversal upon that ground. Having done neither, he must be deemed to have waived his right to a trial of such traverse. Or, if he did not intend to waive his right, he has lost it by permitting the judgment to be obtained and stand unreversed against him."

Trial Out of Order Not Reversible Error.—Coombs Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 668. And see Main *v.* Bell, 33 Wis. 544.

68. **Ga.**—Oliver *v.* Wilson, 29 Ga. 642. **Ia.**—Lewis *v.* Sutliff, 2 Greene 186. **Miss.**—Lowenstein *v.* Powell, 68 Miss. 73, 8 So. 269; Fleming *r.* Bailey, 44 Miss. 132. **Mo.**—Rainwater *v.* Faconesowich, 29 Mo. App. 26. **W. Va.** Miller *v.* Fewsmith Lumb. Co., 42 W. Va. 323, 26 S. E. 175; Capehart's Exrs. *v.* Dowery, 10 W. Va. 130.

The issues must be tried in the county in which the venue is laid. Canova *v.* Colby, 16 Fla. 167.

Must Be Substantial Evidence.—Chenault *v.* Chapron, 5 Mo. 438; Mahner *v.* Linck, 70 Mo. App. 380.

Question of Fraudulent Intent for Jury.—Barney *v.* Scherling, 40 Miss. 320.

69. Martin *v.* Berry, 1 Ind. Ter. 399, 37 S. W. 835; Barton *v.* Ferguson, 1 Ind. Ter. 263, 37 So. 49.

It is not reversible error, however, to submit this issue to the jury. VonBerg *v.* Goodman, 85 Ark. 605, 109 S. W. 1006; Holliday Bros. *v.* Cohen, 34 Ark. 707.

70. **U. S.**—Strauss *v.* Abrahams, 32 Fed. 310. **Colo.**—Drake *r.* Avanzini, 20 Colo. 104, 36 Pac. 846; Miller *v.* Godfrey, 1 Colo. App. 177, 27 Pac. 1016. **D. C.**—Daniels *v.* Solomon, 11 App. Cas. 163. **Ga.**—Moore *v.* Brewer, 94 Ga. 260, 21 S. E. 460; Kenney *v.* Wallace, 87 Ga. 724, 13 S. E. 744; Oliver *v.* Wilson, 29 Ga. 642. **Ill.**—Hawkins *v.* Albright, 70 Ill. 87; Jaycox *v.* Wing,

to preclude him from showing their falsity.[71] When the plaintiff's evidence shows *prima facie* a cause for atttachment the burden is cast upon the defendant to introduce rebutting evidence.[72]

8. The Verdict. — The jury should formally render a verdict,[73] even though there is no evidence tending to show cause for the at-

66 Ill. 182; Ridgway *v.* Smith, 17 Ill. 33; Wells *v.* Parrott, 43 Ill. App. 656; Towle *v.* Lamphere, 8 Ill. App. 399. **Ind.**—Bradley *v.* Bank, 20 Ind. 528. **Ky.** Reynolds *v.* Wright, 18 Ky. L. Rep. 1017, 38 S. W. 861, 39 S. W. 424; Crow *v.* Straus, 14 Ky. L. Rep. 206. **Md.** Pitts Agr. Works *v.* Smelser, 87 Md. 493, 40 Atl. 56. **Miss.**—Roach *v.* Brannon, 57 Miss. 490. **Mo.**—R. C. Stone Milling Co. *v.* McWilliams, 121 Mo. App. 319, 98 S. W. 828; Bowles Live Stock Com. Co. *v.* Hunter, 91 Mo. App. 333. **Tenn.**—Seifrid *v.* People's Bank, 2 Tenn. Ch. 17; Jackson *v.* Burke, 4 Heisk. 610. **Tex.**—Wiggin *v.* Kanady, 33 Tex. 720. **Va.**—Burruss *v.* Trant, 88 Va. 980, 14 S. E. 845; Wingo *v.* Purdy, 87 Va. 472, 12 S. E. 970; Strake *v.* Scott, 78 Va. 180. **Wis.**—Messersmith *v.* Devendorf, 54 Wis. 498, 11 N. W. 906; Lord *v.* Devendorf, 54 Wis. 491, 11 N. W. 903.

Proof of good reason on the part of the creditor to believe the truth of the charge is not sufficient to sustain the attachment, but the substantive charge itself must be proved. Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. 581.

Intervenors charging collusion must sustain the charge. Daniels *v.* Solomon, 11 App. Cas. (D. C.) 163.

Need Not Go Beyond the Grounds Traversed.—Baldwin *v.* Rogers, 74 Ga. 815; Musgrove *v.* Mott, 90 Mo. 107, 2 S. W. 214.

Sustaining One of Several Grounds Discharges the Burden.—Strauss *v.* Abrahams, 32 Fed. 310; Tucker *v.* Frederick, 28 Mo. 574, 75 Am. Dec. 139; Cole Mfg. Co. *v.* Jenkins, 47 Mo. App. 664.

71. In Roach *v.* Brannon, 57 Miss. 490, the court said: "The plaintiff must establish the truth of the facts averred in the affidavit, unless the conduct of the defendant has been such as to preclude him from showing their falsity. It should be borne in mind that this estoppel will not arise because of erroneous and unfounded inferences, which the plaintiffs may have drawn from the defendant's conduct, nor unless they have really acted upon the faith of that conduct, and upon the belief engendered and honestly entertained therefrom. The language or conduct must have been such as warranted the charges contained in the affidavit, the affiant must have believed them to be true, and that belief must have been caused by the acts of declarations of the debtor. Under such circumstances only will the defendant be precluded from showing the truth of the matter, and the plaintiff be relieved from establishing the existence of the facts charged by him. It will, of course, be understood that in all cases where a fraudulent intent is alleged, the jury must judge of that intent from the facts and circumstances of the case, and, notwithstanding the denials of the defendant, should find for the plaintiff if they believed that the intent existed in fact, or if the necessary consequences of the act was to defraud creditors. Fraud in law or in fact alike constitutes ground of attachment, but the existence of either must be established by him who asserts it."

72. Pickard *v.* Samuels, 64 Miss. 822, 2 So. 250.

Rules governing the admissibility and sufficiency of evidence in attachment proceeding are elsewhere discussed. See generally the title "Attachment" in 2 ENCYCLOPAEDIA OF EVIDENCE, 70.

73. Price *v.* Bescher, 12 Heisk. (Tenn.) 372.

Special Findings.—The better practice requires that the jury make separate findings as to each ground of attachment but the failure to so do is, at most, an irregularity which is waived by failure to call the matter to the attention of the trial court either when the verdict is secured or by motion in arrest of judgment. Rothschild *v.* Lynch, 76 Mo. App. 339.

Finding in Conjunctive Includes Disjunctive.—A finding that the defendant "was about fraudulently to convey and assign his property and effects, so as to hinder and delay his creditors" necessarily includes a finding that he

tachment.[74] The verdict must be in accordance with the issues made between the parties.[75] Where the evidence showing cause for the attachment is uncontradicted the court should direct a verdict for the plaintiff.[76] Likewise where there is no evidence in the case upon which a verdict in favor of the plaintiffs, and against the wrongfulness of the suing out of the attachment, might be based, a verdict is properly directed for the defendant.[77]

Assessment of Damages. — It is the duty of the jury which tries the issue formed by the plea in abatement, to assess the plaintiff's damages,[78] or the defendant's, as the case may be.[79] If no damage is proven the jury should report nominal damages.[80]

9. The Judgment. — The judgment upon a finding for the plaintiff should sustain the attachment;[81] but if the finding is for the defendant the attachment should be abated,[82] or the writ quashed,[83] at the cost of the plaintiff and his sureties.[84]

The finding of the issue of a plea in abatement for the defendant does not abate the entire suit, but thereafter it must be proceeded upon

"was about fraudulently to convey or assign his property or effects, so as to hinder or delay his creditors." Stewart *v.* Cabanne, 16 Mo. App. 517.

74. Towle *v.* Lamphere, 8 Ill. App. 399.

75. In Groves *v.* Bailey, 24 Miss. 588, "The defendants appeared, and pleaded to the attachment, 'that they had not concealed their effects so that the plaintiffs' claim could not be made by law.' To this plea the plaintiffs replied, that 'at the time of suing out the attachment, the defendants had concealed their effects, so that the plaintiffs' claim could not be made by ordinary process of law.'" Upon the trial of the issue the jury returned a verdict, "that the defendants were not concealing their effects at the time of suing out said attachment, so that the claim of the said plaintiffs would be defeated; and that there was not good cause to sue out the attachment." The court said: "The verdict of the jury is clearly not in accordance with the issue made by the parties. The affidavit and replication both state that the concealment had taken place before the attachment was sued out. The verdicts says, 'that the defendants were not concealing their effects at the time of suing out the writ.' This may be true, and not inconsistent with the affidavit and replication, which do not speak of a concealment of effects then going on, but of one having already taken place."

76. Curran *v.* Rothschild, 14 Colo. App. 497, 60 Pac. 1111.

77. Simmons Clothing Co. *v.* Davis, 3 Ind. Ter. 374, 58 S. W. 653; Lowenstein *v.* Powell, 68 Miss. 73, 8 So. 269.

78. Brown *v.* Illinois Cent. R. Co., 42 Ill. 366; Boggs *v.* Bindskoff, 23 Ill. 65; Moeller *v.* Quarrier, 14 Ill. 280.

79. Fleming *v.* Bailey, 44 Miss. 132; Barney *v.* Scherling, 40 Miss. 320.

"Should the attachment be dissolved by the court, a jury, if desired, may determine the damages occasioned by its wrongful issuance." Barton *v.* Ferguson, 1 Ind. Ter. 263, 37 S. W. 49.

80. Boggs *v.* Bindskoff, 23 Ill. 65.

81. Hill *v.* Bell, 111 Mo. 35, 19 S. W. 959.

Quod Recuperet.—**Colo.**—Worrall *v.* Hare, 1 Colo. 91. **Ill.**—Moeller *v.* Quarrier, 14 Ill. 280; Italian-Swiss Agricultural Colony *v.* Pease, 96 Ill. App. 45. **Ohio.**—Myers *v.* Hunter, 20 Ohio 381.

82. Hill *v.* Bell, 111 Mo. 35, 19 S. W. 959.

When the plea is in abatement of both the writ and declaration for insufficiency of the affidavit, the proper judgment is to abate the suit. Hellman *v.* Fowler, 24 Ark. 235.

83. **Ark.**—Clark *v.* Latham, 25 Ark. 16. **Ill.**—Eddy *v.* Brady, 16 Ill. 306; Stix *v.* Dodds, 6 Ill. App. 27; Buchman *v.* Dodds, 6 Ill. App. 25. **Miss.** Pfeifer *v.* Hartman, 60 Miss. 505.

84. Stix *v.* Dodds, 6 Ill. App. 27; Buchman *v.* Dodds, 6 Ill. App. 25; Hill *v.* Bell, 111 Mo. 35, 19 S. W. 959.

to final judgment as though commenced originally by summons alone.[85]

G. As to Matters Arising Subsequent to the Attachment. — **1. Bankruptcy and Insolvency.** — Under the Federal Bankruptcy Act an adjudication in bankruptcy and an assignment of the bankrupt's estate dissolves an attachment obtained at anytime within four months prior to the institution of the proceedings in bankruptcy, unless the lien of the attachment is preserved for the benefit of the creditors by express order of the court.[86]

Insolvency. — By statute in some states an attachment issued within a specified time prior to insolvency proceedings is dissolved by the commencement of such proceedings. Only an express provision produces this effect.[87]

2. Assignment for Benefit of Creditors. — In some states by statute an assignment for the benefit of creditors will dissolve a prior attachment issued within a certain period before the assignment.[88]

Subsequent Attachments. — An assignment for the benefit of creditors is not affected by a subsequent attachment issued in the same state.[89]

85. Brackett *v.* Brackett, 61 Mo. 221.

The judgment upon a plea in abatement is a final judgment in the sense that it definitely settles the attachment issues; the property attached should be released when the time to file exceptions expires and none be tendered. The property cannot be held until the issue on the indebtedness be tried. Rauscher *v.* McElhinney, 11 Mo. App. 434.

86. Bankruptcy Act (1898), §67f; West Philadelphia Bank *v.* Dickson, 95 U. S. 180, 24 L. ed. 407; Crook-Horner Co. *v.* Gilpin, 23 Am. B. R. 350; *In re* Walsh Bros., 159 Fed. 560, 20 Am. B. R. 472; Watschke *v.* Thompson, 85 Minn. 105, 88 N. W. 263.

87. **Mass.**—Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515. **N. H.**—Berry *v.* Flanders, 69 N. H. 626, 45 Atl. 591; Bernard *v.* Martel, 68 N. H. 46, 41 Atl. 183; Hurlbutt *v.* Currier, 68 N. H. 94, 38 Atl. 502. **R. I.**—In re Swett, 20 R. I. 398, 39 Atl. 757.

In California under the insolvent act of 1895 provision was made for the dissolution of attachments "made" within one month next preceding commencement of insolvency proceedings. Hefner *v.* Herron, 117 Cal. 473, 49 Pac. 586. See also Elliott *v.* Warfield, 122 Cal. 632, 55 Pac. 409. Such a statute has no application where judgment has been entered in the attachment suit.

As to the effect of the federal bankruptcy law, see the title "Bankruptcy Proceedings."

88. Rosenthal *v.* Perkins (Cal.), 53 Pac. 444; Bank of American L. & T. Co. *v.* Burdick, 18 R. I. 481, 28 Atl. 967; Wheelock, Petitioner, 18 R. I. 463, 28 Atl. 966; Harper *v.* Dennis, 17 R. I. 9, 20 Atl. 96. See also the title "Assignments for the Benefit of Creditors."

In Oregon an assignment for the benefit of creditors prior to the entry of judgment against the debtor dissolves all attachments *porprio vigore*, provided the assignment carries with it the property levied on under the attachment. Joseph *v.* Furnish, 27 Ore. 260, 41 Pac. 424.

When attachment dissolved upon attaching creditor becoming assignee. Ryhiner *v.* Ruegger, 19 Ill. App. 156.

89. Palmer *v.* Mason, 42 Mich. 146, 3 N. W. 945.

When Assignment Operative.—An attachment will be dissolved when issued after the making of the assignment for the benefit of creditors, though obtained before the filing of the assignee's bond. Schofield *v.* Folsom, 7 N. M. 601, 38 Pac. 251.

"The St. 1836, c. 240, concerning assignments, protects the property assigned from attachment thereof, made after the execution and delivery of the instrument, but before notice is published in the newspaper, if publication is made in manner required by the statute within fourteen days

A foreign assignment for the benefit of creditors, it is held in some jurisdictions, will prevail over a subsequent attachment,[90] though in some states such assignment is ineffectual as to residents of the state where the attachment is made,[91] though valid as to non-residents.[92] The assignment is of no effect as to a subsequent attachment by a resident of the state where the property is located, if the assignment is contrary to the policy or law of the state where the attachment is made,[93] but if the attaching creditor is a resident of the state

after the assignment shall have been made." Fiske *v.* Carr, 20 Me. 301.

In **Nebraska** an assignee under a valid assignment for the benefit of creditors may maintain an action to set aside a sale of real estate under an attachment levied after the execution and delivery of the assignment, where such sale would defeat or impair his title as assignee. Smith *v.* Jones, 18 Neb. 481, 25 N. W. 624.

90. **U. S.**—Black *v.* Zacharie, 3 How. 483, 11 L. ed. 690; Van Wyck *v.* Read, 43 Fed. 716; Rosenthal *v.* Mastin Bank, 17 Blatchf. 318, 20 Fed. Cas. No. 12,063; Meeker *v.* Wilson, 1 Gall. 419, 16 Fed. Cas. No. 9,392; Caskie *v.* Webster, 2 Wall. Jr. (C. C.) 131, 5 Fed. Cas. No. 2,500. **Conn.**—Clark *v.* Connecticut Peat Co., 35 Conn. 303. **Ga.**—Princeton Mfg. Co. *v.* White, 68 Ga. 96; Miller *v.* Kernaghan, 56 Ga. 155. **Ky.**—Matthews *v.* Lloyd, 89 Ky. 625, 13 S. W. 106; Coflin *v.* Kelling, 83 Ky. 649. **Md.**—Wilson *v.* Carson, 12 Md. 54. **Mass.**—Sawyer *v.* Levy, 162 Mass. 190, 38 N. E. 365; Train *v.* Kendall, 137 Mass. 366; Means *v.* Hapgood, 19 Pick. 105. **Mo.**—Askew *v.* La Cygne Exch. Bank, 83 Mo. 366, 53 Am. Rep. 590. **N. J.**—Frazier *v.* Fredericks, 24 N. J. L. 162. **N. Y.**—Vanderpoel *v.* Gorman, 140 N. Y. 563, 35 N. E. 932, 37 Am. St. Rep. 601; Barth *v.* Backus, 140 N. Y. 230, 35 N. E. 425, 37 Am. St. Rep. 545; Ockerman *v.* Cross, 54 N. Y. 29, *affirmed*, 40 Barb. 465; Thompson *v.* Fry, 51 Hun 296, 4 N. Y. Supp. 166; Kelsladt *v.* Reilly, 55 How. Pr. 373. **Pa.**—Law *v.* Mills, 18 Pa. 185; Speed *v.* May, 17 Pa. 91, 55 Am. Dec. 540. **S. C.**—Russell *v.* Tunno, 11 Rich. L. 303; Greene *v.* Mowry, 2 Bailey L. 163; West *v.* Tupper, 1 Bailey L. 193. **Tex.**—Weidar *v.* Maddox, 66 Tex. 372, 1 S. W. 168, 59 Am. Rep. 617. **Vt.** Hanford *v.* Paine, 32 Vt. 442, 78 Am. Dec. 586. **Va.**—Gregg *v.* Sloan, 76 Va. 497.

See also the title "**Assignment for the Benefit of Creditors.**"

A deed of assignment void in the state where made but effectual in Missouri to pass title to land situate in that state, was delivered in the state where made, prior to the levy of an attachment upon land in Missouri, at the suit of a citizen of a third state, and recorded in Missouri prior to the issue of execution and sale under a judgment in the attacment suit; the title of the grantee in the deed of assignment is superior to that of the purchasers in the attachment. Attleboro First Nat. Bank *v.* Hughes, 10 Mo. App. 7.

Assignment of interest in a ship on the high seas. Crapo *v.* Kelly, 16 Wall. (U. S.) 610, 21 L. ed. 430, *overruling* Kelly *v.* Crapo, 45 N. Y. 86, 6 Am. Rep. 35; Graves *v.* Roy, 13 La. 454, 33 Am. Dec. 568; Southern Bank *v.* Wood, 14 La. Ann. 554, 74 Am. Dec. 446; Thuret *v.* Jenkins, 7 Mart. (La.) 318, 12 Am. Dec. 508.

In Pennsylvania it is the rule that an assignment made in a foreign state must be recorded in the county where the property is situated, or the attaching creditors have actual notice thereof in order to dissolve an attachment made subsequent to the assignment. Steel *v.* Goodwin, 113 Pa. 288, 6 Atl. 49; Philson *v.* Barnes, 50 Pa. 230; Chemical Nat. Bank *v.* Tuttle, 17 W. N. C. 415; Warner's Appeal, 13 W. N. C. 505.

91. **U. S.**—Sheldon *v.* Wheeler, 32 Fed. 773. **Fla.**—Walters *v.* Whitlock, 9 Fla. 86, 76 Am. Dec. 607. **Ill.**—May *v.* Attleboro First Nat. Bank, 122 Ill. 551, 13 N. E. 806; Henderson *v.* Schaas, 35 Ill. App. 155.

92. May *v.* Attleboro First Nat. Bank, 122 Ill. 551, 13 N. E. 806.

93. **Ga.**—Mason *v.* Stricker, 37 Ga. 262; Stricker *v.* Tinkham, 35 Ga. 176; Herschfeld *v.* Dexel, 12 Ga. 582. **La.**

where the assignment is made and the assignment is valid in such state it will be good as against a levy on property in another state.[94]

3. Reference. — The reference of an action and all demands between the parties to referees or arbitrators dissolves the attachment.[95]

4. Death of a Party. — **Death of Plaintiff.** — The death of the attaching creditor between the issue of the attachment and the judgment will abate the attachment where the statute makes no provision for a continuance of the action after the plaintiff's death.[96]

Death of Defendant. — In some jurisdictions the death of defendant before judgment dissolves the attachment;[97] notwithstanding proceed-

Beirne *v.* Patton, 17 La. 590. **Mass.** Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 846; May *v.* Wannemacher, 111 Mass. 202; Ingraham *v.* Geyer, 13 Mass. 146, 7 Am. Dec. 132; Boyd *v.* Rockport Steam Cotton Mills, 7 Gray 406; Zipcey *v.* Thompson, 1 Gray 243; Osborn *v.* Adams, 18 Pick. 245; Fall River Iron Wks. Co. *v.* Croade, 15 Pick. 11. **Mo.**—Bryan *v.* Brisbin, 26 Mo. 423, 72 Am. Dec. 219. **N. J.**—Moore *v.* Bonnell, 31 N. J. L. 90. **N. Y.**—Guillander *v.* Howell, 35 N. Y. 657. **S. C.**—Ex parte Dickinson, 29 S. C. 453, 7 S. E. 593.

See also the title "Assignment for the Benefit of Creditors."

Houston *v.* Nowland, 7 Gill & J. (Md.) 481, held that a deed made by a debtor in Delaware, to trustees for the benefit of his creditors in conformity with the laws of that state, but not executed, acknowledged, and recorded according to the laws of Maryland, would not operate to transfer real estate in the latter state.

94. **Mass.**—Daniels *v.* Willard, 16 Pick. 36; Whipple *v.* Thayer, 16 Pick. 25, 26 Am. Dec. 626. **Mo.**—Thurston *v.* Rosenfield, 42 Mo. 474, 97 Am. Dec. 351; Einer *v.* Beste, 32 Mo. 240, 82 Am. Dec. 129. **N. J.**—Moore *v.* Bonnell, 31 N. J. L. 90. **Pa.**—Long *v.* Girdwood, 150 Pa. 413, 24 Atl. 711.

The validity of the assignment is to be determined by the laws of the state in which it is made. Richardson *v.* Leavitt, 1 La. Ann. 430, 45 Am. Dec. 90. See also Atwood *v.* Protection Ins. Co., 14 Conn. 555; Burlock *v.* Taylor, 16 Pick. (Mass.) 335.

95. Bowley *v.* Bowley, 41 Me. 542; Clark *v.* Foxcroft, 7 Me. 348; Mooney *v.* Kavanagh, 4 Me. 277; Hill *v.* Hunnewell, 1 Pick. (Mass.) 192. See the title "Reference."

Otherwise if no new demand submitted. Seeley *v.* Brown, 14 Pick. (Mass.) 177.

96. *Ex parte* Vargas, 19 Wend. (N. Y.) 154.

97. **U. S.**—Pancoast *v.* Washington Corp., 5 Cranch (C. C.) 507, construing Maryland statute. **Cal.**—Ham *v.* Henderson, 50 Cal. 367; Ham *v.* Cunningham, 50 Cal. 365; Hensley *v.* Morgan, 47 Cal. 622; Myers *v.* Mott, 29 Cal. 359, 89 Am. Dec. 49. **Colo.**—Thompson *v.* White, 25 Colo. 226, 54 Pac. 718. **Conn.**—Green *v.* Barker, 14 Conn. 431. **La.** — Collins *v.* Duffy, 7 La. Ann. 39. **Mass.**—Herthel *v.* McKim, 190 Mass. 522, 77 N. E. 695, 5 Ann. Cas. 911; Dunbar *v.* Kelly, 189 Mass. 390, 75 N. E. 740; Kingsbury *v.* Baker, 17 Pick. 429. **N. H.**—Fairfield *v.* Day, 72 N. H. 160, 55 Atl. 219. **S. C.**—Crocker *v.* Radcliffe, 3 Brev. 23. **Va.** Felker *v.* Emerson, 17 Vt. 10.

In Delaware the attachment is dissolved if the defendant dies before he files his answer or after trial and judgment on a plea of *nulla bona*. Reynolds *v.* Howell, 1 Marv. 52, 31 Atl. 875.

In Massachusetts the statute requires that the administrator be appointed within one year, but the statute applies though the administrator is not appointed until several years later, and on a supplemental petition, if the original petition is filed within one year. "The design of this statute was to prevent interference with the orderly settlement of estates of deceased persons as provided by the statute, and to bring all the property of a deceased into the control of his personal representatives, to be administered by them and to secure in case of insolvency an equal distribution of the assets among all the creditors of the deceased according to the general policy of the law upon that

ings in insolvency have been commenced against him.[98] In others the contrary rule prevails,[99] unless attended by the insolvency of the estate.[1] and it has been held that it will not have that effect even though attended by insolvency.[2]

After Judgment. — The rule is well settled without an exception in any of the jurisdictions that the death of a defendant after judgment does not effect a dissolution and discharge of attachment lien,[3]

subject." Institution for Savings *v.* Puffer, 201 Mass. 41, 87 N. E. 562.

In Pennsylvania the death of the defendant in a writ of foreign attachment, before final judgment, dissolves the attachment. Reynolds *v.* Nesbitt, 196 Pa. 636, 46 Atl. 841, 79 Am. St. Rep. 736; Farmers', etc., Bank *v.* Little, 8 Watts & S. (Pa.) 207.

In Rhode Island defendant's death before the sale is effected dissolves the attachment. Dwyer *v.* Benedict, 12 R. I. 459; Vaughn *v.* Sturtevant, 7 R. I. 372.

The civil death of a corporation, such as is produced by a decree of forfeiture or other legal dissolution, will dissolve the attachment. **Ala.**—Paschall *v.* Whitsett, 11 Ala. 472. **Me.**—Bowker *v.* Hill, 60 Me. 172. **Pa.**—Farmers', etc., Bank *v.* Little, 8 Watts & S. 207; Frailey *v.* Central F. Ins. Co., 9 Phila. 219. *Contra,* Lindell *v.* Benton, 6 Mo. 361.

Dissolution of foreign corporation vacates attachment. Morgan *v.* New York Nat. Bldg., etc., Assn., 73 Conn. 151, 46 Atl. 877. See, however, Kruger *v.* Bank of Commerce, 123 N. C. 16, 31 S. E. 270.

98. Day *v.* Lamb, 6 Gray (Mass.) 523; Gass *v.* Smith, 6 Gray (Mass.) 112; Parsons *v.* Merrill, 5 Met. (Mass.) 356.

99. **Ariz.**—Wartman *v.* Pecka, 8 Ariz. 8, 68 Pac. 534. **Fla.**—Loubat *v.* Kipp, 9 Fla. 60. **Ill.**—Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761, *affirming* 46 Ill. App. 329; Davis *v.* Shapleigh, 19 Ill. 386; Rauh *v.* Ritchie, 1 Ill. App. 188. **Ia.**—Lord *v.* Allen, 34 Iowa 281. **Miss.**—Lowenberg *v.* Tironi, 62 Miss. 19; Dyson *v.* Baker, 54 Miss. 24; Holman *v.* Fisher, 49 Miss. 472; Melius *v.* Houston, 41 Miss. 59. **Mo.**—Shea *v.* Shea, 154 Mo. 599, 55 S. W. 869; Abernathy *v.* Moore, 83 Mo. 65; Kenrick *v.* Huff, 71 Mo. 570. **N. J.**—Smith *v.* Warden, 35 N. J. L. 346. **N. Y.**—More *v.* Thayer, 10 Barb. 258; Thacher *v.* Bancroft, 15 Abb. Pr. 243. **Okla.** Mosley *v.* Southern Mfg. Co., 4 Okla. 492, 46 Pac. 508. **Ore.**—White *v.* Ladd, 34 Ore. 422, 56 Pac. 515; White *v.* Johnson, 27 Ore. 282, 40 Pac. 511; Bunneman *v.* Wagner, 16 Ore. 433, 18 Pac. 841; Mitchell *v.* Schoonover, 16 Ore. 211, 17 Pac. 867. **Tenn.**—Boyd *v.* Roberts, 10 Heisk. 474; Snell *v.* Allen, 1 Swan 208; Perkins *v.* Norvell, 6 Humph. 151; Green *v.* Shaver, 3 Humph. 139. **Tex.**—Rogers *v.* Burbridge, 5 Tex. Civ. App. 67, 25 S. W. 300. **W. Va.**—White *v.* Heavner, 7 W. Va. 324.

In Tennessee the heirs must be made parties. Perkins *v.* Norvell, *supra,* See also Green *v.* Shaver, *supra.*

In Alabama there is a distinction between personalty and realty. Phillips *v.* Ash's Heirs, 63 Ala. 414. See also McClellan *v.* Lipscomb, 56 Ala. 255.

Where no personal service was made on defendant, his death will dissolve the attachment, though it occur after the rendition of judgment. Harrison *v.* Renfro, 13 Mo. 446.

1. **Ala.**—Phillips *v.* Ash's Heirs, 63 Ala. 414; McClellan *v.* Lipscomb, 56 Ala. 255; Woolfolk *v.* Ingram, 53 Ala. 11; McEachin *v.* Reid, 40 Ala. 410; Lamar *v.* Gunter, 39 Ala. 324; Hale *v.* Cummings, 3 Ala. 398. **Me.**—Ridlon *v.* Cressey, 65 Me. 128; Willard *v.* Whitney, 48 Me. 235; Maxwell *v.* Pike, 2 Me. 8; Martin *v.* Abbot, 1 Me. 333. **N. H.**—Edes *v.* Durkee, 8 N. H. 460; Clindenin *v.* Allen, 4 N. H. 385.

Lien created by contract not destroyed by death and insolvency of the debtor. McKinney *v.* Benagh, 48 Ala. 358.

2. Boyd *v.* Roberts, 10 Heisk. (Tenn.) 474.

3. Abernathy *v.* Moore, 83 Mo. 65; Kenrick *v.* Huff, 71 Mo. 570; Harrison *v.* Renfro, 13 Mo. 446; Sweringen *v.* Eberius, 7 Mo. 421; Fitch *v.* Ross, 4 Serg. & R. (Pa.) 557.

Interlocutory Judgment.—Kincaid *v.* Blake, 1 Bailey (S. C.) 20.

Under the present South Dakota

notwithstanding the estate is thereafter decreed to be insolvent.[4]

5. Final Judgment.— *For Defendant on Merits.* — No order of the court is required to dissolve the attachment when there is a judgment on the merits for defendant.[5] Judgment of nonsuit also vacates the attachment[6] which is not restored by an order for a new trial.[7]

Judgment for Plaintiff. — A general judgment against the defendant does not discharge the attachment,[8] but upon the satisfaction of the judgment the attachment is annulled.[9] In some jurisdictions if only a personal judgment be taken against the defendant, and no adjudi-

statute the death of the defendant after judgment will not affect the attachment. Previous to 1901 the rule was otherwise. Yankton Sav. Bank *v.* Gutterson, 15 S. D. 486, 90 N. W. 144.

Before Sale.—Waitt *v.* Thompson, 43 N. H. 161; Farmers', etc., Bank *v.* Little, 8 Watts & S. (Pa.) 207.

Before Execution.—Miller *v.* Williams, 30 Vt. 386.

4. Grosvenor *v.* Gold, 9 Mass. 209; Bowman *v.* Stark, 6 N. H. 459.

5. **U. S.**—Meloy *v.* Orton, 42 Fed. 513. **Ala.**—Sherrod *v.* Davis, 17 Ala. 312. **Cal.**—Aigeltinger *v.* Whelan, 133 Cal. 110, 65 Pac. 125; O'Connor *v.* Blake, 29 Cal. 312. **Ga.**—Ouzts *v.* Seabrook, 47 Ga. 359. **Ill.**—Stix *v.* Dodds, 6 Ill. App. 27; Buchman *v.* Dodds, 6 Ill. App. 25. **Ind.**—State *v.* Miller, 63 Ind. 475. **Ia.**—Sheldon *v.* Bigelow, 124 Iowa 566, 100 N. W. 502; McCormick Harvesting Mach. Co. *v.* Jacobson, 77 Iowa 582, 42 N. W. 499; Ryan *v.* Heenan, 76 Iowa 589, 41 N. W. 367; Harger *v.* Spofford, 44 Iowa 369; Harrow *v.* Lyon, 3 Greene 157. **Kan.**—Miller *v.* Dixon, 2 Kan. App. 445, 42 Pac. 1014. **Md.**—Higgins *v.* Grace, 59 Md. 365. **Mass.**—Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70; Suydam *v.* Huggeford, 23 Pick. 465; Clap *v.* Bell, 4 Mass. 99. **Mo.** State *v.* Beldsmeier, 56 Mo. 226; Stephenson *v.* Jones, 84 Mo. App. 249. **Neb.**—Alpirn *v.* Goodman, 3 Neb. (Unof.) 397, 91 N. W. 530. **Nev.**—Ranft *v.* Young, 21 Nev. 401, 32 Pac. 490. **N. H.**—Gunnison *v.* Abbott, 73 N. H. 590, 64 Atl. 23; Littlefield *v.* Davis, 62 N. H. 492. **N. Y.**—Neely *v.* Munnich, 27 Misc. 814, 57 N. Y. Supp. 1143, *affirmed* in 27 Misc. 587, 58 N. Y. Supp. 316; Friede *v.* Weissenthanner, 27 Misc. 518, 58 N. Y. Supp. 336; McKean *v.* National Life Assn., 24 Misc. 511, 28 Civ. Proc. 146, 53 N. Y. Supp. 980, 6 Ann. Cas. 179; Blynn *v.* Smith, 4 N. Y. Supp. 306. **Vt.** Felker *v.* Emerson, 17 Vt. 101; Johnson *v.* Edson, 2 Aik. 299.

Failure of clerk to certify judgment to the register does not change the rule. Meloy *v.* Orton, 42 Fed. 513.

Not a Judgment Upon Error.—Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70.

Pendency of new trial does not alter the rule. Ranft *v.* Young, 21 Nev. 401, 32 Pac. 490.

6. **Cal.**—Hamilton *v.* Bell, 123 Cal. 93, 55 Pac. 758. **Ill.**—Bates *v.* Jenkins, 1 Ill. 411. **Ia.**—Brown *v.* Harris, 2 Greene 505, 52 Am. Dec. 535.

7. Hamilton *v.* Bell, 123 Cal. 93, 55 Pac. 758; Brown *v.* Harris, 2 Greene (Iowa) 505.

Otherwise if judgment set aside during the term. Gunnison *v.* Abbott, 73 N. H. 590, 64 Atl. 23; Hubbell *v.* Kingman, 52 Conn. 17.

A void order of dismissal does not destroy the lien. Jaffray *v.* H. B. Claflin Co., 119 Mo. 117, 24 S. W. 761.

8. Yarnell *v.* Brown, 170 Ill. 362, 48 N. E. 909; Lynch *v.* Crary, 52 N. Y. 181, *reversing* 1 Jones & S. 461.

In New York after entry of judgment the attachment merely holds the lien until the issuance of execution. If the execution be returned unsatisfied there is no lien either by virtue of the attachment or the execution. Peetsch *v.* Sommers, 31 App. Div. 255, 53 N. Y. Supp. 438. See also Merchants' Nat. Bank *v.* Greenhood, 16 Mont. 395, 41 Pac. 250, 851, where a fraudulent obstruction interfered with the execution. *Compare* Lant *v.* Manley, 75 Fed. 627, 21 C. C. A. 457, as to its effect where second execution is issued.

9. Neely *v.* Munnich, 27 Misc. 507, 58 N. Y. Supp. 316.

A motion to vacate falls with satisfaction of the judgment. Neely *v.* Munnich, *supra.*

cation of the proceedings in attachment or judgment for the sale of the attached property be made, the lien is released.[10] If only a part of the property is ordered sold the remainder only is thereby relieved.[11] If the plaintiff intentionally and wilfully take judgment in excess of the legal claims, the attachment will be dissolved as to subsequent attachment creditors.[12] So if, pending the action, the parties settle all their accounts, including demands for which the writ contains no proper counts and which were not payable till after the action commenced, this is a fraud in law, and the lien is lost *in toto* as to subsequent attaching creditors.[13]

Confessing judgment destroys the lien as to subsequent attaching creditors.[14]

6. Amendments. — *Amendment to Writ.* — Any material alteration of the writ to the prejudice of the attaching creditors dissolves the attachment as against them,[15] but this is not true as to matters of form.[16]

10. **Ind.**—Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160; United States Mtg. Co. *v.* Henderson, 111 Ind. 24, 12 N. E. 88; Sannes *v.* Ross, 105 Ind. 558, 5 N. E. 699; Smith *v.* Scott, 86 Ind. 346; Lowry *v.* McGee, 75 Ind. 508; Capital City Dairy Co. *v.* Plummer, 20 Ind. App. 408, 49 N. E. 963. **N. C.**—See Farmers' Mfg. Co. *v.* Steinmetz, 133 N. C. 192, 45 S. E. 552, in which the rule is stated as in effect in other states. **Ore.**—Moore, etc., Shoe Mfg. Co. *v.* Billings, 46 Ore. 401, 80 Pac. 422. *Contra*, Reynolds *v.* Williams, 152 Ala. 488, 44 So. 406, holding that the lien is not released.

Distinction as to courts of record and justices of the peace. Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232; Wasson *v.* Cone, 86 Ill. 46.

11. Thomas *v.* Johnson, 137 Ind. 244, 36 N. E. 893.

12. Peirce *v.* Partridge, 3 Met. (Mass.) 44; Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388; Page *v.* Jewett, 46 N. H. 441.

Otherwise if excess is a mistake which is immediately corrected. **U. S.** Cutler *v.* Lang, 30 Fed. 173. **Conn.** Hathaway *v.* Hemingway, 20 Conn. 191. **Mass.**—Felton *v.* Wadsworth, 7 Cush. 587. **N. H.**—Avery *v.* Bowman, 40 N. H. 453.

13. Clark *v.* Foxcroft, 7 Me. 348, See also: **Me.**—Mooney *v.* Kavanagh, 4 Me. 348. **Mass.**—Hill *v.* Hunnewell, 1 Pick. 192; Bean *v.* Parker, 17 Mass. 603. **N. H.**—Page *v.* Jewett, 46 N. H. 441.

14. Fletcher *v.* Bennett, 36 Vt. 659; Hall *v.* Walbridge, 2 Aik. (Vt.) 215. *Contra*, Wigfall *v.* Byne, 1 Rich. L. (S. C.) 412; Schloss *v.* Washington State Bank, 4 Wash. 726, 21 Pac. 23.

This effect is avoided by an agreement to treat the judgment as a nullity. Fletcher *v.* Bennett, 36 Vt. 659.

Withdrawal of plea by defendant and suffering judgment by agreement has not the effect of confessing judgment. State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519, 48 N. E. 82. See also Doggett *v.* Wimer, 54 Mo. App. 125; Adler *v.* Anderson, 42 Mo. App. 189.

15. Clough *v.* Curtis, 62 N. H. 700; Laighton *v.* Lord, 29 N. H. 237; Whitney *v.* Brunette, 15 Wis. 61.

See *supra*, XI, H, and generally the title "Amendments."

Changing Christian Name of Plaintiff.—Flood *v.* Randall, 72 Me. 439.

Where the name in the writ was Henry F. Hawkins, and the certificate by the officer to the register of deeds was of an attachment of the real estate of Henry M. Hawkins, the misdescription of the person, rendered the attachment void. Dutton *v.* Simmons, 65 Me. 583.

16. Norris *v.* Anderson, 181 Mass. 308, 64 N. E. 71, 92 Am. St. Rep. 420; Wood *v.* Denny, 7 Gray (Mass.) 542; Wight *v.* Hale, 2 Cush. (Mass.) 486, 48 Am. Dec. 677 (where "Wight" was substituted for "Wright"); Lord *v.* Clark, 14 Pick. 223; Haven *v.* Snow, 14 Pick. (Mass.) 28.

Amendment of Complaint. — If plaintiff acting in good faith, embraces in his new declaration only the original cause of action intended to be described, he may, without hazard to his security, correct by amendment all mere errors of form or description and want of technicality.[17] The attachment is not affected by adding a new count for the same cause of action,[18] or by changing the form of the action.[19] But any increase in the *ad damnum*,[20] or the addition of a new cause of action which prejudices the rights of subsequent attaching creditors, dissolves the attachment as against such creditors.[21] But if, notwithstanding a vicious amendment, the judgment is only upon the demand originally included in and covered by the original declaration, the attachment will not be dissolved.[22] The same is true

17. **Mass.**—Lord *v.* Clark, 14 Pick. 223. **N. H.**—Laighton *v.* Lord, 29 N. H. 237. **Vt.**—Austin *v.* Burlington, 34 Vt. 506.

See XVI, C, 3.

Where, after the levy of attachments, a third party purchased the claims from the plaintiffs, and the declarations in attachment were amended by alleging that the plaintiffs sued for the use of such party, this did not operate as a dissolution of the attachments. Epstin *v.* Levenson, 79 Ga. 718, 4 S. E. 328.

Amending to state a several agreement, instead of a joint one, and to make definite the character of the claim but not changing the liability, does not vacate the lien. Gibbs *v.* Petree, 7 Tex. Civ. App. 526, 27 S. W. 685.

Admitting a credit of payments made by a joint debtor subsequent to the commencement of the action does not destroy the attachment. First Nat. Bank *v.* Wallace (Tex. Civ. App.), 65 S. W. 392.

18. **Mass.**—Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70; Miller *v.* Clark, 8 Pick. 412; Ball *v.* Claflin, 5 Pick. 303, 16 Am. Dec. 407. **Nev.**—Mendes *v.* Freiters, 16 Nev. 388. **N. H.**—Page *v.* Jewett, 46 N. H. 441. **Ore.**—Meyer *v.* Brooks, 29 Ore. 203, 44 Pac. 281. **Tex.**—Boyd *v.* Beville, 91 Tex. 439, 44 S. W. 287.

Oral evidence to show the cause the same. Freeman *v.* Creech, 112 Mass. 180.

19. **Ill.**—May *v.* Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001, *affirming* 113 Ill. App. 415. **Nev.**—Mendes *v.* Frieters, 16 Nev. 388. **Ore.** Suksdorff *v.* Bigham, 13 Ore. 369, 12 Pac. 818.

See Page *v.* Jewett, 46 N. H. 441.

20. Page *v.* Jewett, 46 N. H. 441; Clough *v.* Monroe, 34 N. H. 381; Laighton *v.* Lord, 29 N. H. 237; Austin *v.* Burlington, 34 Vt. 506. *Contra*, unless fraud shown, Suksdorff *v.* Bigham, 13 Ore. 369, 12 Pac. 818.

21. **Kan.**—Standard Imp. Co. *v.* Lansing Wagon Wks., 58 Kan. 125, 48 Pac. 638. **Mass.**—Russia Cement Co. *v.* LePage Co., 174 Mass. 349, 55 N. E. 70; Ball *v.* Claflin, 5 Pick. 303, 16 Am. Dec. 407; Vancleef *v.* Therasson, 3 Pick. 14; Willis *v.* Crooker, 1 Pick. 204. **Neb.**—Holway *v.* American Exch. Nat. Bank, 64 Neb. 67, 89 N. W. 382, where a different cause of action was added and the first cause was dismissed before trial. **N. H.**—Page *v.* Jewett, 46 N. H. 441; Laighton *v.* Lord, 29 N. H. 237. **Ore.**—Meyer *v.* Brooks, 29 Ore. 203, 44 Pac. 281. **S. C.**—*Ex parte* Chase, 62 S. C. 353, 38 S. E. 718. **Tex.** Boyd *v.* Beville, 91 Tex. 439, 44 S. W. 287. **Wis.**—Beyer *v.* Dobeas, 141 Wis. 89, 123 N. W. 638.

Adding counts on promissory notes to general money counts. Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388.

Amendment to the complaint and affidavit on attachment by inserting a different and distinct cause of action after assignment for benefit of creditors discharges the attachment as to the intervening rights of the assignee. Heidel *v.* Benedict, 61 Minn. 170, 63 N. W. 490.

22. Page *v.* Jewett, 46 N. H. 441;

if, notwithstanding an improper judgment execution is taken out for only the amount originally claimed.[23] A substitution of different parties will destroy the attachment.[24] And so will the bringing in of additional parties,[25] the correction of a misjoinder of parties,[26] or changing the capacity in which the plaintiff brings the action.[27]

Amendment of Return. — An amendment to the officers return to correct a mere clerical mistake will have no effect on the attachment.[28]

7. Failure To Observe Statutory Directions as to Sale. — The statutory requirements as to the sale of the property on the execution issued upon a final judgment in favor of plaintiff must be observed by the officer, or the lien of the attachment will be lost.[29]

Laighton *v.* Lord, 29 N. H. 237, holding also that the burden is on the party amending to show no resulting injury.

23. Cutler *v.* Long, 30 Fed. 173; Standard Imp. Co. *v.* Lansing Wagon Wks., 58 Kan. 125, 48 Pac. 638.

The fact that the judgment can be rendered certain by reference to the pleadings so that it can be known definitely what mount of indebtedness secured by the attachment is included in the judgment will not prevent the loss of the attachment lien. Beyer *v.* Dobeas, 141 Wis. 89, 123 N. W. 638.

24. Fargo *v.* Cutshaw, 12 Ind. App. 392, 39 N. E. 532.

Where an attachment was made against a non-resident and by agreement a resident corporation of which the first defendant was president was substituted as defendant, it was held that the attachment was discharged. Milledgeville Mfg. Co. *v.* Rives, 44 Ga. 479.

25. Moulton *v.* Chapin, 28 Me. 505.

The rule is not applicable where the action was against a partnership and the amendment merely brought in a member of the partnership not named in the original complaint. Henderson *v.* Stetter, 31 Kan. 56, 2 Pac. 849.

26. Hodges *v.* Ninth Nat. Bank. 54 Md. 406.

27. Hagerty *v.* Hughes, 4 Baxt. (Tenn.) 222.

28. Havens *v.* Snow, 14 Pick. (Mass.) 28. See also *supra,* XIII, E, 1.

29. **Ark.**—Snell *v.* Cummins, 67 Ark. 261, 54 S. W. 342. **Me.**—Croswell *v.* Tufts, 76 Me. 295; Aiken *v.* Medex, 15 Me. 157. **N. H.**—Nehan *v.* Knight, 56 N. H. 167.

See *supra,* XIV.

Receiver's possession prevents dissolution of attachment for failure to issue execution and to levy on attached property within statutory period. Central Trust Co. *v.* Worcester Cycle Mfg. Co., 114 Fed. 659.

Effect of Stay of Execution.—Steere *v.* Stafford, 12 R. I. 131.

In Maine failure to seize the property after the rendition of judgment within the statutory period dissolves the attachment lien. Bowley *v.* Bowley, 41 Me. 542.

New Hampshire.—An attachment for goods is not *ipso facto* dissolved by the lapse of thirty days after the end of the term when the defendant was defaulted, though no continuance of the cause was ordered. The court may, in its discretion, order the cause brought forward at a subsequent term, in order to save the attachment. Hackett *v.* Pickering, 5 N. H. 19. See also Nihan *v.* Knight, 56 N. H. 167; Rowe *v.* Page, 54 N. H. 190.

Compare Haynes *v.* Thom, 28 N. H. 386, holding that if the judgment be taken more than thirty days after the end of such term, any attachment which may have been made by virtue of the original writ, will be *ipso facto.* dissolved.

Massachusetts.—In Morse *v.* Knowlton, 5 Allen (Mass.) 41, it was held that if, upon the sale of attached property on a writ, the money received was put into the hands of the creditor, who, after obtaining judgment and taking out execution, refused to pay over the same to the deputy sheriff who had the execution, so that it could be applied thereon, and the execution was returned in no part satisfied, the lien obtained by the attachment was dissolved at the expiration of thirty days, and that another creditor who subsequently attached the same property, subject to the former attachment, and obtained judgment and ex-

8. Repeal of Statute. — An act which merely abolishes one ground for attachment will not dissolve an attachment already secured on that ground.[30] The absolute repeal during the pendency of proceedings of the law to which they owe their existence in the absence of a clause saving pending proceedings, puts an end to the attachment suit; proceedings subsequent thereto are *coram non judice* and void.[31] An attachment which has become perfected by judgment confers vested rights which cannot be impaired by subsequent legislation.[32]

9. Act of Plaintiff. — The plaintiff may voluntarily dismiss the attachment suit.[33] But if the rights of the defendant or third parties

ecution in his suit, became entitled thereto, and might maintain an action against the sheriff, if, upon committing the execution to him for service, the property was not found, or the avails of it applied thereon.

Where the attached property was too bulky to be removed and before the time expired for levy of execution it had been disposed of by the defendant, it was held that the attachment was not lost by failure to levy on it within thirty days after judgment. Davis *v.* Leary, 177 Mass. 526, 59 N. E. 191.

Rhode Island. — "Under the provisions of Pub. Stat. R. I. c. 222, §20, where an execution is not levied before the return-day thereof the property attached is discharged from such attachment; but by Pub. Stat. R. I. cap. 223, §15, the sale is allowed to be made after the return-day. An execution was levied upon certain land and the land sold under the levy. On account of irregularities the sale and deed were void. A new levy was made before the return day of the execution and sale of the land made after such return-day. Before the second levy the judgment debtor had parted with his title. The second sale was valid and passed the title that the judgment debtor had in the land at the time of the original attachment. The execution was unsatisfied and levied within the time prescribed by law to preserve the attachment." East Greenwich Inst. for Savings *v.* Allen, 22 R. I. 337, 47 Atl. 885.

Wisconsin.—The attachment is not lost by failure to issue execution while the rights of the parties are in controversy. Rice *v.* Wolff, 65 Wis. 1, 26 N. W. 181.

Sale Under Agreement of Parties. "Where an agreement is made between all attaching creditors, the debtor, and his assignee, that a third person may sell the attached property, the proceeds to be a fund in court, and that all rights remain, the attachment is not released in favor of a writ subsequently levied." Cressy *v.* Katz-Nevins-Rees Mfg. Co., 91 Iowa 444, 59 N. W. 63.

30. National Bank of Commerce *v.* Riethmann, 79 Fed. 582, 25 C. C. A. 101.

31. National Bank of Commerce *v.* Riethmann, 79 Fed. 582, 25 C. C. A. 101; Roush *v.* Morrison, 47 Ind. 414; Stephenson *v.* Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; Hunt *v.* Jennings, 5 Blackf. (Ind.) 195, 33 Am. Dec. 465. See also Gashar *v.* State, 11 Ind. 548.

Retrospective Legislation Prohibited. After the levy of an attachment the attachment will not be dissolved by the repeal of the act in a state where the constitution prohibits the enactment of a law which is retrospective in its operation. The prior statute should be read in connection with the repealing statute, and is to be treated and held as in force for the purposes of sustaining rights acquired thereunder. Day *v.* Madden, 9 Colo. App. 464, 48 Pac. 1053. To the same effect, see Mulnix *v.* Spratlin, 10 Colo. App. 390, 50 Pac. 1078.

32. McFadden *v.* Blocker, 2 Ind. Ter. 260, 48 S. W. 1043.

33. **Cal.**—Smith *v.* Robinson, 64 Cal. 387, 1 Pac. 353. **Ga.**—Barton-Price Co. *v.* Murphy & Co., 134 Ga. 710, 68 S. E. 484. **La.**—Meyers *v.* Birotle, 41 La. Ann. 745, 6 So. 607. **Mich.**—Orr *v.* Keyes, 37 Mich. 385. **N. Y.**—Straus *v.* Guilhou, 80 App. Div. 50, 80 N. Y. Supp. 180. **N. C.**—Jones *v.* McClair, 64 N. C. 125. **Va.**—Magill *v.* Manson, 20 Gratt. 527.

are affected he must procure first an order of court.[34] Plaintiff may release his rights under the attachment to a subsequent attaching creditor,[35] but a release as to a part of the property will not dissolve the attachment as to the balance.[36] So the attachment will be vacated by any voluntary act of the plaintiff which is clearly inconsistent with his claim of a right to attachment.[37]

After such a dismissal the attachment cannot be revived against third parties by reinstating the case upon the docket during the same term. Union Mfg. Co. *v.* Pitkin, 14 Conn. 174; Murphy *v.* Crew, 38 Ga. 139.

Dismissal as to One Defendant Dissolves as to Him.—Dean *v.* Stephenson, 61 Miss. 175.

Under a statute which allowed other creditors to come in under the attachment it was held that where parties settle an attachment, the action continues and the lien holds good for all creditors who may apply or enter rules under the statute before the discontinuance is entered. Smith *v.* Warden, 35 N. J. L. 346. Of similar effect, see Rice *v.* Baldwin, 20 Fed. Cas. No. 11,750a.

Under such a statute if an attachment has been discontinued by plaintiff by motion only made in open court, without fraud, before any other creditor had applied to the court or auditors, the discontinuance will not be set aside on application of another creditor made to the court on the same day, even if he had given notice to the plaintiff's attorney before the discontinuance, that he would apply under the attachment, but if the discontinuance be entered by fraud, or in bad faith, it will be set aside. Duffin *v.* Wolf, 21 N. J. L. 475.

34. **Ind.**—McLain *v.* Draper, 109 Ind. 556, 8 N. E. 910; Ryan *v.* Burkam, 42 Ind. 507. **Kan.**—Oberlander *v.* Confrey, 38 Kan. 462, 17 Pac. 88. **N. J.** Cummins *v.* Blair, 18 N. J. L. 151.

Defendant's right to vacate on the ground of defective publication of summons cannot be defeated by a withdrawal of the attachment by the plaintiff. Corn Exch. Bank *v.* Bossio, 8 App. Div. 306, 40 N. Y. Supp. 994, 75 N. Y. St. 388.

Defendant's right to damages and costs in case his traverse is successful cannot be defeated by dissolution of the attachment after issue joined on the truth of the affidavit. Mense *v.* Osbern, 5 Mo. 544.

35. Bachelder *v.* Perley, 53 Me. 414.

36. Doggett *v.* Wimer, 54 Mo. App. 125.

Release by Attorney.—The attorney representing the attaching creditor may release the property levied upon whether it be realty (Smith *v.* Robinson, 64 Cal. 387, 1 Pac. 353; Benson *v.* Carr, 73 Me. 76) or personalty (Benson *v.* Carr, *supra;* Muir *v.* Orear, 87 Mo. App. 38), and such release will bind his client as between such client and a party purchasing the property or taking a mortgage thereon, on the strength thereof (Benson *v.* Carr, *supra*).

In Massachusetts the giving of a paper addressed to the register of deeds by plaintiff's attorney to defendant's attorney reciting that the attachment is dissolved and requesting such fact to be noted on the record of attachment, releases the attachment at once and before entry is made on the record. Marble *v.* Jamesville Mfg. Co., 163 Mass. 171, 39 N. E. 998.

37. As for example, where the attaching creditor acting as assignee for the benefit of creditors, consented to such an alteration of the assignment as eliminated its fraudulent character. Ryhiner *v.* Ruegger, 19 Ill. App. 156.

So where the attaching creditor joined in an agreement, which involved a conveyance of all the debtor's property to trustees to pay debts, and under which was inconsistent with the further prosecution of the suit. Marr *v.* Washburn, etc., Mfg. Co., 167 Mass. 35, 44 N. E. 1062, holding further that the failure to administer the trust according to its terms did not relieve the defendant from the effect of assenting to the agreement.

So taking the property of the debtor under an agreement to discharge the attachment destroys the lien. Brandon Iron Co. *v.* Gleason, 24 Vt. 228.

10. Miscellaneous Considerations.[38] — A tender will not release an attachment.[39]

A change of conditions so that a valid cause for the attachment no longer exists does not necesssarily destroy the lien.[40]

38. Sustaining a plea in abatement interposed by one partner does not destroy the lien as to the other partners. Hill *v.* Bell, 111 Mo. 35, 19 S. W. 959.

Invalidity of plaintiff's claim cannot be urged on application to vacate by subsequent attaching creditors. Johnson *v.* Hardwood Door, etc., Co., 79 Hun 407, 29 N. Y. Supp. 797, holding that the proper remedy was by intervention in the suit.

A sale upon mesne process of a part of the property attached, which brought an amount in excess of plaintiff's claim and in excess of the amount the officer was commanded to attach, does not impair the creditor's lien as to the remainder. Marshall *v.* Town, 28 Vt. 14.

Discharge of Mortgage.—Under a statute providing for the attachment of mortgaged property and that the mortgage be made a party to the suit, it was held that the attachment would not be dissolved by the discharge of the trustee where it appeared on his examination that he disclaimed all rights as mortgagee and that there was no mortgage and no debt. Simmons *v.* Woods, 144 Mass. 385, 11 N. E. 659.

Not Abated by Expiration of Term of Judge Issuing Attachment.—Davis *v.* Ainsworth, 14 How. Pr. (N. Y.) 346.

Dissolved if Object Is to Hinder Other Creditors.—Reed *v.* Ennis, 4 Abb. Pr. (N. Y.) 393.

In New York laches in the prosecution may furnish ground to vacate the attachment. Young *v.* Fowler, 73 Hun 179, 25 N. Y. Supp. 875. But in Pennsylvania this is no ground if the delay is accounted for. Cookson *v.* Turner, 2 Binn. 453; Weber *v.* Carter, 1 Phila. 221.

The subsequent marriage of the defendant will not affect the attachment. Bradley *v.* Wacker, 7 Ohio Dec. 566.

The partition of the estate of a debtor held in common with others will not operate to dissolve the attachment, but it will remain a lien upon that part set off to the debtor. Argyle *v.* Dwinel, 29 Me. 29.

Not Discharged by Answer.—Stewart *v.* Parnell, 8 Pa. Co. Ct. 604.

The arrest of the debtor and his discharge on taking the poor debtor's oath did not discharge the attachment. Bailey *v.* Jewett, 14 Mass. 155; Lyman *v.* Lyman, 11 Mass. 317.

Where there are several attachments, the attachment defendant is liable to the extent of the value of the property seized, and when the defendant pays to the prior attaching creditor the value of the property, the obligation under the several attachments is discharged. Thurman *v.* Blankenship-Blake Co., 79 Tex. 171, 15 S. W. 387.

39. Chase *v.* Welsh, 45 Mich. 345, 7 N. W. 895.

A tender before suit of the amount demanded, without interest, the money not being paid into court, will not discharge the attachment. Dudley *v.* Chicago, etc., R. Co., 58 W. Va. 604, 52 S. E. 718.

The mere deposit in court after judgment will not release the attachment. Sagely *v.* Livermore, 45 Cal. 613.

40. Simons *v.* Jacobs, 15 La. Ann. 425; Offutt *v.* Edwards, 9 Rob. (La.) 90; Reeves *v.* Comly, 3 Rob. (La.) 363; New Orleans Canal Co. *v.* Comby, 1 Rob. (La.) 231. See also Jackson *v.* White, 39 Leg. Int 42, 15 Phila. 294.

Where attachment is issued on the ground that defendant has left the state with the intention of never returning, his return will not dissolve the attachment, unless he prove that it was his intention to return, or that no suspicious circumstances existed. Offutt *v.* Edwards, 9 Rob. (La.) 90; Reeves *v.* Comly, 3 Rob. (La.) 363; New Orleans Canal Co. *v.* Comby, 1 Rob. (La.) 231.

Where the attachment was made for fraud for secreting and withdrawing funds from a partnership, it was held that the attachment would not be dissolved by a return of the property. Globe Woolen Co. *v.* Carhart, 67 How. Pr. (N. Y.) 403.

The abandonment and surrender of the property attached by the officer will as a rule dissolve the attachment.[41]

H. Statutory Provisions as to Bonds.[42] — A distinction is to be noted between a forthcoming bond and what is properly termed a dissolution bond. The former was conditioned for the return of the property; the latter for the payment of any judgment which might be obtained. Under the former the lien of the attachment generally continued. It did not produce a dissolution of the attachment,[43] nor

Acquiring residence after issuance of an attachment on the ground of non-residence will not dissolve the attachment. Larimer *v.* Kelley, 10 Kan. 298.

41. **Conn.**—Taintor *v.* Williams, 7 Conn. 271. **Mass.**—Eldridge *v.* Lancy, 17 Pick. 352. Carrington *v.* Smith, 8 Pick. 419; Bagley *v.* White, 4 Pick. 395. **N. H.**—Dunklee *v.* Fales, 5 N. H. 527. **N. Y.**—See Rhoads *v.* Woods, 41 Barb. 471.

Relinquishment under claim of title is not such a surrender. Wheeler *v.* Eaton, 67 N. H. 368, 39 Atl. 901.

Promise to redeliver to the officer on demand is of no effect. Baker *v.* Warren, 6 Gray (Mass.) 527.

The removing property out of the State, by a person to whom the same has been delivered for safe keeping, by an attaching officer, does not dissolve the attachment. Utley *v.* Smith, 7 Vt. 154, 29 Am Dec. 162.

42. See *supra,* X; and the title "Bonds."

43. **U. S.**—Smith *v.* Packard, 98 Fed. 793, 39 C. C. A. 294; Correy *v.* Lake, Deady 469, 6 Fed. Cas. No. 3,253. **Ala.**—Cordaman *v.* Malone, 63 Ala. 556; Rives *v.* Wilborne, 6 Ala. 45; Perine *v.* Babcock, 8 Port. 131; M'Rae *v.* M'Lean, 3 Port. 138. **Cal.**—Low *v.* Adams, 6 Cal. 277. **Colo.**—Chittenden *v.* Nichols, 31 Colo. 202, 72 Pac. 1072; Stevenson *v.* Palmer, 14 Colo. 565, 24 Pac. 5; Schneider *v.* Wallingford, 4 Colo. App. 150, 34 Pac. 1109. **Ill.**—Roberts *v.* Dunn, 72 Ill. 46; Brush *v.* Seguin, 24 Ill. 254; People *v.* Cameron, 7 Ill. 468. **Ind.**—Gass *v.* Williams, 46 Ind. 253. **Ia.**—Valley Bank *v.* Shenandoah Nat. Bank, 109 Iowa 43, 79 N. W. 391; Ayres, etc. Co. *v.* Dorsey Produce Co., 101 Iowa 141, 70 N. W. 111; Cole *v.* Smith, 82 Iowa 579 50 N. W. 54; Allerton *v.* Eldridge, 56 Iowa 709, 10 N. W. 252. See also Wayant *v.* Dodson, 12 Iowa 22. **Kan.** McKinley *v.* Purcell, 28 Kan. 446; Tyler *v.* Safford, 24 Kan. 580. **Ky.**—Lee *v.* Newton, 27 Ky. L. Rep. 1004, 87 S. W. 789; Deposit Bank *v.* Thomason, 23 Ky. L. Rep. 1957, 66 S. W. 604; Hobson *v.* Hall, 14 S. W. 958; Bell *v.* Western River Imp., etc. Co., 3 Metc. 558; Kane *v.* Pilcher, 7 B. Mon. 651; Bell *v.* Pearce, 1 B. Mon. 73; Franklin *v.* Fry, 9 Ky. L. Rep. 358. **Me.**—Perry *v.* Somerby, 57 Me. 552; Carr *v.* Farley, 12 Me. 328; Woodman *v.* Trafton, 7 Me. 178. **Miss.**—Montague *v.* Gaddis, 37 Miss. 453; Gray *v.* Perkins, 12 Smed. & M. 622. **Mo.**—Jones *v.* Jones, 38 Mo. 429; Evans *v.* King, 7 Mo. 411; Simmons Hdw. Co. *v.* Loewen, 95 Mo. 122, 68 S. W. 947; Fleming *v.* Clark, 22 Mo. App. 218. **Neb.**—Dewey *v.* Kavanaugh, 45 Neb. 233, 63 N. W. 396; Wilson *v.* Shepherd, 15 Neb. 15, 16 N. W. 826; Hilton *v.* Ross, 9 Neb. 406, 2 N. W. 862; Allyn *v.* Cole, 3 Neb. (Unof.) 235, 91 N. W. 505. **N. M.**—Holzman *v.* Martinez, 2 N. M. 271. **N. Y.**—Sterling *v.* Welcome, 20 Wend. 238. **Ohio.**—Rutledge *v.* Corbin, 10 Ohio St. 478. **Ore.** Dickson *v.* Back, 32 Ore. 217, 51 Pac. 727; Coos Bay, etc. Co. *v.* Wieder, 26 Ore. 453, 37 Pac. 338; Drake *v.* Sworts, 24 Ore. 198, 33 Pac. 563; Kohn *v.* Hinshaw, 17 Ore. 308, 20 Pac. 629; Duncan *v.* Thomas, 1 Ore. 314. **Tenn.**—Phillips-Buttorff Mfg. Co. *v.* Williams, 63 S. W. 185. **Tex.**—Carothers *v.* Wilkerson, 2 Wills. Civ. Cas. §355.

A personal judgment may be rendered although the defendant has given a delivery bond. Moshell *v.* Reed. 30 Ky. L. Rep. 10, 97 S. W. 372.

Surrender of Person.—In Illinois the filing by the defendant of a bond with sureties conditioned to surrender his person will not be sufficient to obtain a dissolution of an attachment. People *v.* Cameron, 7 Ill. 468.

Costs.—On giving a delivery bond the defendant is entitled to recover the attached property without first paying the costs incurred for keeping

permit a motion to vacate.[44] Some statutes provide for a bond dissimilar from either of the above, but possessing some features common to both, upon the giving of which the property is released from the attachment.[45] And upon the giving of a bond which takes the place of the property as security, the attachment is vacated and the suit is on the plane of one commenced by summons.[46]

it. Milburn *v.* Marlow, 4 Greene (Iowa) 17.

On the dissolution of an attachment the delivery bond is rendered void. Gass *v.* Williams, 46 Ind. 253.

44. **U. S.**—Glidden *v.* Whittier, 46 Fed. 437, as to Idaho law. **Cal.**—Winters *v.* Pearson, 72 Cal. 553, 14 Pac. 304. **Ga.**—Bruce *v.* Conyers, 54 Ga. 678. **Ind.**—Carson *v.* The Talma, 3 Ind. 194. **Ia.**—New Haven Lumber Co. *v.* Raymond, 76 Iowa 225, 40 N. W. 820; J. I. Case Threshing Mach Co. *v.* Merrill, 68 Iowa 540, 27 N. W. 742; see Allerton *v.* Eldridge, 56 Iowa 709, 10 N. W. 252. **Kan.**—Tyler *v.* Safford, 24 Kan. 580. **La.**—Pailhes *v.* Roux, 14 La. 82; Avet *v.* Albo, 21 La. Ann. 349; Savage *v.* Voorhies, 13 La. Ann. 549; Brinegar *v.* Griffin, 2 La. Ann. 154; Myers *v.* Perry, 1 La. Ann. 372; Quine *v.* Mayes, 2 Rob. 510; Baker *v.* Hunt, 1 Mart. 194. **Miss.**—Montague *v.* Gaddis, 37 Miss. 453. **Neb.** Wilson *v.* Shepherd, 15 Neb. 15, 16 N. W. 826; Hilton *v.* Ross, 9 Neb. 406, 2 N. W. 862. **N. Y.** Lawlor *v.* Magnolia Metal Co., 2 App. Div. 552, 38 N. Y. Supp. 36; Dusseldorf *v.* Redlich, 16 Hun 624; Garbutt *v.* Hanff, 15 Abb. Pr. 189; Bowen *v.* Medina First Nat. Bank, 34 How. Pr. 408; Claflin *v.* Bare, 57 How Pr. 78; Rowles *v.* Hoare, 61 Barb. 266. **Ohio.** William Edwards Co. *v.* Goldstein, 80 Ohio St. 303, 88 N. E. 877; Ross *v.* Miller Merchant Tailoring Co., 7 Ohio C. C. 51, 3 Ohio Dec. 658; Egan *v.* McGovern, 2 Disney 168. **Pa.**—Dienelt *v.* Aronia Fabri Co., 2 Pa. Co. Ct. 206. **S. C.**—Bates *v.* Killian, 17 S. C. 553. **Va.**—Claflin *v.* Steenbock, 18 Gratt. 842.

45. **U. S.**—Blount *v.* American Lead, etc. Co., 161 Fed. 714, 88 C. C. A. 574. construing a Missouri statute. **Cal.**—Rosenthal *v.* Perkins, 123 Cal. 240, 55 Pac. 804, *reversing* 53 Pac. 444. **Colo.**—Nichols *v.* Chittenden, 14 Colo. App. 49, 59 Pac. 954. **Ia.**—Austin *v.* Burgett, 10 Iowa 302; Woodward *v.* Adams, 9 Iowa 474; Jones *v.* Peasley, 4 Greene 52. **N. J.**—Schuyler *v.* Sylvester, 28 N. J. L. 487; Vreeland *v.* Bruen, 21 N. J. L. 214.

A Portion of Property.—Lallande *v.* Crandall, 38 La. Ann. 192; Ellsworth *v.* Scott, 3 Abb. N. C. (N. Y.) 9. But see Royal Ins. Co. *v.* Noble, 5 Abb. Pr. N. S. (N. Y.) 54.

A bail-bond was provided for by some early statutes. See: **U. S.**—Barry *v.* Forbes, 1 Pet. 331, 7 L. ed. 156; Nicholl *v.* Savannah S. S. Co., 2 Cranch C. C. 211, 18 Fed. Cas. No. 10,225; Cox *v.* Watkins, 3 Cranch C. C. 629, 6 Fed. Cas. No. 3,307. **Ga.**—Inferior Court of Richmond County *v.* Barr, 1 Dud. 32. **Md.**—Walters *v.* Munroe, 17 Md. 501; Lambden *v.* Bowie, 2 Md. 334; Wilson *v.* Starr, 1 Har. & J. 491; Campbell *v.* Morris, 3 Har. & M. 535. **Miss.**—Garrett *v.* Tinnen, 7 How. 465. **N. J.**—Dickerson *v.* Simms, 1 N. J. L. 199. See Anonymous, 10 N. J. L. 60. **Pa.**—Benner *v.* Cotgreave, 4 Yeates 230; Hailman *v.* Wilson, 2 Pa. L. J. 46, 1 Clark 189; Duffy *v.* Owings, 1 Pa. L. J. 33. **S. C.** Williams *v.* Haselden, 10 Rich. L. 55; Fife *v.* Clarke, 3 McCord L. 347; Harrison *v.* Casey, 1 Brev. 390; Fleming *v.* Rushton, 1 Brev. 383. **Va.**—Tiernans *v.* Schley, 2 Leigh 25.

46. **U. S.**—Blount *v.* American. Lead, etc. Co., 161 Fed. 714, 88 C. C. A. 574 (construing the Missouri statute); Glidden *v.* Whittier, 46 Fed. 437. **Ark.**—Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711; Atkins *v.* Swope, 38 Ark. 528; Morrison *v.* Alphin, 23 Ark. 136; Delano *v.* Kennedy, 5 Ark. 457. **Cal.**—Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741; McMillan *v.* Dana, 18 Cal. 339. **Colo.**—Day *v.* McPhee, 41 Colo. 467, 93 Pac. 670. **Conn.**—Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. 607. **Del.**—Blaney *v.* Randel, 3 Har. 546. **Ga.**—Bruce *v.* Conyers, 54 Ga. 678; Camp *v.* Cahn, 53 Ga. 558; Reynolds *v.* Jordan, 19 Ga. 436; Cincinnati, etc. R. Co. *v.* Pless, 3 Ga. App. 400, 60 S. E. 8; Inferior Court of Richmond County *v.* Barr, 1 Dudley 32. **Ill.**—Hill *v.* Harding, 93

I. Effect on the Action. — If there has been no service of summons or general appearance of the defendant, the action fails

Ill. 77, *reversed* on other grounds, 107 U. S. 631, 27 L. ed. 493; People *v.* Cameron, 7 Ill. 468; Gilbert *v.* Yunk, 110 Ill. App. 558; Hughes *v.* Foreman, 78 Ill. App. 460; Sharpe *v.* Morgan, 44 Ill. App 346. **Ind.**—Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014; Bick *v.* Lang, 15 Ind. App. 503, 44 N. E. 555; Jones *v.* Gresham, 6 Blackf. 291. **Ind. Ter.**—Sanger *v.* Hibbard, 2 Ind. Ter. 547, 53 S. W. 330. **Ia.**—Austin *v.* Burgett, 10 Iowa 302; Currens *v.* Ratcliffe, 9 Iowa 309; Harrow *v.* Lyon, 3 Greene 157. **Kan.**—Endress *v.* Kent, 18 Kan. 236. **Ky.**—McCormack *v.* Henderson, 10 Ky. L. Rep. 541; Bromly *v.* Vinson, 9 Ky. L. Rep. 401; Inman *v.* Strattan, 4 Bush 445; Taylor *v.* Taylor, 3 Bush 118; Bell *v.* Western River Imp., etc. Co., 3 Met. 558; Hazelrigg *v.* Donaldson, 2 Metc. 445; Monroe *v.* Cutter, 9 Dana 93; Harper *v.* Bell, 2 Bibb 221. **La.**—Dorr *v.* Kershaw, 18 La. 57; Beal *v.* Alexander, 1 Rob. 277; White *v.* Hawkins, 16 La. Ann. 25; Love *v.* Voorhies, 13 La. Ann. 549; Barriere *v.* McBean, 12 La. Ann. 493; Kendall *v.* Brown, 7 La. Ann. 668; Rathbone *v.* Ship London, 6 La. Ann. 439; Benton *v.* Roberts, 2 La. Ann. 243. **Md.**—Barr *v.* Perry, 3 Gill 313. **Mass.**—Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70; O'Hare *v.* Downing, 130 Mass. 16; Johnson *v.* Collins, 117 Mass. 343; Braley *v.* Boomer, 116 Mass. 527. **Mich.**—Butcher *v.* Cappon, etc. Leather Co., 148 Mich. 552, 112 N. W. 110, 12 Am. & Eng. Ann. Cas. 169. **Minn.** Johnson *v.* Dun, 75 Minn. 533, 78 N. W. 98; Rachelman *v.* Skinner, 46 Minn. 196, 48 N. W. 776; Ryan Drug Co. *v.* Peacock, 40 Minn. 470, 42 N. W. 298; Slosson *v.* Ferguson, 31 Minn. 448, 18 N. W. 281. **Miss.**—Philips *v.* Hines, 33 Miss. 163; Garrett *v.* Tinnen, 7 How. 465. **Neb.**—McReady *v.* Rogers, 1 Neb. 124, 93 Am. Dec. 333. **N. J.** Heckscher *v.* Trotter, 48 N. J. L. 419, 5 Atl. 581. **N. Y.**—Jones *v.* Gould, 114 App. Div. 120, 99 N. Y. Supp. 789; Lawlor *v.* Magnolia Metal Co., 2 App. Div. 552, 38 N. Y. Supp. 36; Conklin *v.* Dutcher, 5 How. Pr. 386, 1 Code Rep. (N. S.) 49. **N. C.**—Stein *v.* Cozart, 122 N. C. 280, 30 S. E. 340; Davries *v.* Summit, 86 N. C. 126. **N. D.**—Fox *v.* Mackenzie, 1 N. D. 298, 47 N. W. 386. **Ohio.**—Myers *v.* Smith, 29 Ohio St. 120; McCartney *v.* Williams, 17 Ohio Dec. N. P. 645. **Ore.**—Drake *v.* Sworts, 24 Ore. 198, 33 Pac. 563; Bunneman *v.* Wagner, 16 Ore. 433, 18 Pac. 841; Duncan *v.* Thomas, 1 Ore. 314. **Pa.**—Rogers *v.* Schadt, 218 Pa. 617, 67 Atl. 919; Brenner *v.* Moyer, 98 Pa. 274; Albany City Ins. Co. *v.* Whitney, 70 Pa. 248; Bushel *v.* Commonwealth Ins. Co., 15 Serg. & R. 173; Cain *v.* Shakespeare, 12 Phila. 196; Dieult *v.* Aronia Fabric Co., 2 Pa. Co. Ct. 206; Borden *v.* American Surety Co., 2 Pa. Dist. 245; Goldstein *v.* Sondheim, 3 Kulp 212. **R. I.**—Easton *v.* Ormsby, 18 R. I. 309, 27 Atl. 216. **S. C.**—Metts *v.* Piedmont, etc. L. Ins. Co., 17 S. C. 120; Crosslin *v.* Reed, 2 McMull. 10. **S. D.**—Wyman *v.* Hallock, 4 S. D. 469, 54 N. W. 197; McLaughlin *v.* Wheeler, 2 S. D. 379, 50 N. W. 834. **Tenn.**—See Cheatham *v.* Galloway, 7 Heisk. 678. **Tex.**—Levy *v.* McDowell, 45 Tex. 220; Shirley *v.* Byrnes, 34 Tex. 625; Kennedy *v.* Morrison, 31 Tex. 207; Hamilton *v.* Kilpatrick (Tex. Civ. App.), 29 S. W. 819; Carothers *v.* Wilkerson, 2 Wills. Civ. Cas. §355. **Vt.**—Dewey *v.* Fay, 34 Vt. 138; Felker *v.* Emerson, 17 Vt. 101; Johnson *v.* Edson, 2 Aik. 299. **Wash.**—Brady *v.* Onffroy, 37 Wash. 482, 79 Pac. 1004; Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189. **Wis.**—Morawitz *v.* Wolf, 70 Wis. 515, 36 N. W. 392; Clark *v.* Lamoreux, 70 Wis. 509, 36 N. W. 393; Dierolf *v.* Winterfield, 24 Wis. 143.

"The plaintiffs contend that the bond is a mere substitute for the attachment and therefore it should stand in all respects as its precise equivalent. But such is not the purport of the bond, nor the intention of the statute which authorizes it to be given. It does not merely restore the possession of the property to the debtor subject to the attachment; it dissolves the attachment utterly. It is not given for the property itself, nor as security for its value; but for the payment absolutely of the judgment when recovered in the suit, whatever may be its amount. It is in many respects, a higher and better

when the attachment is vacated,[47] the jurisdiction in such cases being

security for the creditor than the attachment. It is not liable to be discharged by the insolvency or death of the debtor; nor by any facts which might dissolve the attachment without defeating the suit.'' Carpenter *v.* Turrell, 100 Mass. 450.

The question of title to the property becomes immaterial when a bond has been given when the alleged owner was present and assented to the transaction and the agreement was under seal, and was for the payment of the debt. Hayes *v.* Kyle, 8 Allen (Mass.) 300.

Bonds Not Part of Pleadings.—National Park Bank *v.* Berry, 89 Ga. 333, 15 S. E. 463.

Motion to vacate upon bond after motion because illegally issued. Goldfield Mohawk Min. Co. *v.* D. Mackenzie & Co., 31 Nev. 359, 102 Pac. 967; Goldfield Mohawk Min. Co. *v.* Frances Mohawk M. & L. Co., 31 Nev. 348, 102 Pac. 963.

The execution of a bond by a stranger to the suit does not waive the right of the defendant to move to have the writ quashed. Pierce *v.* Johnson, 93 Mich. 125, 53 N. W. 16, 18 L. R. A. 486.

Waives Irregularities.—Wolf *v.* Cook, 40 Fed. 432 (as to the law in Wisconsin); Fenner *v.* Boutte, 72 Miss. 271, 16 So. 259; McLaughlin *v.* Wheeler, 2 S. D. 379; 50 N. W. 834, *reversing* 1 S. D. 497, 47 N. W. 816.

Appeal prevented from order denying motion to vacate. Thomas *v.* Craig, 60 Minn. 601, 62 N. W. 1133.

But in Saxton *v.* Plymire, 2 Ohio Cir. Dec. 118, the court held that the defendant by giving a bond to secure the release of the attached property after filing his petition in error seeking the reversal of an order overruling his motion to discharge the attachment, did not defeat his right to prosecute the petition in error.

As to Personal Property.—Schuyler *v.* Sylvester, 28 N. J. L. 487; Vreeland *v.* Bruen, 21 N. J. L. 214; Wood *v.* Watson, 20 R. I. 223, 37 Atl. 1030.

47. **Ark.**—McDonald *v.* Smith, 24 Ark. 614. **Fla.**—Kennedy *v.* Mitchell, 4 Fla. 457. **Ga.**—King *v.* Randall, 95 Ga. 449, 22 S. E. 680; Daniel *v.* Hochstadter, 73 Ga. 144; Oouzts *v.* Seabrook, 47 Ga. 359. **Ind.**—Schoppenhast *v.* Bollman, 21 Ind. 280. See also Olney *v.* Shepherd, 8 Blackf. 146. **Kan.**—Voorhis *v.* Michaelis, 45 Kan. 255, 25 Pac. 592; Pierce *v.* Myers, 28 Kan. 364. **La.** Watson *v.* Simpson, 15 La. Ann. 709; Schlatter *v.* Broaddus, 4 Mart. (N. S.) 430; *Compare* Evans *v.* Saul, 8 Mart (N. S.) 247. **Md.**—Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573. **Mich.**—Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620, *overruling* Hills *v.* Moore, 40 Mich. 210. **Miss.**—Wood *v.* Baily, 77 Miss. 815, 27 So. 1001; Lewenthall *v.* Mississippi Mills, 55 Miss. 101. **Mo.**—Brackett *v.* Brackett, 61 Mo. 221. **Neb.**—Dayton Spice-Milk Co. *v.* Sloan, 49 Neb. 622, 68 N. W. 1040. **N. J.**—Kennedy *v.* Chumar, 26 N. J. L. 305. **Pa.**—Atlas Works *v.* Iron, etc. Co., 23 Pittsb. Leg. J. 61. **Tenn.**—Kruger *v.* Stayton, 11 Heisk. 726; Sherry *v.* Divine, 11 Heisk. 722. **Tex.**—Hochstadler *v.* Sam, 73 Tex. 315, 11 S. W. 408; Cox *v.* Reinhardt, 41 Tex. 591; Gayoso Sav. Inst. *v.* Burrow, 37 Tex. 88; Moore *v.* Corley, (Tex. App.), 16 S. W. 787; Eikel *v.* Hanscom, 3 Wills. Civ. Cas. §473. *Compare* Focke *v.* Hardeman, 67 Tex. 173, 2 S. W. 363. **Va.**—Wingo *v.* Purdy, 87 Va. 472, 12 S. E. 970. **Wis.**—Morrison *v.* Ream, 1 Pin. 244.

But quashed by agreement reserving the right to try the issue does not abate the suit. Ross *v.* Allen, 67 Ill. 317.

Attachment Against Partnership. Where the attachment was issued against partners, but the finding was for one partner on his plea in abatement, it was held that as to him the attachment must be abated, but it must stand as to the partner who made no defense. Hill *v.* Bell, 111 Mo. 35, 19 S. W. 959.

The filing of a plea in abatement has not the effect of entering a general appearance. Brackett *v.* Brackett, 61 Mo. 221; Sherry *v.* Divine, 11 Heisk. (Tenn.) 722. *Compare* Brackett *v.* Brackett, 53 Mo. 265; Perry *v.* Platte, 39 Mo. 404.

If an appeal be taken from the order setting aside the attachment within the time provided for, it will suspend the judgment of dismissal. Watson *v.* Simpson, 15 La. Ann. 709.

Does Not Dissolve a Different Action.

acquired through the attachment.[48] But if the jurisdiction of the court has been otherwise obtained,[49] as by replevin by defendant of the attached property,[50] or acknowledgement of notice of pendency of the attachment suit,[51] the dissolution of the attachment does not affect the action.

Attachment for Debt Not Due. — Under statutes allowing an attachment on a debt not due, it is held that where an attachment is issued upon such a debt and is garnished, the suit falls with it.[52]

XX. REVIEW.[53] — A. ORDERS VACATING ATTACHMENTS. — In some jurisdictions, it is held that an order dissolving or discharging an

Steinharter *v.* Wolfstein, 13 Ky. L. Rep. 871.

48. Schoppenhast *v.* Bollman, 21 Ind. 280.

49. Cincinnati R. Co. *v.* Pless, 3 Ga. App. 400, 60 S. E. 8. **Ind.**—Hartford L. Ins. Co. *v.* Bryan, 25 Ind. App. 406, 58 N. E. 262. **Ia.**—Elliott *v.* Mitchell, 3 Greene 237. **Kan.**—Stapleton *v.* Orr, 43 Kan. 170, 23 Pac. 109; Bundrem *v.* Denn, 25 Kan. 430; Boston *v.* Wright, 3 Kan. 227. **Mo.**—Brownwell, etc. Car Co. *v.* Barnard, 139 Mo. 142, 40 S. W. 762. **Pa.**—Biddle *v.* Black, 99 Pa. 380; Goldstein *v.* Sondheim, 3 Kulp. 212; Butcher *v.* Fernan, 1 Kulp. 401; Bayersdorfer *v.* Hart, 13 Phila. 192. **S. C.**—Light *v.* Isear, 28 S. C. 440, 6 S. E. 284; Cureton *v.* Dargan, 16 S. C. 619. **Tenn.**—Kruger *v.* Stayton, 11 Heisk. 726. **W. Va.**—Miller *v.* Few-Smith Lumber Co., 42 W. Va. 323, 26 S. E. 175.

In Missouri the filing of a plea in abatement to the attachment is sufficient to retain jurisdiction though the attachment be dissolved. Brackett *v.* Brackett, 53 Mo. 265; Perry *v.* Platte, 39 Mo. 404.

Lack of Jurisdiction.—The rule of the text does not hold good where the court to which the attachment is returnable has not jurisdiction of that class of attachments. First Nat. Bank *v.* Regan, 92 Ga. 333, 18 S. E. 295.

An erroneous refusal to vacate an attachment, is no ground for reversing the judgment upon the merits. Tuller *v.* Howard, 17 Misc. 105, 40 N. Y. Supp. 739.

50. McAndrew *v.* Irish-American Bank, 117 Ga. 510, 43 S. E. 858; Buice *v.* Lowman Gold, etc. Min. Co., 64 Ga. 769; Camp *v.* Cahn, 53 Ga. 558; Reynolds *v.* Jordan, 19 Ga. 436; Phillips *v.* Hines, 33 Miss. 163; Lawrence *v.* Featherston, 10 Smed. & M. (Miss.) 345.

51. Hodnett *v.* Stone, 93 Ga. 645, 20 S. E. 43; Buice *v.* Lowman Gold, etc. Min. Co., 64 Ga. 769.

Appearing and pleading, replevying the property and being served with notice of pendency of the suit are all placed upon the same footing; either will entitle the plaintiff to proceed for a general judgment against the defendant notwithstanding the dismissal of the attachment. McAndrew *v.* Irish-American Bank, 117 Ga. 510, 43 S. E. 858.

52. **Ia.**—Wadsworth *v.* Cheeny, 10 Iowa 257. **Kan.**—Pierce *v.* Myers, 28 Kan. 364. **Mo.**—Aultman *v.* Daggs, 50 Mo. App. 280; Grier *v.* Fox, 4 Mo. App. 522. *Contra,* under a later statute, National Tube Work Co. *v.* Ring Refrigerator, etc. Co., 201 Mo. 30, 98 S. W. 620, holding that the suit may be continued as if begun by summons, but no judgment can be rendered until after the maturity of the debt. **Neb.** Dayton Spice Mills Co. *v.* Sloan, 40 Neb. 622, 68 N. W. 1040. **Ohio.**—Heidenheimer *v.* Ogborn, 1 Disney, 351; Ramsey *v.* Overaker, 1 Disney, 569. **Tex.**—Moore *v.* Corley, 16 S. W. 787; Sydnor *v.* Totham, 6 Tex. 189; Rabb *v.* White (Tex. Civ. App.), 45 S. W. 850, *citing* Cox *v.* Reinhardt, 41 Tex. 591; Culberson *v.* Cabeen, 29 Tex. 247. **Va.**—Simon *v.* Ellison, 22 S. E. 860; Wingo *v.* Purdy, 87 Va. 472, 12 S. E. 970. **Wash.**—Augir *v.* Foresman, 23 Wash. 595, 63 Pac. 201. **W. Va.**—Miller *v.* Zeigler, 44 W. Va. 484, 29 S. E. 981, 67 Am. St. Rep. 777; Burgunder *v.* Zeigler, 44 W. Va. 413, 29 S. E. 1034. **Wis.**—Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238.

53. See generally the titles "Appeals;" "Certiorari;" "Mandamus;" "Prohibition."

Appealable as Final Judgments.—A judgment in favor of interpleading claimants (Doane *v.* Glenn, 1 Colo.

attachment may be reviewed by an appeal therefrom or writ of error directed thereto, on the ground that it is a final disposition of the attachment and within the operation of statutes authorizing appeals or writs of error to review final judgments or orders,[54] or because there

417); judgment overruling motion for a rule against attaching creditors (Noonan *v.* Newport, 22 Ky. L. Rep. 491, 56 S. W. 499); an order discharging trustees (Sprague *v.* Auffmordt, 183 Mass. 7, 66 N. E. 416).

Not Final.—Refusal of an order to sell perishable property (Jones *v.* Martins-Turner Co., 106 Ga. 276, 32 S. E. 137); an order directing a specific attachment to issue upon execution of bond to secure owner if attachment wrong (Bashears *v.* Holcomb, 19 Ky. L. Rep. 1286, 43 S. W. 226); an adjudication as to priority of conflicting claims (Sutton *v.* Stevens, 41 Mo. App. 42).

"The order of the court after denying the motion to vacate the injunction, and to discharge the attachment recites: 'And thereupon the defendants by counsel asked that the court should hear the application of defendants for an order on the sheriff to release all the attached property, claiming the same to be exempt, and the court thereupon refused to hear or entertain such application at this time for the reason that the same was not properly before the court at this time.' This is not such a final order as can be brought to this court upon error. The application was neither sustained nor denied, and, for anything that appears in the record, is still pending and undetermined. If the district court without just cause has refused to act in a matter in which it is required by law to act, the remedy is not by error to this court, but by mandamus." Collins *v.* Stanley, 15 Wyo. 282, 88 Pac. 620, 622.

54. **Ala.**—Bray & Bros. *v.* Laird, 44 Ala. 295. **Ark.**—Hatheway *v.* Jones, 20 Ark. 109. **Cal.**—Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17; Reiss *v.* Brady, 2 Cal. 132. **Fla.**—Williams *v.* Hutchinson, 26 Fla. 513, 7 So. 852 (disapproving Lyman *v.* Alexander, 9 Fla. 439); Jeffreys *v.* Coleman, 20 Fla. 536, 538. **Ga.**—Falvey *v.* Adamson, 73 Ga. 493; Bruce *v.* Conyers, 54 Ga. 678; Sutherland *v.* Underwriters' Agency, 53 Ga. 442. **Ind.**—Theiman *v.* Vahle, 32 Ind. 400, *disapproving* Abbott *v.* Zeigler, 9 Ind. 511. **Ia.**—Berry *v.* Gravel, 11 Iowa 135; Johnson & Stevens *v.* Butler, 1 Iowa 459. **Ky.**—Schnabel *v.* Jacobs, 105 Ky. 774, 20 Ky. L. Rep. 1596, 49 S. W. 774. **La.**—Bayne *v.* Cusimano, 50 La. Ann. 361, 23 So. 361. **Md.**— Stewart *v.* Chappell, 98 Md. 527, 57 Atl. 17; Stewart *v.* Katz, 30 Md. 334; Wright *v.* Baldwin, 3 Gill 341; Washington *v.* Hodgskin, 12 Gill & J. 353. **N. D.**—Red River Nat. Bank *v.* Freeman, 1 N. D. 196, 46 N. W. 36. **N. Y.**—Everitt *v.* Park, 88 Hun 368, 34 N. Y. Supp. 827; Friede *v.* Weissenthanner, 27 Misc. 518, 58 N. Y. Supp. 336 (appeal from city court of New York — question of jurisdiction). **Tenn.**—Scott *v.* White, 1 Shannon Tenn. Cas. 23. But see Younger *v.* Younger, 90 Tenn. 25, 16 S. W. 78, where it was said that the attachment in the above case "must have been regarded and treated, for the purpose of the appeal, as a separate proceeding, because originating before a different tribunal," and that upon this view alone could it be sustained. **Wash.**—Augir *v.* Foresman, 23 Wash. 595, 63 Pac. 201; Suffern *v.* Chisholm, 1 Wash. Ter. 486. **Wis.**—Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934. **Wyo.**—C. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213; Sundance First Nat. Bank *v.* Moorcroft Ranch Co., 5 Wyo. 50, 36 Pac. 821.

A judgment on an issue in favor of an intervener in an original suit by attachment, may be appealed from as the statute, directing a mode of proceeding unknown to the common law and declaring that "the verdict of the jury in such case shall be conclusive as to the parties then in court," does not show an intention to take away the right of appeal. McLean *v.* McDaniel, 44 N. C. 203.

Proceedings in the main case are not suspended or barred by an appeal from an order dissolving an attachment. Churchill *v.* Goldsmith, 64 Mich. 250, 31 N. W. 187.

As to application of doctrine of res judicata, to appealable interlocutory

orders in attachment proceedings not directly appealed from, see the title, "Res Judicata."

An appeal cannot be taken from an order discharging an attachment under a statute providing for an appeal from an order refusing to discharge an attachment. Jensen *v.* Hughes, 12 Wash. 661, 42 Pac. 127.

In New York it has been held that the court of appeals will not hear an appeal from an order vacating an attachment, where it is at all discretionary, even though it involves a substantial right, but that such orders are appealable to the intermediate appellate court only. Wenzell *v.* Morrisey, 115 N. Y. 665, 22 N. E. 271; Thorington *v.* Merrick, 101 N. Y. 5, 3 N. E. 794; Bate *v.* McDowell, 97 N. Y. 646; Catlin *v.* Rickets, 91 N. Y. 668; National Shoe, etc. Bank *v.* Mechanics' Nat. Bank, 89 N. Y. 440; Allen *v.* Meyer, 73 N. Y. 1; Wallace *v.* Castle, 68 N. Y. 373. Sartwell *v.* Field, 68 N. Y. 341; Anonymous, 59 N. Y. 313; Claflin *v.* Baere, 59 How. Pr. 20, 80 N. Y. 642.

However, the court of appeals will hear cases in which a question of law is presented by a failure of the affidavits to present a case within the statutory provisions allowing attachment to issue. Catlin *v.* Ricketts, 91 N. Y. 668; Dunlop *v.* Patterson F. Ins. Co., 74 N. Y. 145, 30 Am. Rep. 823; Yates *v.* North, 44 N. Y. 271; Tracy *v.* Selma First Nat. Bank, 37 N. Y. 523. Likewise where the appeal is taken by a subsequent attaching creditor it may be taken to the court of appeals. Habler *v.* Bernharth, 115 N. Y. 549, 22 N. E. 167, wherein the court said: "But where the proceeding to vacate the attachment is taken by a subsequent lienor, and not by the defendant in the action, and the appeal to the General Term is taken by him, the question before the General Term is one of strict legal right, and no question of discretion is presented. The sole point then to be determined, is as to priority in point of law of the liens of the respective parties. It is, then, purely a question whether there was jurisdiction to grant the attachment on the papers presented. It would be an anomaly that a court would exercise a discretion as to which of two contesting creditors it would award priority of lien. The order of the General Term in this case, which affirmed the order of the Special Term vacating the plaintiff's attachment at the instance of a subsequent creditor is, therefore, appealable to this court."

An appeal will not lie from an order vacating an attachment from the municipal court of New York city to the appellate division. Feldman *v.* Siegel, 43 Misc. 392, 87 N. Y. Supp. 538.

The Michigan statute (How. Stat. §8030), does not authorize an appeal from the order of a circuit judge made on the hearing of an application to dissolve an attachment, but is confined to circuit court commissioners. Harvey *v.* Circuit Court Judge, 63 Mich. 572, 30 N. W. 188.

Appealable Where Attachment Necessary to Continuance of Suit.—Smith *v.* Elliot, 3 Mart. O. S. (La.) 366; Sailor P. Mill, etc., Co. *v.* Moyer, 35 Pa. Super. 503.

Order Releasing Property.—A statute allowing an appeal from an order "dissolving or refusing to dissolve an attachment," was held to allow an appeal from an order releasing property as not liable to attachment. Risdon Iron, etc. Wks. *v.* Citizens' Traction Co., 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25.

Only Parties Directly Interested Have Right.—Where the statute allows an appeal from an order quashing or abating or refusing to quash or abate an attachment, it applies only to the parties directly interested in the motion and not to some one who may be a party to the suit, and have an interest in its ultimate result, and does not make such motion, or join therein. Elkins Nat. Bank *v.* Simmons, 57 W. Va. 1, 49 S. E. 893.

Effect of Final Judgment and Execution.—The rendition of a final judgment and levy of execution in the main action does not prevent a decision of the appeal from the order dissolving the attachment. Calvert, etc., Co. *v.* Drs. K., etc. Medical Assoc., 61 Mich. 836, 28 N. W. 111, wherein the court said: "This is a matter of justice to both parties; and although by legal proceedings in the main case, or by the action of third parties, the

is other express or implied statutory authority,[55] as that such an order

final issue before the commissioner or upon appeal may become only a question of costs, and the possession of the property cannot be affected as against other subsequent levies, the right to determine the legality of the issue of the writ, and the levy thereunder, remains, and is not affected thereby. The attachment levy must stand or fall upon its own merits. Neither party should be allowed to lose or profit by the intervention of causes, for which they are not responsible, between the issuing of the writ and the final hearing, after the delay attending appeals and trials. The plaintiff in attachment should not be mulcted in costs because, in the ordinary and rightful course of his suit, he has merged his attachment levy in judgment; nor should the defendant be punished in the same manner for the reason that, while he has been attempting to remove an unjust attachment and imputation of fraud, some third person has levied upon the same property." And see Detroit Free Press Co. *v.* Drs. K., etc., Med. Assn., 64 Mich. 605, 31 N. W. 537.

Waiver.—The taking of steps in the course of proceedings, conductive to a final judgment on the merits, after the dissolution of a conservatory writ, cannot be set up as an acquiescence in the dissolving decree. Wickman *v.* Nalty, 41 La. Ann. 284, 6 So. 123.

Attachment Vacated on Conditions. Where the order had been granted upon a condition with which the defendant has complied, it was held that the plaintiff had obtained an advantage and was not in a position to demand a reversal of the order. MacDonald *v.* Manice, 65 App. Div. 610, 72 N. Y. Supp. 543.

Error in deciding the ownership of attached property is one of fact and not of law and can only be corrected on appeal and not by bill of review. Kern *v.* Wyatt, 89 Va. 885, 17 S. E. 549.

Writ of Error.—Kan.—Chappell *v.* Comins, 44 Kan. 743, 25 Pac. 216; Marietta *v.* Standard Oil Co., 9 Kan. App. 887, 57 Pac. 47. **N. J.**—Bisbee *v.* Bowden, 55 N. J. L. 69, 25 Atl. 855. **Ohio**—Beitman *v.* McKenzie, 9 Ohio Dec. (Reprint) 241, 11 Wkly. L. Bul. 272, *affirmed* in 9 Ohio Dec. (Reprint) 403, 12 Wkly. L. Bul. 321.

Certiorari.—Bisbee *v.* Bowden, 55 N. J. L. 69, 25 Atl. 855.

55. **Ark.**—Hatheway *v.* Jones, 20 Ark. 109. **Minn.**—Gale *v.* Seifert, 39 Minn. 171, 39 N. W. 69. **N. D.**—Red River Valley Bank *v.* Freeman, 1 N. D. 196, 46 N. W. 36.

An appeal lies before judgment from an order discharging an attachment under a statute providing for appeals when an order "grants, refuses, continues, or modifies a provisional remedy, or . . . when it sets aside or dismisses a writ of attachment for irregularity." Wyman *v.* Wilmarth, 1 S. D. 35, 44 N. W. 1151; Quebec Bank *v.* Carroll, 1 S. D. 1, 44 N. W. 723.

In California, in the absence of a statute authorizing an appeal in such cases, it was held that an order dissolving or refusing to dissolve an ancillary attachment, was not appealable. Myers *v.* Mott, 29 Cal. 359, 89 Am. Dec. 49; Allender *v.* Fritts, 24 Cal. 447; Taaffe *v.* Rosenthal, 7 Cal. 514.

A California Statute.—An order discharging an attachment in respect of certain property is appealable under C. C. P., section 963, providing that an appeal may be taken from an order "dissolving or refusing to dissolve an attachment." Risdon Iron, etc., Wks. *v.* Citizens' Tract. Co., 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25.

An appeal lies from an order dissolving, or refusing to dissolve, an attachment, under Code Civ. Proc., §963, hence irregularities, merely, in its inception, or as to its form, cannot be considered on appeal from final judgment, being the subject of direct attack by such appeal. Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

In the District of Columbia, a statute provided that any party aggrieved by any order, judgment, or decree made at any special term, might, if the same involves the merits of the action or proceeding, appeal therefrom. See United States *v.* Ottman, 3 MacArthur 73.

Kentucky Statute.—Schnabel *v.* Jacobs, 105 Ky. 774, 49 S. W. 74.

Minnesota.—Gale *v.* Seifert, 39 Minn. 171, 39 N. W. 69; Davidson *v.* Owens,

is one affecting substantial rights[56] or causing irreparable injury.[57]

Not Appealable. — In many cases it is held that an order setting aside

5 Minn. 69. See Humphrey *v.* Hezlep, 1 Minn. 239, holding that such an order is not appealable.

South Dakota.—Quebec Bank *v.* Carroll, 1 S. D. 1, 44 N. W. 723.

In Wisconsin it is held that if a writ of attachment is set aside, the attachment plaintiff, if he deem himself aggrieved, should proceed promptly to appeal under §3069, Stats. 1898, and take the proper proceedings to continue the attachment. Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934. See also Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122; Shakman *v.* Koch, 93 Wis. 595, 67 N. W. 925; Couldren *v.* Caughey, 29 Wis. 317.

But if the district court refuse to discharge an attachment, such refusal cannot be reviewed until after final judgment below. Chappell *v.* Comins, 44 Kan. 743, 25 Pac. 216. *Compare* Butcher *v.* Taylor, 18 Kan. 558, holding that an order of a justice of the peace discharging an attachment is not a "final judgment."

56. Wilson *v.* Shepherd, 15 Neb. 15, 16 N. W. 826 (see Adams County Bank *v.* Morgan, 26 Neb. 148, 41 N. W. 993); C. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213. See the title "Appeals."

In Turpin *v.* Coates, 12 Neb. 321, 11 N. W. 300, it is said: "The object of an attachment is to obtain sufficient property or credits of the debtor to satisfy the judgment which may be recovered. This right under certain conditions the statute gives. If a court improperly deprive a party of the benefit of this proceeding, is he not thereby deprived of a substantial right? A special proceeding may be said to include every special statutory remedy which is not in itself an action. We have no doubt that an order discharging garnishees, is an order affecting a substantial right, made in a special proceeding. Such an order in many cases would entirely defeat the collection of a debt. Neither is it necessary to wait until final judgment before such an order can be reviewed. No judgment can be rendered against the garnishees until after final judgment against the debtor; but if the attachment is not dissolved, the creditor has a right to the security obtained by the proceedings in garnishment for the satisfaction of any judgment he may obtain."

Contra.—Under a statute providing that an appeal may be taken to the supreme court from the superior courts "in all actions and proceedings" it was held that an order discharging an attachment was not appealable. Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

In Ohio, it is held that an order discharging an attachment is "an order affecting a substantial right made in a special proceeding," and an appeal may be taken therefrom. Watson *v.* Sullivan, 5 Ohio St. 42. See Beitman *v.* McKenzie, 7 Ohio Dec. (Reprint) 241.

New Mexico.—Laws 1901, c. 82, authorizing appeals to the supreme court from interlocutory orders affecting substantial rights, is invalid, as being in conflict with the organic act, providing that appeals shall be allowed in all cases "from the final decisions of district courts to the Supreme court, under such regulations as may be prescribed by law." An order vacating an attachment is not a final decision, within the provision of the organic act authorizing an appeal to the supreme court from final decisions of the district court. Jung *v.* Myer, 11 N. M. 378, 68 Pac. 933.

An order accepting recognizance and dissolving an attachment is not appealable as an order affecting a substantial right and in effect determining the action and preventing a judgment from which an appeal may be taken. Allen *v.* Partlow, 3 S. C. 417. See also National Park Bank *v.* Berry, 89 Ga. 333, 15 S. E. 463. See the title "Appeals."

The right of an intervener to bond property provisionally seized, being expressly conferred by law, the court below has no discretion but to grant the order, and no appeal will lie therefrom. Jennings *v.* McConnico, 25 La. Ann. 651.

57. Hyde *v.* Jenkins, 6 La. 427; Bayne *v.* Cusimano, 50 La. Ann. 361, 23 So. 361; Smith *v.* Elliott, 3 Mart. (La.) 366. See the title "Appeals."

or vacating an ancillary attachment is interlocutory in character and not final, and is not one which will support an appeal,[58] or a writ of error,[59] in the absence of a valid statute authorizing an immediate

58. **Ala.**—Stanton *v.* Heard, 100 Ala. 515, 14 So. 359; Bray *v.* Laird, 44 Ala. 295. **Colo.**—Bogert *v.* Adams, 5 Colo. App. 510, 39 Pac. 351. **Mich.**—Harvey *v.* Pealer, 63 Mich. 572, 30 N. W. 183. **Minn.**—Humphrey *v.* Hezlep, 1 Minn. 239, since changed. See Davidson *v.* Owens, 5 Minn. 69. **Mo.**—Jones *v.* Evans, 80 Mo. 565. **N. M.**—Machin *v.* Keeler, 11 N. M. 413, 68 Pac. 937; Lydonville Nat. Bank *v.* Folsom, 10 N. M. 306, 62 Pac. 976; Schofield *v.* American Val. Co., 9 N. M. 485, 54 Pac. 753. **N. C.**—Phelps *v.* Worthington, 92 N. C. 270. **Ore.**—Farmers' Bank *v.* Key, 33 Ore. 443, 54 Pac. 206; Van Voorhies *v.* Taylor, 24 Ore. 247, 33 Pac. 380. **Tex.**—Eikel *v.* Hanscom, 3 Wills. Civ. Cas. §473. **Wash.**—Jensen *v.* Hughes, 12 Wash. 661, 42 Pac. 127.

Reason of Rule.—In Wirt *v.* Dinan, 41 Mo. App. 236, the court said: "It has been long and well understood in this state that there can be but one final judgment in a cause, and that such final judgment cannot be composed of fragments. As to the defendant the judgment must relieve him from further appearance as to the entire cause. He must be permitted to go 'without day,' etc. Such is not the case here. The defendants (as appears from this record) are still held in the court below to answer the merits of the action or petition, while this attachment—this adjunct to the main case—is brought here for review. The judgment below did not discharge defendants from the entire cause but only quashed 'and for naught held' the writ and levy of attachment, and *'as to the same'* (to-wit, the writ of attachment only and nothing more) the defendants were permitted to go without day. Said judgment did not even award defendants their costs expended in the whole case, but simply adjudged costs only 'growing out of the issuing, levy and return of *said writ of attachment.'* Obviously then the judgment complained of has only to do with a fragmentary portion of the case, and an appeal or writ of error therefrom is not allowed unless the statute takes this case from the general rule."

In New Mexico it was held that §§8 and 9, c. 75, of the Session Laws of 1899, which seek to allow appeals from judgments or orders dissolving attachments before final judgments are rendered in the main suit, are contrary to the provisions of the organic act, and are void. Machen *v.* Keeler, 11 N. M. 413, 68 Pac. 937.

Missouri.—In Wirt *v.* Dinan, 41 Mo. App. 236, the court said: "In the revision of 1879, the law was amended so as to permit *appeals* from such orders and judgments on the plea in abatement (section 439, Revised Statutes, 1879). But this amendment to the old law applies, in terms, only to judgments on *pleas in abatement*, and makes no reference whatever to judgments or orders dissolving or quashing attachments on motion, such as we have here. The plea in abatement, provided by section 438 and mentioned in section 439 (Revised Statutes, 1879), is quite a different matter from the motion to quash mentioned in section 445. The first, by means of the affidavit of the defendant, puts in issue the facts which furnish the grounds for the attachment, while the latter (or motion to quash) simply calls for the judgment of the court as to the legal sufficiency of the affidavit on its face."

59. **U. S.**—Leitensdorfer *v.* Webb, 20 How. 176, 15 L. ed. 891; Atlantic Lumber Co. *v.* Bucki, etc., Lumber Co., 92 Fed. 864, 35 C. C. A. 59; Hammer *v.* Scott, 60 Fed. 343, 19 U. S. App. 639, 8 C. C. A. 655. **Ala.**—Eslava *v.* Rigeaud, 3 Ala. 363. **Mich.**—Gore *v.* Roy, 69 Mich. 114, 36 N. W. 739. **Mo.** Lane *v.* Fellows, 1 Mo. 353; Wirt *v.* Dinan, 41 Mo. App. 236. **Pa.**—Brown *v.* Ridgway, 10 Pa. 42; Miller *v.* Spreecher, 2 Yeates 162.

A statute providing for review or writ of error of every final decision in a civil action was held not to allow such review. **Suffern** *v.* Chisholm, 1 Wash. Ter. 486.

When the record fails to disclose that any property was ever taken under the order of attachment, there being no return made by the sheriff to the writ, an order dissolving an attachment will

review,[60] but may be reviewed upon an appeal from the final judg-

not support a writ of error. Sand Hills Commercial Co. *v.* Phillips, 5 Neb. (Unof.) 330, 98 N. W. 718.

Circuit Court of Appeals Act.—Hammer *v.* Scott, 60 Fed. 343, 19 U. S. App. 639, 8 C. C. A. 655.

An order quashing an attachment before final termination of the case on the merits is not a final decision within the meaning of the act creating the circuit court of Appeals. (26 Stat. at L. 826, c. 517, §6, 4 Fed. Cas. Ann. 409). Hammer *v.* Scott, 60 Fed. 343, 19 U. S. App. 639, 8 C. C. A. 655.

In Pennsylvania the statute (Act of March 17, 1869) gives to the court of common pleas when in session, or to a judge thereof in vacation, a discretionary power to dissolve the attachment issued under its provisions. Under this statute the decision cannot be reviewed on writ of error. Slingluff *v.* Sisler, 193 Pa. 264, 44 Atl. 423; Hull *v.* Oyster, 168 Pa. 339, 31 Atl. 1007; Hoppes *v.* Houtz, 133 Pa. 34, 19 Atl. 312; Wetherald *v.* Shupe, 109 Pa. 389; Johnston *v.* Menagh, 4 Pa. Super. 154, 40 W. N. C. 187.

This rule is not applied where all the facts are agreed upon and made part of the record as the question then becomes one of law only. Hallowell *v.* Tenney Canning Co., 16 Pa. Super. 60. In Nicoll *v.* McCaffrey, 1 Pa. Super. 187, the court speaking through Rice, P. J., said: "When therefore it is said that an order quashing a writ of foreign attachment on extrinsic evidence is not reviewable on writ of error or certiorari, we do not understand it to be meant that the judgment of the court is conclusive and that such writ will not lie to it, as in the case where by statute the decision of the common pleas, upon certiorari to justices of the peace is made final and conclusive. It is meant simply that the appellate court will not review the decision of the court upon questions of fact; because the writ brings up nothing but what appears upon the record, and the evidence is not part of the record; and also because if the evidence were brought up it would not be the province of the reviewing court to pass upon the credibility of the witnesses or to decide as to the weight of the testimony. But where neither of these obstacles exists, where no question as to the competency or credibility of the witnesses or as to the weight of the testimony is involved, where all of the facts are agreed upon and are made part of the record, and the question thus presented is purely one of law, it would be very strange if the action of the court in entering a judgment which ends the action and puts the plaintiff out of court were not reviewable."

State Rules Not Affecting Federal Practice.—In Leitensdorfer *v.* Webb, 20 How. (U. S.) 176, 15 L. ed. 891, it was held that a rule in the state practice allowing appeals from orders dissolving attachments will not affect the practice in the federal courts.

Error Will Not Lie When no Levy Made.—Sand Hills Commercial Co. *v.* Phillips, 5 Neb. (Unof.) 330, 98 N. W. 718.

Michigan.—A writ of error will not lie to review an order of the circuit court dissolving a writ of attachment as it is not a proceeding according to the course of the common law but is a special proceeding under the statute. Gore *v.* Ray, 69 Mich. 114, 36 N. W. 739.

In Kansas the order is not reversible until after final judgment. Simpson *v.* Kirschbaum, 43 Kan. 36, 22 Pac. 1018.

60. **Constitutionality of Statute.**—A statute authorizing an appeal from an order dismissing an attachment is in violation of the organic act of the territory under which appeals can be taken only from final judgments. Machen *v.* Keeler, 11 N. M. 413, 68 Pac. 937; Jung *v.* Myer, 11 N. M. 378, 68 Pac. 933.

Judgments on motion quashing an attachment cannot be reviewed independently of final judgment on appeal brought after such judgment. Lyndonville Nat. Bank *v.* Folsom, 10 N. M. 306, 62 Pac. 976. (Rule since changed by Laws of N. M. 1899, p. 770, §§8, 9.)

To New York Appellate Term.—An order, made by the municipal court of New York, vacating an attachment, is not appealable to the appellate term, as such an order is not one of those provided for by statute. Wuertz *v.* Braun, 113 App. Div. 459, 99 N. Y.

ment on the merits,[61] which, under some statutes, carries up all orders.

B. Order Denying Motion To Vacate. — While cases hold, under what in some jurisdictions is deemed to be sufficient statutory authority, that an order refusing to vacate an attachment may be the subject of an appeal,[62] or that the proper method of review is by writ

Supp. 340; Feldman *v.* Siegel, 43 Misc. 392, 87 N. Y. Supp. 538; Gansevoort Bank *v.* Altshul, 26 Misc. 6, 55 N. Y. Supp. 733.

The word "proceedings" in a statute authorizing appeals "in all actions and proceedings" has reference to cases known as "special proceedings," and not to matters arising in the progress of the action or merely incident or ancillary thereto. Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

As Subsidiary and Not Original Process.—When the suit was commenced by summons, and an attachment was sued out as a subsidiary process and not original, a decree quashing the attachment does not terminate the suit and is not a final decree, and as it determines nothing as to the complainant's right of recovery, it is not an interlocutory decree from which an appeal would lie under §3157 of the Code. Jacobi *v.* Schloss, 7 Coldw. (Tenn.) 385.

The proceeding to dissolve an attachment is collateral to the main controversy. **Ark.**—Cutter *v.* Gumberts, 8 Ark. 449. **Mich.**—Gray *v.* York, 44 Mich. 415, 6 N. W. 374. **N. M.**—Jung *v.* Meyer, 11 N. M. 378, 68 Pac. 933.

An order of a justice of the peace discharging a warrant of attachment is interlocutory, and no appeal lies from such an order made in an action in the court of a justice of the peace. Phelps *v.* Worthington, 92 N. C. 270.

If a reinstatement of the attachment be desired, the party should obtain leave and apply to a judge of the appellate court, under statutory provisions. Leet *v.* Lockett, 4 Met. (Ky.) 55.

61. Lyndonville Nat. Bank *v.* Folsom, 10 N. M. 306, 62 Pac. 976; Lang *v.* Marks, 65 How. Pr. (N. Y.) 127.

Washington.—Under §6503, Bal. Code, the appellant is required to designate in the notice of appeal the order refusing to discharge the writ of attachment. This does not apply when the appeal is from a final judgment or decree, as "subd. 1, §6500 Bal. Code, expressly provides that, when the appeal is from any final judgment entered in the action, an appeal from such judgment brings up for review any order made in the same action, either before or after judgment, in case the record shall show such order sufficiently, for the purposes of a review thereof." Bingham *v.* Keylor, 25 Wash. 156, 64 Pac. 942.

62. **Cal.**—Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17; Taaffe *v.* Rosenthal, 7 Cal. 514; Griswold *v.* Sharpe, 2 Cal. 17. **Ia.**—Johnson *v.* Butler, 1 Iowa 459. **Ky.**—Francis *v.* Burnett, 84 Ky. 23. **Nev.**—Ranft *v.* Young, 21 Nev. 401, 32 Pac. 490. **N. Y.**—Thompson *v.* Dater, 57 Hun 316, 10 N. Y. Supp. 613 (appeal to General Term from County Court); Achelis *v.* Kalman, 60 How. Pr. 491. **N. C.**—Finch *v.* Slater, 152 N. C. 155, 67 S. E. 264; Judd *v.* Crawford Gold Min. Co., 120 N. C. 397, 27 S. E. 81; Sheldon *v.* Kivett, 110 N. C. 408, 14 S. E. 970; Roulhac *v.* Brown, 87 N. C. 1. **Ore.**—Sheppard *v.* Yocum, 11 Ore. 234, 3 Pac. 824. **S. C.**—Carolina Agency Co. *v.* Garlington, 85 S. C. 114, 67 S. E. 225. **Wash.**—Jensen *v.* Hughes, 12 Wash. 661, 42 Pac. 127. **Wis.**—Howell *v.* Kingsbury, 15 Wis. 272.

Defendant cannot appeal from an order denying a motion to dissolve, when he has duly executed to plaintiff a statutory bond for releasing the attachment, which has been approved by the judge and filed, and the attachment released. Thomas *v.* Craig, 60 Minn. 501, 62 N. W. 1133.

As Affecting a Substantial Right.—Judd *v.* Crawford Gold Min. Co., 120 N. C. 397, 27 S. E. 81; Sheldon *v.* Kivett, 110 N. C. 408, 14 S. E. 970.

Though Not a Final Decree.—Elkins Nat. Bank *v.* Simmons, 57 W. Va. 1, 49 S. E. 893.

While an attachment proceeding is auxiliary to the original or main cause, yet it is also of such an independent character, within the meaning of the statute, Code §1855, that an appeal will lie from an order dissolving or sustaining the same. Berry

of error,[63] in many jurisdictions the right, for the want of statutory direction, to prosecute appeal[64] or error from such an order is

v. Gravel, 11 Iowa 135; Johnson *v.* Butler, 1 Iowa 459.

In Wisconsin, an order granting or refusing a provisional remedy must be reviewed, if at all, on direct appeal from the order. It does not affect the merits of the action, nor the judgment, so as to render it reviewable under §3070, St. 1898. Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934. See also Shakman *v.* Koch, 93 Wis. 595, 67 N. W. 925; Howell *v.* Kingsbury, 15 Wis. 272.

A motion to vacate a rule issued by a justice of the supreme court in vacation discharging a rule to show cause why a writ of attachment issued out of the supreme court should not be quashed, is improper, as, either the proceeding before the single justice was nugatory, in which case the rule to show cause has not been disposed of, or else the justice heard the rule by consent, in which case his decision is not subject to review. Garbett *v.* Mountford, 70 N. J. L. 577, 57 Atl. 257.

An order denying a motion by a receiver to set aside an attachment upon the corporation, sued out before his qualification as receiver cannot be appealed from, as the receiver has mistaken his remedy. Andrews *v.* Paschen, 67 Wis. 413, 30 N. W. 712.

An assignee for the benefit of creditors cannot appeal from a judgment sustaining an attachment as he was not a party to the action or proceeding. Johnson *v.* Louisville City Nat. Bank, 22 Ky. L. Rep. 118, 56 S. W. 710.

Not Reviewable by Certiorari.—Holland *v.* White, 120 Pa. 228, 13 Atl. 782.

63. **Mich.**—Pierce *v.* Johnson, 93 Mich. 125, 53 N. W. 16, 18 L. R. A. 486. **N. J.**—Bisbee *v.* Bowden, 55 N. J. L. 69, 25 Atl. 855. **Ohio.**—Young *v.* Gerdes, 42 Ohio St. 102.

Reviewable by Certiorari.—Martin Lumb. Co. *v.* Circuit Judge, 116 Mich. 354, 74 N. W. 649; Bisbee *v.* Bowden, 55 N. J. L. 69, 25 Atl. 855.

New Jersey.—A motion to review a judgment of a single justice in vacation discharging a rule to show cause why an attachment should not be dissolved was refused as the proceeding before the single justice was either nugatory, in which case the rule to show cause was not disposed of, or else the justice heard the rule by consent, in which case his decision was not subject to review. Garbett *v.* Mountford, 70 N. J. L. 577, 57 Atl. 257.

New York.—As to the right to appeal from the municipal court of New York city, see Hotel Touraine *v.* Waite, 61 Misc. 54, 113 N. Y. Supp. 19; Delamanarus *v.* Traparis, 49 Misc. 636, 98 N. Y. Supp. 515; Gansevoort Bank *v.* Altshul, 26 Misc. 6, 55 N. Y. Supp. 733.

64. **Ala.**—Watson *v.* Auerbach, 57 Ala. 353; Rich *v.* Thornton, 69 Ala. 473. **Fla.**—Forbes *v.* Porter, 23 Fla. 47, 1 So. 336; Marshall *v.* Lavisies, 22 Fla. 583; Harrison *v.* Thurston, 11 Fla. 307. **Ky.**—Overby *v.* Gay, 17 B. Mon. 144. **Md.**—Stewart *v.* Chappell, 98 Md. 527, 57 Atl. 17; Parkhurst *v.* Citizens' Nat. Bank, 61 Md. 254; Hagerstown First Nat. Bank *v.* Weckler, 52 Md. 30. **Mont.**—Great Falls Meat Co. *v.* Jenkins, 33 Mont. 417, 84 Pac. 74. **Pa.**—First Nat. Bank *v.* Crosby, 179 Pa. 63, 36 Atl. 155; Lafferty *v.* Corcoran, 175 Pa. 5, 34 Atl. 308; Dempsey *v.* Petersburg Sav., etc., Co., 26 Pa. Super. 633.

Not a Final Order.—Ky.—Hanson *v.* Bowyer, 4 Met. 108. **Md.**—Mitchell *v.* Chestnut, 31 Md. 521; Baldwin *v.* Wright, 3 Gill 241. **Pa.**—Bellah *v.* Poole, 202 Pa. 71, 51 Atl. 593; Slingluff *v.* Sisler, 193 Pa. 264, 44 Atl. 423; Moss *v.* Mitchell, 174 Pa. 517, 34 Atl. 125.

No Irreparable Injury.—An order overruling a motion to dissolve an attachment is interlocutory, and an appeal will be dismissed when it does not appear that irreparable injury will result. Hart *v.* Phillips, 1 Rob. (La.) 223; Powell *v.* Hopson, 12 La. Ann. 615. See the title "Appeals."

To New York Appellate Term.—An order, made by the municipal court of New York, vacating an attachment, is not appealable to the appellate term, as such an order is not one of those provided for by statute. Delamanarus *v.* Traparis, 49 Misc. 636, 98 N. Y. Supp. 515.

No Personal Service nor General

denied.[65] It is sometimes held that the order may be reviewed after final judgment, but not before,[66] and that it may be reviewed on a general appeal of the case on the merits,[67] but when an appeal will lie from the order the question cannot be reviewed on appeal from the judgment in the same action.[68]

In New York, the action of the court in granting or refusing a motion to dissolve an attachment is considered an exercise of judicial discretion when the case presents no question of legal right. The court at general term may entertain an appeal from an order of the special term granting or denying such a motion and review the discretion exercised by the special term.[69] But an appeal cannot be taken from

Appearance.—When neither summons nor notice of entry of judgment have been served personally upon the defendant, who appeared only for the purpose of the motion, an appeal may be taken to the appellate term from an order of the municipal court denying a motion to vacate an attachment. Hotel Touraine *v.* Waite, 61 Misc. 54, 113 N. Y. Supp. 19.

On Original Process.—In Allender *v.* Fritts, 24 Cal. 447, the court said: "In those states where the attachment is used as a process acquiring jurisdiction, the consequence of dissolving or refusing to dissolve an attachment might be different. But here, the judgment is not in any respect affected by the attachment."

65. **Ala.**—Ellison *v.* Mounts, 12 Ala. 472; Massey *v.* Walker, 8 Ala. 167. **Ga.** National Park Bank *v.* Berry, 89 Ga. 333, 15 S. E. 463. **Kan.**—Simpson *v.* Kirschbaum, 43 Kan. 36, 22 Pac. 1018; Snavely *v.* Buggy Co., 36 Kan. 106, 12 Pac. 522. **Neb.**—Root *v.* State Bank, 30 Neb. 772, 47 N. W. 82; Wilson *v.* Shepherd, 15 Neb. 15, 16 N. W. 826. **Okla.**—Snyder *v.* Elliott, 26 Okla. 856, 110 Pac. 784. **Pa.**—Holland *v.* White, 120 Pa. 228, 13 Atl. 782; Lindsley *v.* Malone, 23 Pa. 24.

After Discharge by Judgment for Defendant.—A judgment in favor of defendant dissolved the attachment, and a subsequent refusal of the court to discharge the attachment was not appealable as there was no attachment which the refusal could affect. Ranft *v.* Young, 21 Nev. 401, 32 Pac. 490.

66. Realty Inv. Co. *v.* Porter, 58 Kan. 817, 50 Pac. 879; Chappell *v.* Comins, 44 Kan. 743, 25 Pac. 216; Snavely *v.* Buggy Co., 36 Kan. 106, 12 Pac. 522; Noyes *v.* Phipps, 9 Kan. App. 887, 58 Pac. 1007; Talbot *v.* Pierce, 14 B. Mon (Ky.) 195.

It is only orders vacating, discharging, or modifying provisional remedies that are reviewable independent of the main case. Realty Inv. Est. Co. *v.* Porter, 59 Kan. 817, 50 Pac. 879; Simpson *v.* Rothschild, 43 Kan. 33, 22 Pac. 1019.

Not Reviewable Before Trial Judgment.—Root *v.* State Bank, 30 Neb. 772, 47 N. W. 82.

67. Sturges, etc., Co. *v.* Cornish, 125 Ill. App. 401; Aurich *v.* Wolf, 30 La. Ann. 375.

68. Great Falls Meat Co. *v.* Jenkins, 33 Mont. 417, 84 Pac. 74.

Considered as an Exercise of Discretion.—DeBardeleben *v.* Crosby, 53 Ala. 363; Penn *v.* Edwards, 42 Ala. 655; Ellison *v.* Mounts, 12 Ala. 472.

69. Haebler *v.* Bernharth, 115 N. Y. 459, 22 N. E. 167; Lansingburgh Bank *v.* McKie, 7 How. Pr. (N. Y.) 360.

A statutory provision that the plaintiff "must show by affidavits, to the satisfaction of the judge," that the jurisdictional fact exists, does not vest a discretion in the judge to determine the sufficiency of such allegations, but the sufficiency of the allegations may be reviewed by the general term. Steel *v.* Raphael, 59 Hun 626, 13 N. Y. Supp. 661.

When, under a statutory provision, an application may be made to vacate an attachment founded only upon the papers upon which the warrant was granted, an appeal may be taken to the general term, and the general term must exercise the same supervision over the motion that the judge to whom it was originally made could have done. Achelis *v.* Kalman, 60 How. Pr. (N. Y.) 491.

the general term to the court of appeals to review the discretionary action of the general term in affirming or reversing an order of the special term sustaining or dissolving an attachment,[70] though such an order is appealable when it presents a question of law or absolute legal right.[71]

In Pennsylvania, also, an order dissolving or refusing to dissolve an attachment is interlocutory and a matter of sound discretion of the lower court, and is not appealable.[72]

C. Judgment on Plea in Abatement. — When no statute authorizes it, an appeal will not lie from a judgment upon a plea in abatement of an attachment, as the cause is not finally determined.[73] A

When Not Ex Parte.—Thompson *v.* Dater, 57 Hun 316, 10 N. Y. Supp. 613.

An order appointing appraisers to discharge an attachment on giving security in its stead, is a matter of discretion, and does not involve the merits of the action, or affect a substantial right. Lupton *v.* Jewett, 19 Abb. Pr. (N. Y.) 320.

From City Court General Term to Appellate Term.—Friede *v.* Weissenthanner, 27 Misc. 518, 58 N. Y. Supp. 336, *reversing* 56 N. Y. Supp. 399.

70. Wenzell *v.* Morrisey, 115 N. Y. 665, 22 N. E. 271; National Shoe, etc., Bank *v.* Mechanics' Nat. Bank, 89 N. Y. 440; Claflin *v.* Baere, 80 N. Y. 642, 59 How. Pr. 20; Ellis *v.* Rice, 77 N. Y. 610; Sartwell *v.* Field, 68 N. Y. 341. *Compare* Yates *v.* North, 44 N. Y. 271; Wright *v.* Rowland, 4 Keyes (N. Y.) 165.

Ground of Action Not Stated.—Thorington *v.* Merrick, 101 N. Y. 5, 3 N. E. 794; Bate *v.* McDowell, 97 N. Y. 646.

Facts Sufficient To Authorize Attachment.—When the original affidavits upon which the attachment was granted, and those used to oppose the motion to vacate the same, show a state of facts sufficient to authorize the judge to grant the attachment upon the ground stated therein, this is enough to call for the exercise of judicial discretion. Whitaker *v.* Imperial Skirt Mfg. Co., 78 N. Y. 621.

71. Allen *v.* Meyer, 73 N. Y. 1; Wallace *v.* Castle, 68 N. Y. 370.

Proceeding by Third Person To Vacate.—Haebler *v.* Bernharth, 115 N. Y. 459, 22 N. E. 167.

Question of Want of Power.—Tracy *v.* Selma First Nat. Bank, 37 N. Y. 523. See also Dunlop *v.* Patterson F. Ins. Co., 74 N. Y. 145, 30 Am. Rep. 283.

Presumption of Exercise of Discretion.—If the general term vacates the attachment on the appeal of the defendant in the action, it will be deemed to have acted in the exercise of its discretion, unless its decision is placed solely on the question of power. Haebler *v.* Bernharth, 115 N. Y. 459, 22 N. E. 167.

72. Wetherald *v.* Shupe, 109 Pa. 389, 2 Atl. 220; Potter *v.* Graham, 8 Pa. Super. 199; Johnston *v.* Menagh, 4 Pa. Super. 154.

It has been held, however, that an order quashing a foreign attachment where the defendant has not appeared or been served, is a final disposition of the action commenced by this process and may be appealed from. Sailor Planing Mill, etc., Co. *v.* Moyer, 35 Pa. Super. 503; Nicoll *v.* McCaffrey, 1 Pa. Super. 187.

73. State *v.* Smith, 105 Mo. 6, 16 S. W. 1052; Walser *v.* Haley, 61 Mo. 445; Jones *v.* Snodgrass, 54 Mo. 597; Davis *v.* Perry, 46 Mo. 449; Strauss *v.* Boden, 62 Mo. App. 664; Springfield Mill Co. *v.* Ramey, 57 Mo. App. 33; Hauser *v.* Andersch, 56 Mo. App. 485; Knapp *v.* Joy, 9 Mo. App. 47.

When the debt was due when the suit was commenced and jurisdiction did not depend on the attachment, the suit for a recovery on the debt may be maintained notwithstanding the failure to sustain the attachment, and a decree discharging an attachment, rendered upon a verdict in favor of a plea in abatement filed to the attachment, is not final. Younger *v.* Younger, 90 Tenn. 25, 16 S. W. 78.

Statute Permitting Plaintiff To Appeal.—Missouri Rev. St., 1889, §562, provided that plaintiff in an attachment proceeding might appeal from a judgment on a plea in abatement against

judgment sustaining a plea in abatement of an attachment is appealable under some statutes,[74] and under others it is not appealable.[75] A judgment overruling a plea in abatement and sustaining the attachment may be reviewed on appeal or error.[76]

Bill of Exceptions. — Exceptions should be taken and preserved by a bill of exceptions in order that the court may know upon what grounds the lower court sustained or overruled the traverse.[77] If no bill of

him, but contained no provision authorizing the defendant to appeal from a like judgment against him on a plea in abatement sustaining the attachment. Under the statute it was held that the defendant must appeal from the judgment on the merits in order to get the case before the appellate court for review of the trial and judgment on the plea in abatecmnt. Osborne *v.* Farmers' Mach. Co., 114 Mo. 579, 21 S. W. 837; Laun *v.* Pfister, 69 Mo. App. 629; Mackey *v.* Hyatt, 42 Mo. App. 443; Bagley *v.* Kelly, 38 Mo. App. 623; Metzenberger *v.* Keil, 31 Mo. App. 130; Duncan *v.* Forgey, 25 Mo. App. 310; Fagley *v.* Vail, 11 Mo. App. 601.

By the act of 1891, amending the above statute, the plaintiff was prohibited from appealing from a judgment dissolving an attachment. See Crawford *v.* Armstrong, 58 Mo. App. 214; Aultman *v.* Daggs, 50 Mo. App. 280.

74. Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122; Davidson *v.* Hackett, 49 Wis. 186, 5 N. W. 459.

What Case Must Be Brought up by Writ of Error.—Bogert *v.* Adams, 5 Colo. App. 510, 39 Pac. 351.

Upon an appeal the court will review the evidence and reverse if satisfied that the finding of fact is not sustained by the evidence. Davidson *v.* Hackett, 49 Wis. 186, 5 N. W. 459.

Final Judgment in Favor of Appellants.—No appeal can be taken from an order dissolving an attachment where the final judgment in the case is in favor of the appellants. Bogert *v.* Adams, 5 Colo. App. 510, 39 Pac. 351.

No Appeal Until After Final Judgment.—"When an affidavit in attachment is traversed and trial is had on the issues raised, an appeal cannot be taken from the judgment, until final judgment is entered in the main case to which the attachment is auxiliary." Schofield *v.* American Val. Co., 9 N. M. 485, 54 Pac. 753.

Effect of Dismissal of Main Action. "After judgment is entered for the defendant on the trial of the issues raised on the traverse of an affidavit for attachment, no appeal can be taken from such judgment when the plaintiff afterwards voluntarily dismisses the main case to which the writ of attachment was auxiliary." Schofield *v.* American Val. Co., *supra.*

75. Jones *v.* Evans, 80 Mo. 565; Link *v.* Hathaway, 143 Mo. App. 502, 127 S. W. 913; Harris *v.* Letner, 101 Mo. App. 689, 74 S. W. 1116.

A creditor filed a bill against his debtor and others seeking decree for his debt, and to reach and subject the debtor's effects by attachment, garnishment, and injunction. Upon the debtor's plea in abatement the attachment was quashed. From this decree the complainant appealed, the cause remaining undisposed of as to all other questions and parties. It was held the decree appealed from is not final, and the appeal should be dismissed as prematurely taken. Younger *v.* Younger, 90 Tenn. 25, 16 S. W. 78.

76. **Review by Appeal, Not by Writ of Error.**—Rev. St. Mo. 1879, 439, which provides that, upon determination in favor of plaintiff of a plea in the nature of a plea in abatement, putting in issue the facts alleged in an affidavit for attachment, the cause shall proceed, and that proceedings upon the plea shall be reviewable by appeal, does not authorize their review by writ of error, as a longer time is allowed for error than for appeal. Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632.

Review by Appeal or Writ of Error. Wehle *v.* Kerbs, 6 Colo. 167.

Motion for New Trial Necessary.—Alexander *v.* Wade, 107 Mo. App. 321, 80 S. W. 917.

Trial Judgment Necessary Before Appeal.—State *v.* Smith, 105 Mo. 6, 16 S. W. 1052.

77. **Colo.**—Solomon *v.* Saly, 6 Colo.

exceptions is filed the appellate court will assume that the evidence in the lower court was sufficient.[78]

Effect of Appeal. — Under some statutes if the plaintiff perfects an appeal from a judgment on a plea in abatement within a certain time he can retain his lien until the decision of the appeal.[79]

Review on Appeal From Final Judgment. — It has been held that if there be defects in the affidavit for which the attachment could be abated, the refusal to entertain a motion to quash because of them is not reviewable on proceedings taken to review the final judgment.[80]

But it seems otherwise to be a general rule, that where an appeal cannot be taken from an order dissolving or refusing to dissolve an attachment, a ruling for either party on a traverse of the writ may be reviewed on an appeal or writ of error from final judgment.[81]

D. Order Made After Judgment in the Action. — An order overruling a motion to release certain property from an attachment after final judgment, is appealable under a statutory provision that "an appeal may be taken from any special order made after final judgment."[82]

App. 170, 40 Pac. 150. Ill.—McFarland *v.* Claypool, 128 Ill. 397, 21 N. E. 587. Miss.—Barney *v.* Scherling, 40 Miss. 320.

See also p. 843.

78. Solomon *v.* Saly, 6 Colo. App. 170, 40 Pac. 150.

79. Lowenstein *v.* Powell, 68 Miss. 73, 8 So. 269; Pfiefer *v.* Hartman, 60 Miss. 505.

80. Rich *v.* Thornton, 69 Ala. 473. See also Eslava *v.* Rigland, 3 Ala. 363.

81. Wehle *v.* Kerbs, 6 Colo. 167; Bogert *v.* Adams, 5 Colo. App. 510, 39 Pac. 351.

An appeal from the final judgment brings up for review the interlocutory order. Forbes *v.* Porter, 23 Fla. 47, 1 So. 336; Realty Invest. Co. *v.* Porter, 58 Kan. 817, 50 Pac. 879; Simpson *v.* Kirschbaum, 43 Kan. 36, 22 Pac. 1018. But see Allender *v.* Tritts, 24 Cal. 447, holding that an order refusing to dissolve an attachment cannot be reviewed on an appeal from the judgment, as it is not an order which can be reviewed under a statute authorizing the court to "review an intermediate order involving the merits and necessarily affecting the judgment."

Reviewing Judgment on Plea in Abatement.—American Nat. Bank *v.* Thornburrow, 109 Mo. App. 639, 83 S. W. 771. See also Knapp *v.* Joy, 9 Mo. App. 47.

In Connection With Judgment in Main Action.—There cannot be an appeal from an order or a judgment in an attachment proceeding until after final judgment in the main action, and then only in connection with the judgment in such main action. State *v.* Miller, 63 Ind. 475. See also Theirman *v.* Vahle, 32 Ind. 400, *overruling* Abbott *v.* Zeigler, 9 Ind. 511.

Sufficiency of Proof To Sustain the Writ.—"On the question as to setting aside the writ upon the ground that there was no proof of any facts sufficient to sustain the writ, we have frequently decided that in this class of cases the appeal brings up nothing but the record, and that we will review nothing but the regularity of the proceedings." Slingluff *v.* Sisler, 193 Pa. 264, 44 Atl. 423. See also Lewis *v.* Wallick, 3 Serg. & R. (Pa.) 410.

On Certiorari Only.—"The proceedings are contrary to the course of the common law; they are purely statutory, hence, they can be reviewed on a certiorari only, and not upon a writ of error." Wetherald *v.* Shupe, 109 Pa. 389, 2 Atl. 220. See the title "Certiorari."

82. Coey *v.* Cleghorn, 10 Idaho 162, 77 Pac. 331.

And it has been held that when, after a judgment in favor of the plaintiff and pending an issue on an interplea, an order was made dissolving an attachment, such order finally determined the only issue remaining be-

E. Objections Not Raised in Trial Court. — It is generally held that the rule that an appellate court will not consider any question which was not raised in and presented to the lower court for determination,[83] applies to attachment proceedings,[84] though some cases have held that as to matters which may be considered conditions precedent upon the right of the court to exercise jurisdiction in attachment proceedings, objections to defects or irregularities in such proceedings may be first taken in an appellate court, under the rule that the remedy by attachment is the exercise of a special limited jurisdiction distinct from the general jurisdiction of the court, and that the power of the court to act must appear upon the face of its proceedings.[85] Thus irregularities on the face of the proceedings are waived if not objected to below.[86] There cannot be raised for the first time on appeal

tween the plaintiff and defendant and a writ of error will lie (Salmon *v.* Mills, 66 Fed. 32, 27 U. S. App. 732, 13 C. C. A. 372, under Ark. Stats., Mansf. Dig., c. 9, §§377, 394), and that after a judgment for the defendant on the merits, an order refusing to discharge the attachment is void and an appeal therefrom will not lie, as, when the judgment was rendered the attachment was *ipso facto*. dissolved, and if the officer detains the property after demand he is answerable in an action of trover (Ranft *v.* Young, 21 Nev. 401, 32 Pac. 490). See also Higgins *v.* Grace, 59 Md. 365, where the court said: "After verdict and judgment in favor of the defendants which was rendered on the 8th of June, 1881, the court on the 24th of June quashed the attachment. Judgment upon the short note case in favor of the defendants by operation of law dissolved the attachment and put it to an end, subject only to revival by reversal of the judgment. The order quashing the attachment has been appealed from. It was certainly irregular and erroneous to pass any such order at that time, and the order will be reversed with the reversal of the judgment."

An order, entered after a judgment by default on the debt, striking an attachment from the calendar on the ground that the attachment had been abandoned or discontinued, by taking judgment on the merits, without replication to a plea in abatement to the attachment, was a final disposition of that branch of the case from which an appeal or writ of error would lie. Hemphill *v.* Collins, 117 Ill. 396, 7 N. E. 496.

83. See the title "Appeals."

84. Ia.—Patterson *v.* Stiles, 6 Iowa 54. Miss.—Thompson *v.* Raymon, 7 How. 186. W. Va.—McIntosh *v.* Augusta Oil Co., 47 W. Va. 832, 35 S. E. 860.

See generally the cases cited in the following notes.

85. Coward *v.* Dillinger, 56 Md. 59; Mears *v.* Adreon, 31 Md. 229.

That the writ was made returnable to a rule day instead of to a term of court, may be taken for the first time on appeal. Weehawken Wharf Co. *v.* Knickerbocker Coal Co., 24 Misc. 683, 53 N. Y. Supp. 982, *reversing* 22 Misc. 559, 49 N. Y. Supp. 1001, 22 Misc. 768, 49 N. Y. Supp. 1050; Keyser *v.* Guggenheimer, 91 Va. 317, 21 S. E. 475.

But in Austrian Bentwood Furniture Co. *v.* Wright, 43 Misc. 616, 88 N. Y. Supp. 142, it was held that an objection that motion papers to vacate an attachment are insufficient cannot be successfully raised for the first time on appeal.

86. Ala.—Linam *v.* Jones, 134 Ala. 570, 33 So. 343. Minn.—Brown *v.* Minneapolis Lumber Co., 25 Minn. 461. N. Y.—Godfrey *v.* Godfrey, 75 N. Y. 434. W. Va.—Joseph *v.* Pyle, 2 W. Va. 449.

a question as to a defective or insufficient affidavit[87] or bond,[88] and so as to objections to the validity of the attachment generally,[89] and to the form of the writ,[90] or to the fact that no bond was filed by the plaintiff before issuance of the writ.[91] Questions of variance cannot be first raised on appeal.[92]

87. **Ala.**—Johnston *v.* Hannah, 66 Ala. 127. **Ark.**—Landfair *v.* Lowman, 50 Ark. 446, 8 S. W. 188; Fletcher *v.* Menken, 37 Ark. 206. **Ia.**—Berry *v.* Gravel, 11 Iowa 135; Patterson *v.* Stiles, 6 Iowa 54. **Kan.**—Leser *v.* Glaser, 32 Kan. 546, 4 Pac. 1026. **Ky.** Buffington *v.* Mosby, 34 S. W. 704. **Mo.**—Alexander *v.* Hayden, 2 Mo. 211. **Tex.**—Merrielles *v.* State Bank, 5 Tex. Civ. App. 483, 24 S. W. 564. **Va.**—Sims *v.* Tyrer, 96 Va. 5, 26 S. E. 508. **Wyo.** Roy *v.* Union Merc. Co., 3 Wyo. 417, 26 Pac. 996.

No Objection Below by Plea in Abatement or Motion To Quash.—Thompson *v.* Raymon, 7 How. (Miss.) 186.

That Affidavit Does Not Show Ground for Attachment.—McIntosh *v.* Augusta Oil Co., 47 W. Va. 832, 35 S. E. 860.

That Affidavit Is Made Upon Belief. Landfair *v.* Lowman, 50 Ark. 446, 8 S. W. 188.

Not Properly Verified.—Mitchell *v.* New Farmers' Bank, 22 Ky. L. Rep. 1291, 60 S. W. 375; Roy *v.* Union Merc. Co., 3 Wyo. 417, 26 Pac. 996.

88. **Ala.**—Fleming *v.* Burge, 6 Ala. 373; Conklin *v.* Harris, 5 Ala. 213. **Ill.**—Schmitt *v.* Devine, 164 Ill. 537, 45 N. E. 974, *affirming* 63 Ill. App. 289. **Ia.**—Bretney *v.* Jones, 1 Greene 366. **Kan.**—Myers *v.* Cole, 32 Kan. 138, 4 Pac. 169.

Opportunity To Amend or Give New Bond.—Objection to a defective attachment bond should be made in the court below so that an amendment, if desired, can be made. Lawver *v.* Langhans, 85 Ill. 138; Morris *v.* School Trustees, 15 Ill. 266; Miere *v.* Brush, 4 Ill. 21.

When the bond appears to be good on its face, and was approved by the clerk of the lower court, objection thereto cannot be considered on appeal when it was not objected to below. Myers *v.* Cole, 32 Kan. 138, 4 Pac. 169.

That the Bond Was Not Under a Seal.—Northrup *v.* Garrett, 17 Hun (N. Y.) 497.

The party must seek his remedy against the clerk if the bond be insufficient. Bretney *v.* Jones, 1 Greene (Iowa) 366.

Amendable Defects Not Raised on Appeal.—Moline Plow Co. *v.* Updyke, 48 Kan. 410, 29 Pac. 575; Chiles *v.* Shaw, 13 Ky. L. Rep. 143.

Objection To Moving Papers.—Any objection to moving papers that they do not show any valid attachment or that they do not point out the irregularities complained of cannot be made for the first time in the appellate court. Macdonald *v.* Kieferdorf, 22 Civ. Proc. 105, 18 N. Y. Supp. 763.

89. American Express Co. *v.* Smith, 57 Iowa 242, 10 N. W. 655.

No Motion Below To Quash or Suppress.—**Ky.**—Smith *v.* Belmont, etc., Iron Co., 11 Bush 390. **La.**—Ledoux *v.* Smith, 4 La. Ann. 482. **Va.**—Kenefick *v.* Caulfield, 88 Va. 122, 13 S. E. 348.

But in Mears *v.* Adreon, 31 Md. 229, it was held that upon an appeal from a judgment of condemnation attachment, the question of the regularity and sufficiency of the proceedings is open to inquiry in the appellate court, although no motion has been made in the court below to set aside the judgment, or any motion to quash before the judgment was rendered.

Validity of Attachment Sale.—Williams *v.* Bennett, 75 Ark. 312, 88 S. W. 600, 112 Am. St. Rep. 57.

That the answer of defendant to the ground of attachment was not sworn to, was not made a ground of objection on the trial in the court below, precludes the raising of that point on appeal. Schnabel *v.* Jacobs, 105 Ky. 774, 48 S. W. 774.

90. Brown *v.* Minneapolis Lumber Co., 25 Minn. 461.

91. Fletcher *v.* Menken, 37 Ark. 206.

92. McCain *v.* Street, 136 Ala. 625, 33 So. 872.

"A variance between the amount of the debt claimed in the affidavit for the attachment, and the amount claimed in the complaint, must be taken advantage of in the trial court. The ob-

F. What Questions Are Reviewable. — The appeal brings up the main case for review only so far as is material to the understanding and disposition of the attachment appeal.[93] Questions within the discretion of the lower court will not be reviewed unless there has been a gross or palpable abuse of discretion.[94]

Harmless Errors. — Errors which were harmless to the appellant will not be ground for reversal of the order.[95]

Questions of Practice. — Matters of practice affecting a motion for dissolution of an attachment are within the sound discretion of the lower court and cannot be heard on the review,[96] unless it is evident that the complaining party has not been allowed a reasonable opportunity to be heard.[97]

jection cannot be made on appeal for the first time." Fears *v.* Thompson, 82 Ala. 294, 2 So. 719.

Variance between affidavit and complaint (Fears *v.* Thompson, 82 Ala. 294, 2 So. 719; McAbee *v.* Parker, 78 Ala. 573); though the judgment was by default (Decatur, etc., Imp. Co. *v.* Crass, 97 Ala. 524, 12 So. 41).

Variance Between Affidavit and Writ.—Zeigler *v.* Cox, 63 Ill. 48.

Variance Favorable to Appellant. Tessier *v.* Crowley, 16 Neb. 369, 20 N. W. 264.

93. In Berry *v.* Gravel, 11 Iowa 135, the court said: "The attachment proceedings are auxiliary to, and for some purposes, independent of, those in the main action; and where a party appeals from the rulings and decisions made in the court below on the attachment part of the case (so stating in his appeal) he cannot assign errors on the proceedings in the principal suit, which are in no manner connected with the orders appealed from. While it is true that this court will look into the entire record in the consideration of the errors assigned, such rule is not to be carried to the extent of justifying us in examining errors upon a part of the record from which there never has been an appeal."

94. **Motion Addressed to Discretion of Court.**—A motion to discharge an attachment is addressed to the sound judicial discretion of the court and its decision thereon will not be disturbed, unless there has been a gross or palpable abuse of such discretion. Cohen *v.* Burr, 6 Wis. 200.

95. **Ind.**—Hubble *v.* Wright, 23 Ind. 322. **Kan.**—Shedd *v.* McConnell, 18 Kan. 594. **Tex.**—Smith *v.* Morgan (Tex. Civ. App.), 56 S. W. 950. **Wash.** Turpin *v.* Whitney, 6 Wash. 61, 32 Pac. 1022, 34 Pac. 151.

96. Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879; Godfrey *v.* Godfrey, 75 N. Y. 434.

A failure to comply with a rule of practice requiring the moving party to state the present condition of the action cannot be raised for the first time on appeal. Austrian Bentwood Co. *v.* Wright, 43 Misc. 616, 88 N. Y. Supp. 142.

A refusal of the court to accept the affidavit of the moving party as not showing grounds for information and belief is not reviewable. National Broadway Bank *v.* Barker, 128 N. Y. 603, 27 N. E. 1029, *affirming* 60 Hun 578, 14 N. Y. Supp. 529, 20 Civ. Proc. 338; Hodgman *v.* Barker, 128 N. Y. 601, 27 N. E. 1029.

Admission of Evidence.—"On the hearing of a motion to dissolve an attachment, error cannot be predicated upon the admission of improper evidence. It is presumed that the trial judge, in arriving at a conclusion, considered only proper and competent evidence, and disregarded that which was improper." Merrifield *v.* Farmers' Nat. Bank, 59 Neb. 602, 81 N. W. 611.

Rulings as to admission of testimony on an application to vacate are not reviewable on *certiorari*. Schall *v.* Bly, 43 Mich. 401, 5 N. W. 651.

97. In Carson *v.* Getchell, 23 Minn. 571, the court said: "What affidavits may be read, and in what order the parties shall put in their proofs, and whether a continuance shall be granted to give a party opportunity to produce further proofs, on motions in the district court, are matters of practice within the sound discretion of that

Findings of Fact. — The appellate court will review the evidence upon which the judgment in the lower court is based,[98] but where a trial court hears a motion to dissolve an attachment and makes a finding in favor of one of the parties and against the other, the appellate court will not ignore such finding or reverse it, unless it can say as a matter of law that the finding is erroneous,[99] or that the preponderance of the evidence against the decision is clear and decisive.[1] If the evidence is conflicting the ruling will not be disturbed unless clearly and

court, and we cannot review its action, unless it is evident that the party complaining has not been allowed a reasonable opportunity to be heard."

98. Rice *v.* Jerenson, 54 Wis. 248, 11 N. W. 549.

99. **Ark.**—Blass *v.* Lee, 55 Ark. 329, 18 S. W. 186. **Ga.**—Dunlap Hardware Co. *v.* Jay, 101 Ga. 645, 28 S. E. 974; O'Connor *v.* Donaldson, 92 Ga. 342, 17 S. E. 270. **Kan.**—Wilson *v.* Lightbody, 29 Kan. 446; Utquhart *v.* Smith, 5 Kan. 447. **Ky.**—Rapp *v.* Shoemaker, 11 Ky. L. Rep. 401. **La.**—Witherow *v.* Croslin, 24 La. Ann. 128. **Mich.**—Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879; Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 17 N. W. 790, 18 N. W. 206; Sheldon *v.* Stewart, 43 Mich. 574, 5 N. W. 1067; Schall *v.* Bly, 43 Mich. 401, 5 N. W. 651. **N. H.**—Sawyer *v.* Wood, 59 N. H. 347. **N. Y.**—Blakeslee *v.* Cattelain, 86 Hun. 574, 33 N. Y. Supp. 903; Dodd *v.* Averill, 14 Misc. 518, 35 N. Y. Supp. 1070. **Ohio.**—Harrison *v.* King, 9 Ohio St. 388; Beitman *v.* McKenzie, 12 Cinc. L. Bul. 321, *affirmed* in 17 Cinc. L. Bul. 405; Sibley *v.* Condensed Lubricating Oil Co., 12 Cinc. L. Bul. 308. **Wash.**—Hendleman *v.* Kahan, 48 Wash. 549, 93 Pac. 1074. **Wis.**—Cohen *v.* Burr, 6 Wis. 200. **Wyo.**—C. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213.

Reason of Rule.—In Curtis *v.* Davis, 44 Kan. 144, 24 Pac. 50, Simpson, C., aptly states the reason for the rule in the following language: "We do not hear the witnesses and observe their demeanor upon the stand, and consequently we cannot weigh the evidence; and from this condition arises a rule, so often repeated that its assertion has become one of dull uniformity, that we can reverse only where there is no evidence to support a material fact. If there is any conflict among the witnesses, a finding by the court is as conclusive as if made by a jury. . . . While it would seem to us in some cases that the statements of the witnesses as they appear in the cold type would lead us to different conclusions than those adopted by the trial court, we must always recollect that the trial judge has had the very great advantage of a personal view of the witness, can observe his manner, note his demeanor, determine his degree of intelligence, estimate his interest in the result, develop his prejudices, and make due allowance either for his timidity, or for that 'exceeding freshness' sometimes manifested on the witness stand. The operation of the rule, so far as we have observed, has invariably been in the interest of truth and justice."

In Falvey *v.* Adamson, 73 Ga. 493, the court said: "On an application to dismiss an attachment granted *ex parte* on the ground of a fraudulent transfer of property by the debtor, the decision of the judge on disputed facts may be reviewed; but in making such judgment, he is allowed the exercise of a sound discretion similar to that which he has in cases of injunction; and such discretion will not be controlled unless it plainly appears to have been abused."

Credibility of Witnesses.—The appellate court will not review findings as to the credibility of witnesses or the truth of their statements. **Neb.** Landis *v.* Newton, 1 Neb. (Unof.) 561, 95 N. W. 791. **N. Y.**—Brooks *v.* Mexican Nat. Const., 93 N. Y. 647; Stringfield *v.* Fields, 13 Daly 171. **S. C.**—Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

Every presumption must be in favor of the conclusion reached by the lower court upon questions of fact unless the contrary clearly appears. Bingham *v.* Keylor, 25 Wash. 156, 64 Pac. 942.

1. Schoeneman *v.* Sowle, 102 Minn. 466, 113 N. W. 1061; First Nat. Bank *v.* Buchan, 76 Minn. 54, 78 N. W. 878;

manifestly wrong.[2] In such a case all that the appellate court can do is to look into the evidence to see whether there is sufficient evidence to sustain every ingredient of the finding of the court; or, in other words, to see whether there is such a lack of evidence that it can say as a matter of law that the finding is erroneous.[3] Sometimes the question is left entirely to the discretion of the lower court.[4]

First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. 799; Blandy *v.* Raguet, 14 Minn. 243; Whipple *v.* Hill, 36 Neb. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313; Feder *v.* Solomon, 26 Neb. 266, 42 N. W. 1; Holland *v.* Commercial Bank, 22 Neb. 571, 36 N. W. 113.

Evidence Sufficient To Call for Reversal.—Smith *v.* Boyer, 29 Neb. 76, 45 N. W. 265, 26 Am. St. Rep. 373, *reversed*, 35 Neb. 46, 52 N. W. 581.

2. **Cal.**—Slosson *v.* Glosser, 114 Cal. xvii., 46 Pac. 276. **Kan.**—Moline Plow Co. *v.* Updyke, 48 Kan. 410, 29 Pac. 575; Champion Mach. Co. *v.* Updyke, 48 Kan. 404, 29 Pac. 573; Wilson *v.* Lightbody, 29 Kan. 446. **Ky.**—Helmers *v.* Klehammer, 19 Ky. L. Rep. 1005, 42 S. W. 1107; Haynes *v.* Viley, 8 Ky. L. Rep. 606, 2 S. W. 681. **Minn.**—First Nat. Bank *v.* Anderson, 101 Minn. 107, 111 N. W. 947; Rosenberg *v.* Burnstein, 60 Minn. 18, 61 N. W. 684; Finance Co. *v.* Hursey, 60 Minn. 17, 61 N. W. 672; Brown *v.* Minneapolis Lumber Co., 25 Minn. 461; Blady *v.* Raquet, 14 Minn. 243. **Neb.**—George F. Ditt man Boot, etc., Co. *v.* Graff, 3 Neb. (Unof.) 165, 91 N. W. 188; Merrifield *v.* Farmers' Nat. Bank, 59 Neb. 602, 81 N. W. 611; Smith *v.* Bowen, 51 Neb. 245, 70 N. W. 949; Sterling Mfg. Co. *v.* Hough, 49 Neb. 618, 68 N. W. 1019; Geneva Nat. Bank *v.* Bailor, 48 Neb. 865, 67 N. W. 965; Nebraska Moline Plow Co. *v.* Klingman, 48 Neb. 204, 66 N. W. 1101; Whipple *v.* Hill, 36 Neb. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313; Dolan *v.* Armstrong, 35 Neb. 339, 53 N. W. 132; Johnson *v.* Steele, 23 Neb. 82, 36 N. W. 358. **N. Y.**—Stringfield *v.* Fields, 13 Daly 171. **Okla.**—Citizens' Nat. Bank *v.* Gilroy, 5 Okla. 754, 50 Pac. 550; Tootle *v.* Brown, 4 Okla. 612, 46 Pac. 550.

In Smith *v.* Boyer, 35 Neb. 46, 52 N. W. 581, the court said: "It has been repeatedly held by this court that the same presumption exists in favor of the correctness of the ruling of the court or judge upon a motion to discharge an attachment where the evidence is conflicting as of any other finding or judgment."

If the testimony is partly oral and partly in writing, and there is testimony tending to sustain the finding and order of the district judge, his finding thereon is as binding upon the court as if it had been made by a jury. Champion Mach. Co. *v.* Updyke, 48 Kan. 404, 29 Pac. 573.

Finding of Trial Court Not Conclusive.—Gilbert *v.* Gilbert, 33 Mo. App. 259.

3. **Kan.**—Wilson *v.* Lightbody, 29 Kan. 446. **N. Y.**—Bicknell *v.* Speir, 18 N. Y. Supp. 590. **Ohio.**—Sevills *v.* Wagner, 46 Ohio St. 52, 18 N. E. 430.

4. Thorington *v.* Merrick, 101 N. Y. 5, 3 N. E. 794; Brooks *v.* Mexican Nat. Const. Co., 93 N. Y. 647; Slingluff *v.* Sisler, 193 Pa. 264, 44 Atl. 423; Lafferty *v.* Corcoran, 175 Pa. 5, 34 Atl. 308; Moss *v.* Mitchell, 174 Pa. 517, 34 Atl. 125; Hall *v.* Oyster, 168 Pa. 399, 31 Atl. 1007; Hoppes *v.* Houtz, 133 Pa. 34, 19 Atl. 312; Holland *v.* White, 120 Pa. 228, 13 Atl. 782; Wetherald *v.* Shupe, 109 Pa. 389.

In Bellah *v.* Poole, 202 Pa. 71, 51 Atl. 593, the court said: "This appeal is a substitute for a certiorari, and on it we can consider nothing outside the record. The testimony taken by the learned trial judge, and on which he acted in refusing to quash the writ, cannot be brought on the record by a bill of exceptions, and hence, it is not before us. Neither is the opinion of the judge in which he assigns his reasons for refusing to quash the writ a part of the record. We review the action of the court below only so far as it is shown by the record, and that discloses no error."

In Lindsley *v.* Malone, 23 Pa. 24, which was a foreign attachment, the defendant entered a conditional appearance and obtained a rule on the plaintiff to show cause why the writ

Finding on Affidavits Alone. — In some states the rule that the appellate court will not pass upon the evidence when conflicting, has been held not to apply where the evidence is all documentary,[5] as the ap-

should not be quashed on the ground that he was a resident of the state when the writ was issued. Evidence was heard in support of the rule which, however, was discharged by the court. On a writ of error, it was held that the action of the court below was not the subject of review by the supreme court. Knox, J., delivering the opinion, observed that "as there is no bill of exceptions to evidence on a motion for summary relief, the refusal of the district court to quash the writ cannot be reviewed here. Miller *v.* Spreeher, 2 Yeates 162; Shorts *v.* Quigley, 1 Binn. 222, and Brown *v.* Ridgeway, 10 Barr 42."

5. Hegwer *v.* Kiff, 31 Kan. 636, 3 Pac. 303; Robinson *v.* Melvin, 14 Kan. 484; Hatch *v.* Smith, 6 Kan. App. 649, 50 Pac. 952; New York, etc., Bank *v.* Codd, 11 How. Pr. (N. Y.) 221. See Schoeneman *v.* Sowle, 102 Minn. 466, 113 N. W. 1061.

"It is true," said Temple, J., in Tuller *v.* Arnold, 93 Cal. 166, 28 Pac. 863, "this court will not interfere with the discretion of the trial court, except where it can plainly see that there has been an abuse of such discretion, but where, in a matter in reference to which this court has equal advantages with the lower court, it is beyond doubt that error has been committed to the prejudice of the appellant, it is the duty of the court to correct the error. Such error must be held to be an abuse of discretion. Every reversal goes upon this theory, and it should make no difference whether the mistake be as to a conclusion from the evidence, or in construing the law, provided it be made equally clear that error has occurred."

In Brewster *v.* Van Camp, 55 Hun (N. Y.) 603, 8 N. Y. Supp. 588, the court said: "Upon a motion to vacate an attachment under the code, the question is not one of jurisdiction of the officer who granted, but upon the facts presented the court is to determine whether the attachment ought to issue; and this is so when the motion is founded upon the alleged insufficiency of the affidavits upon which the order for the attachment was made, and a decision upon such a motion by the special term is reviewable upon the merits in this court. Allen *v.* Meyer, 73 N. Y. 1. The rule as stated by the learned counsel for the respondent, that if the affidavits stated facts sufficient to give the officer jurisdiction, and to call upon him to exercise his judgment, a motion to vacate founded upon the same papers as those upon which the attachment was granted will be denied, has no application to this court on a motion to vacate an attachment. Such is the rule in the court of appeals, when reviewing an order of this court sustaining an attachment. If the attachment is granted in a case not authorized, or if there is an entire absence of facts proved justifying the granting of the same, the case will present a question of law, and the court of appeals would have jurisdiction to interfere and correct the legal error. *Id.* In that tribunal, if the affidavit shows any fact, however light, which tends to show the existence of the statutory conditions, the judge granting the attachment acquires jurisdiction; and it will not interfere, but affirm the order."

Evidence Showing Question Decided on Pleadings.—A journal entry that "after hearing the allegations of the pleadings herein filed, and being fully advised in the premises, I do hereby order that the order of attachment heretofore issued and made herein be, and the same is hereby, dissolved, and that each and all and every of the property herein attached be discharged from said attachment," was held to show that the court decided the question upon the pleadings and not on evidence. Brown *v.* Cairns, 63 Kan. 882, 65 Pac. 231.

Weight of Evidence Not Reviewed. The determination of the officer issuing the writ of attachment for a debt not due upon the sufficiency of the "proof" required by the statute, is not conclusive upon the court acting upon the face of the papers constituting the proof. If, however, facts and circumstances be stated legally tending to establish the grounds of the

pellate court in such a case is as competent as the trial judge to form a just estimate of the credence to be given thereto.[6] In other states even if disputed questions of facts are tried on affidavits the rule is the same as if there had been a trial and the findings of the trial court will not be disturbed unless manifestly wrong.[7]

G. The Record. — The complaint and affidavit upon which the attachment is based constitute part of the record of which the court must take notice, and they need not be formally introduced in evidence.[8]

Bill of Exceptions. — Rulings on motions for vacation or discharge made in the trial court will not be considered on appeal unless presented on a bill of exceptions.[9] And a bill of exceptions is necessary to bring into the record the affidavits, depositions, and other evidence used on the trial of the motion.[10]

attachment, and fairly calling on the officer issuing it for an exercise of his judgment upon the weight of the evidence, the proceedings will not be quashed by the court acting upon the face of the papers, on account of error of judgment as to the weight of it. If there is nothing which in law amounts to proof, the proceedings may be quashed as *coram non judice*. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

Order Made on Original Papers.— On an appeal from an order denying a motion to vacate an attachment made on the original affidavits the appellate court will consider the sufficiency of the papers to support the attachment. Aehelis *v.* Kalman, 60 How. Pr. (N. Y.) 491.

6. Hegwer *v.* Kiff, 31 Kan. 440.

7. Fremont Brewing Co. *v.* Pekarek, 4 Neb. (Unof.) 531, 95 N. W. 12; Geneva Nat. Bank *v.* Bailor, 48 Neb. 866, 67 N. W. 865; Dolan *v.* Armstrong, 35 Neb. 339, 53 N. W. 132; Johnson *v.* Steele, 23 Neb. 82, 36 N. W. 358.

8. Goldman *v.* Floter, 142 Cal. 388, 79 Pac. 58.

See generally the title "Appeals."

9. **Ala.**—McCain *v.* Street, 136 Ala. 625, 33 So. 872. **Ill.**—Ballance *v.* Samuel, 4 Ill. 380; Kellogg *v.* Turpie, 2 Ill. App. 55. **Md.**—Hollowell *v.* Miller, 17 Md. 305. **Wash.**—Kratz *v.* Dawson, 3 Wash. Ter. 100, 13 Pac. 663. **Wyo.** Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

See the title "Bill of Exceptions."

In Cobb *v.* O'Neal, 1 How. (Miss.) 581, the court said: "A presumption always arises in favor of the correctness of the decision below, and a judgment cannot, therefore, be reversed, unless the party seeking to reverse it can point out the error committed by the court. This rule applies with peculiar force to motions, in which the circuit courts may act upon something extrinsic or *dehors* the record. If they do, it is the business of the party objecting to have such matter placed upon the record, that it may come fairly before the appellate court. It is the province of an appellate court to correct the errors which have occurred in the courts."

10. **Ark.**—Estes *v.* Chesney, 54 Ark. 463, 16 S. W. 267. **Ia.**—Langworthy *v.* Waters, 11 Iowa 432. **Neb.**—Hobbs *v.* Hunt, 34 Neb. 657, 52 N. W. 278; Strunk *v.* State, 31 Neb. 119, 47 N. W. 640; Olds Wagon Co. *v.* Benedict, 25 Neb. 372, 41 N. W. 254; Tessier *v.* Crowley, 16 Neb. 369, 20 N. W. 264. **Ohio.**—Garner *v.* White, 23 Ohio St. 192. **Utah.**—Bowring *v.* Bowring, 4 Utah 185, 7 Pac. 716. **Wash.**—Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189. **Wyo.**—Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

Affidavits Copied Into Record by Clerk.—Where affidavits read on the hearing of a motion are copied into the record by the clerk, without any bill of exceptions taken for that purpose, they cannot be considered, on proceedings in error. Sleet *v.* Williams, 21 Ohio St. 82.

District of Columbia.—"Under the provisions of Sec. 783, R. S. D. C., an attachment for matters of fact not apparent in the record itself can only be questioned by filing an affidavit

Presumptions. — When there is no bill of exceptions, the appellate court will presume in favor of the action of the court below in sustaining or refusing a motion to dismiss an attachment.[11] Thus the appellate court, in the absence of a bill of exceptions will presume that the evidence introduced before the trial judge was sufficient to sustain his judgment,[12] or that an attorney had authority to sign his client's name to the attachment bond.[13]

Necessity for Motion for New Trial. — As a general rule, no motion for a new trial in the lower court is necessary in order to bring the order sustaining or dissolving the attachment before the appellate court for revision.[14]

H. Effect on Lien. — Appeal by Plaintiff. — The statutes usually provide that if the plaintiff perfects his appeal from a judgment in the main action in favor of the defendant within a certain time and secures a stay of execution it will have the effect of preventing a dissolution of the attachment.[15] In the absence of a statute or an order of the

traversing plaintiff's affidavit. The issue thus made is tried by the judge in chambers. As far as the affidavits are concerned, they necessarily become a part of the record as much as the pleading and process, by virtue of the statutory requirements." Barbour *v.* Paige Hotel Co., 2 App. Cas. 174.

In Pennsylvania the evidence cannot be brought into the record by a bill of exceptions. Ingram *v.* Orangers, 33 Pa. Super. 316; Nicoll *v.* McCaffrey, 1 Pa. Super. 187.

11. Fla.—Stearns *v.* Jaudon, 27 Fla. 469, 8 So. 640. Ind.—Murphy *v.* Crayton, 51 Ind. 147; Fecheimer *v.* Hays, 11 Ind. 478. Ky.—Harper *v.* Bell, 2 Bibb 221. N. Y.—Hill *v.* Kniekerbocker Electric Light, etc., Co., 21 Civ. Proc. 141, 60 Hun 578, 14 N. Y. Supp. 517. Va.—Kenefick *v.* Canfield, 88 Va. 122, 13 S. E. 348.

Presumption Controlling Although Defects Manifest.—In Harper *v.* Bell, 2 Bibb (Ky.) 221, a motion was made in the court below to quash an attachment, and overruled, and although the appellate court decided that the attachment upon its face was manifestly defective, yet it was held that, as the reasons of the motion did not appear on the record, it was no ground of error. The court evidently founded their decision on the presumption, that the decision of the court below was correct, unless shown to be erroneous; and as no error was pointed out, by setting out the grounds of motion, and as the court might have overruled the motion for extrinsic matter, the judgment overruling the motion was sustained, although the attachment was admitted to be defective.

Jurisdiction Not Presumed.—Jeffery *v.* Wooley, 10 N. J. L. 123.

12. Ill.—Ballance *v.* Samuel, 4 Ill. 380. Neb.—George F. Dittman Boot, etc., Co. *v.* Graff, 3 Neb. (Unof.) 165, 91 N. W. 188. Utah.—Cochrane *v.* Bussche, 7 Utah 233, 26 Pac. 294.

13. Goddard *v.* Cunningham, 6 Iowa 400.

14. Ky.—Francis *v.* Burnett, 84 Ky. 23; Crouch *v.* Meguiar-Harris Co., 19 Ky. L. Rep. 819, 42 S. W. 91. Ohio. Beitman *v.* McKenzie, 12 Cinc. L. Bul. 321; Sibley *v.* Condensed Lubricating Oil Co., 12 Cinc. L. Bul. 308. Wyo. First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

15. Ala.—Sherrod *v.* Davis, 17 Ala. 312. Md.—Higgins *v.* Grace, 59 Md. 365. Mich.—Trent *v.* Dunham, 74 Mich. 114, 41 N. W. 876, 16 Am. St. Rep. 616. N. Y.—Milliken *v.* Fidelity, etc., Co., 129 App. Div. 206, 113 N. Y. Supp. 809; Friede *v.* Weissenthanner, 27 Misc. 518, 58 N. Y. Supp. 336; McKean *v.* National L. Assoc., 24 Misc. 511, 53 N. Y. Supp. 980; Wright *v.* Rowland, 4 Abb. Dec. 649.

Where the plaintiff obtains a stay of proceedings pending an appeal, no motion on defendant's part to vacate the attachment will lie. The effect of the stay is merely to suspend the annulment of the attachment, and does

court or judge staying or suspending the force and effect of such judgment pending proceedings in error to an appellate court a subsequent reversal of such judgment by the appellate court will not operate to revive such lien to the prejudice of a purchaser or attaching creditor intermediate the date of the judgment and the reversal in the appellate court.[16]

not continue its existence. Friede *v.* Weissenthanner, 27 Misc. 518, 58 N. Y. Supp. 336.

California.—Under the California practice the appeal may be taken within sixty days, but if the appellant wishes to preserve the lien of the attachment he must perfect his appeal within five days. Flagg *v.* Puterbaugh, 101 Cal. 583, 36 Pac. 95, *construing* §§940, 946, Code Civ. Proc.

In Iowa the final judgment will discharge an attachment unless an appeal is taken within two days. Munn *v.* Shannon, 86 Iowa 363, 86 N. W. 263; McCormick Harvesting Mach. Co. *v.* Jacobson, 77 Iowa 582, 42 N. W. 469; Ryan *v.* Heenan, 76 Iowa 589, 41 N. W. 367.

An announcement of the appeal is not necessary where the officer releases the property, as the object of the announcement is to prevent a release of the property until the appeal is perfected. Sheldon *v.* Bigelow, 124 Iowa 566, 100 N. W. 502.

A failure to perfect the appeal within two days will not affect the jurisdiction of the appellate court to hear the case. Munn *v.* Shannon, 86 Iowa 363, 53 N. W. 263.

Appeal Must Be Taken Within Thirty Days.—Marietta *v.* Standard Oil Co., 9 Kan. App. 887, 57 Pac. 47.

Louisiana.—The appeal should be taken within ten days in order to have the effect of suspending the execution of the judgment. Watson *v.* Simpson, 15 La. Ann. 709.

In Nebraska a period not exceeding twenty days may be fixed by the court. McDonald *v.* Bowman, 40 Neb. 269, 58 N. W. 704; Adams County Bank *v.* Morgan, 26 Neb. 148, 41 N. W. 993; Trupin *v.* Coates, 12 Neb. 321, 11 N. W. 300; State *v.* Cunningham, 9 Neb. 146, 1 N. W. 1011.

In South Dakota if the appellant desires that the property should remain as it was before the order dismissing or modifying the attachment was made, he must serve within three days an undertaking, as required by the statute. The right of appeal, however, is in no way affected by this statute. Quebec Bank *v.* Carroll, 1 S. D. 1, 44 N. W. 723.

The Wisconsin statute provides that, "when a party shall give immediate notice of appeal from an order vacating or modifying a writ of attachment, . . . he may, within three days thereafter, serve an undertaking executed on his part, . . . to the effect that if the order appealed from, or any part thereof, be affirmed, the appellant will pay all costs and damages . . . the adverse party may sustain by reason of the continuance of the attachment," and that, "upon the giving of such undertaking, such court or judge shall order the attachment to be continued," etc. In construing this statute the court said: "It seems to me the provision applies in terms only to the case of an appeal from an order vacating or modifying the writ, and has no application, unless by analogy, to the case where the injunction (sic.) is dissolved by the entry of a judgment against the plaintiff upon the merits. And, the attachment being a proceeding collateral to and depending wholly upon the action, it cannot exist without that; and when the action itself goes down the attachment goes with it, unless continued by special order of the court." Meloy *v.* Orton, 42 Fed. 513.

Offer of Payment.—Wright *v.* Rowland, 4 Keyes (N. Y.) 165, *reversing* 36 How. Pr. 115.

Next Succeeding Term.—Suydam *v.* Huggeford, 23 Pick. (Mass.) 465.

Effect of Appeal on Cancellation of Notice of Levy on Real Estate.—McKean *v.* National L. Assn., 24 Misc. 511, 53 N. Y. Supp. 980.

16. Miller *v.* Dixon, 2 Kan. App. 445, 42 Pac. 1014; Friede *v.* Weissenthanner, 27 Misc. 518, 58 N. Y. Supp. 336. And see Pach *v.* Orr, 15 Civ. Proc. 176, 1 N. Y. Supp. 760.

Defendant is entitled upon rendition

Appeal by Defendant. — Where an appeal from a final judgment is taken by a defendant and an appeal bond is given to satisfy any judgment that may be rendered on appeal the usual effect is to discharge the attachment on the ground that the security given is a substitute for the security of the attachment.[17]

of judgment in his favor to a return of the property, notwithstanding an appeal by plaintiff. Moore *v.* Somerindyke, 1 Hilt. (N. Y.) 199.

Under the California statute the defendant may make any disposition of the property that he could have made before the levy was made and with like force and effect. Loveland *v.* Alvord Consol. Quartz Min. Co., 76 Cal. 562, 18 Pac. 682.

In Indiana the filing of the ordinary appeal bond does not suspend the operation of the judgment, except that it stays the execution, and such bond has no effect on the portion of the property attached which was discharged by the judgment. Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203.

17. **Kan.**—St Joseph, etc., R. C. *v.* Casey, 14 Kan. 504. **Mass.**—Otis *v.* Warren, 16 Mass. 53. **Mich.**—Busbey *v.* Raths, 45 Mich. 181, 7 N. W. 802.

Certiorari Bond Has Same Effect. Vanderhoof *v.* Prendergast, 94 Mich. 18, 53 N. W. 792.

Effect of Supersedeas in Forma Pauperis.—The issuance and service of a writ of *supersedeas* upon an officer having property in his hands under an attachment has the effect to release the property, and authorize the officer to return it to the debtor without bond for its forthcoming at the end of the suit, even though the writ is sued out *in forma pauperis.* McCamy *v.* Lawson, 3 Head (Tenn.) 256. *Contra,* Collins *v.* Burns, 16 Colo. 7, 26 Pac. 145.

Issues Raised.—Where the issue traversing the truth of the ground upon which the attachment was issued, was tendered at the trial term of the attachment, and disallowed by the court, an appeal upon the merits does not carry up this preliminary question. Neal *v.* Bookout, 30 Ga. 40.

ATTORNEYS

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CROSS-REFERENCES:

Amicus Curiae;
Appearances;
Arguments;
Judges.

I. HISTORICAL. — The ancient common law required parties to be present and prosecute or defend in person. It required a patent or special authority from the crown (*a dedimus protestatem de attoranto faciendo*) to enable parties to appear by attorney.[1] Afterwards by various statutes the right to appear by attorney was recognized. But a party might still sue or defend in person and the right to prosecute or defend by attorney was a mere privilege intended for the convenience and benefit of suitors. In the early days attorneys were appointed orally by the court.[2] Later they were appointed by warrant out of court, and the practice of the court was to require the warrant to be filed at any time before judgment, though the failure to do so was cured by statute of jeofails and not assignable as error.[3]

II. **DEFINED.** — An attorney at law is a duly qualified officer of a court of justice entitled to practice his profession before the court and to manage and conduct cases before it as the legal representative of another. He is also the agent of his client and in that capacity his relations are governed by the principles of the law of agency. An attorney at law becomes such by complying with the requirements governing admission to the bar in the jurisdiction in which he practices. He is not an officer of the court in the full sense of that term. He neither receives compensation as other officers of the court do, nor has he any regular prescribed duties, yet his duties are not nominal, nor merely passive. He is amenable to the control of the court and may be required to render active service to the court, either as *amicus curiae* or as counsel for a prisoner on trial before the court. The office of attorney is a quasi-public one.[4]

1. **State** *v.* Mosher, 128 Iowa 82, 103 N. W. 105; Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520; Matter of Burr, 1 Wheeler's Crim. Cas. (N. Y.) 503, 510. And see note to Bank of New York *v.* Stryker, 1 Wheeler's Crim. Cas. (N. Y.) 330, 337.

2. **Ia.**—State *v.* Mosher, 128 Iowa 82, 103 N. W. 105; Harshey *v.* Blackmarr, 20 Iowa 161, 171, 89 Am. Dec. 520. **Ky.**—Holbert *v.* Montgomery's Admrs., 5 Dana 11. **Pa.**—Reinholdt *v.* Alberti, 1 Binn. 469. **Eng.**—3 Bl. Comm. 25; Thompson *v.* Blackhurst, 1 N. & M. 266, 28 E. C. L. 313; Lorymer *v.* Hollister, 2 Str. 693, 93 Eng. Reprint 788; Anonymous, 1 Salk. 87, 91 Eng. Reprint 81; Anonymous, 6 Mod. 16, 87 Eng. Reprint 780; Vincent *v.* Bodurdo, 2 Keb. 199, 84 Eng. Reprint 125; Allebey *v.* Colley, Cro. Jac. 695, 79 Eng. Reprint 603.

3. **U. S.** —Osborn *v.* United States Bank, 9 Wheat. 738, 831, 6 L. ed. 204. **Ia.**—Harshey *v.* Blackmarr, 20 Iowa 161, 171, 89 Am. Dec. 520. **N. Y.**—Denton *v.* Noyes, 6 Johns. 296, 5 Am. Dec. 237.

4. **U. S.**—*Ex parte* Garland, 4 Wall. 333, 18 L. ed. 366. **Ia.**—Hyatt *v.* Hamilton County, 121 Iowa 292, 96 N. W. 855, 100 Am. St. Rep. 354, 63 L. R. A. 614. **Mass.**—Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239. **N. Y.**—*In re* Shay, 133 App. Div. 547, 118 N. Y. Supp. 146. *In re* Oaths, 20 Johns. 492. **Pa.**—*In re* Ryan's Case, 7 Watts 438. *In re* Austin's Case, 5 Rawle 191, 28 Am. Dec. 657. **S. D.**—Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021. **Tex.**—Hawkins *v.* Murphy, 51 Tex. Civ. App. 568, 112 S. W. 136. **Wis.**—*In re* Mosness, 39 Wis. 509, 20 Am. Rep. 55. **Eng.**—3 Black. 25.

The term attorney is everywhere understood as having "reference to a class of persons who are by license instituted officers of courts of justice, and who are empowered to appear and prosecute and defend, and upon whom peculiar duties, responsiblities and liabilities are developed by law in consequence." Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021. See Martin *v.* Way, 3 Mich. 598.

"It is believed that no civilized na-

III. ADMISSION TO PRACTICE. — As requirements for admission vary in the different states, the statutes of each should be consulted for particular guidance. The usual requisites are citizenship, attainment of majority, good reputation and common school and legal education. In some states the applicant must have had a high school education and must have studied law for a period of two or three years.[5] In Indiana, however, it is a constitutional right of a citizen possessing good moral character to be admitted to the bar.[6] The courts and legislature may, however, prescribe reasonable rules and regulations for the admission of persons to practice, not in conflict with the constitution.[7]

tion of modern times has been without a class of men intimately connected with the courts, and with the administration of justice, called variously attorneys, counselors, solicitors, proctors, and other terms of similar import.'' *Ex parte* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366, 372, *per* Mr. Justice Miller, *dissenting.*

''Attorneys at law are officers of the court, admitted as such by its order; but it is a mistake to suppose that they are officers of the United States, as they are neither elected or appointed in the manner prescribed by the Constitution for the election or pointment of such officers. *Ex parte* Garland, 4 Wall. 333, 378 [71 U. S. xviii., 366, 370 . . .] Persons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as used in this country.'' National Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621. And see *In re* Duncan, 83 S. C. 186, 65 S. E. 210.

The distinction between attorneys, solicitors and barristers is not recognized in this country outside of one or two of the Atlantic states. See *In re* Paschal, 10 Wall. (U. S.) 483, 19 L. ed. 992.

Though an officer of the court an attorney is not an officer of the government. Savings Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621; *Ex parte* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366.

''An attorney at law is an officer of court exercising a privilege or franchise to the enjoyment of which he has been admitted, not as a matter of right, but upon proof of fitness through evidence in his possession of satisfactory legal attainments and fair private character.'' *In re* Durant, 80 Conn. 140, 67 Atl. 497.

5. Cobb *v.* Judge of Superior Court, 43 Mich. 289, 5 N. W. 309; *In re* Robinson, 82 Neb. 172, 117 N. W. 352.

Sex is no longer a disqualification for admission to practice in either the federal courts nor in the courts of the states; and today women are admitted to practice on the same terms as men and the tendency everywhere is to remove the disqualification of sex. *In re* Thomas, 16 Colo. 441, 27 Pac. 707, 13 L. R. A. 538 cases collated.

An alien may not be admitted to practice, nor can a non-resident be licensed. *In re* O'Neill, 90 N. Y. 584; *In re* Mosness, 39 Wis. 509, 20 Am. Dec. 55.

As bearing on this question the construction of the state statute must be left to the courts of the state. *In re* Lockwood, 154 U. S. 116, 14 Sup. Ct. 1082, 38 L. ed. 929.

As to the right to refuse to admit a person to practice because he did not possess the proper political qualifications, see Borgue *v.* United States, 209 U. S. 91, 28 Sup. Ct. 501, 52 L. ed. 698.

Under Police Power.—The right of the legislature to establish regulations governing the admission of attorneys is vested in that body by virtue of the police power. *In re* Applicants for License, 143 N. C. 1, 55 S. E. 635.

6. Constitution of Indiana, art. 7, 182; Ind. Rev. St. 1881, §962; *In re* Denny, 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722.

Women may be admitted to practice under this provision. *In re* Leach, 134 Ind. 655, 34 N. E. 641, 21 L. R. A. 701.

7. *In re* Leach, 134 Ind. 655, 34 N.

While a litigant may appear in person to conduct his own case or defense, he cannot select for his attorney a person who has not been licensed, or appoint anyone to act in that capacity under the guise of an agent.[8]

The right to practice law depends upon the license or permission of a court and admission to practice is a judicial act, although courts have generally conceded to the legislature the right to lay down general qualifications for admission.[9] The court, however, must determine whether or not such qualifications exist. The right to practice law is not ordinarily a privilege of a citizen of the United States or of a state under the fourteenth amendment; it is regarded in the nature of a franchise and is taxable.[10]

IV. PRIVILEGES AND DISQUALIFICATIONS. — A. Immunity From Arrest. — As an officer of court, an attorney is privileged from arrest on mesne process during attendance upon the sessions of the court during the trial of a cause in which he is retained.[11]

B. Immunity From Service of Civil Process. — An attorney is not as a rule exempt from service of papers in civil proceedings even

E. 641, 21 L. R. A. 701; McCracken *v.* State, 27 Ind. 491.

8. Cobb *v.* Judge of Superior Court, 43 Mich. 289, 5 N. W. 309.

9. *Ex parte* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; *In re* Goodell, 39 Wis. 232, 20 Am. Rep. 42. Such a statute does not infringe upon the inherent right of the court. *In re* Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288 (annotated case).

10. Bradwell *v.* Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442, 14 L. R. A. 581; *In re* Taylor, 48 Md. 28, 30 Am. Rep. 451.

The Supreme Court of the United States said in Bradwell *v.* Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442: "There are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. It has not, so far as we know, ever been made in any State or in any case to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State. But, on whatever basis this right may be placed, so far as it can have any relationship to citizenship at all, it would seem that, as to the courts of a State, it would relate to citizenship of the State, and as to Federal Courts, it would relate to citizenship of the United States." See also *In re* Lockwood, 154 U. S. 116, 14 Sup. Ct. 1082, 38 L. ed. 929.

11. Hoffman *v.* Bay Circuit Judge, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L. R. A. 663. "An attorney being defendant, cannot by plea, waive or destroy his privilege, because the privilege is allowed him, not for his own sake, but for the sake of the court, and the suitors in it. If he renounces his privilege by mere absence from court, and business, how is the plaintiff to know that fact beforehand? He can only judge from the record, and it is sufficient for him, that the defendant is an attorney, *prout patet per recordum*. This is the amount of the doctrine in the adjudged cases; Gardner *v.* Jessop, 2 Wils. 42; Farrill *v.* Head, Barnes, 419." Scott *v.* VanAlstyne, 9 Johns. (N. Y.) 216. See, however, Greenleaf *v.* People's Bank, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L. R. A. 499, in which it is said that this immunity was never recognized or acknowledged in North Carolina.

The privilege of an attorney may be taken away by express enactment or by the manifest intent of the legislature. Matter of Bliss, 9 Johns. (N. Y.) 347.

while engaged in court,[12] though there is authority to the contrary.[13]

C. Disqualification as Surety. — He is disqualified from acting as bail or surety in any court proceeding.[14]

12. **U. S.**—Robbins *v.* Lincoln, 27 Fed. 342. **N. Y.**—National Press Intelligence Co. *v.* Brooke, 18 Misc. 373, 41 N. Y. Supp. 658, 75 N. Y. St. 1044. See as to early rule in New York, Gilbert *v.* Vanderpoel, 15 Johns. 242; Van Alstyne *v.* Dearborn, 2 Wend. 586. **N. C.**—Greenleaf *v.* People's Bank, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L. R. A. 499.

This was also the common law rule. Greenleaf *v.* People's Bank, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L. R. A. 499. See, however, Lyell *v.* Goodwin, 4 McLean 29, 34, 15 Fed. Cas. No. 8,616; Gilbert *v.* Vanderpoel, 15 Johns. (N. Y.) 242.

"It is not for an American court to reverse the process, and hold that, because lawyers were formerly privileged from arrest during attendance upon court, therefore they are exempt from being sued and being served with a summons. By the census of 1900 there were 114,703 practicing lawyers in the United States, of whom 1,263 were in North Carolina. If, during all these years lawyers had possessed the privilege of exemption from the service of summons, assuredly more than one case could be found to assert it. If it had been so asserted, it would have been promptly repealed by statute, seeing that the Parliament in England passed an act denying a similar claim that its own members were exempt from service of summons because privileged from arrest, and that members and Senators in Congress are not privileged from service of summons, though expressly exempted from arrest on civil process by the Constitution." Greenleaf *v.* People's Bank, 133 N. C. 292, 301, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L. R. A. 499.

The case of Central Trust Co. *v.* Milwaukee St. R. Co., 74 Fed. 442, in which a subpoena served upon nonresident counsel, which prevented his returning home and attending to business he had left unprovided for was set aside, which is cited in Hoffman *v.* Bay Circuit Judge, *infra*, is *distinguished* by Clark, C. J. (concurring opinion) in Greenleaf *v.* People's Bank, *supra*. "That case is not sustained by any previous authority, and evidently rests more upon the ground stated therein, that the non-resident subpoenaed was president of a railway company, than because he was also a lawyer, but, if sound, it is very far from sustaining an alleged exemption from service of summons, which did not prevent Morey from returning home and adjusting his business, for the trial of his case is for a subsequent term."

13. **U. S.**—Lyell *v.* Goodwin, 4 McLean 29, 15 Fed. Cas. No. 8,616. **Mich.**—Hoffman *v.* Bay Circuit Judge, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L. R. A. 663; Mitchell *v.* Huron Circuit Judge, 53 Mich. 541, 19 N. W. 176. **Ohio.**—Whitman *v.* Sheets, 20 Ohio C. C. 1, 11 Ohio Cir. Dec. 179.

14. **Ill.**—Jack *v.* People, 19 Ill. 57. **Ia.**—Hudson *v.* Smith, 111 Iowa 411, 82 N. W. 943; Valley Nat. Bank *v.* Garretson, 104 Iowa 655, 74 N. W. 11; Cuppy *v.* Coffman, 82 Iowa 214, 47 N. W. 1005; Massie *v.* Mann, 17 Iowa 131. **Minn.**—Schueck *v.* Hagar, 24 Minn. 339. **N. Y.**—Coster *v.* Watson, 15 Johns. 535. **S. D.**—Dennett *v.* Reisdorfer, 15 S. D. 466, 90 N. W. 138; Towle *v.* Bradley, 2 S. D. 472, 50 N. W. 1057. **Utah.**—McWhirter *v.* Donaldson, 36 Utah 293, 104 Pac. 731. **Wis.** Gilbank *v.* Stephenson, 30 Wis. 155; Cothren *v.* Connaughton, 24 Wis. 134.

Not Ground for Dismissing Appeal. The fact that an attorney is one of the sureties on an appeal bond in violation of a court rule is no ground for dismissing the appeal. DeJarnett *v.* Marquez, 127 Cal. 558, 50 Pac. 45, 78 Am. St. Rep. 90.

In Georgia it is held that the provision is directory and if violated the obligation is neither void or voidable. The courts may require that other security be given without holding the bond a nullity. Husband Bros. *v.* Georgia Southern S. & F. R. Co., 3 Ga. App. 157, 59 S. E. 326.

In Iowa the statutory prohibition applies to an appeal bond given on appeal from a justice's court, and the giving of such a bond does not per-

V. PRESUMPTION OF AUTHORITY TO APPEAR. — A. In General. — When an attorney appears in court in a cause, he is presumed to be authorized by a party connected with the litigation.[15] Production of his authority will not be required on mere demand.[16] The presumption, however, is not conclusive and his authority may be inquired into.[17]

B. Inquiry as to Authority. — The client may deny the author-

fect the appeal. Valley Nat. Bank *v.* Garretson, 104 Iowa 655, 74 N. W. 11.

In Kentucky the prohibitory provision is held to be merely directory, and if an attorney persists in tendering himself as bail and by becoming such procures the discharge of persons accused of crime he will be held on his bond. Holandsworth *v.* Com., 11 Bush (Ky.) 617.

Under the Louisiana statute an attorney may become a surety on an undertaking in either a civil or criminal proceeding; such statute cannot be changed by rule of court. State *v.* Babin, 124 La. 1005, 50 So. 825.

Under the Nebraska statute (Comp. St. c. 10, §14) an attorney is not a proper surety; yet if he executes the bond and it is approved the obligation is valid, and the fact of the surety being an attorney at law furnishes no legal cause for striking the instrument from the files. Chase *v.* Omaha Loan & Tr. Co., 56 Neb. 358, 76 N. W. 896; Luce *v.* Foster, 42 Neb. 818, 60 N. W. 1027; Tessier *v.* Crowley, 17 Neb. 207, 22 N. W. 422.

In Tennessee under the act of 1903, c. 48, it is unlawful for an attorney to sign a bond recognizance for the appearance of a defendant in a criminal case, the violation of which is a misdemeanor. It is, however, held that this does not prevent an attorney from becoming a surety for a fine after it is assessed. Halfacre *v.* State, 112 Tenn. 609, 79 S. W. 132.

In Texas the prohibition is provided by court rule (Rule 50, 20 S. W. xv) and is held to be directory. A bond on writ of error signed by an attorney is not defective on that ground. Kohn *v.* Washer, 69 Tex. 67, 6 S. W. 551, 5 Am. St. Rep. 28; Prusiecki *v.* Ramziuski (Tex. Civ. App.), 81 S. W. 549.

In Washington there is no prohibitive statute, and an attorney provided may be a surety if he is otherwise competent. Murray *v.* Moynahan, 27 Wash. 379, 67 Pac. 810.

15. **U. S.**—Osborne *v.* United States Bank, 9 Wheat. 738, 6 L. ed. 204. **Ill.** Leshio *v.* Fischer, 62 Ill. 118. **Ia.**—Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520; Piggott *v.* Addicks, 3 Greene 427, 56 Am. Dec. 547. **Kan.** Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 16, 46 Am. Rep. 86; Brinkman *v.* Staffer, 23 Kan. 528; Esley *v.* People, 23 Kan. 510. **Me.**—Penobscot Boom Co. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656. **Md.**—Hager *v.* Cochran, 66 Md. 253, 7 Atl. 462; Dorsey *v.* Kyle, 30 Md. 512, 96 Am. Dec. 617. **Mich.**—Norberg *v.* Heineman, 59 Mich. 210, 26 N. W. 481; Arnold *v.* Nye, 23 Mich. 286. **Miss.**—Hardin *v.* Ho-Yo-Po Nubby's Lessee, 27 Miss. 567. **N. Y.**—Hamilton *v.* Wright, 37 N. Y. 502; Denton *v.* Noyes, 6 Johns. 296, 5 Am. Dec. 237. **Ohio.**—Pillsbury's Lessee *v.* Dugan's Adm., 9 Ohio 117, 34 Am. Dec. 427; Critchfield *v.* Porter, 3 Ohio 518. **Vt.**—Proprietors *v.* Bishop, 2 Vt. 231. **W. Va.**—Low *v.* Settle, 22 W. Va. 387. **Wis.**—Schlitz *v.* Meyer, 61 Wis. 418, 21 N. W. 243; Thomas *v.* Steele, 22 Wis. 207; Grignon *v.* Schmitz, 18 Wis. 620.

16. **Ark.**—Tally *v.* Reynolds, 1 Ark. 99, 31 Am. Dec. 737. **Ia.**—State *v.* Carothers, 1 G. Gr. 464. **Kan.**—Esley *v.* People, 23 Kan. 510. **La.**—Dockham *v.* Potter, 27 La. Ann. 73. **Mich.**—Norberg *v.* Heineman, 59 Mich. 210, 26 N. W. 481. **W. Va.**—Low *v.* Settle, 22 W. Va. 387. **Wis.**—Schlitz *v.* Meyer, 61 Wis. 418, 21 N. W. 243; Thomas *v.* Steele, 22 Wis. 207.

17. **Conn.**—Aldrich *v.* Kinney, 4 Conn. 380, 10 Am. Dec. 151. **Ill.**—Leslie *v.* Fischer, 62 Ill. 118. **Ia.**—Harshey *v.* Blackmarr, 20 Iowa 161, 171, 173, 89 Am. Dec. 520. **Kan.**—Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86; Esley *v.* People, 23 Kan. 510. **Md.**—Hager *v.* Cochran, 66 Md. 253, 7 Atl. 462; Dorsey *v.* Kyle, 30 Md. 512, 96 Am. Dec. 617. **Mass.**—Gleason *v.* Dodd, 4 Mete. 333. **Mich.**—Norberg *v.* Heineman, 59 Mich. 210, 26 N. W. 481; Arnold *v.*

ity of an attorney who presumes to act for him. This may be done by motion and proper showing or by writ of error if the defect appears on the record, and not by *audita querela*. The remedy in some cases may be had against the attorney where he is pecuniarily responsible.[18] The question may be decided by affidavits, the burden being upon the moving party. If the question of authority is to be raised, it should be done at the earliest opportunity and not for the first time upon appeal.[19]

C. Plea by Unauthorized Attorney. — Where default has been entered for not replying to a plea filed by an unauthorized attorney, the order may be set aside on motion. In like manner, a suit brought without authority may be stayed on motion of plaintiff without costs.[20]

D. Firm May Act. — The employment of one of a firm of attorneys is an employment of all of them and the business may be performed by any one of them.[21]

Nye, 23 Mich. 286. **Mich.**—Hardin *v.* Ho-Yo-Po, Nubby's Lessee, 27 Miss. 567. **Neb.**—Hurste *v.* Hotaling, 20 Neb. 178, 29 N. W. 299; McDowell *v.* Gregory, 14 Neb. 33, 14 N. W. 899. **N. Y.**—Hamilton *v.* Wright, 37 N. Y. 502; Denton *v.* Noyes, 6 Johns. 296, 5 Am. Dec. 237. **Ohio.**—Critchfield *v.* Porter, 3 Ohio 518. **W. Va.**—Low *v.* Settle, 22 W. Va. 387. **Wis.**—Schlitz *v.* Meyer, 61 Wis. 418, 21 N. W. 243; Thomas *v.* Steele, 22 Wis. 207.

Between plaintiff and defendant the attorney is a competent witness to prove his authority. Tulloch *v.* Cunningham, 1 Cow. (N. Y.) 256.

18. **Ind.**—Wiley *v.* Pratt, 23 Ind. 628; Sherrard *v.* Nevius, 2 Ind. 241, 52 Am. Dec. 508. **Ia.**—Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520; Hefferman *v.* Burt, 7 Iowa 321, 71 Am. Dec. 445; DeLouis *v.* Meek, 2 Greene 55, 50 Am. Dec. 491. **Kan.**—Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 16, 46 Am. Rep. 86; Brinkman *v.* Shaffer, 23 Kan. 528. **La.**—Ridge *v.* Atter, 14 La. Ann. 866; Marvel *v.* Manouvrie, 14 La. Ann. 3, 74, Am. Dec. 424. **Mich.**—Arno *v.* Wayne, Circuit Judge, 42 Mich. 362, 4 N. W. 147. **Ohio.**—Critchfield *v.* Porter, 3 Ohio 518. **Vt.**—Abbott *v.* Dutton, 44 Vt. 546, 8 Am. Rep. 394; Spaulding *v.* Swift, 18 Vt. 214.

19. **Ark.**—Tally *v.* Reynolds, 1 Ark. 99, 31 Am. Dec. 737. **Cal.**—People *v.* Mariposa Co., 39 Cal. 683. **Del.**—State *v.* Houston, 3 Harr. 15. **Ill.**—Leslie *v.* Fischer, 62 Ill. 118. **Kan.**—Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86. **Ky.**—M'Alexander *v.* Wright, 37 T. B. Mon. 189, 16 Am. Dec. 93. **Miss.**—McKiernan *v.* Patrick, 4 How. 333. **Mo.**—Keith *v.* Wilson, 6 Mo. 435, 35 Am. Dec. 443. **N. Y.**—Hamilton *v.* Wright, 37 N. Y. 502.

20. **Md.**—Dorsey *v.* Kyle, 30 Md. 512, 96 Am. Dec. 617; Munnikuyson's Adm. *v.* Dorsett's Adm., 2 Harr. & G. 378. **N. H.**—Everett *v.* Warner Book, 58 N. H. 340; Bunton *v.* Lyford, 37 N. H. 512, 75 Am. Dec. 144. **N. Y.**—Brown *v.* Nichols, 42 N. Y. 26; Acker *v.* Ledyard, 8 N. Y. 65; Denton *v.* Noyes, 6 Johns. 296, 5 Am. Dec. 237 (followed but under protest); Ingalls *v.* Sprague, 10 Wend. 673; Meacham *v.* Dudley, 6 Wend. 514. **N. C.**—England *v.* Garner, 90 N. C. 197. **Pa.**—Cyphert *v.* McClune, 22 Pa. 195. **Vt.**—Abbott *v.* Dutton, 44 Vt. 546, 8 Am. Rep. 394; Spaulding *v.* Swift, 18 Vt. 214; Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340; St. Albans *v.* Bush, 4 Vt. 58, 23 Am. Dec. 246. **Eng.**—Anonymous, 1 Salk. 86, 91 Eng. Reprint 81; Reynolds *v.* Howell, L. R. 8 Q. B. 398.

Sufficiency of Evidence.—**Ind.**—Hughes *v.* Osborn, 42 Ind. 450. **Me.**—Bridgton *v.* Bennett, 23 Me. 420; Penobscot Boom Co. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656. **Minn.**—Eickman *v.* Troll, 29 Minn. 124, 12 N. W. 347. **Miss.**—Hardin *v.* Ho-Yo-Po-Nubby's Lessee, 27 Miss. 567. **N. H.**—Manchester Bank *v.* Fellows, 28 N. H. 302.

21. Eggleston *v.* Boardman, 37 Mich. 14.

VI. IMPLIED AUTHORITY. — A. In General. — An attorney has exclusive control of the management and conduct of his client's suit in court in all matters which pertain to the remedy and which do not affect the client's substantial rights, and to this extent his client may not interfere. The client is bound by whatever the attorney does in good faith, although it may be prejudicial to his interest. This applies to all necessary acts in or out of court which affect the remedy and not the cause of action. Having elected to appear by attorney, the client cannot appear in person at the same time, but must leave the management of his case with his duly appointed attorney.[22] He may waive formalities and technicalities;[23] and may dismiss the suit or allow a non-suit to be rendered,[24] or he may take an appeal.[25] He has implied authority to admit facts on the trial or before trial and to dispense with proof.[26] He may stipulate the issues.[27] He may release an attachment before judgment.[28] Where there are several suits involving substantially the same question he may stipulate that all shall abide the result of one.[29] He has authority to incur reasonable expenses for printing the necessary briefs in his client's cause.[30] After suffering a non-suit he may bring a new action.[31] After judgment he may stipulate stay of execution,[32] but cannot stay proceedings on a judgment by

22. **U. S.**—Pierce *v.* Strickland, 2 Story 292, 19 Fed. Cas. No. 11,147; Nightingale *v.* Oregon Cent. R. Co., 2 Sawy. 338, 18 Fed. Cas. No. 10,264. **Cal.**—Mott *v.* Foster, 45 Cal. 72; Board of Comrs. *v.* Younger, 29 Cal. 147, 87 Am. Dec. 164. **Colo.**—Lee *v.* Grimes, 4 Colo. 185. **Ia.**—DeLouis *v.* Meek, 2 G. Gr. 55, 50 Am. Dec. 491. **Me.**—Burgess *v.* Stevens, 76 Me. 559; Benson *v.* Carr, 73 Me. 76; Jenney *v.* Delesdernier, 20 Me. 183. **Mass.**—Moulton *v.* Bowker, 115 Mass. 36, 15 Am. Rep. 72; Wieland *v.* White, 109 Mass. 392; Shores *v.* Caswell, 13 Metc. 413. **Mich.**—Foster *v.* Wiley, 27 Mich. 244, 15 Am. Rep. 185. **Neb.**—McCann *v.* McLennan, 3 Neb. 25. **N. H.**—Edgerton *v.* Brackett, 11 N. H. 218. **N. J.**—Howe *v.* Lawrence, 22 N. J. L. 99. **N. Y.**—McBratney *v.* Rome & C. R. Co., 87 N. Y. 467. **N. C.**—Beck *v.* Bellamy, 93 N. C. 129. **Wis.**—Clark *v.* Randall, 9 Wis. 135, 76 Am. Dec. 252.

23. Hefferman *v.* Burt, 7 Iowa 320, 71 Am. Dec. 445; Hanson *v.* Hoitt, 14 N. H. 56.

24. **Cal.**—McLeran *v.* McNamara, 55 Cal. 508. **La.**—Paxton *v.* Cobb, 2 La. 137. **Mo.**—Davis *v.* Hall, 90 Mo. 659, 3 S. W. 382. **N. Y.**—Barrett *v.* Third Ave. R. Co., 45 N. Y. 628; Gailland *v.* Smart, 6 Cow. 385.

25. Bach *v.* Ballard, 13 La. Ann. 487 (an attorney *ad hoc* for an absentee has the right to appeal if he believes his client will be benefited thereby); Adams *v.* Robinson, 1 Pick. (Mass.) 461; Grosvenor *v.* Danforth, 16 Mass. 74 (an attorney may sue out a writ of error where an erroneous judgment has been rendered, without special authority).

26. **Ala.**—Starke *v.* Kenan, 11 Ala. 819. **Ia.**—Treadway *v.* Sioux City & St. P. R. Co., 40 Iowa 526. **Ky.**—Talbot *v.* McGee, 4 Mon. 375. **Md.**—Farmers' Bank *v.* Sprigg, 11 Md. 389. **Mass.**—Lewis *v.* Sumner, 13 Metc. 269. **N. H.**—Pike *v.* Emerson, 5 N. H. 393, 22 Am. Dec. 468.

27. Bingham *v.* Supervisors, 6 Minn. 136.

28. **U. S.**—Pierce *v.* Strickland, 2 Story 292, 19 Fed. Cas. No. 11,147. **Me.**—Benson *v.* Carr, 73 Me. 76; Jenney *v.* Delesdernier, 20 Me. 183. **Mass.** Moulton *v.* Bowker, 115 Mass. 36, 15 Am. Rep. 72.

29. North Missouri R. Co. *v.* Stephens, 36 Mo. 150, 88 Am. Dec. 138.

30. Weisse *v.* New Orleans, 10 La. Ann. 46; Williamson Paper Co. *v.* Bosbyshell, 14 Mo. App. 534.

31. Scott *v.* Elmendorf, 12 Johns. (N. Y.) 317.

32. **U. S.**—Union Bank *v.* Geary, 5 Pet. 99, 8 L. ed. 60. **Mass.**—Wieland

accepting a trust deed.[33] He may remit damages after verdict on suggestion of court or intimation of its advisability.[34]

B. Making of Affidavits. — The attorney may make necessary affidavits of facts within his own knowledge relating to the case or the course of the same,[35] but he is not bound to make the affidavit on attachment or to furnish the bond.[36] He may make affidavit to a petition in *scire facias*,[37] or he may waive verification of a document.[38]

C. Authority To Refer or Arbitrate. — **1. In General.** — He may consent to a reference,[39] or submit the controversy to arbitration.[40]

2. Exception Regarding Arbitration. — It is held that this authority exists only in a pending action and that no authority exists to submit by an agreement *in pais*.[41] In other jurisdictions it is, however, held

v. White, 109 Mass. 392. **Pa.**—Silvis *v.* Ely, 3 Watts & S. 420.

Compare Doe *v.* Ingersoll, 11 Smed. & M. (Miss.) 249, 49 Am. Dec. 57 (in which a contrary view is expressed); Dunn *v.* Newman, 7 How. (Miss.) 582.

33. Pendexter *v.* Vernon, 9 Humph. (Tenn.) 84.

34. Lamb *v.* Williams, 1 Salk. 89, 91 Eng. Reprint 83.

35. Manley *v.* Headley, 10 Kan. 88; Austin *v.* Latham, 19 La. 88; Clark *v.* Morse, 16 La. 575 (for an attachment); Simpson *v.* Lombas, 14 La. Ann. 103 (for an order of seizure and sale).

36. Foulks *v.* Falls, 91 Ind. 315; Rhine's Adm. *v.* Evans, 66 Pa. 192, 5 Am. St. Rep. 364.

37. Wright *v.* Parks, 10 Iowa 342.

38. Smith *v.* Milliken, 2 Minn. 319.

39. **Ga.**—Wade *v.* Powell, 31 Ga. 1. **N. Y.**—Tiffany *v.* Lord, 40 How. Pr. 481. **Pa.**—Stokely *v.* Robinson, 34 Pa. 315. **S. C.**—Smith *v.* Bossard, 2 McCord 406.

40. **U. S.**—Holker *v.* Parker, 7 Cranch 436, 3 L. ed. 396. **Ala.**—Beverly *v.* Stephens, 17 Ala. 701; Scarborough *v.* Reynolds, 12 Ala. 252. **Colo.**—Lee *v.* Grimes, 4 Colo. 185. **Ga.**—McElreath *v.* Middleton, 89 Ga. 83, 14 S. E. 906; Wade *v.* Powell, 31 Ga. 1, 22. **Ill.**—Connett *v.* Chicago, 114 Ill. 233, 29 N. E. 280. **Ky.**—Smith *v.* Dixon, 3 Met. 438; Talbot *v.* McGee, 4 T. B. Mon. 377. **Md.**—White *v.* Davidson, 8 Md. 169. **Mass.**—Everett *v.* City of Charleston, 94 Mass. 93; Buckland *v.* Conway, 16 Mass. 396; Haskell *v.* Whitney, 12 Mass. 47. **Miss.**—Jankins *v.* Gillespie, 10 Smed. & M. 31, 48 Am. Dec. 732. **N. H.**—Brooks *v.* Durham, 55 N. H. 559; Pike *v.* Emerson, 5 N. H. 393, 22 Am. Dec. 468; Alton *v.* Gilmanton, 2 N. H. 520. **N. Y.**—Yates *v.* Russell, 17 Johns. 461; Gorham *v.* Gale, 7 Cow. 739; Tilton *v.* U. S. Life Ins. Co., 8 Daly 84. See also Camp *v.* Root, 18 Johns. 22. **N. C.**—Morris *v.* Grier, 76 N. C. 410. **Ohio.**—Treasurer of Champaign Co. *v.* Norton, 1 Ohio 270. **Pa.**—Sergeant *v.* Clark, 108 Pa. 588; Williams *v.* Tracey, 95 Pa. 308.

See, however, Connett *v.* Chicago, 114 Ill. 233, 29 N. E. 280 (as to the authority of a city attorney to enter into an arbitration agreement without the consent of the city council), McPherson *v.* Cox, 86 N. Y. 472 (in which a contrary opinion is expressed, but is *dictum*).

At Common Law.—"The authority of an attorney at common law, by a consent order made in the court, to submit a pending suit to arbitration, is universally admitted;" and is limited to such a case. McGinnis *v.* Curry, 13 W. Va. 29, 47.

41. **Conn.**—Daniels *v.* City of New London, 58 Conn. 156, 19 Atl. 573, 7 L. R. A. 563. **Miss.**—Jenkins *v.* Gillespie, 10 Smed. & M. 31, 48 Am. Dec. 732. **W. Va.**—State *v.* Rawson, 25 W. Va. 23, 30; McGinnis *v.* Curry, 13 W. Va. 29.

"The general doctrine is that an attorney who is employed in a suit, may submit the matter in dispute to arbitration, because he may do anything, by the implied assent of the client, arising from the employment in the suit; . . . There must be a cause pending which the attorney is employed to manage." He cannot, however, make a statutory submission if no suit is pending. Jenkins *v.* Gillespie, 10 Smed. & M. (Miss.) 31, 48

there is no authority to submit to arbitration vested in the attorney, as such.[42]

3. Amendment of Arbitration Agreement. — When the arbitration agreement is entered into by or with the consent of the principal, an attorney has no authority to amend the submission in a material way without his client's authority.[43]

VII. AUTHORITY NOT IMPLIED. — The attorney may not accept service of original jurisdictional personal process,[44] nor confess judgment against his client.[45] He may not stipulate that a dismissal shall bar an action for malicious prosecution, nor compromise his client's claim.[46] As the duties of an attorney are of a personal and confidential character, he cannot delegate to another attorney without permission powers and duties which call for the exercise of individual judgment and discretion,[47] but may employ another attorney as his subordinate, being responsible for him, and may delegate to the subordinate such work as is ministerial and mechanical.[48] He is not at liberty to stipulate that a case in which he is retained shall not be tried during a particular period.[49] An attorney has no authority to release the interests of parties, although thereby he makes them competent as witnesses.[50] Nor may he transfer a demand or suit, [51] or waive an inquisition.[52] He is without power to release his client's

Am. Dec. 732. See also Scarborough *v.* Reynolds, 12 Ala. 252.

In West Virginia an attorney at law as such "'has no authority before or after the institution of a suit to make an agreement *in pais* to submit his client's cause to arbitration, though he may, if his clients are adults, consent in open court to submit their cause to arbitration; and if they be adults, they will thereby be bound.'" State *v.* Rawson, 25 W. Va. 23; Mc Ginnis *v.* Curry, 13 W. Va. 29.

42. King *v.* King, 104 La. 420, 29 So. 205. And see Haynes *v.* Wright, 4 Hayw. (Tenn.) 63.

An attorney at law may submit his client's cause to arbitration by rule of court, but in no other way. Markley *v.* Amos, 8 Rich. L. (S. C.) 468.

43. Daniels *v.* City of New London, 58 Conn. 156, 19 Atl. 573, 72 L. R. A. 563. This decision it will be noted is in a jurisdiction where an agreement *in pais* cannot be entered into by the court.

44. Starr *v.* Hall, 87 N. C. 381, 87 N. E. 38.

45. **Cal.**—Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369. **Ill.**—Wadhams *v.* Gay, 73 Ill. 415; People *v.* Lamborn, 2 Ill. 122. **La.**—Edwards *v.* Edwards, 29 La. Ann. 597. **Eng.**—Swinfin *v.* Swinfin, 24 Beav. 549, 53 Eng. Reprint 470.

46. Moye *v.* Cogdell, 69 N. C. 93; Adams *v.* Roller, 35 Tex. 711.

47. **Ark.**—Danley *v.* Crawl, 28 Ark. 95; Kellogg *v.* Norris, 10 Ark. 18. **Ia.**—Antrobas *v.* Sherman, 65 Iowa 230, 21 N. W. 579, 54 Am. Rep. 7; Smalley *v.* Greene, 52 Iowa 241, 3 N. W. 78. **Mich.**—Eggleston *v.* Boardman, 37 Mich. 14. **Miss.**—Dickson *v.* Wright, 52 Miss. 585, 24 Am. Rep. 677.

48. McEwen *v.* Mazyck, 3 Rich. L. (S. C.) 210.

Not at Client's Expense.—Voorheis *v.* Harrison, 22 La. Ann. 85; Young *v.* Crawford, 23 Mo. App. 432.

49. Robert *v.* Commercial Bank, 13 La. 528, 33 Am. Dec. 570.

50. **Ala.**—Ball *v.* Bank of Alabama, 8 Ala. 590, 42 Am. Dec. 649. **Me.**—York Bank *v.* Appleton, 17 Me. 55. **Mass.**—Shores *v.* Caswell, 13 Metc. 413. **N. Y.**—Murray *v.* House, 11 Johns. 464, 6 Am. Dec. 386; East River Bank *v.* Kennedy, 9 Bosw. 543.

51. **Ala.**—Craig *v.* Ely, 5 Stew. & P. 354. **Ind.**—Russell *v.* Drummond, 6 Ind. 216. **N. H.**—Child *v.* Eureka Powder Wks., 44 N. H. 354.

52. Hadden *v.* Clark, 2 Grant Cas. (Pa.) 107.

security in the absence of payment.[53] And he may not release a surety or endorser,[54] release an arrest on a writ of *capias ad satisfaciendum* without receiving a satisfaction,[55] nor release his client's cause of action.[56] He may not stipulate not to appeal nor move for a new trial.[57] Nor may he release defendant's property from the lien of a judgment or levy.[58] He may not compromise his client's claim,[59] nor has he implied authority to bind his client by an appeal or replevin bond, nor to indemnify a surety on an injunction bond for his client, although the execution of such undertakings might be ratified.[60]

VIII. AUTHORITY AFTER JUDGMENT. — A. In General. The attorney's authority continues until collection of the judgment or until the expiration of the redemption from levy.[61] But only the attorney of record may receive payment.[62]

What Is Payment. — Payment must be in full and for current money.[63]

53. Terhune *v.* Colton, 10 N. J. Eq. 21; Tankersley *v.* Anderson, 4 Desaus. (S. C.) 44.

"We entertain no doubt of the competency of an attorney, when instructed by his client, to do the best he can, either to compound the debt, extend its time of payment, or bind his principal by assenting to an assignment; but the authority to give day of payment upon receiving security, does not seem to be within the ordinary scope of the duty of an attorney at law." Lockhart *v.* Wyatt, 10 Ala. 231, 44 Am. Dec. 481.

54. **Ky.**—Savings Inst. *v.* Chinin's Adm., 7 Bush 539; Givens *v.* Briscoe, 3 J. J. Marsh. 529. **Me.**—York Bank *v.* Appleton, 17 Me. 55. **Miss.**—Union Bank *v.* Govan, 10 Smed. & M. 333. **N. Y.**—Kellogg *v.* Gilbert, 10 Johns. 220, 6 Am. Dec. 335; East River Bank *v.* Kennedy, 9 Bosw. 543.

55. Kellogg *v.* Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; Treasurer *v.* McDowell, 1 Hill (S. C.) 184, 26 Am. Dec. 166.

56. **Ill.**—Wadhams *v.* Gay, 73 Ill. 415. **N. Y.**—Mandeville *v.* Reynolds, 68 N. Y. 528; Cox *v.* New York, etc., R. Co., 63 N. Y. 414. **S. C.**—Gilliland *v.* Gasque, 6 S. C. 406.

An attorney has no authority to enter a *retraxit*, which is equivalent to a release. Barnard *v.* Daggett, 68 Ind. 305; Kellog *v.* Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335.

57. People *v.* Mayor, 11 Abb. Pr. (N. Y.) 66. *Contra*, Pike *v.* Emerson, 5 N. H. 393, 22 Am. Dec. 468.

58. **Ga.**—Phillips *v.* Dobbins, 56 Ga. 617. **Md.**—Horsey *v.* Chew, 65 Md. 555, 5 Atl. 466; Fritchey *v.* Bosley, 56 Md. 94. **Miss.**—Banks *v.* Evans, 10 Smed. & M. 35, 48 Am. Dec. 734. **N. Y.**—Benedict *v.* Smith, 10 Paige 126.

59. Wharton's Agency, §§ 585, 589. **Ill.**—Nelson *v.* Cook, 19 Ill. 440. **Mass.** Wieland *v.* White, 109 Mass. 392. **N. C.**—Moye *v.* Cogdell, 69 N. C. 93. **Tex.**—Adams *v.* Roller, 35 Tex. 711. **Eng.**—Butler *v.* Knight, L. R. 2 Exch. 109, 113.

60. **Me.** — Narraguagus Land Proprs. *v.* Wentworth, 36 Me. 339. **Md.** White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699. **N. H.**—Clark *v.* Courser, 29 N. H. 170. **N. Y.**—*Ex parte* Holbrook, 5 Cow. 35.

Contra, Adams *v.* Robinson, 1 Pick. (Mass.) 462, as to appeal bond.

61. **Ala.**—Frazier *v.* Parks, 56 Ala. 363. **Ark.**—Conway Co. *v.* Little Rock, etc., R. Co., 39 Ark. 50, 83 Am. Dec. 202; Miller *v.* Scott, 21 Ark. 396. **Ill.** Smyth *v.* Harvie, 31 Ill. 62, 83 Am. Dec. 202. **Ia.**—McCarver *v.* Nealy, 1 Greene 360. **Me.**—White *v.* Johnson, 67 Me. 287; Gray *v.* Wass, 1 Me. 257. **N. J.**—Wyckoff *v.* Bergen, 1 N. J. L. 214. **N. C.**—Rogers *v.* McKenzie, 81 N. C. 164. **W. Va.**—Yoakum *v.* Tilden, 3 W. Va. 167, 100 Am. Dec. 738.

62. Cameron *v.* Stratton, 14 Ill. App. 270.

63. **Ala.**—Robinson *v.* Murphy, 69 Ala. 543; Chapman *v.* Cowles, 41 Ala. 103, 91 Am. Rep. 508; West *v.* Ball, 12 Ala. 346; Borent *v.* McGhee, 6 Port. 432, 31 Am. Dec. 695; Cost *v.* Genette, 1 Port. 212; Craig *v.* Ely, 5 Stew. &

B. Enforcement of the Judgment. — An attorney may enforce judgment by suing out and controlling the execution and other processes over which he has plenary power if he does not sacrifice nor prejudice his client's right.[64] He may institute supplementary proceedings.[65]

IX. REPRESENTING ADVERSE INTERESTS. — A. In General. — An attorney cannot act in any matter for two or more parties whose interests are adverse,[66] nor after the termination of his relation

P. 354; Kirk *v.* Glover, 5 Stew. & P. 340. **Ark.**—Walker *v.* Scott, 13 Ark. 644; Lawson *v.* Bettison, 12 Ark. 401. **Ga.**—Jeter *v.* Haviland, 24 Ga. 252. **Ill.**—Trumbull *v.* Nicholson, 27 Ill. 149; Miller *v.* Lane, 13 Ill. App. 648. **Ind.**—Jones *v.* Ransom, 3 Ind. 327. **Ia.** Bigler *v.* Toy, 68 Iowa 687, 28 N. W. 17. **Kan.**—Herriman *v.* Shoman, 24 Kan. 387, 36 Am. Rep. 261. **Ky.**—Harrow *v.* Farrow's Heirs, 7 B. Mon. 126, 45 Am. Dec. 60. **La.**—Davis *v.* Lee, 20 La. Ann. 248; Railey *v.* Bagley, 19 La. Ann. 172. **Me.**—Jewett *v.* Wadleigh, 32 Me. 110; Lord *v.* Burbank, 18 Me. 178. **Mass.**—Langdon *v.* Potter, 13 Mass. 319. **Miss.**—Rice *v.* Troupe, 62 Miss. 186; Garvin *v.* Lowry, 7 Smed. & M. 24; Clark *v.* Kingsland, 1 Smed. & M. 248; Wenans *v.* Lindsay, 1 How. 577. **Mo.**—Vanderline *v.* Smith, 18 Mo. App. 55. **Neb.**—Hamrick *v.* Combs, 14 Neb. 381, 15 N. W. 731. **N. Y.**—Mandeville *v.* Reynolds, 68 N. Y. 528; DeMets *v.* Dagron, 53 N. Y. 635; Beers *v.* Hendrickson, 45 N. Y. 665. **N. C.**—Moyo *v.* Cogdell, 69 N. C. 93; Child *v.* Dwight, 21 N. C. 171. **Pa.**—Kirk's Appeal, 87 Pa. 243, 30 Am. Rep. 357; Rowland *v.* State, 58 Pa. 196; Fassitt *v.* Middleton, 47 Pa. 214, 86 Am. Dec. 535; Stokely *v.* Robinson, 34 Pa. 315; Campbell's Appeal, 29 Pa. 401, 72 Am. Dec. 641; Stackhouse *v.* O'Hara's Exrs., 14 Pa. 88; Huston *v.* Mitchell, 14 Serg. & R. 307, 16 Am. Dec. 506. **S. C.**—Gilleland *v.* Gasque, 6 S. C. 406; Tankersley *v.* Anderson, 4 Desaus. 44. **Tenn.**—Baldwin *v.* Merrill, 8 Humph. 132. **Vt.**—Vail *v.* Conand, 15 Vt. 314. **Va.**—Wilkinson *v.* Holloway, 7 Leigh 277; Smock *v.* Dade, 5 Rand. 639, 16 Am. Dec. 780. **W. Va.**—Kent *v.* Chapman, 18 W. Va. 485; Wiley *v.* Mahood, 10 W. Va. 206; Harper *v.* Harvey, 4 W. Va. 539.

64. **U. S.**—Savery *v.* Sypher, 6 Wall. 157, 18 L. ed. 822. **Ala.**—Albertson *v.* Goldsby, 28 Ala. 711, 65 Am. Dec. 380; Crenshaw *v.* Harrison, 8 Ala. 342. **Conn.**—Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179. **Ga.**—Phillips *v.* Dobbins, 56 Ga. 617. **Me.**—White *v.* Johnson, 67 Me. 287. **Md.**—Farmer's Bank *v.* Mackall, 3 Gill 447. **Mass.** Wieland *v.* White, 109 Mass. 392. **N. Y.**—Welsh *v.* Cochran, 63 N. Y. 181, 20 Am. Rep. 519; Beardsley *v.* Root, 11 Johns. 464, 6 Am. Dec. 386; Averill *v.* Williams, 4 Denio, 295, 47 Am. Dec. 252; Gorham *v.* Gale, 7 Cow. 739, 17 Am. Dec. 549; Kellogg *v.* Gilbert, 10 Johns. 220, 6 Am. Dec. 335. **Pa.**—Lynch *v.* Com., 16 Serg. & R. 368, 16 Am. Dec. 582. **Vt.**—Willard *v.* Goodrich, 31 Vt. 597.

65. Dearborn *v.* Dearborn, 15 Mass. 316; Ward *v.* Roy, 69 N. Y. 96.

66. **U. S.**—*In re* Wooten, 118 Fed. 670; *In re* Boone, 83 Fed. 944. **Cal.**—Van Loben Sels *v.* Bunnell, 131 Cal. 489, 63 Pac. 773; Perkins *v.* West Coast Lumb. Co., 129 Cal. 427, 62 Pac. 57; *In re* Jones Estate, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251. **Ill.**—People *v.* Kerthley, 225 Ill. 30, 80 N. E. 50; Michigan Stove Co. *v.* Hardwood Hdw. Co., 71 Ill. App. 240. **Mass.** Keyes *v.* McKerrow, 180 Mass. 261, 62 N. E. 259 (as to when it is permissable); Provident Inst. for Savings *v.* White, 115 Mass. 112; Gordon *v.* Green, 113 Mass. 259; Houghton *v.* Kendall, 7 Allen 72. **Mich.**—Taber *v.* Donovan, 156 Mich. 652, 121 N. W. 481. **N. Y.**—Sherwood *v.* Saratoga & W. R. Co., 15 Barb. 650; Herrick *v.* Catley, 30 How. Pr. 208.

See also: **Mo.**—Stone *v.* Slattery's Admr., 71 Mo. App. 442. **N. C.**—Johnson *v.* Johnson, 141 N. C. 91, 53 S. E. 623. **Wis.**—Harrigan *v.* Gilchrist, 121 Wis. 127, 393, 99 N. W. 909. See also McWhirter *v.* Donaldson (Utah), 114 Pac. 731.

Relation of Attorney and Client Must Exist.—The relation of attorney and client must have existed be-

with one party can he properly accept employment in the matter from the other.[67]

B. After Terminating Relation of Attorney and Client. — An attorney cannot even after the relation of attorney and client has terminated do anything which will seriously or injuriously affect his former client in any matter in which the attorney formerly represented him,[68] nor traffic with the clients' interest by using against him

tween the attorney and the objecting party. Hicks *v.* Drew, 117 Cal. 305, 49 Pac. 189.

Counsel who appear for the executor or trustee, in an action for the construction of a will, ought not to appear and act for legatees and devisees under the will. Davenport *v.* Lines, 77 Conn. 469, 473, 59 Atl. 603.

"Attorneys at law cannot thus accept employment from adverse litigants at the same time, and in the same controversy. Nor does it matter that the intentions and motives of the lawyers are honest, as we fully believe them to have been in the present instance. This rule is a rigid one, and designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests rather than to enforce to their full extent the rights of the interest which he should alone represent." Strong *v.* International Bldg., L. & I. Co., 183 Ill. 97, 55 N. E. 675, 47 L. R. A. 792, *affirming* 82 Ill. App. 426.

Compare Culver *v.* Nester, 116 Mich. 191, 74 N. W. 532, where an attorney retained to bring about a judicial sale of his client's property, the title to which was in dispute with his client's consent executed a contract with a prospective purchaser whereby he was to receive from the latter a commission if he should be the successful bidder at a stated amount, and the agreement was held not invalid as jeopardizing the client's interest.

The fact that an attorney acts for a borrower and receives compensation from him does not of itself prevent the attorney acting for the lender, if such be the mutual understanding. Lawall *v.* Groman, 180 Pa. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

Plaintiff in a foreclosure action has no right to complain of defendant's attorney also acting as attorney for an intervener. Ingenhuett *v.* Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310.

A master in chancery who granted a preliminary injunction in an action, and who was not interested in the action, may with propriety appear subsequently as counsel for the defendant. Barrett *v.* Waters, 19 Ill. App. 652.

67. **U. S.**—*In re* Boone, 83 Fed. 944; United States *v.* Costen, 38 Fed. 24. **Ala.**—Parker *v.* Parker, 99 Ala. 239, 13 So. 520, 42 Am. St. Rep. 48. **Cal.**—*In re* Stephens, 77 Cal. 357, 19 Pac. 646, 84 Cal. 77, 24 Pac. 46; *In re* Cowdrey, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545; Burridge *v.* Pearson, 55 Cal. 472; Valentine *v.* Stewart, 15 Cal. 387. **Ia.**—Whitcomb *v.* Collier, 110 N. W. 836. **Miss.**—Spinks *v.* Davis, 32 Miss. 152. **N. Y.**—Hatch *v.* Fogerty, 40 How. Pr. 492; Sherwood *v.* Saratoga & W. R. Co., 15 Barb. 650; Herrick *v.* Catley, 1 Daly 512. **Tenn.**—Cantrell *v.* Chism, 5 Sneed 116. **Wash.** Clarke Co. *v.* Comrs. of Clarke Co., 1 Wash. Ter. 250. **Eng.**—Earl Cholmondeley *v.* Lord Clinton, 19 Ves. 262, 34 Eng. Reprint 515.

68. *In re* Boone, 83 Fed. 944; Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422.

Counsel for the original receiver ought not to appear for his successor in the receivership, when the administration of the original receiver is attacked. The objection will be sustained when properly made, but when counsel have already been heard on a preliminary motion the objection is too late. *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800.

City Attorney.—That one of the plaintiff's attorneys in a damage suit was at the time of the injury the city attorney does not disqualify him. Flynn *v.* City of Neosho, 114 Mo. 567, 21 S. W. 903.

An attorney should not be excluded from appearing on behalf of a plaintiff in an action for damages for tak-

knowledge or information acquired through the former connection.[69]

X. ASSIGNMENT OF ATTORNEY BY THE COURT. — He may be assigned by the court as counsel for indigent parties in court proceedings.[70] Such service is usually gratuitous, except where provision is made by statute for paying the attorney such reasonable compensation as may be allowed by the court.[71]

XI. DISBARMENT. — A. GENERALLY. — The court granting a license to one to practice as an attorney may suspend it or revoke it for manifest incompetency or untrustworthiness. This may be done on satisfactory showing of professional dishonesty, notorious immorality, or for a criminal act evidencing professional dishonor.[72] The proceed-

ing exempt persons property under an attachment sued out by reason of his having previously represented defendant, when it appears that he had been simply consulted with reference to the collection of the original amount and not employed in the attachment suit subsequently brought to collect it, it failing to appear that any facts were disclosed which he could use prejudical to defendant. Messenger *v.* Murphy, 33 Wash. 353, 74 Pac. 480.

69. **U. S.**—*In re* Boone, 83 Fed. 944; United States *v.* Costen, 38 Fed. 24. **Ind.**—Price *v.* Grand Rapids & I. R. Co., 18 Ind. 137. **Mo.**—Bent *v.* Priest, 10 Mo. App. 543. **N. Y.**—Hatch *v.* Fogerty, 40 How. Pr. 492; Herrick *v.* Catley, 30 How. Pr. 208.

Compare Lalance & Grosjean Mfg. Co. *v.* Haberman Mfg. Co., 93 Fed. 197, in which the court holds it to be a question which the attorney must decide for himself, and refused to grant an injunction restraining an attorney from giving information to others than the original clients as to information acquired.

70. Cutts *v.* State, 54 Fla. 21, 45 So. 491; House *v.* Whitis, 5 Baxt. (Tenn.) 690.

71. In Indiana the provision of art. 3, c. 40, Rev. St. 1843, authorizing the appointment of attorneys in cases of poor persons and requiring them to act without fee or reward, applies only to civil suits and cannot be extended to apply to criminal cases. Webb *v.* Baird, 6 Ind. 13.

In Maryland provision is made for the appointment of counsel to prosecute or defend and for payment for the services rendered. Gen. Laws Md., art. 26, §7; art. 36, §10; Worcester County *v.* Melvin, 89 Md. 37, 42 Atl. 910; Goldsborough *v.* Lloyd, 86 Md. 374, 38 Atl. 773; Ruley *v.* Hyland, 77 Md. 487, 26 Atl. 1038.

In Nevada provision is made for payment of counsel assigned in cases where defendant is charged with either misdemeanor or felony. Compiled Laws Nevada (1900) §2455; Laws of 1911, c. 157; County of Washoe *v.* County of Humboldt, 14 Nev. 123.

In New York provision is made for payment of counsel assigned in cases where the defendant is charged with a capital offense. Code Civ. Proc. 308; People *v.* Ferraro, 162 N. Y. 545, 57 N. E. 167; People *v.* Barone, 161 N. Y. 475, 55 N. E. 1091; People *v.* Fuller, 35 Misc. 189, 71 N. Y. Supp. 487; People *v.* Heiselbetz, 26 Misc. 100, 55 N. Y. Supp. 4.

72. **U. S.**—*Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. ed. 552; *Ex parte* Robinson, 19 Wall. 505, 22 L. ed. 205. **Kan.**—*In re* Wilson, 79 Kan. 674, 100 Pac. 635, 21 L. R. A. (N. S.) 517. **Mich.**—*In re* Mill's Case, 1 Mich. 393. **Nev.**—*In re* Maestretti, 30 Nev. 191, 93 Pac. 1005; *In re* Breen, 30 Nev. 164, 93 Pac. 997. **N. H.**—*In re* Bryant's Case, 24 N. H. 149. **N. Y.**—*In re* Percy's Case, 36 N. Y. 651; *In re* Kaffenburgh, 115 App. Div. 346, 101 N. Y. Supp. 507, *affirmed* in 188 N. Y. 49, 80 N. E. 570. **Pa.**—*In re* Dicken's Case, 67 Pa. 169, 5 Am. St. Rep. 420; Com. *v.* District Court, 5 Watts. & S. 272; *In re* Austin, 5 Rawle 191, 28 Am. Dec. 657. **Wash.**—*In re* Robinson, 48 Wash. 153, 92 Pac. 929. **Eng.**—*Ex parte* Brownsall, 2 Cowp. 829, 98 Eng. Reprint 1385; 12 Geo. I., c. 29; 4 Henry IV., c. 18. Section 33 of the schedule of the constitution which provides that all attorneys at law, licensed to practice in any court of record of the territory of Oklahoma, or in any of the United States courts for the Indian

ings will lie though the attorney, since the commission of the matters

Territory, or any court of record of any of the five civilized tribes, shall be eligible to practice in any court of the state without examination, does not preclude this court from inquiring into the moral qualifications, or to disbar those who fall within its terms, and who claim the rights conferred thereunder, when the contingency arises requiring the exercise of such power. *In re* Mosher, 24 Okla. 61, 102 Pac. 705, 24 L. R. A. (N. S.) 530 (annotated case).

Disbarment proceedings are peculiar to themselves and are governed exclusively by the statute covering them. *In re* Danford, 157 Cal. 425, 108 Pac. 322.

"The office of an attorney is his property and he cannot be deprived of it unless by the judgment of his peers or the law of the land, this last phrase meaning, as we have been taught by Lord Coke, 'Due process of law'." *Ex parte* Steinman, 95 Pa. 220, 40 Am. Rep. 637.

"The rule to be deduced from all the English authorities seems to be this: That an attorney will be struck off the roll if convicted of felony or if convicted of a misdemeanor involving want of integrity, even though the judgment be arrested or reversed for error; and also, without a previous conviction, if he is guilty of gross misconduct in his profession or of acts which, though not done in his professional capacity, gravely affect his character as an attorney; but in the latter case, if the acts charged are indictable and are fairly denied, the court will not proceed against him until he has been convicted by a jury; and will in no case compel him to answer under oath to a charge for which he may be indicted. This rule has, in the main, been adopted by the courts of this country; though special proceedings are provided for by statute in some of the States, requiring a formal information under oath to be filed, with regular proceedings and a trial by jury. The cases are quite numerous in which attorneys, for malpractice or other misconduct in their official character, and for other acts which showed them to be unfit persons to practice as attorneys, have been struck from the roll upon a summary proceeding without any previous conviction of a criminal charge. See amongst others, the case of Niven, 1 Wheel. Cr. Cas., 337, note; case of Burr, 1 Id., 503; S. C., 2 Cranch, C. C., 379; In re Peterson, 3 Paige, 510; Ex parte Brown, 1 How. (Miss.), 303; ex parte Mills. 1 Mich., 392; ex parte Secombe, 19 How., 9 (60 U. S., XV., 565); In re Perry, 36 N. Y., 651; Dickens' case, 67 Pa. St., 169; In re Hirst, 9 Phila. Rep., 216; Baker *v.* Commonwealth, 10 Bush (Ky.) 592; Penobscot Bar *v.* Kimball, 64 Me. 140; Matter of Wool, 36 Mich. 299; People *v.* Goodrich, 79 Ill. 148; Delano's Case, 58 N. H., 5; *Ex parte* Walls, 64 Ind. 461; Matter of Eldridge, 82 N. Y., 161. But where the acts charged against an attorney are not done in his official character and are indictable and not confessed, there has been a diversity of practice on the subject; in some cases it being laid down that there must be a regular indictment and conviction before the court will proceed to strike him from the roll; in others such previous conviction being deemed unnecessary." *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. ed. 552, 559. The former view, the court goes on to say, is taken in the following cases: **Ark.**—Beene *v.* State, 22 Ark. 149. **Mo.**—State *v.* Foreman, 3 Mo. 412. **Ohio.**—State *v.* Chapman, 11 Ohio 430. **Pa.**—*Ex parte* Steinman, 95 Pa. 229, 40 Am. Rep. 637. **Eng.**—Anonymous Case, 6 Mod. 16, 87 Eng. Reprint 780. But the following cases support the view that a conviction is not necessary: **Ill.**—People *v.* Appleton, 15 Chicago Legal News 241. **Ind.**—*Ex parte* Walls, 64 Ind. 461. **Ia.**—Perry *v.* Iowa, 3 Greene 550. **Me.** Penobscot County Bar *v.* Kimball, 64 Me. 140. **Mich.**—*In re* Wool, 36 Mich. 299. **N. H.** Delano's Case, 58 N. H. 5, 42 Am. Rep. 555. **N. Y.**—*In re* Percy, 36 N. Y. 651; *Ex parte* Burr, 1 Wheel. Cr. Cas. 503; *s. c.*, 2 Cranch C. C. 379, 4 Fed. Cas. No. 2,186. **Tenn.** Smith *v.* State, 1 Yerg. 228; Fields *v.* Tennessee, Mart. & Y. 168.

This power of disbarment or suspension is quite different and distinct from the power to punish for contempt; though it is frequently the case that causes for removal from the bar may also present ground for pun-

charged, has ceased to practice law, and has taken judicial office,[73] or has engaged in mercantile[74] or other pursuits.[75]

B. Occupation of Public Office. — Proceedings may be instituted to disbar an attorney though he occupy a public office from which he can only be removed by impeachment, and the offense charged against him was committed in the office so occupied.[76] The election of

ishment for contempt . *In re* Adriaans 17 App. Cas. (D. C.) 39, 46.

Judicial Act.—The admission and the removal of attorneys are judicial and not ministerial acts (Randall *v.* Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285); and are matters of sound judicial discretion (*Ex parte* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366).

"The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct." *Ex parte* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366.

See generally the title "Courts."

The purpose is not to punish but to remove one whom the court regards as an improper person. Hawker *v.* New York, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. ed. 1002; *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. ed. 552.

So offensive language to a judge out of court is a sufficient reason for disbarment. Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646.

Soliciting business may be designated by the legislature as a ground for disbarment. State *v.* Rossman, 53 Wash. 1, 101 Pac. 357, 21 L. R. A. (N. S.) 821.

Deceiving the court at the time of admission by concealing a disbarment in another state is no ground for removing an attorney. *In re* Bradley, 14 Idaho 784, 96 Pac. 208; *In re* Mosher, 24 Okla. 61, 102 Pac. 705, 24 L. R. A. (N. S.) 530 (annotated case). See also *In re* Leonard, 127 App. Div. 493, 111 N. Y. Supp. 905; *In re* Pritchett, 122 App. Div. 8, 106 N. Y. Supp. 847; *In re* Marx, 115 App. Div. 448, 101 N. Y. Supp. 680.

The statute of limitations cannot be pleaded where there was fraud in the proceedings admitting him to practice. *In re* Leonard, 127 App. Div. 493, 111 N. Y. Supp. 905.

Conviction of a felony or misdemeanor involving moral turpitude is designated by some statutes as a ground for disbarment. *In re* Henry, 15 Idaho 755, 99 Pac. 1054, 21 L. R. A. (N. S.) 207.

Pardon.—A pardon of an attorney convicted of a crime does not restore "good moral character," and will not prevent disbarment. **Colo.**—People *ex rel.* Barlesso *v.* Burton, 39 Colo. 164, 88 Pac. 1063, 12 Am. St. Rep. 165. **Ky.**—Nelson *v.* Com., 128 Ky. 779, 109 S. W. 337, 16 L. R. A. (N. S.) 272. **Me.**—Penobscot County Bar *v.* Kimball, 64 Me. 140. **N. Y.**—*In re* Attorney, 86 N. Y. 563.

While a pardon by the President of the United States to an attorney engaged in the late civil war may permit him to practice in the federal court, it cannot restore his standing in a state court. *Ex parte* Quarrier, 4 W. Va. 210.

See, however, **U. S.**—*Ex parte* Garland, 4 Wall. 333, 380, 18 L. ed. 366, 370, where it was held that to disregard the pardon would be to inflict a punishment. **Ill.**—People *v.* George, 186 Ill. 122, 57 N. E. 804, where, however, defendant's acts subsequent to the pardon showed that he was without integrity. **Tex.**—Scott *v.* State, 6 Tex. Civ. App. 343, 25 S. W. 337.

Application To Revoke License.—"After the license has been granted, it is too late to reopen the case. Proceedings for disbarment is the proper remedy." Neff *v.* Kohler Mfg. Co., 90 Mo. App. 296.

73. *In re* Dellenbaugh & Burke, 17 Ohio C. C. 106, 9 Ohio Cir. Dec. 325.

74. *In re* Dellenbaugh & Burke, 17 Ohio C. C. 106, 9 Ohio Cir. Dec. 325, *citing* 6 Dowl. Pr. Cas. 310.

75. Scott *v.* VanAlstyne, 9 Johns. (N. Y.) 216.

76. *In re* Dellenbaugh & Burke, 17 Ohio C. C. 106, 9 Ohio Cir. Dec. 325; *In re* Jones, 70 Vt. 71, 39 Atl. 1087. And see *In re* Johnson (S. D.), 131 N. W. 153. *Compare*, however, Baird *v.* Justices Court of Riverside Twp.,

a disbarred attorney to public office, the incumbent of which is required to be an attorney, does not authorize him to practice in the courts of the state, he being disqualified from holding such office.[77]

C. JURISDICTION.—**1. Inherent Power.**—The power to disbar is inherent in all courts having the power to admit attorneys.[78] Such

11 Cal. App. 439, 105 Pac. 259; *In re* Silkman, 88 App. Div. 102, 84 N. Y. Supp. 1027 (holding that the "power to discipline lawyers is confined to such acts exhibiting turpitude or loss of that good character which was essential to admission in the first instance, and when misconduct is made by statute ground for removal from office, the same, in the absence of expressions to the contrary, must be deemed exclusive"). See also *In re* Sherin (S. D.), 130 N. W. 761, as to the hearing of disbarment proceedings in advance of the disposition of a criminal proceeding involving the same facts. But see *In re* Danford, 157 Cal. 425, 108 Pac. 322, when the misconduct is also a violation of the criminal law.

77. Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021. See also II, *supra*.

An attorney who has been disbarred for violation of legal ethics is not "learned in the law" within the constitutional provision making that a requirement for holding public office, it being presumed that the violation occurred through ignorance and not through wilfulness. Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021.

78. **U. S.**—Bradley *v.* Fisher, 13 Wall. 335, 20 L. ed. 646; Cobb *v.* United States, 172 Fed. 641, 96 C. C. A. 477. *In re* Beene, 83 Fed. 944; United States *v.* Clark, 76 Fed. 560. **Ark.**—Boone *v.* State, 22 Ark. 149. **Cal.**—People *v.* Turner, 1 Cal. 143, 52 Am. Dec. 295. **Colo.**—*In re* Walkey, 26 Colo. 161, 56 Pac. 576. **Conn.**—*In re* Durant, 80 Conn. 140, 67 Atl. 497. **Fla.** State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 314. **Ill.**—People *v.* Amos, 246 Ill. 299, 92 N. E. 857; People *v.* Chamberlain, 242 Ill. 260, 89 N. E. 994. **Ia.** State *v.* Mosher, 128 Iowa 82, 103 N. W. 105. **Kan.**—*In re* Wilson, 79 Kan. 450, 100 Pac. 75. **Ky.**—Com. *v.* Roe, 129 Ky. 650, 112 S. W. 683; Com. *v.* Richie, 114 Ky. 366, 70 S. W. 1054. **La.**—State *v.* Fourchy, 106 La. 743, 31 So. 325; State *v.* Richtor, 49 La. Ann. 1015, 22 So. 195. **Me.**—Penobscot County Bar *v.* Kimball, 64 Me. 140. **Mich.**—*In re* Radford, 159 Mich. 91, 123 N. W. 546; *In re* Mills, 1 Mich. 392. **Mo.**—State *v.* Gebhardt, 87 Mo. App. 542. **Mont.**—*In re* Wellcome, 23 Mont. 213, 58 Pac. 47. **N. Y.**—*In re* Cooper, 22 N. Y. 81. **N. C.**—*Ex parte* Schenck, 65 N. C. 353. **Ohio.**—*In re* Thatcher, 80 Ohio St. 492, 89 N. E. 39; Hale *v.* State, 55 Ohio St. 210, 45 N. E. 199. **S. D.**—Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021; *In re* Egan, 22 S. D. 355, 117 N. W. 874. **Tenn.**—Davis *v.* State, 92 Tenn. 634, 23 S. W. 59. **Tex.**—Scott *v.* State, 86 Tex. 321, 24 S. W. 789. **Vt.**—*In re* Jones, 70 Vt. 71, 39 Atl. 1087. **Wash.** *In re* Robinson, 48 Wash. 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525; *In re* Lambuth, 18 Wash. 478, 51 Pac. 1071.

See also note to *In re* Philbrook, 105 Cal. 471, 38 Pac. 511, 45 Am. St. Rep. 59.

Compare In re Waugh, 32 Wash. 50, 72 Pac. 710, in which a doctrine contrary to that here stated seems to be expressed; however, in *In re* Robinson, *supra*, the court states that it never meant to hold other than that the court had such inherent power.

A judge at chambers has no authority to exercise the power to disbar or suspend. State *v.* Nathans, 49 S. C. 199, 27 S. E. 52.

The power should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with the proper respect of the court for itself, or a proper regard for the integrity of the profession. Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646; Com. *v.* Roe, 129 Ky. 650, 112 S. W. 683.

An appellate court has the power by original proceeding to suspend or disbar an attorney for unprofessional conduct in a lower court. *In re* Thatcher, 80 Ohio St. 492, 655, 89 N. E. 39.

Statute no Limitation on Common Law Right.—The fact that the statute enumerates certain grounds for which an attorney can be disbarred does not

jurisdiction may be exercised, though the offense charged was committed outside of the state.[79] That one court alone has the authority to admit attorneys to practice does not restrict authority to disbar to that court where the statute enumerates the courts that shall have such jurisdiction.[80]

limit the common law power of the court in that respect, and attorneys can be disbarred on other than statutory grounds. *In re Smith*, 73 Kan. 743, 85 Pac. 584. See also **U. S.**—Cobb *v.* United States, 172 Fed. 641, 96 C. C. A. 477. **Ky.**—Com. *v.* Roe, 129 Ky. 650, 112 S. W. 683. **S. D.**—Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021; *In re* Egan, 22 S. D. 355, 117 N. W. 874.

Restriction of Right.—The inherent right of the court to disbar attorneys may be restricted by legislative enactment. *In re* Ebbs, 150 N. C. 44, 63 S. E. 190, 196. *Compare*, however, Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021, in which such right is questioned.

United States Rev. St. §725 limits the power of the federal courts to punish for contempts, but has no application to the authority of those courts to disbar attorneys for unprofessional conduct or for particular acts not specified in that statute. *In re* Boone, 83 Fed. 944.

The California Civil Code (§287) designates among other things the courts having power to remove or suspend attorneys, but no such authority is therein conferred on a justice of the peace. Baird *v.* Justices Court of Riverside Tp., 11 Cal. App. 439, 105 Pac. 259.

In Nebraska the statute contains no provision for disbarment proceedings. The supreme court having the sole power to admit attorneys to practice has the sole power to annul such admission to practice. *In re* Newby, 76 Neb. 182, 107 N. W. 850.

In North Dakota the supreme court while holding that it has undoubted jurisdiction to discipline members of the bar, will not act unless in exceptional cases, the policy of the statute clearly authorizing a different practice, and such applications should be made to the district court. *In re* Freerks, 11 N. D. 120, 90 N. W. 265.

The Ohio statute (Rev. St. §563) is not an enlargement of the jurisdiction of the courts named therein, in contravention of the constitution, but are regulative provisions of powers already existing in those courts; and the provision of the Revised Codes (§432) is merely a legislative affirmance of a power that already existed. *In re* Thatcher, 80 Ohio St. 492, 654, 655, 89 N. E. 39.

Formerly each court might punish or disbar for itself, but its judgment was not effective in any other court. **U. S.**—*Ex parte* Tillinghast, 4 Pet. 108, 7 L. ed. 798. **Fla.**—State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 314. **Ia.**—State *v.* Mosher, 128 Iowa, 82, 103 N. W. 105.

In Louisiana under the Constitution of 1898, art. 85, the supreme court has exclusive original jurisdiction over disbarment proceedings. State *v.* Fourchy, 106 La. 743, 31 So. 325.

In South Carolina the supreme court has original jurisdiction to entertain the proceeding. *In re* Duncan, 64 S. C. 461, 42 S. E. 433.

Judicial Notice.—A court will take judicial notice of its own judgment disbarring an attorney. Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021.

79. *In re* Lamb, 105 App. Div. 462, 94 N. Y. Supp. 331.

80. *In re* Dellenbaugh & Burke, 17 Ohio C. C. 106, 9 Ohio Cir. Dec. 325 .

An attorney charged with misbehavior before one court cannot be cited to appear before another court though held by the same judge, when the court where the offense was committed is a tribunal competent to punish for such misbehavior. *Ex parte* Bradley, 7 Wall. (U. S.) 364, 19 L. ed. 214.

In California the supreme court will refuse to consider an original application for disbarment unless the proceeding is instituted by a bar association or the misconduct is alleged to have direct connection with matters pending before that court. The superior courts having concurrent jurisdiction the proceedings should be instituted in the local tribunal. *In re* Delmas, 139 Cal. xix, 72 Pac. 402.

The rule stated in *In re* Stephens, 102 Cal. 264, 36 Pac. 586, as to the insti-

2. Effect of Removal From State. — Removal from the state after service of the notice but before the return day of the order to show cause, will not oust the court of jurisdiction.[81]

D. Form of Complaint. — **1. Generally.** — The remedy of disbarment is a special proceeding,[82] and is usually entitled in the name of the offender.[83] The statute should be followed so far as it prescribes the steps to be taken; otherwise it is to be conducted in general harmony with the practice of the court in civil cases.[84]

2. Necessity for Formal Complaint. — A court has jurisdiction on its own motion, and without any formal complaint or petition, to strike the name of an attorney from the rolls.[85] The court may, how-

tution of proceedings by private individuals cannot be extended to apply to the superior court. *In re* Danford, 157 Cal. 425, 108 Pac. 322.

In Iowa Code §309 giving to the supreme court exclusive authority to admit attorneys to practice did not operate to repeal by implication §323 authorizing any court of record to revoke or suspend the license; the district court still retains jurisdiction to try and determine disbarment proceedings. State *v.* Mosher, 128 Iowa 82, 103, N. W. 105.

In Louisiana the power given to disbar attorneys for misconduct is not dependent upon or affected by the amount involved. State *v.* Rightor, 49 La. Ann. 1015, 22 So. 195.

In Nevada the power to remove or suspend attorneys rests solely in the supreme court. State *v.* Crosby, 24 Nev. 115, 50 Pac. 127, 77 Am. St. Rep. 786.

81. *In re* Walkey, 26 Colo. 161, 56 Pac. 576.

82. *In re* Wilson, 79 Kan. 450, 100 Pac. 75; *In re* Burnette, 73 Kan. 609, 85 Pac. 575.

In no sense can a disbarment proceeding be called an action at law. *In re* Radford, 159 Mich. 91, 123 N. W. 546.

83. Hyatt *v.* Hamilton County (Iowa), 90 N. W. 508, *reversed* on rehearing, 121 Neb. 292, 96 N. W. 855, 100 Am. St. Rep. 354, 63 L. R. A. 614; *In re* Crum, 7 N. D. 316, 75 N. W. 257.

The information to strike a name from the roll of attorneys is not of the character which the constitution of the state of Illinois requires to be carried on in the name and by the authority of the people, nor need it conclude against the peace and dignity of the same. People *v.* Moutray, 166 Ill. 630, 47 N. E. 79. See also *In re* Wilson, 79 Kan. 450, 100 Pac. 75.

84. Matter of Burnette, 73 Kan. 609, 85 Pac. 575. See also *In re* Wilson, 79 Kan. 450, 100 Pac. 75; *In re* Spenser, 128 N. Y. Supp. 168.

In Michigan there is no settled practice in disbarment proceedings. The better practice is to have the trial courts try and determine the issue of fact in the case, leaving to the persons disciplined a review by the supreme court of any questions of law raised. *In re* Radford, 159 Mich. 91, 123 N. W. 546.

Who May Institute.—The Illinois statute (Rev. St. c. 13, §7) provides that the proceeding may be instituted by "any person interested," it is not necessary that the information shall be presented by the injured client. People *v.* Chamberlain, 242 Ill. 260, 89 N. E. 994.

85. Randall *v.* Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285; *Ex parte* Steinman, 95 Pa. 220, 40 Am. Rep. 637.

Disbarment proceedings need not be presented with the particularity and formality required in criminal proceedings. Philbrook *v.* Newman, 85 Fed. 139.

That an attorney was disbarred by one circuit court of appeals is not alone sufficient ground for disbarment by another court. *In re* Watt, 149 Fed. 1009.

"Due process of law in such cases requires specific charges, due notice of the same, an opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the law and facts." Garfield *v.* United

ever, appoint one or more attorneys to prepare and take charge of the proceedings.[86]

3. Stating Charges. — The time and place of the misconduct as

States, 32 App. Cas. (D. C.) 153; United States *v.* Bliss, 12 App. Cas. (D. C.) 493.

In the federal courts there is no established formal procedure, and a petition for disbarment is sufficient which states sufficient facts to advise the respondent of the nature of the charge against him. United States *v.* Parks, 93 Fed. 414.

Similar rule in state courts. *In re* Darrow (Ind.), 83 N. E. 1026; State *v.* Hays, 64 W. Va. 45, 61 S. E. 355.

The Iowa statute contemplates an examination of the accusation by the court and a finding as to its sufficiency before the accused is ordered to answer. This is, however, directory, and where the accused tests the accusation by demurrer and afterwards answers, he waives the irregularity. State *v.* Mosher, 128 Iowa 82, 103 N. W. 105; State *v.* Howard, 112 Iowa 256, 83 N. W. 975.

Manner of Conducting Proceeding. The manner in which the proceeding shall be conducted so that it be without oppression or unfairness is a matter of judicial regulation. Randall *v.* Brigham, 7 Wall (U. S.) 523, 19 L. ed. 285.

It is improper to disbar an attorney without first giving him notice of the proceedings and an opportunity to be heard. *In re* Peyton, 12 Kan. 398.

When Notice Unnecessary.—Where the offense is committed in the presence of the court no notice to the offender is necessary. *In re* Woolley, 11 Bush (Ky.) 95. Nor is notice necessary where the statute provides for disbarment upon conviction for a felony or misdemeanor involving moral turpitude, and makes it the duty of the clerk of the court to transmit a certified copy of the record of conviction which shall be deemed conclusive evidence. *In re* Bloor, 21 Mont. 49, 52 Pac. 779.

Based on Criminal Proceedings.—If the proceeding be based on a criminal conviction, the offense of which the attorney is convicted must be set out; and though courts possess inherent power to punish members of the bar for misconduct, an information that is fatally defective will be set aside. United States *v.* Clark, 76 Fed. 560.

86. Ia.—State *v.* Howard, 112 Iowa 256, 83 N. W. 975. Mo.—State *v.* Ford, 178 Mo. 518, 77 S. W. 741. N. Y.—*In re* Stern, 137 App. Div. 909, 121 N. Y. Supp. 948.

The Alaska Code (§750) requiring a reference to three disinterested attorneys is confined to a case where the accusation is made upon the knowledge of the court or the judges thereof. Cobb *v.* United States, 172 Fed. 641, 96 C. C. A. 477.

Statements in Accusation.—Where the statute provides that "proceedings may be commenced by order of the court" the court is required to direct some attorney to draw up the accusation; in the absence of anything in the statute as to what shall be included in the order, the attorney preparing the accusation may include any matter he deem appropriate and is not limited to what the court had in mind in directing the proceedings to be commenced. State *v.* Mosher, 128 Iowa 82, 103 N. W. 105.

Bar Associations.—A bar association is not a recognized body and cannot as such control the prosecution of a disbarment proceeding. *In re* McCarthy's Case, 42 Mich. 71, 51 N. W. 963. *Compare* Cal.—*In re* Collins, 147 Cal. 8, 81 Pac. 220. Colo—People *v.* Mead, 29 Colo. 344, 68 Pac. 241. Wash.—State *v.* Martin, 45 Wash. 76, 87 Pac. 1054.

The North Carolina statute (Pub. Laws 1907, c. 941, p. 1342) provides for the institution and prosecution of proceedings only by the State Bar Association. *In re* Ebbs, 150 N. C. 44, 63 S. E. 190.

Use of Depositions. — Depositions may be used in disbarment proceedings as in civil actions or proceedings. State *v.* McRae, 49 Fla. 389, 38 So. 605; State *v.* Mosher, 128 Iowa 82, 103 N. W. 105.

Testimony may be taken by deposition out of the state for use in the proceedings. *In re* Wellcome, 23 Mont. 259, 58 Pac. 711.

In New York there is no authority unless by consent of the parties to issue a commission to take a deposition

well as the acts charged must be set forth with reasonable certainty,[87] though no formal or technical description of the act complained of is requisite to the validity of the proceedings.[88] The proceeding to suspend or disbar is a civil one,[89] and is in the nature of an extreme remedy. While not a formal proceeding, the accused attorney should be informed of the accusation and the evidence against him and should have ample opportunity for explanation and defense.[90]

in disbarment proceedings. *In re* Attorney, 83 N. Y. 164.

87. People *v.* Matthews, 217 Ill. 94, 75 N. E. 444; Reilly *v.* Cavanaugh, 32 Ind. 214.

"We are not willing to say that allegations in an information of this kind must be as precise as in an indictment; but that they must be clear, specific and circumstantial, not general, vague and insufficient, all the authorities are agreed." State *v.* Gebhardt, 87 Mo. App. 542. See also *In re* Bowman, 7 Mo. App. App. 569.

The charges should be specific, definite and certain. *In re* Veeder, 10 N. M. 669, 65 Pac. 180.

An information for disbarment is insufficient if it fail to allege that defendant is an "attorney at law." State *v.* Quarles, 158 Ala. 54, 48 So. 499.

88. Penobscot Co. Bar *v.* Kimball, 64 Me. 140; Boston Bar Assn. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568; *In re* Randall, 11 Allen (Mass.) 473.

89. **U. S.**—Bradley *v.* Fisher, 13 Wall. 335, 20 L. ed. 646; *Ex parte* Burr, 9 Wheat. 529, 6 L. ed. 152; Philbrook *v.* Newman, 85 Fed. 139; *In re* Burr, 1 Wheeler's Crim. Cas. 503, 2 Cranch. C. C. 379, 4 Fed. Cas. No. 2,186. **Fla.** State *v.* McRae, 49 Fla. 389, 38 So. 605. **Ill.**—Keithley *v.* Stevens, 238 Ill. 199, 87 N. E. 375, *affirming* 142 Ill. App. 406; People *v.* Momtray, 166 Ill. 630, 47 N. E. 79. **Ia.**—State *v.* Mosher, 128 Iowa 82, 103 N. W. 105. **Ky.** Com. *v.* Richie, 114 Ky. 366, 24 Ky. L. Rep. 1218, 70 S. W. 1054. **Mont.**—*In re* Wellcome, 23 Mont. 259, 58 Pac. 711. **N. C.**—*In re* Ebbs, 150 N. C. 44, 63 S. E. 190. **Okla.**—*In re* Biggers, 24 Okla. 842, 104 Pac. 1083. **Tex.**—Scott *v.* State, 86 Tex. 321, 24 S. W. 789.

See Matter of Randel, 158 N. Y. 216, 52 N. E. 1106.

Compare **Ala.**—State *v.* Quarles, 158 Ala. 54, 48 So. 499, holding the proceeding to be quasi criminal and the statute relating thereto must be strictly construed. **Kan.**—*In re* Peyton, 12 Kan. 398, holding that the proceeding "is a criminal proceeding, or at least, it is a quasi criminal proceeding." **Ky.**—Baker *v.* Com., 10 Bush 592, in which the court says the proceedings "are more in the nature of a criminal than a civil proceeding."

That the statute also provides for criminal prosecution does not affect the power of the court to try the offense as merely a civil proceeding. State *v.* Fourchy, 106 La. 743, 31 So. 325; State *v.* Rightor, 49 La. Ann. 1015, 22 So. 195.

While disbarment proceedings are penal in their nature they are not strictly criminal proceedings. Scott *v.* State, 86 Tex. 321, 24 S. W. 789, *disapproving* State *v.* Tunstall, 51 Tex. 81. See also: **Ala.**—Thompson *v.* State, 58 Ala. 365. **Mass.**—Boston Bar Assn. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568. **Mich.**—Matter of Baluss, 28 Mich. 507. **N. Y.**—*In re* Roe, 81 App. Div. 656, 81 N. Y. Supp. 249.

As it is not a criminal proceeding the right to a jury trial is not secured by the constitution. *Ex parte* Robinson, 48 Wash. 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525; State *v.* Shumate, 48 W. Va. 359, 37 S. E. 618.

90. **U. S.**—Randall *v.* Brigham, 7 Wall. 523, 19 L. ed. 285. **Conn.**—*In re* Wescott, 66 Conn. 585, 34 Atl. 505. **Me.**—Penobscot Co. Bar *v.* Kimball, 64 Me. 140. **Mass.**—Boston Bar Assn. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568. **N. Y.**—*In re* Roe, 81 App. Div. 656, 81 N. Y. Supp. 249.

Summary Proceedings.—"There may be cases, undoubtedly, of such gross and outrageous conduct in open court on the part of the attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned. *Ex parte* Heyfron, 7 How. (Miss.) 127; People *v.* Turner, 1 Cal. 148; Fletcher *v.* Daingerfield, 20 Cal. 430; Beene *v.* State, 22 Ark. 157;

4. **Verification of Charges.** — The general rule is that charges should not be acted on unless made under oath;[91] but when the attorney himself waives this preliminary by inviting the inquiry, he waives this requirement.[92]

5. **Amendment of Specifications.** — If there is objection that there

Ex parte Bradley, 7 Wall. 364 [74 U. S., xix, 214]; Bradley *v.* Fisher, 13 Wall. 354 [80 U. S., xx, 651]. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged." *Ex parte* Robinson, 19 Wall. (U. S.) 505, 22 L. ed. 205. See also *In re* Walker, 26 Colo. 161, 56 Pac. 576; State *v.* McClaugherty, 33 W. Va. 250, 10 S. E. 407. However, in extreme cases and for self protection the court may strike an attorney's name from the roll; such summary jurisdiction cannot be exercised on charges merely affecting his character as a citizen. Neff *v.* Kohler Mfg. Co., 90 Mo. App. 296. See also Penobscot Co. Bar *v.* Kimball, 64 Me. 140.

Service of Notice.—"In the absence of specific directions regarding such service, any method adopted from which it appears that respondent received the required notice will be sufficient. The copies mailed distinctly advised him regarding the charges, and the time within which he was to plead thereto; and as they were mailed in the usual way, properly addressed, the presumption attaches that he received them in due time." *In re* Walkey, 26 Colo. 161, 56 Pac. 576.

91. **U. S.**—*In re* Burr, 9 Wheat. 529, 6 L. ed. 152. **Colo.**—People *v.* Mead, 29 Colo. 344, 68 Pac. 241. **N. Y.**—*In re* Roe, 81 App. Div. 656, 81 N. Y. Supp. 249.

Unless good reason for a different course be shown the proceedings should be instituted by verified information. Moutray *v.* People, 162 Ill. 194, 44 N. E. 496; State *v.* Gebhardt, 87 Mo. App. 542.

Verification of Petition.—When the verification is sufficient in form and complies with the statute, it cannot be shown that in fact it is made upon information and not upon personal knowledge as therein stated. *In re* Collins, 147 Cal. 8, 81 Pac. 220.

In Kansas when the accusation is drawn up by an attorney by order of the court it need not be verified; if made by a person interested it must be sworn to by the person making it. A verification made on information and belief does not make the proceeding either void or voidable when no appearance or answer is filed. *In re* Burnette, 70 Kan. 229, 78 Pac. 440.

When Verified Charges Unnecessary. When a state bar association after investigation of charges by its grievance committee presents an unverified petition stating that in its opinion the facts warrant an investigation, and the supreme court refers the matter to the attorney general with instructions to embody the charges in an information and present same to the court, such information need not be under oath. People *v.* Mead, 29 Colo. 344, 68 Pac. 241.

In Montana this is required by statute, and if some of the charges only are positively sworn to and the others sworn to on information and belief, it is partially valid and an objection aimed at the entire accusation is too broad and will be overruled. *In re* Wellcome, 23 Mont. 213, 58 Pac. 47.

An information based wholly on information and belief will not be considered. *In re* Weed, 26 Mont. 241, 67 Pac. 308. See also *In re* Hudson, 102 Cal. 467, 36 Pac. 812; *In re* Hotchkiss, 58 Cal. 39. *Compare In re* Veeder, 10 N. M. 669, 65 Pac. 180, holding that it is not necessary "that the charges should be made or verified by one having actual knowledge thereof but may be made upon information and belief; the sources of such information should be definitely set forth in the affidavit of verification."

92. *In re* Burr, 9 Wheat. (U. S.) 529, 6 L. ed. 152; State *v.* Gebhardt, 87 Mo. App. 542. See also Cobb *v.* United States, 172 Fed. 641, 96 C. C. A. 477.

is a variance between the charges and the evidence, the court may permit the specifications to be amended.[93]

E. The Answer. — **1. In General.** — The usual practice is to require the answer to the charges to be under oath.[94] The answer should meet the allegations in the complaint,[95] and opportunity may be given in a proper case to make the answer more specific.[96]

2. Pleading Statute of Limitations. — The statute of limitations cannot be interposed as a plea in bar of proceedings for disbarment; though the court may be unwilling to suspend or disbar the attorney when there has been unreasonable delay in the presentation of the charges.[97]

F. The Demurrer. — If a demurrer be filed to the entire application to suspend, and any one of the specifications contain sufficient cause for the motion the demurrer will be overruled.[98]

G. Reference To Hear Testimony. — The practice is to have the matter sent to a referee for the purpose of taking evidence,[99] though this is held to be erroneous practice, and that there is no authority to refer the matter of taking evidence.[1]

H. Procedure Upon Default. — The charges must be proven, notwithstanding the respondent's default;[2] but he is not entitled to notice of further proceedings.[3]

93. Boston Bar Assn. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568.

Striking Out Amendment.—When the amendment to the accusation only sets out evidential facts that might be proven under the original accusation, it is not error to strike it out. State *v.* Howard, 112 Iowa 256, 83 N. W. 975.

94. People *v.* Mead, 29 Colo. 344, 68 Pac. 241.

95. People *v.* Webster, 28 Colo. 223, 64 Pac. 207; People *v.* Hill, 182 Ill. 425, 55 N. E. 542.

The answer should not merely deny the charges made but should set out the *bona fide* character of the transaction to which the charges relate. People *v.* Hill, 182 Ill. 425, 55 N. E. 542.

Pleading Evidence. — An answer pleading matters of evidence will be stricken from the files. People *v.* Payson, 210 Ill. 82, 71 N. E. 692.

Pleading Impertinent and Irrelevant Matter.—Pleading scandalous, impertinent and immaterial matter which is so intermixed with what may be material that it is impossible to separate them, will cause the whole answer to be stricken out. People *v.* Payson, 210 Ill. 82, 71 N. E. 692.

96. People *v.* Webster, 28 Colo. 223, 64 Pac. 207.

97. **U. S.**—United States *v.* Parks, 93 Fed. 414. **Cal.**—*In re* Danford, 157 Cal. 425, 108 Pac. 322; *Ex parte* Tyler, 107 Cal. 78, 40 Pac. 33; *In re* Lowenthal, 78 Cal. 427, 21 Pac. 7. **Kan.**—*In re* Smith, 73 Kan. 743, 85 Pac. 584. **Mont.**—*In re* Weed, 26 Mont. 507, 68 Pac. 1115.

Compare In re Elliott, 73 Kan. 151, 84 Pac. 750, where the court held the matter had been allowed to become stale.

98. Reilly *v.* Cavanaugh, 32 Ind. 214.

99. People *v.* Mead, 29 Colo. 344, 68 Pac. 241. See also People *v.* Hill, 182 Ill. 425, 55 N. E. 542; *In re* Jones, 70 Vt. 71, 39 Atl. 1087.

The fact that the attorney was not permitted to attend before a committee of attorneys who were making an investigation for the purpose of determining whether charges should be presented, affords no cause for complaint. State *v.* Fourchy, 106 La. 743, 31 So. 325.

1. State *v.* McRae, 49 Fla. 389, 38 So. 605; State *v.* Finley, 30 Fla. 325, 11 So. 674, 18 L. R. A. 401; *In re* Smith, 73 Kan. 743, 85 Pac. 584.

2. Colo.—People *v.* Mead, 29 Colo. 344, 68 Pac. 241; *In re* Walkey, 26 Colo. 161, 56 Pac. 576. **Kan.**—*In re* Burnette, 70 Kan. 229, 78 Pac. 440. **Tenn.** Smith *v.* State, 1 Yerg. 228.

3. *In re* Walkey, 26 Colo. 161, 56 Pac. 576.

I. Trial. — The same rules of law which govern other trials of fact and the determination of other civil rights apply to disbarment proceedings.[4] The respondent is not entitled to a jury trial.[5]

Necessity for Written Findings. — Written findings of fact and conclusions of law were not required by the common law practice, and are necessary only when a statute so provides.[6]

J. Application To Set Aside Judgment. — Application to set aside or modify a judgment of disbarment should be made to the lower court, even though the judgment has been affirmed on appeal.[7]

Change of Venue. — In a proper case, such as where the court in which the proceedings are brought is incompetent to hear the issue, a change of venue will be granted.[8]

K. Mandamus To Restore. — In a proper case a court of controlling authority may interfere by writ of mandamus in the case of a removal or suspension of an attorney,[9] but where the cause of disbarment is a matter resting within the judicial discretion of the court it cannot be so reviewed.[10]

L. Review. — In several jurisdictions the order or judgment of disbarment is held to be reviewable by appeal or writ of error, though the statute is silent on the subject;[11] in others provision therefor is

4. People *v.* Amos, 246 Ill. 299, 92 N. E. 857.

Attorneys jointly charged may be tried jointly. It is not error to refuse a separate trial to each of them, and one may be found guilty and the other not guilty. *In re* Darrow (Ind.), 92 N. E. 369; *In re* Wilson, 79 Kan. 450, 100 Pac. 75.

5. *In re* Danford, 157 Cal. 425, 108 Pac. 322; *In re* Wharton, 114 Cal. 367, 46 Pac. 172, 55 Am. St. Rep. 72.

6. *In re* Danford, 157 Cal. 425, 108 Pac. 322.

Rehearing.—When proceedings have been heard before a judge and no decision is rendered thereon by him before leaving office, they may be retried before his successor and supplemental charges filed covering facts occuring since the original accusation was filed. *In re* Crum, 7 N. D. 316, 75 N. W. 257.

7. *In re* Wharton, 130 Cal. 486, 62 Pac. 741.

8. State *v.* Smith, 176 Mo. 90, 75 S. W. 586.

Interested Party.—If the attorney charges that the judge is an interested party, he is entitled under the Missouri statute to a change of venue, regardless of whether such statement be true or false. State *v.* Smith, *supra.*

9. *Ex parte* Burr, 9 Wheat. (U. S.) 529, 6 L. ed. 152. People *v.* Turner, 1 Cal. 143. See also Garfield *v.* United States, 32 App. Cas. (D. C.) 109.

Mandamus is the appropriate remedy to restore a disbarred attorney where the court below exceeded its jurisdiction. *Ex parte* Robinson, 19 Wall. (U. S.) 506, 22 L. ed. 205; *Ex parte* Bradley, 7 Wall. (U. S.) 364, 19 L. ed. 214. *Compare* State *v.* Shumate, 48 W. Va. 359, 37 S. E. 618, when the question is discussed but not directly passed upon.

10. *Ex parte* Secombe, 19 How. (U. S.) 9, 15 L. ed. 565, *citing* Tillinghast *v.* Conklin, not reported.

11. U. S.—*Ex parte* Secombe, 19 How. 9, 15 L. ed. 565. Conn.—*In re* Durant, 80 Conn. 140, 67 Atl. 497. D. C.—*In re* Adriaans, 28 App. Cas. 515. Idaho.—McNamee *v.* Steel, 8 Idaho 539, 69 Pac. 319; Goode *v.* Steele, 8 Idaho 538, 69 Pac. 319. Ind.—*Ex parte* Trippe, 66 Ind. 531. Ia.—State *v.* Mosher, 128 Iowa 82, 103 N. W. 105;

made by statute allowing review either by appeal or writ of error.[12]

Reversible Error.— If there are a number of specific charges and the findings are sufficient as to some of them, the judgment will not be reversed.[13] Nor will a judgment be reversed unless it appears that the error was prejudicial and that the party complaining or appealing sustained substantial injury.[14] A disbarment for an offense involving

State *v.* Tracy, 115 Iowa 71, 87 N. W. 727. *Compare* State *v.* Howard, 112 Iowa 256, 83 N. W. 975. **Ky.**—Com. *v.* Richie, 114 Ky. 366, 24 Ky. L. Rep. 1218, 70 S. W. 1054. **Mass.**—Boston Bar Assn. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568. **N. Y.**—Matter of Randel, 158 N. Y. 216, 52 N. E. 1106. **Vt.**—*In re* Jones, 70 Vt. 71, 39 Atl. 1087. **W. Va.**—State *v.* Stiles, 48 W. Va. 425, 37 S. E. 620; State *v.* Shumate, 48 W. Va. 359, 37 S. E. 618; State v. McClaugherty, 33 W. Va. 250, 10 S. E. 407.

See also *In re* Attorney, 83 N. Y. 164, which was an appeal from an order that a commission to take testimony issue.

In Iowa on appeal the supreme court will consider the case *de novo*. State *v.* Mosher, 128 Iowa 82, 103 N. W. 105.

Trial De Novo.—Trial *de novo* does not necessarily mean that the court may try the case anew as a court of original jurisdiction. The appellate court in the exercise of its appellate jurisdiction is a court of review, and reviews all the facts to ascertain if all the equities have been adjusted in keeping with good conscience; and when it appears that the trial court committed error, such error cannot be overcome by trying the case anew in the appellate court. State *v.* Smith, 176 Mo. 90, 75 S. W. 586.

Certiorari.—In Missouri the proceedings may be taken to the supreme court by certiorari; such writ bringing up, however, only errors on the face of the record and those jurisdictional in their nature. The writ is remedial and the court will not only consider whether the court was without any jurisdiction, but also whether having jurisdiction it undertook to exercise unauthorized powers. State *v.* Smith, 176 Mo. 90, 75 S. W. 586.

In California the application for a certiorari to annul a disbarment order (§1069, C. C. P.) must be a verified petition of the party beneficially interested. Certiorari will not lie where the matter complained of can be corrected on appeal. Baird *v.* Justice's Court of Riverside Twp., 11 Cal. App. 439, 105 Pac. 259.

Certiorari is not a proper remedy to review a disbarment proceeding under the Michigan statute (Pub. Acts 1905, No. 318, p. 484). *In re* Radford, 159 Mich. 91, 123 N. W. 546.

12. Walls *v.* Palmer, 64 Ind. 493. See the cases cited in the last preceding note.

The Florida statute permits the taking of a bill of exceptions and writ of error. State *v.* McRae, 49 Fla. 389, 38 So. 605.

In Kansas an appeal is provided for but there is not a trial *de novo* before the supreme court. *In re* Burnette, 73 Kan. 609, 85 Pac. 575. See also *In re* Norris, 60 Kan. 649, 57 Pac. 528.

The North Dakota statute provides for an appeal. *In re* Crum, 7 N. D. 316, 75 N. W. 257.

In Pennsylvania review by writ of error is provided for by statute. *Ex parte* Steinman, 95 Pa. 220.

In Texas an appeal lies from the district court to the court of civil appeals. Scott *v.* State, 86 Tex. 321, 24 S. W. 789.

In West Virginia the supreme court of appeals has jurisdiction to review by writ of error an order striking an attorney's name from the roll. State *v.* Stiles, 48 W. Va. 425, 37 S. E. 620.

Review by Federal Court.—A judgment of disbarment rendered in a state court having jurisdiction of the subject-matter and of the person of the defendant will not be reviewed in a federal court in an action for damages for conspiracy to procure the disbarment. Philbrook *v.* Newman, 85 Fed. 139.

13. *In re* Wilson, 79 Kan. 450, 100 Pac. 75.

14. Baird *v.* Justices' Court of Riverside Twp., 11 Cal. App. 439, 105 Pac. 257; *In re* Goodman, 199 N. Y. 143, 92 N. E. 211, *affirming* 135 App. Div. 594, 120 N. Y. Supp. 801.

moral turpitude will not be interfered with on appeal unless there be abuse of discretion.[15]

Appeal by Accuser.— No appeal, however, can be taken by the accuser.[16]

XII. REINSTATEMENT. — Disbarment is not necessarily a permanent disability to practice; upon satisfactory showing a disbarred attorney may be reinstated.[17] The power to reinstate an attorney is necessarily implied from the authority possessed by the court to strike his name from the roll.[18]

Application. — The application for reinstatement is properly made by petition under oath,[19] setting forth the grounds of the application.[20]

15. *In re* Hopkins, 54 Wash. 569, 103 Pac. 805.

16. *In re* Danford, 157 Cal. 425, 108 Pac. 322; *In re* Thompson (Cal.), 45 Pac. 1034. *Compare* Norton *v.* Wingerd, 9 Pa. Super. 514.

Appeal by Third Person.—Though the statute provide that a party aggrieved may prosecute appeals, it will not cover an appeal by a third party. The interested parties in a disbarment proceeding outside of the respondent being the court and the public. *In re* Ault, 15 Wash. 417, 46 Pac. 644.

17. **U. S.**—*In re* Boone, 90 Fed. 793, **Cal.**—*In re* Burris, 147 Cal. 370, 81 Pac. 1077; *In re* Treadwell, 114 Cal. 24, 45 Pac. 993. **Colo.**—People *v.* Essington, 32 Colo. 168, 75 Pac. 394. **D. C.** *In re* Adriaans, 33 App. Cas. 203. **Mass.** Boston Bar Assn. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568. **Mont.**—*In re* Weed, 30 Mont. 456, 77 Pac. 50. **N. H.** Hobbs Case, 75 N. H. 285, 73 Atl. 303. **N. D.**—*In re* Simpson, 11 N. D. 526, 93 N. W. 918. **Ohio.**—*In re* King, 54 Ohio St. 415, 43 N. E. 686. **Pa.**—*In re* Kennedy, 178 Pa. 232, 35 Atl. 995. **S. D.**—*In re* Ramsey, 128 N. W. 176. **Vt.** *In re* Enright, 69 Vt. 317, 37 Atl. 1046.

The question on the application for re-instatement is "Will the public interest in the orderly and impartial administration of justice be conserved by his participation therein in the capacity of an attorney and counsellor at law?" *In re* Thatcher (Ohio), 93 N. E. 895.

Good reputation since disbarment not alone sufficient, proof of good moral character necessary. *In re* Palmer, 15 Ohio C. C. 94, 8 Ohio Cir. Dec. 508.

An attorney is not entitled to reinstatement two years after disbarment, when some of the acts involved criminality, on a showing of uprightness during that period. *In re* Clark, 128 App. Div. 348, 112 N. Y. Supp. 777.

18. People *v.* Essington, 32 Colo. 168, 75 Pac. 394; *In re* Simpson, 11 N. D. 526, 93 N. W. 918.

19. *Ex parte* Walls, 73 Ind. 95; *In re* Newton, 27 Mont. 182, 70 Pac. 510.

Necessity for Written Pleadings.— The application need not necessarily be in writing but may be made orally, and may be considered without written pleadings. There can be therefore no available error in the rulings of the court on the papers in the case, none being required. *Ex parte* Walls, 73 Ind. 95.

Effect of Denial of Application Without Prejudice.—*In re* Sullivan, 185 Mass. 426, 70 N. E. 441.

Application by Third Parties.—The application must be made and signed by the applicant for reinstatement; a petition made by attorneys and others for the reinstatement will not be considered. *In re* Pemberton (Mont.), 63 Pac. 1043, s. c. 69 Pac. 836.

20. *Ex parte* Walls, 73 Ind. 95; *In re* Newton, 27 Mont. 182, 70 Pac. 982; *In re* Pemberton (Mont.), 63 Pac. 1043; *s. c.*, 69 Pac. 836.

Insufficient Grounds.—*In re* Weed, 28 Mont. 264, 72 Pac. 653; *In re* Egan, 24 S. D. 301, 123 N. W. 478.

Proof of Character on Reinstatement.—On an application for reinstatement the burden of proving good moral character is on the applicant, though no objection is made to the application. *Ex parte* Walls, 73 Ind. 95.

Objections. — Objections thereto may be filed.[21]

Trial. — The applicant is not entitled to a jury trial on the issues presented,[22] it being a summary proceeding to be decided by the court.[23]

Appeal. — It seems that the court may on appeal review the action of the lower court refusing reinstatement.[24]

XIII. RESIGNATION. — In Oregon it is provided by statute that an attorney may voluntarily resign, but such action does not remove his name from the rolls unless the court approves such action.[25] He is subject still to its jurisdiction and amenable to its orders and judgments so far as they relate to acts committed by him prior to his resignation.[26]

This practice is recognized in other jurisdictions and is usually granted unless it be made for the purpose of withdrawing from some impending censure.[27]

In England a rule was early adopted providing that the name of an attorney would not be stricken from the rolls at his own request without an affidavit that he did not apply therefor under an apprehension that charges would be preferred against him.[28]

21. *Ex parte* Walls, 73 Ind. 95; *In re* Egan, 24 S. D. 301, 123 N. W. 478.
22. *Ex parte* Walls, 73 Ind. 95.
23. *Ex parte* Walls, 73 Ind. 95.
24. *Ex parte* Walls, 73 Ind. 95.
25. Hill's Ann. Laws, §§1045, 1046; *Ex parte* Thompson, 32 Ore. 499, 52 Pac. 570, 40 L. R. A. 194.
26. *Ex parte* Thompson, 32 Ore. 499, 52 Pac. 570, 40 L. R. A. 194.
27. Scott *v.* Van Alstyne, 9 Johns. (N. Y.) 216.
28. **N. D.**—*In re* Crum, 7 N. D. 316, 75 N. W. 257. **Ore.**—*Ex parte* Thompson, 32 Ore. 499, 52 Pac. 570, 40 L. R. A. 194. **Eng.**—*Ex parte* Foley, 8 Ves. 33, 32 Eng. Reprint 262; *Ex parte* Owen, 6 Ves. 11, 31 Eng. Reprint 913. See remarks of Lord Eldon, 6 Ves. 4, 31 Eng. Reprint 909.

AUDITA QUERELA

By JOHN F. CROWE,
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CROSS-REFERENCES:

Execution;
Judgment;
Motions.

I. NATURE OF WRIT. — A. DEFINITION. — An *audita querela* is a remedy by action in the same court to relieve against an unjust judgment or execution by setting them aside for some injustice of the party who obtained them which could not be pleaded in the action.[1]

1. McMillan *v.* Baker, 20 Kan. 50; Goodrich *v.* Willard, 11 Gray (Mass.) 380.

Purpose of Writ.—"The original purpose of the writ, and the one to which it was generally confined was, that of relieving a party from the wrongful acts of his adversary, and of

B. NATURE. — It is in the nature of a bill in equity to be relieved against the oppression of, or injury threatened by, the defendant,[2] and

permitting him to show any matter of discharge which may have occurred since the rendition of the judgment, lest, as Blackstone says, 'in any case there should be an oppressive defect of justice, where a party who hath a good defense is too late to make it in the ordinary forms of law.' Powell on Appellate Proceedings defines the writ, 'as a proceeding in order to be relieved from the final judgment and execution, on account of some objection which cannot be relieved by proceedings in error. It is founded upon some matter of equity, or fraud, or release, or something of the like nature, which has transpired since the rendition of the judgment, that renders it inequitable and unjust that it should be enforced.' " McMillan *v.* Baker, 20 Kan. 50.

Relief Preventive.—"The relief by *audita querela*, at common law, was intended to be *preventive*, to stay the commission of an injury contemplated by the defendant. Blackstone thus defines it: 'An *audita querela* is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, *which has happened since* the judgment, as if the plaintiff has given a general release, or if the defendant has paid the debt to the plaintiff without procuring satisfaction to be entered on the record, and where the party has had no opportunity of pleading it, etc. In all such cases an *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff.' (3 Black. Com. 305.)" Mallory *v.* Norton, 21 Barb. (N. Y.) 424, 435.

Remedy for Irregularity. — "But when there is a regular judgment, or a regular award of execution, if an execution after irregularly issue, it cannot be a good cause, in a writ of error, to reverse a judgment or award of execution regularly made. The remedy for the party injured is either by *audita querela*, or by motion to the court to set the execution aside." Johnson *v.* Harvey, 4 Mass. 483.

Neglect To Plead.—"It is a settled principle, that where a party has had time to take advantage of the matter which discharges him, and neglects it, he cannot afterwards be helped by an *audita querela*. Com. Dig. *Audita Querela, C.;* Staniford *v.* Barry, 1 Aik. 321. 'Allegations of abuse,' says Mr. Justice Sewall, 'are not to be heard as a ground of complaint, where the party complaining has already had a legal opportunity of defense, or when the injury, if any has been sustained, is to be attributed to his own neglect; for otherwise legal proceedings would be *endless.*' Lovejoy *v.* Webber, 10 Mass. 103. See also 12 Mass. 270, 271." Faxon *v.* Baxter, 11 Cush. (Mass.) 35.

"As the plaintiff might have given notice of a desire to be present at the taxation of the costs of which he complains, and might have appealed to the court from the taxation by the clerk (Rev. Sts., c. 121, 27, 28), we are of opinion that *audita querela* is not his remedy for the erroneous taxation. The case is within the rule which denies this remedy to a party who has had an opportunity, and has neglected it, to avail himself of all his defenses and rights. 1 Rol. Ab. 306. Com. Dig. *Audita Querela,* C. Faxon *v.* Baxter, 11 Cush. 35." Goodrich *v.* Willard, 11 Gray (Mass.) 380.

2. Baker *v.* Walsh, 14 Allen (Mass.) 172.

"This writ of *audita querela* was brought for the purpose of having the execution, last issued, and the levy made by virtue of it, set aside. Such process, according to the authorities, is 'in the nature of a bill in equity, to be relieved against the oppression of the plaintiff.' It lies where, after judgment, the debt has been paid or released, and yet the debtor is arrested, or in danger of being arrested, on an execution issued on such judgment; and where the debtor has had no opportunity to avail himself of such payment or release, in defence; and in other cases where a defendant had good matter to offer in defence, but had no opportunity to offer it before judgment against him. 3 Bl. Com. 405. Injury, or danger of injury, seems to be essential to the maintenance of the

is a regular suit, with its usual incidents, issues of law and fact, time, judgment and error.[3]

C. Modern Practice. — In modern practice the granting of summary relief on motion or petition has superseded the remedy by *audita querela*.[4]

action." Bryant *v.* Johnson, 24 Me. 304.

In French *v.* White, 78 Vt. 89, 62 Atl. 35, 2 L. R. A. (N. S.) 804, it was held that after bankruptcy proceedings had been commenced against a non-resident in the federal court "the state court acquired no jurisdiction of the *res* in the former case, and that the attempted attachment of the property and all subsequent proceedings in that action are void. This being so, the property is not affected thereby, and there is no necessity for this action of *audita querela* to vacate the judgment and execution."

Allegation of Fraud Necessary.— "The remedy is said to be in the nature of a bill in equity. An allegation of fraud and deceit seems to be essential, and the case supposed must be one where legal process has been abused, and injuriously employed to purposes of fraud and oppression." Lovejoy *v.* Webber, 10 Mass. 101.

3. **Ala.**—Bruce *v.* Barnes, 20 Ala. 219. **Ill.**—Harding *v.* Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347. **N. Y.**—Brooks *v.* Hunt, 17 Johns. 484.

Right to Trial by Jury.—"Now, the motion to enter satisfaction of a judgment, when no supersedeas has been granted or prayed, is still the same thing, to wit: the substitute for the writ of *audita querela*, and the same practice must govern on the trial of such a motion as would govern if the proceedings had been commenced by a petition for a *supersedeas*. The petition and *supersedeas* are merely intended to arrest the execution until it is ascertained whether it has been properly or improperly issued, and if the allegation in the petition be that the judgment has been paid, the precise same question is presented, whether it be brought forward by way of a petition for a *supersedeas*, or by motion to have the judgment satisfied, and should be tried in the same manner, whether brought forward in the one mode or the other. We, therefore, hold, that the plaintiff in the judgment had the right to a trial by jury, and also the right to cross examine all witnesses whose testimony was offered as evidence to establish the fact of payment." Bruce *v.* Barnes, 20 Ala. 219.

Issue Is Made.—"In cases arising upon motion, it would seem that the same mode of trial ought to prevail as prevailed at common law in proceedings by the writ of *audita querela*, and such we find to be the practice. An issue is made, and sent to the jury to be tried, as any other issue of fact." Harding *v.* Hawkins, 141 Ill. 572, 584, 31 N. E. 307, 33 Am. St. Rep. 347.

4. **U. S.**—Boyle *v.* Zacharie & Turner, 6 Pet. 635, 8 L. ed. 527. **Ala.**—Dunlap *v.* Clements, 18 Ala. 778; Edwards *v.* Lewis, 16 Ala. 813. **Ga.**—Manning *v.* Phillips, 65 Ga. 548; Hill *v.* DeLaunay, 34 Ga. 427. **Ill.**—Harding *v.* Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; People *v.* Barnett, 91 Ill. 423. **Kan.**—McMillan *v.* Baker, 20 Kan. 50. **Ky.**—Chambers *v.* Neal, 13 B. Mon. 256. **Md.**—Huston *v.* Ditto, 20 Md. 305, 331; Job *v.* Walker, 3 Md. 129. **Miss.**—Benwood Iron Wks. *v.* Tappan, 56 Miss. 659; **N. Y.**—Wetmore *v.* Law, 34 Barb. 515; Davis *v.* Sturtevant, 4 Duer 148; Baker *v.* Judges, 4 Johns. 191. **N. C.**—McRea *v.* Davis, 58 N. C. 140. **Pa.**—Harper *v.* Kean, 11 Serg. & R. 280, 297. **S. C.**—Longworth *v.* Screven, 2 Hill L. 298, 27 Am. Dec. 381. **Tenn.**—Marsh *v.* Haywood, 6 Humph. 210. **Tex.**—Cook *v.* Sparks, 47 Tex. 28. **Va.** Steele *v.* Boyd, 6 Leigh 547, 29 Am. Dec. 218. **Wis.**—McDonald *v.* Talvey, 18 Wis. 571.

Motion Supersedes Writ.—"An *audita querela* was the ancient remedy where the matter of discharge happened after the recovery of judgment, and the defendant was in execution or in danger thereof. But the practice now is, in such a case, to grant summary relief upon motion, which has rendered the remedy by

II. PROCEEDING TO PROCURE WRIT. — A. PARTIES. — All parties to the original judgment and execution sought to be vacated, or their legal representatives, must be made parties to the writ of *audita querela*,[5] and a stranger to the record cannot be permitted to intervene and tender an issue.[6]

audita querela useless, and driven it out of practice. (3 Blackstone's Commentaries, 406.) In a note on the same page, Chief Justice Eyre is reported to have said, 'I take it to be the modern practice to interpose in a summary way, in all cases where the party would be entitled to relief on an *audita querela.*' " Chambers *v.* Neal, 13 B. Mon. (Ky.) 256.

Georgia Statutory Proceeding.— "The proceeding by illegality is a statutory remedy in Georgia, and was substituted in the place of the writ of *audita querela* in England. See 34 Ga. 427; the writ of *audita querela* in England was a form of action which lies for a defendant to recall or prevent an execution on account of some matter occurring after judgment, amounting to a discharge. See 1 Bouv. Law Dic., page 169. One of the characters of the suit was that its venue was of the court issuing the execution, its province was to deal with its own judgment, and our legislature in adopting the illegality proceeding, seems to confine the office of illegality to executions and judgments issuing out of and returnable to the courts, and by express provision of law requires the illegality to be returned by the levying officer to the court from which it was issued. See Code, section 3664, *et seq.*" Manning *v.* Phillips, 65 Ga. 548.

English Practice.—In the case of Sutton *v.* Bishop, 4 Burr., 2283, 2287, 98 Eng. Reprint 191, decided in 1769, the court said: "An *audita querela*, it was agreed, would be the proper method, and the most unexceptional one, and was the old legal remedy; but as it had been long disused and would be expensive, they chose to do it, if it might so be done, in a *summary* way, as being more easy and less expensive." But in Giles *v.* Nathan, 5 Taunt. 558, 1 E. C. L. 188, the court held that where a writ of *audita querela* clearly affords relief to the defendants, the court will relieve him on motion, without putting him to the *audita querela*. But where the relief is questionable, the court will not dispose of the case on motion, but leave the defendant so to proceed that the plaintiff may demur or bring error.

5. **Ala.**—Edwards *v.* Lewis, 16 Ala. 813. **Conn.**—Stevens *v.* Curtiss, 3 Conn. 260. **Mass.**—Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373; Coffin *v.* Ewer, 5 Met. 228. **Miss.**—Melton *v.* Howard, 7 How. 103. **Vt.**—Godfrey *v.* Downer, 47 Vt. 653; Johnson *v.* Plimpton, 30 Vt. 620; Herrick *v.* Orange County Bank, 27 Vt. 584; Gleason *v.* Peck, 12 Vt. 56, 36 Am. Dec. 329.

Audita querela will not lie against the United States (Avery *v.* United States, 79 U. S. 304, 20 L. ed. 405), nor against a state (Com. *v.* Berger, 8 Phila. [Pa.] 237).

Nominal Party.—"Without, however, determining that these remedies would have prevented the plaintiff from availing himself of the writ of *audita querela*, (see Lovejoy *v.* Webber, 10 Mass. 101), we are of opinion that, as against Barton, the writ will not lie. He had nothing to do with the prosecution of the action on the judgment. While it was brought in his name, it was brought for the benefit of Rice. He received nothing from the judgment, and it would be a perversion of justice to compel him to pay what he had not received. No case has been cited to us, and we have found none, where under such circumstances a writ of *audita querela* has availed the plaintiff." Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373.

6. Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373; Coffin *v.* Ewer, 5 Met. (Mass.) 228.

Assignee Must Sue in Assignor's Name.—"Being a suit between the parties to the judgment, the pleadings must be made up in their names, and a stranger to the record cannot be permitted to intervene and tender an issue, without violating the first rules of pleading. The plea tendered in the name of Baker was therefore properly rejected by the court. It is true that

B. Application for Writ. — The writ can only be awarded in open court setting forth the grounds upon which the relief is desired.[7]

C. Jurisdiction. — The writ can only issue out of the court which rendered the judgment, or from which the execution, from which relief is desired, is issued.[8]

III. PLEADING AND TRIAL. — A. Petition, Declaration or Complaint. — The petition, declaration or complaint must set forth the facts justifying the rendering of the relief sought with such certainty as would be good on demurrer.[9] And the declaration may be

courts of law will protect the interest of the assignee of a judgment, or of any other chose in action, and will not permit the assignor to defeat the interest of the assignee by any act of his own, or by a combination with the party who owes the money; and if the money be paid after notice of the assignment, such payment will not discharge the demand, but the assignee may use the name of the assignor and recover it, notwithstanding such payment. But as the legal title is not in the assignee, he cannot sue in his own name, but must use the name of his assignor." Edwards *v.* Lewis, 16 Ala. 813.

7. **N. Y.**—Waddington *v.* Vredenbergh, 2 Johns. Cas. 227. **Pa.**—Newhart *v.* Wolfe, 102 Pa. 561; Schott *v.* McFarland, 1 Phila. 53. **Vt.**—Kinman *v.* Swift, 18 Vt. 315.

Allowed in Open Court.—"We were asked to reverse upon the ground that the writ is of right, and no allowance of the court necessary. The authorities are not so. While the writ is now seldom used in practice all the precedents, so far as I have had access to them, show that it has been issued upon petition and allowance. A carefully prepared form will be found as a precedent in 1 Tourbat & Haley at page 1171. The old authorities are uniform that an allowance is necessary and that it can be only issued out of the court in which the judgment was entered. Audita querela is not to be allowed but in open court. 3 Viner's Abridg. 335; 1 Comyn's Digest 789." Newhart *v.* Wolfe, 102 Pa. 561, 566.

8. Newhart *v.* Wolfe, 102 Pa. 561, 565; Harper *v.* Kean, 11 Serg. & R. (Pa.) 280, 299; Ross *v.* Shurtleff, 55 Vt. 177; Shumway *v.* Sargeant, 27 Vt. 440; Warner *v.* Crowe, 16 Vt. 79.

Founded Upon Record.—"The audita querela is a judicial writ, founded upon the record, and upon common principles is directed to the court in which the judgment was rendered, and where the record remains." Poultney *v.* Treasurer of States, 25 Vt. 168.

9. **Ala.**—Edwards *v.* Lewis, 16 Ala. 813. **Me.**—King *v.* Jeffrey, 77 Me. 106. **Pa.**—Keen *v.* Vaughn's Exr., 48 Pa. 477; Schott *v.* McFarland, 1 Phila. 53. **Vt.**—Perry *v.* Ward, 20 Vt. 92; Sawyer *v.* Vilas, 19 Vt. 43; Hastings *v.* Webber, 2 Vt. 407.

Allegation of Fraud and Deceit.—"This will lead us to examine the complaint, and inquire whether there are those defects in it which have been urged. It is said there is no allegation of fraud and deceit in the defendant, and we are referred to the case of Lovejoy *v.* Webber, 10 Mass. 101, where it is said that such an allegation is essential. The book is not in town so that we can examine the case. If it decides that the words fraudulently and deceitfully, must be made use of in a writ, without which it would be bad, I should hesitate before I could subscribe to the authority. If it decides that facts must be set forth which show fraud and deceit in the party complained of, this declaration is not liable to objection on that account." Stone *v.* Seaver, 5 Vt. 549, 555. And see Lovejoy *v.* Webber, 10 Mass. 101, cited *supra*, note 2.

Allege Grounds in Complaint.—"The county court found that in fact the verdict was taken and the judgment rendered after twelve o'clock at night of the seventh, and that the eighth was Sunday. Whether such fact would invalidate the judgment or not, we have no occasion now to decide, as no such point has been made in the argument, and though stated in the exceptions, we think it is not fairly presented in the pleadings. This

tested by motion to dismiss as well as by demurrer.[10]

B. PLEA. — **1. In Abatement.** — A plea in abatement will lie in *audita querela* if the writ is not served on all the defendants.[11]

2. In Bar. — Defendant may plead in bar and may plead several matters,[12] but no one plea must be double.[13]

C. TRIAL ON MERITS. — Issues of fact can be tried by the court, but upon demand of either party trial by jury must be had.[14]

D. APPEAL. — The proceedings in an *audita querela* are subject to review on appeal,[15] or writ of error.[16]

audita is brought to set aside the execution, and not the judgment itself, and upon the ground that the ground that the execution misdescribed the day of judgment. If the plaintiff would ask to have either the judgment or execution set aside because the judgment was entered on Sunday, he should so have alleged in his complaint, to have advertised the defendant of the ground of objection. Not having done so, this finding of the court seems to have been set aside from the issue, and its effect has not been urged here.'' Oakes *v.* School Dist. No. 9, 33 Vt. 155.

10. Me.—King *v.* Jeffrey, 77 Me. 106. Mass.—Goodrich *v.* Willard, 11 Gray 380; Lovejoy *v.* Webber, 10 Mass. 101. Miss.—Melton *v.* Howard, 7 How. 103. Vt.—Scott *v.* Darling, 66 Vt. 510, 29 Atl. 993; Burns *v.* St. Albans Bank, 45 Vt. 259; Herrick *v.* Orange County Bank, 27 Vt. 584; Witherell *v.* Goss, 26 Vt. 748; Porter *v.* Vaughn, 24 Vt. 211; Griswold *v.* Rutland, 23 Vt. 324; Stone *v.* Seaver, 5 Vt. 549.

11. Clark *v.* Nat. Hydraulic Co., 12 Vt. 435; Clark *v.* Freeman, 5 Vt. 122; Hiecock *v.* Hiecock, 1 Chip. (Vt.) 133.

12. Edwards *v.* Lewis, 16 Ala. 813; Mussey *v.* White, 58 Vt. 45, 3 Atl. 319; Sisco *v.* Parkhurst, 23 Vt. 537; Stone *v.* Seaver, 5 Vt. 549.

Proof of Facts Not Alleged in the Declaration.—''The declaration contains no allegation that the plaintiff has a defense to the note on which the judgment was taken. The plaintiff having now established on trial the facts held sufficient on demurrer, the defendant seeks to set up the justness of the demand recovered upon by way of defense. This matter, however, is nothing in the nature of an avoidance, but is something which, if material at all, was essential to the plaintiff's case. So the holding on demurrer was an adjudication that the plaintiff is entitled to this relief without regard to the character of the demand recovered upon.'' Sawyer *v.* Cross, 66 Vt. 616, 30 Atl. 5.

13. In Spaulding *v.* Swift, 18 Vt. 214, the court held that the plea was not double because it alleged that the former writ was legally served upon the plaintiff in the *audita querela*, and that he appeared and answered to the suit by attorney.

14. Ala.—Bruce *v.* Barnes, 20 Ala. 219. Ill.—Harding *v.* Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347. N. Y.—Brooks *v.* Hunt, 17 Johns. 484. Vt.—Perkins *v.* Cooper, 28 Vt. 729.

15. Fitch *v.* Scovel, 1 Root (Conn.) 56.

The Right of Appeal.—''As to the right of appeal to this court, we think that the statement of facts agreed to by the parties in the superior court was intended to present the question of law, whether, upon the facts stated, this process would lie, and whether any case was shown for sustaining an *audita querela* and setting aside the former judgment; and the appeal was properly taken.'' White *v.* Clapp, 8 Allen (Mass.) 283.

16. Gordonier *v.* Billings, 11 Pa. 498.

To Supreme Court of United States. Brooks *v.* Hunt, 17 Johns. (N. Y.) 484.

BAIL.—See Recognizance.

BANKRUPTCY PROCEEDINGS

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I. EFFECT OF STATUTE. — The enactment by congress of the bankruptcy law suspended the operation of state insolvency laws from the time of its enactment, subject to such limitations as are therein prescribed.[1] But the state law is clearly operative in all cases not

1. **U. S.**—Butler *v.* Goreley, 146 U. S. 303, 13 Sup. Ct. 48, 36 L. ed. 981; Tua *v.* Carriere, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. ed. 855; *In re* Pickens Mfg. Co., 166 Fed. 585, 20 Am. B. R. 202; *In re* Allison Lumb. Co., 137 Fed. 643, 14 Am. B. R. 78; *In re* F. A. Hall, 121 Fed. 992; Carling *v.* Seymour Lumb. Co., 113 Fed. 483, 51 C. C. A. 1, *reversing* 112 Fed. 323; *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637; *In re* Curtis, 94 Fed. 630, 36 C. C. A. 430, *affirming* 91 Fed. 737; *In re* John A. Etheridge Furniture Co., 92 Fed. 329, 1 Am. B. R. 112; *In re* Smith, 92 Fed. 135; *In re* Bruss-Ritter Co., 90 Fed. 651; Torrens *v.* Hammond, 10 Fed. 900. See, however, Boese, *v.* King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. ed. 760, holding that the operation of the state act is not necessarily suspended. **Cal.**—R. H. Herron Co. *v.* Superior Court of San Francisco, 136 Cal. 279, 68 Pac. 814, 89 Am. St. Rep. 124; Seattle Coal & Transp. Co. *v.* Thomas, 57 Cal. 197; Martin *v.* Berry, 37 Cal. 208. **Conn.**—Ketcham *v.* McNamara, 72 Conn. 709, 46 Atl. 146, 50 L. R. A. 641. **Ga.**—Boston Mere. Co. *v.* Ould-Carter Co., 123 Ga. 458, 51 S. E. 466, when proceedings under the Bankruptcy Act are begun, but in the absence of proceedings in the United States courts, the state courts have jurisdiction to try all cases under an insolvent trader's act. **Ill.**—Harbaugh *v.* Costello, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147, *affirming* 83 Ill. App. 29. **Me.**—Littlefield *v.* Gay, 96 Me. 422, 52 Atl. 925; First Nat. Bank *v.* Ware, 95 Me. 388, 50 Atl. 24; Moody *v.* Post Clyde Devel. Co., 18 Am. B. R. 275. **Md.** Old Town Bank of Baltimore *v.* McCormick, 96 Md. 341, 10 Am. B. R. 767, holding that there is a suspension of the state act only in so far as there is a conflict between the two laws. **Mass.**—Hoague *v.* Cumner, 187 Mass. 296, 72 N. E. 956; Parmenter Mfg. Co. *v.* Hamilton, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258; Griswold *v.* Pratt, 9 Met. 16 (as to act of 1841). **Mich.**—Cook *v.* Rogers, 31 Mich. 391. **Minn.**—Armour Pack. Co. *v.* Brown, 76 Minn. 465, 79 N. W. 522; Foley-Bean Lumb. Co. *v.* Sawyer, 76 Minn. 118, 78 N. W. 1038. **N. H.**—E. C. Wescott Co. *v.* Berry, 69 N. H. 505, 45 Atl. 352. **Pa.**—Potts *v.* Smith Mfg. Co., 25 Pa. Super. 206. **R. I.**—Mauran *v.* Crown Carpet Lining Co., 6 Am. B. R. 734. **Tex.**—Patty-Joiner & Eubanks Co. *v.* Cummins, 93 Tex. 598, 57 S. W. 566, 4 Am. B. R. 269.

The bankruptcy laws enacted pursuant to the powers delegated to congress by the federal constitution are binding upon the state as well as the federal courts, and the states are bound to respect the rights acquired under them. Hall *v.* Chicago B. & I. R. Co., 25 Am. B. R. 53.

Avoids Assignments for Benefit of Creditors.—Under the provisions of the bankruptcy act where there is an assignment for the benefit of creditors and within four months thereafter bankruptcy proceedings are begun, an adjudication therein will avoid the assignment and the trustee in bankruptcy may recover the assigned estate or its proceeds from the assignee. The bankruptcy court after the filing of the petition may direct the marshal to take charge of the property until the dismissal of the petition or the appointment of a trustee. Davis *v.* Bohle, 92 Fed. 325, 34 C. C. A. 372, *affirming* 91 Fed. 366. See also *In re* Smith, 92 Fed. 135. But see Randolph *v.* Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. ed. 1165 (holding that the proceedings under the state assignment act are not illegal, but avoidable only in case bankruptcy proceedings were begun). To the same effect, see **U. S.**—*In re* Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933, 10 Am. B. R. 113; Simonson *v.* Sinsheimer, 95 Fed. 948, 37 C. C. A. 337; *In re* Romanow, 92 Fed. 510. **N. M.**—Grunsfeld Bros. *v.* Brownell, 12 N. M. 192, 76 Pac. 310. **N. C.**—*Ex parte* Zeigenfuss, 24 N. C. 463. **Vt.**—Hilliard *v.* Burlington Shoe Co., 76 Vt. 57, 56 Atl. 283. **Wash.**—Jensen-King-Byrd Co. *v.* Williams, 35 Wash. 161, 76 Pac. 934;

within the provision of the United States law, and where the record does not show a case in which the bankruptcy act would apply there is no error in the court's proceeding under the state insolvency law.[2]

The bankruptcy act does not interfere with the operation of the state insolvent law upon any subject-matter which is expressly or impliedly excepted from its operation.[3] The rights and liabilities of the

State *v.* Superior Court of Kings County, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177. Wis.—Duryea *v.* Muse, 117 Wis. 399, 94 N. W. 365; Binder *v.* McDonald, 106 Wis. 332, 82 N. W. 156.

In re Scholtz, 106 Fed. 834, held that the state insolvent laws were not superseded by the bankruptcy act, and when the state court had obtained jurisdiction before bankruptcy proceedings were begun, the assignee might properly sell the property and retain proceeds arising from a sale of the property until the apportionment of the trustee in bankruptcy, and might then turn over to him the proceeds, the sale not being void. To the same effect, see: Ga.—Merry *v.* Jones, 119 Ga. 643, 46 S. E. 861. Me.—First Nat. Bank *v.* Ware, 95 Me. 388, 50 Atl. 24. Minn.—Osborn *v.* Fender, 88 Minn. 309, 92 N. W. 1114. Neb.—Hood *v.* Blair State Bank, 3 Neb. (Unof.) 432, 91 N. W. 701, 706.

The Indiana statute (Rev. St. 1881) §§2662-2683, is an insolvency law and its operation was suspended by the enactment of the bankruptcy act of 1898. *In re* Smith, 92 Fed. 135.

The Maryland statute for winding up insolvent corporations is in the nature of a proceeding in insolvency and was superseded by the bankruptcy act. *In re* Storck Lumb. Co., 114 Fed. 360.

The Missouri statute (Rev. St. 1899, §§1305, 1306) providing that it is the duty of the secretary of state to take charge of any banks whose capital is impaired and if on examination it be found insolvent to so report to the attorney-general, who is required to institute proceedings to wind up its affairs, is in legal effect an insolvency law, and in respect to banks owned by private individuals or partnerships its operation was suspended by the bankruptcy act. Participation by creditors in proceedings thereunder did not stop such creditors from instituting proceedings in bankruptcy. *In re* Salmon & Salmon, 143 Fed. 395. As to corporate banks, see V, B, 1; V, C, 4.

Supervision of City Ordinance as fo Employe's Debts.—A city ordinance requiring employes to promptly pay all necessary personal and household expenses and making the failure to do so a ground for discharge was superseded in so far as it affected debts of the employe dischargeable in a bankrupty proceeding against him. *In re* Hicks, 133 Fed. 739.

2. Appeal of Shepardson, 36 Conn. 23. See also Singer *v.* National Bedstead Mfg. Co., 11 Am. B. R. 276; McCullough *v.* Goodhart, 3 Am. B. R. 85; Singer *v.* National Bedstead Mfg. Co., 65 N. J. Eq. 290, 25 Atl. 868.

While the operation of a state insolvency act may to some extent be suspended, if thereunder there is a conveyance of all a debtor's property subject to the payment of his debts for the equal benefit of all the creditors who may accept under it, it is otherwise valid, except as against proceedings seasonably taken under the bankruptcy act. Patty-Joiner & Eubanks Co. *v.* Cummins, 93 Tex. 598, 57 S. W. 566, *affirming* 59 S. W. 297. See, however, Carling *v.* Seymour, Lumb. Co., 113 Fed. 483, 51 C. C. A. 1, *reversing* 112 Fed. 323, that the passage of a national bankruptcy act renders void conflicting state statutes.

Under the constitution congress was empowered to establish uniform laws on the subject of bankruptcy. This jurisdiction was not granted by, and could not be revoked, annulled or impaired by, the law or act of any state. *In re* Duulop, 156 Fed. 545, 86 C. C. A. 435, 19 Am. B. R. 361.

3. R. H. Herron Co. *v.* Superior Court of San Francisco, 136 Cal. 279, 68 Pac. 814, 89 Am. St. Rep. 124. See also Keystone Driller Co. *v.* Superior Court of San Francisco, 138 Cal. 738, 72 Pac. 398; Old Town Bank *v.* Mc-

parties are controlled by the bankruptcy act, and a state law which comes in conflict with it must yield.[4]

II. RULES OF CONSTRUCTION. — A. GENERALLY. — The national bankruptcy act is remedial, and should be interpreted literally and according to the fair import of its terms, with a view to effect its objects and to promote justice.[5]

B. MEANING OF WORDS AND PHRASES. — 1. Generally. — As the statute itself defines most of the terms used throughout the act, it is not necessary to repeat them here.[6]

Cormick, 96 Md. 341, 53 Atl. 934, 10 Am. B. R. 767.

The Illinois voluntary insolvency act is not suspended by the bankruptcy act as to a corporation not within the purview of the latter act. Dillie *v.* People, 118 Ill. App. 426.

The Kentucky Statute of 1899, §1910, commonly known as the "Act of 1856," is not a bankrupt law nor an insolvent act, and proceedings thereunder are not affected by the bankruptcy act. Downer *v.* Porter, 116 Ky. 422, 76 S. W. 135.

The New Mexico statute Comp. Laws, 1897, §§2818-2826, is not a bankruptcy law. Grunsfeld Bros. *v.* Brownell, 12 N. M. 192, 76 Pac. 310.

The Ohio statute (Rev. St. §6343, as amended in 1898) providing for the equality of distribution of the property of debtors among their creditors, is not suspended by the bankruptcy act. *In re* Farrell, 176 Fed. 505, 100 C. C. A. 63, 23 Am. B. R. 826.

The Pennsylvania Insolvency Act of 1901 (P. L. 404) is not suspended by the bankruptcy law as to wage earners and persons engaged chiefly in farming or tilling the soil. Rittenhouse's Insolvent Estate, 30 Pa. Super. 468.

4. **U. S.**—Dutcher *v.* Wright, 94 U. S. 553, 24 L. ed. 130; Toof *v.* Martin, 13 Wall. 40, 20 L. ed. 481; *In re* Eggert, 98 Fed. 843. **Cal.**—Keystone Driller Co. *v.* Superior Court of San Francisco, 138 Cal. 738, 72 Pac. 398. **Ill.**—Dille *v.* People, 118 Ill. App. 426. **Mo.**—Rosenfeld *v.* Siegfried, 91 Mo. App. 169. **N. C.**—*Ex parte* Ziegenfuss, 24 N. C. 463. **R. I.**—Mauran *v.* Crown Carpet Lining Co., 23 R. I. 324, 50 Atl. 331.

5. Botts *v.* Hammond, 99 Fed. 916, 40 C. C. A. 179; Norcross *v.* Nathan, 99 Fed. 414; Southern Loan & Trust Co. *v.* Benbow, 96 Fed. 514; Blake-Moffitt & Towne *v.* Francis-Valentine Co., 89 Fed. 691. See also Pirie *v.* Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. ed. 1171, 5 Am. B. R. 814; Southern Loan & Trust Co. *v.* Benbow, 96 Fed. 514, 3 Am. B. R. 9; *In re* Gutwillig, 9 Fed. 475, 1 Am. B. R. 388. *Compare* Matter of Mersman, 7 Am. B. R. 46, in which it said that "the prevailing tendency of late is to construe this law by the letter rather than the spirit."

6. Bankruptcy Act (1898), §1.

"Mercantile" connotes the buying and selling of commodities and does not refer to such a business as that of a mercantile agency. Zugalla *v.* International Merc. Agency, 142 Fed. 927, 74 C. C. A. 97.

A stock broker is neither a "trader" nor engaged in a "mercantile pursuit"; these terms are used in their technical sense. *In re* Surety Guarantee & Trust Co., 121 Fed. 73.

"Mining" and "manufacturing" are used in their broadest sense and are not necessarily mutually exclusive. Burdick *v.* Dillon, 144 Fed. 737, 75 C. C. A. 603.

"Trading" as used in the bankruptcy statute means buying and selling merchandise or any class of goods with the object of deriving a profit therefrom. *In re* Charles Town Light & Power Co., 25 Am. B. R. 687.

A corporation whose principal business is to buy, sell, measure and deliver electricity is a "trading company within the meaning of the bankruptcy act." *In re* Charles Town Light & Power Co., 25 Am. B. R. 687.

An electric light company furnishing light and power has been adjudged bankrupt. *In re* Suburban Electric Co. (Unreported) cited in the Charles Town Light & Power Co., 25 Am. B. R. 687. *Compare*, however, *In re* New York & W.

2. "Parties." — The term "parties" includes all persons who are directly interested in the subject-matter in issue, who have a right to make defense, control the proceedings or appeal from the judgment. Strangers are persons who do not possess these rights.[7]

C. Use of Forms. — The forms found in the general orders and forms prescribed by the supreme court should be followed; the forms of special pleading and procedure used in chancery cases should not be used.[8]

III. SPECIFIC POWERS CONFERRED ON THE COURTS. — A. Allowance of Claims. — **1. Generally.** — The court has among other things the right to allow or disallow claims, to reconsider claims that have been allowed or disallowed, and to allow or disallow them.[9]

2. Debts Provable. — a. *In General.* — The following are provable debts: a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him

Water Co., 98 Fed. 711, 3 Am. B. R. 568, holding that a water supply Co. transporting and supplying water to its patrons was not "engaged in trading" with the meaning of the bankruptcy act.

Matter of Hudson River Power Co., 25 Am. B. R. 504, *affirming* 23 Am. B. R. 191, holding a public service corporation engaged in generating and selling electricity, but whose principal business is public and private lighting under franchises issued by local and state authority, under which it is given the right of eminent domain, is not engaged in "manufacturing, trading or mercantile pursuits" within the meaning of the act and not subject to adjudication in bankruptcy.

Definitions of such terms are not as important as formerly, owing to the amendment of 1910, which permits the filing of a voluntary petition by any corporation except a municipal, railroad, insurance, or banking corporation, and provides that an involuntary petition may be filed against "any incorporated company, and any moneyed, business or commercial corporation, except a municipal, railroad, insurance or banking corporation, owing debts to the amount of one thousand dollars or over." Bankruptcy act (1898) §4b. Prior to the amendment of 1910, a corporation engaged in the laundry business could not be adjudged a bankrupt. (*In re* Eagle Steam Laundry Co. of Queen's Co., 25 Am. B. R. 868), nor could a corporation principally engaged in conducting a restaurant (matter of United States Restaurant & Realty Co., 25 Am. B. R. 915).

Not Retroactive.—The amendment of 1910 to §4 of the bankruptcy act, was not intended to have a retroactive effect. Matter of United States Restaurant & Realty Co., 25 Am. B. R. 915.

"**There is no judicial presumption** that the corporate name of a corporation denotes what is the business in which it is engaged principally," and a corporation may be engaged principally in selling horses, though its name indicates its business was that of conducting a boarding and livery stable. United States *v.* Freed, 25 Am. B. R. 89.

7. *In re* Columbia Real Estate Co. 101 Fed. 965, 4 Am. B. R. 411.

8. Gage & Co. *v.* Bell, 124 Fed. 371, 10 Am. B. R. 696. As to schedules, see "B."

9. Bankruptcy Act (1898), §2, (2).

plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.[10]

b. *Unliquidated Claims.* — (I.) Generally. — Unliquidated claims may upon application to the court be liquidated in such manner as the court may direct and may thereafter be proved and allowed against the estate.[11]

(II.) How Liquidation Accomplished. — Claims may be liquidated either by directing a hearing before the referee in charge, or by directing a plenary suit to be brought in any court having jurisdiction, or by permitting an action pending in any court to proceed to judgment.[12]

3. Contingent Liability. — The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable.[13] When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* to the original debt.[14]

10. Bankruptcy statute, §63a.

The debt must have existed (*In re* Burka, 107 Fed. 674, 5 Am. B. R. 12) and be matured at the time of filing the petition (*In re* Garlington, 115 Fed. 999, 8 Am. B. R. 602). See also *In re* Swift, 112 Fed. 315, 50 C. C. A. 264, 7 Am. B. R. 374, 382; Phenix Nat. Bank *v.* Waterbury, 197 N. Y. 161, 90 N. E. 435, 23 Am. B. R. 250, *affirming* 123 App. Div. 453, 108 N. Y. Supp. 391.

An indebtedness arising between the filing of the petition and the adjudication is not ordinarily provable. *In re* Adams, 130 Fed. 381, 12 Am. B. R. 368; *In re* Coburn, 126 Fed. 218, 11 Am. B. R. 212.

A claim based on a tort as known at common law is undoubtedly provable whenever it may be resolved into an implied contract. Clark *v.* Rogers, 26 Am. B. R. 413.

Proof of Joint Liability.—The holder of a claim upon which several parties are liable may prove his claim against those who become bankrupt and at the same time pursue the others at law. Board of County Comrs. *v.* Hurley, 169 Fed. 92, 94 C. C. A. 362, 22 Am. B. R. 209.

11. Bankruptcy Act (1898), §63b; *In re* Rubel, 170 Fed. 1021, 95 C. C. A. 671, 21 Am. B. R. 566.

12. *In re* Buchans Soap Corporation, 169 Fed. 1017, 22 Am. B. R. 382; *In re* Rome, 1 Am. B. R. 393.

"Claims in controversy are not to be settled or liquidated by suit in the state courts unless the judge or referee so directs." *In re* Heim Milk Product Co., 25 Am. B. R. 746.

13. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

14. General Order, XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

Preferred Claim.—A proof of claim must state facts which show the claim to be entitled to a preference or priority of payment. It is not sufficient to say in the claim that the debt therein mentioned is "preferred" or a "preferred claim." *In re* Dunn, 25 Am. B. R. 103.

4. What Constitutes Proof of Claim.— a. *In General.* — The proof of claim consists of a statement in writing under oath, signed by a creditor, setting forth the claim, the consideration therefor, and whether any, and if so, what securities are held therefor, and whether any, and if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.[15] The items which make up the account must be set forth sufficiently to enable creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim.[16]

b. *Form.* — Depositions to prove claims against a bankrupt's estate must be correctly entitled in the court and in the cause.[17]

c. *Proof by Partnership or Corporation, or Agent.* — When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent,

15. Bankruptcy Act (1898), §57a; Matter of Creasinger, 17 Am. B. R. 538; *In re* Sumner, 101 Fed. 224, 4 Am. B. R. 123. And see *In re* Dunn Hdw. & Furn. Co., 132 Fed. 719, 13 Am. B. R. 147; *In re* Stevens, 103 Fed. 243.

The verification of the proof of debt is in no true sense an *Ex parte* affidavit. Baumhauer *v.* Austin, 26 Am. B. R. 385.

As to who may administer oath, see *infra*, XVIII.

16. To say "that the consideration for said debt is for legal services performed for said S. during the year 1898" is insufficient. *In re* Scott, 93 Fed. 418, 1 Am. B. R. 553. See also Matter of Creasinger, 17 Am. B. R. 538; *In re* Blue Ridge Pack. Co., 125 Fed. 619, 11 Am. B. R. 36.

"It must be conceded that a proof of claim should show the consideration for the claim." Matter of Creasinger, 17 Am. B. R. 538.

"The requirement by Bankr. Act secs. 57a, 57 b, of a statement of the consideration and payments, is of more than general allegations in these respects, which might be sufficient in a declaration against the bankrupt upon these causes of action, and extends to the particulars of each, for the information of the trustee and those interested in the estate, but not beyond what relates to the claim as it accrued to the claimant." *In re* Stevens, 107 Fed. 243, 5 Am. B. R. 806. "If the claim was on the note, an instrument in writing, evidence of indebtedness, the section requires that the consideration for the note be stated. If a note is given for property, or money loaned or advanced, or for work, labor, and services, etc., as the case may be, the proof of claim must so state and give facts in regard thereto which will enable the trustee and creditors to investigate and ascertain the consideration and justice of the claim. If the claim is for a debt for work, etc., or money loaned, or property sold, etc., and no note has been given, the proof of claim should state the consideration and give facts which will enable the trustee and creditors to ascertain the adequacy of the consideration and the justice and legality of the claim. Whether the claim be on a promissory note, other instrument in writing, or on an account, or for money loaned, etc., the proof of claim must state 'the consideration' for the debt." *In re* Coventry Evans Furniture Co., 166 Fed. 516, 22 Am. B. R. 623.

Presentation by Attorney.—There is no objection to permitting the attorney for the trustee to make out and present the formal proof of claim of a creditor. *In re* McKenna, 137 Fed. 611, 15 Am. B. R. 4.

Proof of Claim not a Pleading.— "The proof of claim is not a pleading; it is a deposition which must set forth the evidence with particularity." Matter of Creasinger, 17 Am. B. R. 538, 546.

17. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

The failure to give the title of the court at the head of the proof does not vitiate the proof if otherwise good. *In re* Blue Ridge Pack. Co. 125 Fed. 619, 11 Am. B. R. 36.

the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer.[18]

d. *Open Account.* — Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it.[19] All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon.[20]

5. Filing Proof. — a. *Generally.* — Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred.[21] Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.[22]

b. *Claim Founded on Written Instrument.* — If the claim is founded on a written instrument, such instrument unless it be lost or destroyed must be filed with the proof of claim. If the instrument be lost or destroyed a statement of such fact and the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is alowed or disallowed the instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.[23]

6. Assigned Claims. — a. *Generally.* — Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims.[24]

18. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

See *infra*, III, 6, b.

19. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

20. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

21. Bankruptcy Act (1898), §57e; General Order XX, 172 U. S. 659, 43 L. ed. 1193, 89 Fed. ix, 32 C. C. A. xii.

22. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

Delivering Claim to Trustee.—The presentation and delivery of claims to the trustee is a sufficient filing, it being his duty to deliver them to the referee. Matter of Kessler, 25 Am. B. R. 512.

Trustee's Proof of Claim.—A trustee cannot file with himself his own proof of claim, nor will the delivery of his own claim to his attorney stand in the place of a delivery to the referee. J. B. Orcutt Co. *v.* Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. ed. 390, 17 Am. B. R. 72, *reversing* 13 Am. B. R. 512.

The filing of a proof of claim with the *trustee* before the expiration of one year after adjudication, is a sufficient filing under the statute and General Order XXI. J. B. Orcutt Co. *v.* Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. ed. 390, 17 Am. B. R. 72, *reversing* 13 Am. B. R. 512.

23. Bankruptcy Act (1898), §57b.

24. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii; *In re* Fortune, 1 Low. 384, 7 Fed. Cas. No. 3,586, 3 N. B. R. 312.

Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant.[25] If objection be made, he shall proceed to hear and determine the matter.[26]

b. *Proof of Execution.* — The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts.[27] When the person executing is not personally known to the officer taking the proof or

25. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

26. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

27. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

This is sufficiently complied with where the oath is contained in the proof of debt accompanying and executed on the same day as the power of attorney, there being no necessity for swearing to it a second time. *In re* Blue Ridge Pack. Co., 125 Fed. 619, 11 Am. B. R. 36. *Compare In re* Finlay, 3 Am. B. R. 738, in which a contrary opinion is expressed.

Proof by Foreign Creditor.—The power of attorney of a foreign creditor may be acknowledged before a foreign consul, notwithstanding the provision in General Order XXI, that a power of attorney to present claim can only be acknowledged before a referee, U. S. commissioner, or a notary public. *In re* Sugenheimer, 91 Fed. 744, 1 Am. B. R. 425.

Proof by Agent.—"If it was meant by General Order XXI to say that a partnership or corporation might not make proof of claim, in case of partnership by other than one of the partners, and, in case of a corporation by other than the treasurer, etc., it seems to me the provisions of the general order conflict with those of the bankruptcy act, and the act would govern. I think therefore that a corporation may make proof of its claim by agent or attorney in fact, when there is sufficient reason why it should not be made by the officer designated." Matter of Reboulin Fils & Co., 19 Am. B. R. 215.

Stating Reason for Agent Making Proof.—"When General Order XXI provided that a proof of claim made by an agent should state the reason the deposition was not made by the claimant in person, it would seem as if the provision was for some purpose, and that the reason must be a good, and valid, and sufficient reason and 'such a reason as would satisfy the officer taking the proof that it was proper to dispense with the oath of the claimant in person' or with the oath of the treasurer, etc." A statement "that the proof cannot be made by said Societe Marseillaise, or by an officer thereof, because the said Societe Marseillaise and all its officers are without the United States, and are in the Republic of France, and there reside," is insufficient, there being no reason "why the treasurer, or proper officer, should not have verified the proof of claim in this matter, even though he was in France, and it could have been done as well as to execute the power of attorney in France." Matter of Reboulin Fils & Co., 19 Am. B. R. 215.

As to form of oath, see *In re* Finlay, 3 Am. B. R. 738.

Authority of Justices of the Peace. Justices of the peace are included within the class of officers authorized to take acknowledgments to letters of attorney. *In re* Roy, 26 Am. B. R. 4.

acknowledgment, his identity shall be established by satisfactory proof.[28]

7. Allowance of Secured Claims. — a. *In General.* — Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the court seem to be owing over and above the value of their securities or priorities.[29]

b. *Secured Creditor Defined.* — The term "secured creditor" includes a creditor who has security for his debt upon the property of the bankrupt of a nature assignable under the bankruptcy act, or who owns such a debt for which some indorser, surety or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets.[30]

8. Claim of Creditor Having Preference. — The claims of a creditor who has received preference, voidable under §60, subd. b, or to whom conveyances, transfers, assignments or incumbrances, void or voidable under §67, subd. e, have been made or given shall not be allowed unless such creditor shall surrender such preferences, conveyances, transfers, assignments or incumbrances.[31]

9. Subrogation. — Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.[32]

10. Time for Making Proof. — a. *Generally.* — Claims cannot be proved subsequent to one year after adjudication;[33] or if they are

28. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

29. Bankruptcy Act (1898), §57e; *In re* Goldsmith, 118 Fed. 763, 9 Am. B. R. 419.

If a secured creditor of a bankrupt whose security is insufficient, discloses his security in proving his claim before the referee, he may retain his security and share in the dividends as to the overplus. Kohout *v.* Chaloupka, 11 Am. B. R. 265. See also *In re* Hines, 144 Fed. 142, 16 Am. B. R. 495.

A creditor holding a note of the bankrupt and as collateral thereto, holds another on which the bankrupt is an indorser, may make proof upon either one, but not on both. First Nat. Bank of Beaumont *v.* Eason, 149 Fed. 204, 79 C. C. A. 162, 17 Am. B. R. 593.

30. Bankruptcy Act (1898), §1a, (23).

31. Bankruptcy Act (1898), §57g.

32. Bankruptcy Act (1898), §57i.

33. Bankruptcy Act (1898), §57n; *In re* Rosenberg, 144 Fed. 442, 16 Am. B. R. 465; *In re* Moebius, 116 Fed. 47, 8 Am. B. R. 599; *In re* Hawk, 144 Fed. 916, 52 C. C. A. 536, 8 Am. B. R. 71; *In re* Leibowitz, 108 Fed. 617, 6 Am. B. R. 268; *In re* Rhodes, 105 Fed. 231, 5 Am. B. R. 197; *In re* Shaffer, 104 Fed. 982, 4 Am. B. R. 728; Bray *v.* Cobb, 100 Fed. 270, 3 Am. B. R. 788; *In re* Stein, 94 Fed. 124, 1 Am. B. R. 662; Steinhardt *v.* National Park Bank, 120 App. Div. 255, 105 N. Y. Supp. 23, 19 Am. B. R. 72, *reversing* 18 Am. B. R. 86.

This provision by implication provides in effect that any claim may be proved within one year after the adjudication. Matter of Bell Piano Co., 155 Fed. 272, 18 Am. B. R. 183.

This language is more than a limitation of time; it is an absolute prohibition. Matter of Bimberg, 121 Fed. 942, 9 Am. B. R. 601; Matter of

liquidated by litigation and the final judgment be rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition and judgment.[34] The "litigation" here refers to controversies between a creditor and the bankrupt, and not between a creditor and third parties.[35]

b. *Infants and Insane Persons.* — Infants and insane persons without guardians, without notice of the proceedings, have an additional six months to make proof.[36]

c. *After Expiration of Year.* — When a creditor has not been tardy, and the delay is caused by fraud of the bankrupt, the claim may be proved though the year has expired.[37]

Prindle Pump Company, 10 Am. B. R. 405; *In re* Moebius, 116 Fed. 47, 8 Am. B. R. 590. The courts have no power or discretion to extend the time, or permit the proof of claims after the prescribed period, even if the claimant has been misled by the fraudulent concealment of assets. *In re* Meyer, 25 Am. B. R. 44.

Claims of the United States or of a state, county or other municipality for taxes are excepted from the provisions of the section, it not being necessary to file proofs of claim. *In re* Cleanfast Hosiery Co., 4 Am. B. R. 702.

Section 57n of the Bankruptcy Act not alone requires the making of a sworn statement as required by subdivision of that section within the time specified, but requires also the filing or presentation of the claim in the bankruptcy proceedings to prevent the claim from being barred by the statute. *In re* French, 25 Am. B. R. 77.

34. Bankruptcy Act (1898), §57n; *In re* Strobel, 160 Fed. 916, 20 Am. B. R. 884; *In re* Landis, 156 Fed. 318, 19 Am. B. R. 420.

The exception is interpreted as if to read: "If the final judgment therein is rendered within thirty days before the expiration of such time or at any time thereafter." *In re* Keyes, 160 Fed. 763, 20 Am. B. R. 183; Powell *v.* Leavitt, 150 Fed. 89, 80 C. C. A. 43, 18 Am. B. R. 10.

"Litigated" Claim.—A creditor who claimed to hold security for his claim and who was defeated in a suit in which that question was litigated may prove his claim after the expiration of a year under §57n. Matter of Salvator Brewing Co., 26 Am. B. R. 21.

"Proof" and "Allowance."— "Proof and allowance of claims are two separate and distinct steps; that a clear statement of a claim in writing duly verified and filed with the referee, if made within a year, is sufficient to take the claim out of the statutory limitation, even though it may be allowed, or liquidated and allowed, afterwards." *In re* Mertens, 147 Fed. 177, 77 C. C. A. 473, 16 Am. B. R. 825.

A deficiency judgment upon a sale in foreclosure which accrued before the expiration of the year must be proved within the period prescribed and not thereafter. *In re* Sampter, 170 Fed. 938, 96 C. C. A. 98, 22 Am. B. R. 357.

Where the amount of the claim was recovered back by the trustee as a preferential payment after the year had expired, the original indebtedness may be then proved against the bankrupt estate. *In re* Coventry-Evans Furniture Co., 171 Fed. 673, 22 Am. B. R. 623. And see, when preference surrendered, *In re* Lange, 170 Fed. 114, 22 Am. B. R. 414.

35. *In re* Pittsburg Industrial Iron Wks., 22 Am. B. R. 851; *In re* Thompson's Sons, 123 Fed. 174, 10 Am. B. R. 581.

"Litigation" does not include an undefended action. Matter of Prindle Pump Co., 10 Am. B. R. 405.

Time Added.—This means that ninety days additional may be added to the year. Matter of Eldred, 155 Fed. 686, 19 Am. B. R. 52.

"The words 'such time' refer to the one year after or following adjudication." *In re* Peck, 161 Fed. 762, 20 Am. B. R. 629.

36. Bankruptcy Act (1898), §57a; Matter of Eldred, 155 Fed. 686, 19 Am. B. R. 52.

37. *In re* Towne, 122 Fed. 313, 10

11. Hearing and Filing Objection. — Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowances shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.[38]

While the act does not require objections to be submitted in writing, this is the better practice, even when the objections are made by the trustee, and if they are stated orally, specific objections should thereafter be filed;[39] objections should be sufficiently explicit to indicate their nature and character,[40] but they need not be under oath.[41]

Objections to claims shall be heard by the court and determined as soon as the convenience of the court and the best interests of the estates and the claimant will permit.[42]

12. Allowance of Claims After Composition. — A referee in bankruptcy has no authority to allow or disallow claims filed after confirmation of a composition.[43]

B. Re-examination of Claims. — **1. In General.** — When the trustee of any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for

Am. B. R. 284, pointing out that cases construing the provision as an absolute prohibition were cases of a tardy creditor in competition with a diligent one. See also National Bank of Commerce *v.* Williams, 159 Fed. 615, 86 C. C. A. 605, 20 Am. B. R. 79. *Compare In re* Peck, 168 Fed. 48, 93 C. C. A. 470, 21 Am. B. R. 707, holding that while it may be permitted in some cases, that the creditor alleges he was misled by the schedules is insufficient.

Fraudulent Concealment of Assets. That there had been a fraudulent concealment of assets on the part of the bankrupt is not sufficient reason. Matter of Paine, 127 Fed. 246, 11 Am. B. R. 351.

Advice of Counsel.—That a creditor acted on advice of counsel and feared he might be prejudiced in his right is no excuse. *In re* Baird & Co., 154 Fed. 215, 18 Am. B. R. 228.

Accident or Mistake.—That a creditor failed to file his claim through accident or mistake gives the court no authority to permit the claim to be filed. *In re* Sanderson, 160 Fed. 278, 20 Am. B. R. 396.

Failure To Receive Notice.—A claim cannot be filed after this period though the creditor had no notice of the bankruptcy proceedings. *In re* Muskoka Lumb. Co., 127 Fed. 886, 11 Am. B. R. 761.

38. Bankruptcy Act (1898), §57d; *In re* Back Bay Automobile Co., 158 Fed. 679, 19 Am. B. R. 835, *reversing* 19 Am. B. R. 33.

"The term 'parties in interest' applies to those who have an interest in the *res* which is to be administered and distributed in the proceeding; and does not include those who are merely debtors or alleged debtors of the bankrupt." Matter of Sully & Co. 152 Fed. 619, 81 C. C. A. 609, 18 Am. B. R. 123.

39. *In re* Cannon, 133 Fed. 837, 14 Am. B. R. 114. See also *In re* Royce Dry Goods Co., 133 Fed. 100, 13 Am. B. R. 257.

40. *In re* Royce Dry Goods Co., 133 Fed. 100, 13 Am. B. R. 257; *In re* Wooten, 118 Fed. 670, 9 Am. B. R. 247.

41. *In re* Wooten, 118 Fed. 670, 9 Am. B. R. 247.

42. Bankruptcy Act (1898), §57f.

By the judge or referee. *In re* Eagles, 99 Fed. 695, 3 Am. B. R. 733.

43. Matter of Fox, 6 Am. B. R. 525.

hearing the petition, of which due notice shall be given by mail addressed to the creditor.[44]

2. **Petition for.** — The petition for re-examination should be drawn with all the particularity of a bill in equity.[45] Any number of creditors may be named in the same petition, but each should be served with a copy, together with a copy of the order to show cause.[46]

3. **Hearing.** — At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.[47] The only authority here conferred is to expunge or diminish a claim.[48]

4. **Who May Institute Proceedings.** — When there is a trustee, he alone may institute proceedings for the re-examination and disallowance of claims,[49] though prior to the trustee qualifying if it become necessary or desirable to re-examine a claim, the application may be made by a creditor,[50] or by the bankrupt.[51] If the trustee should with-

44. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii. The procedure here provided for is exclusive. *In re* Roanoke Furnace Co., 152 Fed. 846, 18 Am. B. R. 661.

Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed. Bankruptcy Act (1898), §57k.

The application must be made promptly or it will be dismissed on the ground for laches. *In re* Hamilton Furniture Co., 116 Fed. 115, 8 Am. B. R. 588. See also Matter of Sully, 152 Fed. 619, 81 C. C. A. 609, 18 Am. B. R. 123; Matter of Hinckel Brew. Co., 123 Fed. 942, 10 Am. B. R. 484.

45. Matter of Linton, 7 Am. B. R. 676.

The petition is not required to contain facts which if proved would defeat the claim. It is only necessary to aver facts which if true are sufficient cause for the re-examination of the claim. *In re* George Watkinson Co., 130 Fed. 218, 12 Am. B. R. 370.

46. Matter of Linton, 7 Am. B. R. 676.

47. General Order XXI, 172 U. S. 660, 43 L. ed. 1192, 89 Fed. ix, 32 C. C. A. xii.

A creditor whose claim is disallowed may file a petition for review of the order of the referee by the district court, or if through inadvertence items are omitted he may file an amended proof of claim, but there is no authority under this subdivision to permit a re-examination of a claim of a creditor on his own petition. *In re* Chambers Calder Co., 6 Am. B. R. 707.

As to whether creditors are entitled to notice of a re-examination, see *In re* Mammoth Pine Lumb. Co., 8 Am. B. R. 651, 661; *In re* Stoever, 105 Fed. 355, 5 Am. B. R. 250; *In re* Doty, 5 Am. B. R. 58.

48. Fitch *v.* Richardson, 147 Fed. 196, 77 C. C. A. 422, 16 Am. B. R. 835.

The better practice is to vacate the first order of allowance and allow the claim for the new amount. *In re* Smith, 2 Am. B. R. 648.

Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustees may recover from the creditor the amount of the dividend received upon the claim if rejected in whole or the proportional part thereof if rejected only in part. Bankruptcy Act (1898), §57l.

49. Matter of Lewensohn, 121 Fed. 538, 57 C. C. A. 600, 9 Am. B. R. 368. *Compare In re* Lyon, 7 Am. B. R. 61, in which the creditors joined with the trustees.

50. Matter of Lewensohn, 121 Fed. 538, 57 C. C. A. 600, 9 Am. B. R. 368.

51. *In re* Ankeny, 100 Fed. 614, 4 Am. B. R. 72.

out sufficient reason refuse to proceed, the court by its order could compel him to do so, or remove him for disobedience.[52]

5. **Time for Making Application.** — Re-examination of a claim cannot be had after the estate is closed.[53]

C. PRESERVATION OF ESTATE. — **1. Appointing Receivers or Marshals.** — If necessary to preserve the estate after the filing of the petition, the court will appoint receivers or marshals, upon application of the parties in interest, to take charge of the property until the petition is dismissed or the trustee is qualified.[54] The authority to

The right of a creditor to move to expunge a claim is no higher than that of the bankrupt. *In re* Arnold, 133 Fed. 789, 13 Am. B. R. 320.

52. Matter of Ferrer, 22 Am. B. R. 785; Matter of Lewensohn, 121 Fed. 538, 57 C. C. A. 600, 9 Am. B. R. 368; *In re* Baird, 112 Fed. 960, 7 Am. B. R. 448; Chatfield *v.* O'Dwyer, 101 Fed. 797, 42 C. C. A. 30, 4 Am. B. R. 313. Whether this can be done on petition of the bankrupt, see *In re* Levy, 7 Am. B. R. 56.

53. Matter of Lewensohn, 121 Fed. 538, 57 C. C. A. 600, 9 Am. B. R. 368.

This refers to "claims against the bankrupt that were in existence when the petition was filed and not to claims against the estate for expenses of administration." *In re* Reliance Storage Warehouse Co., 100 Fed. 619, 4 Am. B. R. 49.

54. Bankruptcy Act (1898), §2, (3); Matter of Oakland Lumb. Co., 174 Fed. 634, 98 C. C. A. 388, 23 Am. B. R. 181; Boonville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. B. R. 13; Horner-Gaylord & Co. *v.* Miller & Bennett, 147 Fed. 295, 17 Am. B. R. 257; *In re* Rosenthal, 144 Fed. 548, 16 Am. B. R. 448; *In re* Benedict, 140 Fed. 55, 15 Am. B. R. 232. See also Bardes *v.* Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. ed. 1175, 4 Am. B. R. 163.

"From the time of the filing of the petition in a case of voluntary bankruptcy, the bankrupt estate is *in custodia legis;* and, under the general powers and jurisdiction conferred upon a court of bankruptcy, which are to be exercised by the referee to whom a matter in bankruptcy is referred, I think there is power in the court, and it is the duty of the court on its own motion, in a proper case, to take actual possession and custody of the bankrupt estate through a receiver, or by a direction to the marshal." *In re* Abrahamson & Bretstein, 1 Am. B. R. 44.

"Coincident with the filing of a petition in bankruptcy, either voluntary or involuntary, a court of bankruptcy acquires control over the estate of a bankrupt or person charged with acts of bankruptcy. It may immediately seize and lay claim to all property either in the actual possession of the bankrupt or such as may be reduced to possession. Power is conferred on the court to appoint marshals or receivers to take charge of the property of bankrupts. . . . True, the receiver here is not vested with the title to the property of which he becomes custodian, nor does any provision of the Bankrupt Act vest him with powers similar to that of a trustee appointed by the creditors. The property, however, corporeal and incorporeal, either comes into his possession as an officer of the court, or such right to possession is obtained as will tend to retain intact the actual and visible assets of the bankrupt, to the end that, when an adjudication is made, the trustee may be vested not merely with the bankrupt's title to the property, but that he may have and receive the actual possession of all assets in the control of the bankrupt at the instant that the protection of the court was invoked." *In re* Kleinhans, 113 Fed. 107, 7 Am. B. R. 604.

No Appointment by Consent.—"The Bankruptcy Act makes no provision for the appointment of a receiver in bankruptcy by the consent of the alleged bankrupt. The appointment, by the terms of the act, is only authorized when it is absolutely necessary for the preservation of the estate." T. S. Faulk & Co. *v.* Steiner, 165 Fed.

so act is vested in the court by virtue of its general equity powers, independent of the express delegation of authority.[55]

The power to appoint may be exercised in either voluntary or involuntary proceedings,[56] notwithstanding the estate is being administered in the state court by reason of a general assignment.[57] And the power to appoint a receiver is unquestioned notwithstanding that thereafter there may be a dismissal because the party was not subject to adjudication as a bankrupt.[58]

Notice to the bankrupt prior to the appointment of a receiver is not expressly required by the act, and there may be cases of great urgency in which notice may be dispensed with properly in order to preserve the property from irreparable damage.[59] In such a case before the

861, 91 C. C. A. 547, 21 Am. B. R. 623.

A receiver should be appointed only when the preservation of the estate demand it. *In re* Desrochers, 25 Am. B. R. 703.

55. Davis *v.* Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. B. R. 412; *In re* Florcken, 107 Fed. 241, 5 Am. B. R. 802; Cox *v.* Wall, 99 Fed. 546, 3 Am. B. R. 664; *In re* Fixen, 96 Fed. 748, 2 Am. B. R. 822; *In re* John A. Etheridge Furniture Co., 92 Fed. 329, 1 Am. B. R. 112.

Authority Under Previous Acts.—The act of 1867 contained no provision for the appointment of receivers, but it was held that the court had this authority as being "within the general equity powers of a court of bankruptcy." Lansing *v.* Manton, 3 N. Y. Wkly. Dig. 112, 14 Fed. Cas. No. 8,077, 14 N. B. R. 127. See also Keenan *v.* Shannon, 10 Phila. 219, 31 Leg. Int. 85, 14 Fed. Cas. No. 7,640, 9 N. B. R. 441.

Action Not Reviewable by Mandamus.—The action of the court relative to the appointment of a receiver is not reviewable by mandamus proceedings. Edinburg Coal Co. *v.* Humphreys, 134 Fed. 839, 67 C. C. A. 435, 13 Am. B. R. 593.

56. Bryan *v.* Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. ed. 814, 5 Am. B. R. 623; T. S. Faulk & Co. *v.* Steiner, 165 Fed. 861, 91 C. C. A. 547, 21 Am. B. R. 623; *In re* Rosenthal, 144 Fed. 548, 16 Am. B. R. 448; *In re* Knopf, 144 Fed. 245, 16 Am. B. R. 432; *In re* Moody, 131 Fed. 525, 12 Am. B. R. 718; *In re* Florcken, 107 Fed. 241, 5 Am. B. R. 802.

57. Bryan *v.* Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 44 L. ed. 814, 5 Am. B. R. 623; *In re* John A. Etheridge Furn. Co., 92 Fed. 329, 1 Am. B. R. 112. See, however, Matter of Oakland Lumb. Co., 174 Fed. 634, 98 C. C. A. 388, 23 Am. B. R. 181, quoting from *In re* Spaulding (unreported), in which the court reversed an order appointing a receiver in bankruptcy where the assets were being preserved by a receiver appointed by a state court, and said: "What could the Federal receiver do under such circumstances? He has not title to any property. He is a mere custodian. He could not take the assets from the State court receiver. The bankruptcy court could not make any such order and the assets could only be taken from the State court receiver by an application in the State court itself."

58. *In re* T. E. Hill Co., 20 Am. B. R. 73.

Pending the adjudication the receiver is merely a custodian of the property of the bankrupt, the title thereto remaining in the bankrupt, though the court may take custody and control thereof. Whittlesey *v.* Becker, 23 Am. B. R. 672.

59. *See In re* Abrahamson & Bretstein, 1 Am. B. R. 44.

Except in rare cases a receiver ought never to be appointed without notice to the alleged bankrupt. Latimer *v.* McNeal, 142 Fed. 451, 73 C. C. A. 567, 16 Am. B. R. 43, *affirming* 136 Fed. 912, 14 Am. B. R. 676. And see T. S. Faulk & Co. *v.* Steiner, 165 Fed. 861, 91 C. C. A. 547, 21 Am. B. R. 623, that although "the Bankruptcy Act does not expressly provide that notice shall be given before the appointment shall be made, but it is a general rule that, from the institution of a suit until final judgment, every step that immediately

appointment is made the necessity therefor should plainly appear.[60]

Proceedings Cannot Be Attacked Collaterally. — Neither the official status of the receiver nor the regularity of the proceedings leading up to his appointment can be attacked collaterally.[61]

2. Bond of Receiver. — The order appointing a receiver must require the giving of a bond by the petitioners before the receiver takes possession.[62]

3. When Receiver Appointed by Referee. — After the receipt by the referee of the order of reference, he has authority to appoint the receiver.[63]

affects the rights of a defendant should be preceded by notice, and with few and well-defined exceptions, no court is justified in appointing a receiver and seizing the property of a defendant without giving him notice and an opportunity to be heard."

"No order appointing a receiver or otherwise disturbing the possession of property should be granted by any court without notice to the parties in possession and those otherwise interested; notice that would constitute due process of law, as required by the Constitution of the United States." Ross-Meeham Foundry Co. *v.* Southern Car & Foundry Co., 124 Fed. 403, 10 Am. B. R. 624.

In the case of T. S. Faulk & Co. *v.* Steiner, 165 Fed. 861, 91 C. C. A. 547, 21 Am. B. R. 623, it is said: "It has been doubted if a reference is ever justified in appointing a receiver without notice before adjudication. . . . It constantly occurs that applications are made for summary action by referees without any notice whatever to the parties who are in possession of the property sought to be seized. . . . The courts should stand firmly against this tendency, and not hesitate to vacate any order of a referee that is violative of this vital principle."

60. *In re* Oakland Lumb Co., 174 Fed. 634, 98 C. C. A. 388, 23 Am. B. R. 181. See also Bryan *v.* Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. ed. 814, 5 Am. B. R. 623; Horner-Gaylord Co. *v.* Miller & Bennett, 147 Fed. 295, 17 Am. B. R. 257; *In re* Rosenthal, 144 Fed. 548, 16 Am. B. R. 448; *In re* Florcken, 107 Fed. 241, 5 Am. B. R. 802.

What Petition Should Show.—"The petition to appoint the receiver should allege that the appointment is absolutely necessary for the preservation of the estate, and the facts should be stated either in the sworn petition, or in accompanying affidavits showing the necessity. The record falls far short of this rule, both as to averment and proof. Neither the petition, the affidavit accompanying it, the order of appointment, nor other parts of the record show that the appointment was absolutely necessary for the preservation of the estate." T. S. Faulk & Co. *v.* Steiner, 165 Fed. 861, 91 C. C. A. 547, 21 Am. B. R. 623.

After Adjudication.—After adjudication of voluntary bankruptcy, an application by creditors, in which the bankrupt unites, to appoint a receiver or custodian to preserve the assets of the estate, otherwise wholly unprotected, will usually be granted, especially in the absence of any charge of fraud or collusion, and where the creditors and other persons interested make no objection whatever. *In re* Huddleston, 167 Fed. 428, 21 Am. B. R. 669.

Vacating Order.—When an order appointing a receiver is granted *ex parte*, and the petition upon which it was granted fails to show it was necessary, the court will vacate such order. Matter of Oakland Lumb. Co., 174 Fed. 634, 98 C. C. A. 388, 23 Am. B. R. 181, *citing In re* Spaulding (which is unreported).

61. Ross *v.* Stroh, 165 Fed. 628, 91 C. C. A. 616, 21 Am. B. R. 644.

62. Bankruptcy Act (1898), §3e; Matter of Haff, 135 Fed. 742, 68 C. C. A. 380, 13 Am. B. R. 354, where the order was vacated for failure to give a bond.

63. His authority dates from the time the order of reference is placed in his hands, not from the time of its signing or filing. *In re* Florcken, 107 Fed. 241, 5 Am. B. R. 802.

4. Duty and Authority of Receiver. — It is the duty of the receiver to conserve the assets and estate of the bankrupt, pursuing that course pointed out by the act which will best promote and further the interests of the creditors.[64] Such being his duty he has the power to institute an action at law or a suit in equity, whenever such action or suit is necessary.[65] The receiver's authority is confined to the jurisdiction of the court appointing him.[66]

There are contradictory decisions as to the right of the receiver to sue to recover property.[67]

5. Action Against Receiver. — The United States statutes referring to the right to sue a receiver[68] apply to receivers in bankruptcy;[69] as

64. *In re* Kleinhans, 113 Fed. 107.

Authority of Receiver Prior to Adjudication.—"Receivers, prior to adjudication, are in no condition to adjust claims, liquidated or unliquidated, and have no power. They may not compromise claims or admit or reject them. They cannot properly defend, or, if they do, cannot act intelligently, as their office is of short duration, and their province is to care for and protect or preserve the property, not defend suits. In short, the act contemplates that all claims against the bankrupt, which are provable—and this is a provable claim—shall be proved and presented to the referee or court with such proof and then be allowed or disallowed and liquidated, if unliquidated, as directed by the referee or the court." *In re* Heim Milk Product Co., 25 Am. B. R. 746.

65. *In re* Fixen & Co., 96 Fed. 748, 2 Am. B. R. 822.

Fraudulent Transfer.—It is well settled that receiver in bankruptcy have no legal right or capacity to maintain a suit to recover bankrupt's property fraudulently transferred. Frost *v.* Latham, 25 Am. B. R. 313.

66. *In re* Benedict, 140 Fed. 55, 15 Am. B. R. 232. See also Great Western Min. & Mfg. Co. *v.* Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. ed. 1163; Booth *v.* Clark, 17 How. (U. S.) 524, 15 L. ed. 164; *In re* Dunseath & Son Co., 168 Fed. 973, 22 Am. B. R. 75; *In re* Benedict, 140 Fed. 55, 15 Am. B. R. 232; *In re* National Mercantile Agency, 128 Fed. 639, 12 Am. B. R. 189.

67. Guarantee Title & Trust Co. *v.* Pearlman, 144 Fed. 550, 16 Am. B. R. 461 (holding that the authority to appoint is purely statutory, and that he is possessed only of such powers as are conferred by statute or such as are fairly to be deduced therefrom); Boonville Nat. Bank *v.* Blakey, 107 Fed. 891, 6 Am. B. R. 13 (holding it to be his duty to preserve the property, and that he may defend or assert his possession of the visible property of the bankrupt, but is vested with no authority to bring actions to recover property).

The curtailment of his authority is based on the theory that being the creature of statute his authority is not as extensive as that of a receiver appointed under the general equity powers of the court. Booneville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. B. R. 13. See also *In re* National Mercantile Agency, 12 Am. B. R. 189, in which it was contended that the receiver might sue if specially authorized by the court; but the question was not passed on, it appearing that no authority had been given him and this was considered controlling, the bill being dismissed for that reason.

68. Act of March 3, 1887, ch. 373, §3, 24 U. S. St. at L. 554; Act of August 13, 1888, ch. 866, §3, 25 U. S. St. at L. 436.

69. *In re* Kalb & Berger Mfg. Co., 165 Fed. 895, 91 C. C. A. 573, 21 Am. B. R. 393; Matter of Kanter & Cohen, 121 Fed. 984, 58 C. C. A. 260, 9 Am. B. R. 372; *In re* Arthur E. Smith, 121 Fed. 1014, 9 Am. B. R. 603; *In re* Kelly Dry Goods Co., 102 Fed. 747, 4 Am. B. R. 528; *In re* Gutman & Wenk, 8 Am. B. R. 252.

The city court of New York has jurisdiction over an action against a receiver in bankruptcy for goods sold and delivered for use in carrying on the business of the bankrupt within the

to matters concerning conduct of business of the bankrupt estate.[70]

6. Continuing the Business. — The statute provides that the receiver, marshal or trustee may be authorized to conduct the business of the bankrupt for a limited period, if necessary for the best interest of the estate.[71]

D. Bringing in and Substituting Additional Parties. — The court may bring in and substitute additional persons or parties when necessary for a complete determination of the controversy.[72]

E. To Close or Reopen Estates. — The court may close estates whenever it appears that they have been fully administered by approv-

jurisdictional amount. Orr Co. *v.* Cushman, 18 Am. B. R. 535.

70. In *In re* Kalb & Berger Mfg. Co., 165 Fed. 895, 91 C. C. A. 573, 21 Am. B. R. 393, the receiver merely arranged for the storage of machinery which came into his hands as receiver; his act related to the care and preservation of the property, but had no relation to any business carried on by him. It was held that the court could by injunction restrain an action pending in a state court against him that was brought against him as receiver without leave.

Suit Against Receiver Personally. If the action be brought in a state court against the receiver personally, the United States court has no authority to enjoin the action. *In re* Roberts, 169 Fed. 1022, 94 C. C. A. 668, 22 Am. B. R. 908; *In re* Kalb & Berger Mfg. Co., 165 Fed. 895, 91 C. C. A. 573, 21 Am. B. R. 393.

71. Bankruptcy Act (1898), §2 (5); *In re* Clark Coal & Coke Co., 173 Fed. 658, 22 Am. B. R. 843; *In re* Erie Lumb. Co., 150 Fed. 817, 17 Am. B. R. 689; *In re* Dimm & Co., 146 Fed. 402, 17 Am. B. R. 119 (the selling of the property piece by piece in continuous daily auctions permissible); *In re* Bourlier Cornice & Roofing Co., 133 Fed. 958, 13 Am. B. R. 585.

By Whom Application Made.—Application of this character should generally be made by creditors, and the court should be very loath to permit the carrying into effect of an unexecuted contract upon the initiative of the trustee. *In re* Bourlier Cornice & Roofing Co., 133 Fed. 958, 13 Am. B. R. 585.

Order Cannot Be Attacked Collaterally.—The order permitting a receiver to continue the business of the bankrupt cannot be collaterally attacked. Matter of Isaacson, 174 Fed. 406, 98 C. C. A. 614, 23 Am. B. R. 98.

Authority To Raise Funds.—Under the authority conferred on the court to operate the business of the bankrupt through receivers, it is "equally competent for the court to raise on the credit of the values in hand the funds immediately necessary for its operation." This is not only so in case of railway or quasi-public corporations, but applies as well to private corporations under the provisions of the bankruptcy act. And receivers' certificates issued under such authority are valid. *In re* Restein, 162 Fed. 986, 20 Am. B. R. 832; *In re* Erie Lumb. Co., 150 Fed. 817, 17 Am. B. R. 689.

A receiver who is authorized to conduct a business has the implied power to purchase on credit, and even to borrow money, should it be customary and necessary for the successful carrying on of the business. Such a power will be implied only in the absence of an express power to borrow conferred by the court. *In re* C. M. Burkhalter & Co., 25 Am. B. R. 378.

But merchants and others doing business with the receiver are presumed to have notice as to the extent of the receiver's authority, and when they deal with the receiver in excess of his authority they do so at their own peril. *In re* Erie Lumb. Co., 150 Fed. 817, 17 Am. B. R. 689. See also *In re* C. M. Burkhalter Co., 25 Am. B. R. 44.

72. Bankruptcy Act (1898), §2, (6); Bryan *v.* Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. ed. 814, 5 Am. B. R. 623; Sinsheimer *v.* Simonson, 107 Fed. 898, 47 C. C. A. 51, 5 Am. B. R. 537; *In re* Hobbs & Co., 145 Fed. 211, 16 Am. B. R. 544 (may bring in persons who have filed mechanics' liens against the bankrupt, and to deter-

ing the final accounts and discharging the trustee;[73] and reopen them whenever it appears they were closed before being fully administered.[74] But if the application be delayed unreasonably the court will

mine the validity of the liens); *In re* Bandouine, 96 Fed. 536.

Consent of Proposed Party.—The decision in Bardes *v.* Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. ed. 1175, 4 Am. B. R. 163, holding that the consent of the proposed defendant was necessary when the party to be brought in claimed adversely, has been nullified by the amendment of 1903. Bankruptcy Act (1898), §23b.

Who Considered Parties.—"A bankruptcy proceeding is a proceeding *in rem*, and all persons interested in the *res* are regarded as parties to the bankruptcy proceedings. These include the bankrupt and the trustee, as well as creditors of the bankrupt, both secured and unsecured." Southern Loan & Trust Co. *v.* Benbow, 96 Fed. 514, 3 Am. B. R. 9. See also Carter *v.* Hobbs, 92 Fed. 594, 1 Am. B. R. 215. For definition of parties, see II., B, 2.

73. Bankruptcy Act (1898), §2, (8); *In re* Newton, 107 Fed. 429, 46 C. C. A. 399, 6 Am. B. R. 52.

"The Bankrupt Act contemplates that proceedings in bankruptcy shall go forward with all reasonable dispatch conpatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizen." Boyd *v.* Glucklich, 116 Fed. 131, 53 C. C. A. 451, 8 Am. B. R. 393.

74. Bankruptcy Act (1898), §2, (8); *In re* Pierson, 174 Fed. 160, 23 Am. B. R. 58 (upon the ground of newly discovered assets, and leave may be granted to creditors to file claims within one year after the reopening); *In re* McKee, 165 Fed. 269, 21 Am. B. R. 306 (holding that the proceeding will be reopened upon an application made within one year after the discharge was granted and leave granted to amend the schedules, it appearing that at the time of the adjudication an action was pending against the bankrupts to which they had pleaded an unliquidated counterclaim, but by mistake neither the liability of the suit nor the possible asset was included in the schedules); *In re* Barton's Estate, 144 Fed. 540, 16 Am. B. R. 569 (the estate will be reopened in the interest of the creditors where a discharge was refused on the ground that the bankrupt had not accounted for a large sum of money); Matter of Fulton G. Paine, 127 Fed. 246, 11 Am. B. R. 351 (the matter of reopening a case is given in one contingency only, namely, when it appears that the case was closed before being fully administered. No time is fixed within which this may be done. The matter being left to the sound discretion of the court); *In re* Newton, 107 Fed. 429, 46 C. C. A. 399, 6 Am. B. R. 52. See also Matter of Gilroy & Bloomfield, 140 Fed. 733, 14 Am. B. R. 627, in which the case was reopened and referred back to the referee for further examination.

Proceedings on Reopening.—"When such a showing is made to the court as justifies an order for reopening the estate, such order should be made by the court as a first step towards the further administration of the bankrupt's estate. After such order is made, section 44 of the act contains provisions for further proceedings. This section provides that 'the creditors of a bankrupt estate shall at their first meeting after the adjudication, or after the vacancy has occurred in the office of the trustee, or after the estate has been reopened, . . . appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee as herein provided the court shall do so.' This section, in our opinion, confers upon the creditors of the estate the same authority and power with respect to the appointment of a trustee, after an estate once closed has been, by order of court, reopened, as is conferred upon them at the first meeting held after the adjudication. It confers upon the creditors, as the parties chiefly interested, the right in either case to select their own trustee. When they fail to do so, either at the first meeting, or afterwards, in case of a reopening of the estate, and not till then, power is conferred upon the court to make such appointment." *In re* Newton, 107 Fed. 429, 46 C. C. A. 399, 6 Am. B. R. 52.

refuse to entertain such application upon the ground of laches.[75]

F. Composition Agreements. — **1. Generally.** — The court may confirm or reject compositions between debtors and their creditors and set aside compositions and reinstate the cases.[76] The composition

Petition for reopening need not be of any formal or technical character, but it "must be either in itself, or in connection with supporting affidavits, of such persuasive character as to reasonably satisfy the court of the requisite jurisdictional fact, namely, that there are some assets belonging to the bankrupt which have not been administered." *In re* Newton, 107 Fed. 429, 46 C. C. A. 399, 6 Am. B. R. 52.

A petition by a creditor for reopening need not show what property was surrendered by the bankrupt, and what representations were made in his schedules, nor that any creditor was deceived by the representations in the schedules. Traub *v.* Marshall Field & Co., 25 Am. B. R. 410.

That a bankrupt may oppose a petition to reopen the estate because closed before being fully administered is conceded in Traub *v.* Marshall Field & Co., *supra.*

Who May Petition.—The petition or application to reopen the estate must be made by some party interested in the estate who would be benefitted by the reopening. *In re* Meyer, 25 Am. B. R. 44.

Parties Affected.—The only parties who are benefitted by such action are the creditors who proved their claims and no others. Creditors who failed to prove their claims have no standing in court upon the reopening of the case. *In re* Shaffer, 104 Fed. 982,, 4 Am. B. R. 728. See also Matter of Paine, 127 Fed. 246, 11 Am. B. R. 351.

Right To Reopen During Pendency of Petition To Set Aside Composition The referee may independently of, and while an application to set aside a composition is pending, reopen the estate. Matter of Sonnabend, 18 Am. B. R. 117.

75. Vary *v.* Jackson, 164 Fed. 840, 90 C. C. A. 602, 21 Am. B. R. 334 (where there was a delay of seven years); *In re* Paine, 127 Fed. 248, 11 Am. B. R. 351 (holding that a fairly reasonable time should be allowed); *In re* Reese, 115 Fed. 993, 8 Am. B. R. 411.

Laches.—"The Bankruptcy Law provides no limitation of time within which closed estates may be reopened, and the doctrine of laches is applicable when an unreasonable delay has intervened." Traub *v.* Marshall Field & Co., 25 Am. B. R. 410.

The application will be denied where eighteen months after the discharge of the bankrupt he asks leave to reopen the proceedings with leave to amend his schedules so as to include a creditor not named therein and who had no notice or actual knowledge of the proceedings, so that the bankrupt could procure a discharge from this debt with the others. *In re* Spicer, 145 Fed. 431, 16 Am. B. R. 802.

76. Bankruptcy Act (1898), §2, (9). "Jurisdiction to confirm this so-called composition could not be conferred by the express consent of all the creditors. . . . The court has power to 'confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases.' This power is limited by section 12 (*In re* Rudwick, 2 Am. B. R. 114, 93 Fed. 787) and compositions recognized and specified in section 12 only may be confirmed by the court or judge. Other settlements and compromises and so-called compositions are not cognizable by the court or judge, except when they are brought in question in a proper manner or interfere with the due administration of the bankrupt estate according to law. In such cases the court or judge would be called upon to declare their illegality. The provisions of the law as to compositions are to be strictly construed. *In re* Rider, 3 Am. B. R. 178, 90 Fed. 808. The offer of composition must be presented to all the creditors of the bankrupt, whether or not they have proved their claims." *In re* Frear, 120 Fed. 978, 10 Am. B. R. 199.

When a debtor after examination has been adjudicated a bankrupt, the court will not approve a provision in a com-

may be offered either before or after the adjudication in bankruptcy.[77]

The provisions regarding compositions with creditors are to be strictly construed, and unless the procedure adopted substantially complies with the statute, the composition will not be approved, though no objection be made thereto by any creditor.[78]

2. Necessity for Examination of Bankrupt. — No composition agreement can be offered until after the debtor has been examined in open court or at a meeting of his creditors, and has filed his schedules of property and list of creditors.[79] The composition need not be first offered at a meeting of creditors; it may, however, be offered at such a meeting held after the examination of the bankrupt has been completed.[80]

3. When Offered Before Adjudication. — In compositions before adjudication, the bankrupt must file the necessary schedules. The court shall thereupon call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of the estate, at which meeting the judge or referee is to preside.[81]

4. Composition to be Presented to All Creditors. — The offer of composition must be presented to all the creditors of the bankrupt whether they have proved their claims or not.[82]

5. Confirmation of Composition. — a. *Acceptance of Offer.* — Before being offered for confirmation the composition must be offered to all the creditors of the bankrupt, and must be accepted in writing by

position agreement providing for a provisional order of adjudication. *In re* Linderman, 166 Fed. 593, 22 Am. B. R. 131.

77. Bankruptcy Act (1898), §12a.

The amendment providing for composition before adjudication was passed in 1910 and prescribes the procedure in such a case. This provision seems to nullify the effect of *In re* Back Bay Automobile Co., 158 Fed. 679, 19 Am. B. R. 835, *reversing* 19 Am. B. R. 33, holding that, as the bankrupt cannot be examined until the first meeting of creditors, and such meeting cannot be held until after adjudication, no composition agreement can be approved until after adjudication.

78. *In re* Frear, 120 Fed. 978, 10 Am. B. R. 199. See also *In re* Rider, 96 Fed. 808, 3 Am. B R. 178.

Compromise of Controversy.—"There is no inherent power in the court to compel minority creditors to give up legal property rights, and in their stead to accept securities and incur liabilities which have already been declined. If such power exists, it must be found in the Bankruptcy Act. No doubt a composition may be imposed upon a reluctant minority of the creditors, but the power to carry out such an arrangement has been expressly given. There is no such grant of authority in case a certain plan of reorganization should seem desirable to the majority of a bankrupt's creditors." *In re* Northampton Portland Cement Co., 25 Am. B. R. 565.

79. Bankruptcy Act (1898), §12a.

Construction of Term "Open Court." The term "open court" in this section means and includes the hearing before the referee. *In re* Bloodworth-Stembridge Co., 24 Am. B. R. 156.

80. *In re* Hilborn, 104 Fed. 866, 4 Am. B. R. 741, holding that a special meeting of creditors need not be called for that purpose.

81. Bankruptcy Act (1898), §12a.

Action upon the petition for adjudication shall be delayed until it be determined whether such composition shall be confirmed. Bankruptcy Act (1898), §12a.

82. *In re* Rider, 96 Fed. 808, 3 Am. B. R. 178.

Before voting upon the proposition, however, they must prove their claims. *In re* Rider, 96 Fed. 808, 3 Am. B. R. 178.

the required majority in number and amount of those whose claims have been allowed.[83]

b. *Notice of Motion To Confirm.* — At least ten days' notice of the hearing on the application for the confirmation of the composition must be given all creditors, unless they have waived such notice.[84]

c. *Appearances to be Entered.* — A creditor opposing the confirmation of a composition must enter his appearance in opposition thereto on the day when the creditors are required to show cause.[85]

d. *Filing Objections.* — Such objecting creditor must file a specification in writing of the grounds of his opposition within ten days from the return day, unless the time be enlarged by special order of the judge.[86]

e. *Consideration Must Be Deposited.* — The consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the costs of the proceedings, must have been deposited in such place as shall be designated by, and subject to the order of, the judge.[87]

f. *Hearing Before Judge.* — The judge must fix a date for the hearing, and the hearing must be had before him.[88]

g. *Confirmation Discretionary.* — The judge may reject the composition if he be convinced that it is not for the best interests of the creditors.[89]

83. Bankruptcy Act (1898), §12b; *In re* Rider, 96 Fed. 808, 3 Am. B. R. 178.

Creditors whose debts are secured by mortgage in process of foreclosure and who are not the owners of a provable debt are not necessary parties to a composition agreement. Matter of Kahn, 121 Fed. 412, 9 Am. B. R. 107.

The assignee of a number of creditors will be counted as one creditor. *In re* Messengill, 113 Fed. 366, 7 Am. B. R. 669.

Acceptance cannot be withdrawn in the absence of fraud or misrepresentation. *In re* Levy, 110 Fed. 744, 6 Am. B. R. 399.

84. Bankruptcy Act (1898), §55Sa, (2).

Notice Issued by Referee.—Bankruptcy Act (1898), §39a (4). See also *In re* Hilborn, 104 Fed. 866, 4 Am. B. R. 741.

85. General Order XXII, 172 U. S. 661, 43 L. ed. 1192, 89 Fed. x, 32 C. C. A. xxv.

86. General Order XXII, 172 U. S. 661, 43 L. ed. 1192, 89 Fed. x, 32 C. C. A. xxv.

87. Bankruptcy Act (1898), §12b

The amount to be deposited must be sufficient to cover the named percentage on all claims of creditors both those already filed and also those scheduled by the bankrupt and not filed. *In re* Fox, 6 Am. B. R. 525.

The bankrupt must make a sufficient deposit to cover the payment of the percentage accepted in composition settlement on all preferred claims and unsecured claims appearing on the schedule. *In re* Harvey, 144 Fed. 901, 16 Am. B. R. 345; *In re* Flynn, 13 Am. B. R. 720.

What Need Not Be Covered by Deposit.—Secured claims, not liquidated, are not to be considered, in the amount deposited. *In re* Harvey, 144 Fed. 901, 16 Am. B. R. 345. See also *In re* Fox, 6 Am. B. R. 525.

The referee is not included within the term "judge" in this action; the official referred to being the judge of the district court. *In re* Bloodworth-Stembridge Co., 24 Am. B. R. 156.

88. *In re* Bloodworth-Stembridge Co., 24 Am. B. R. 156; Matter of Sonanbend, 18 Am. B. R. 117.

89. *In re* Rider, 96 Fed. 808, 3 Am. B. R. 178.

The judge may order an independent investigation as to whether the composition offered will be for the best in-

h. *Effect of Order of Confirmation.* — The order confirming the composition is in effect a discharge of bankrupt and may be pleaded with like effect.[90]

6. Proceedings After Confirmation. — a. *Generally.* — Upon the confirmation of a composition, the consideration is to be distributed as the judge shall direct and the case dismissed.[91]

b. *Manner of Distribution.* — A creditor who fails to prove his claim within one year from the date of the adjudication will not share in the distribution.[92]

7. When Composition Not Confirmed. — Whenever a composition is not confirmed the estate shall be administered in the usual manner.[93]

8. Effect of Failure To Carry Out Composition. — The effect of failure to carry out a common law composition, or a "voluntary composition deed," strictly according to its terms depends upon the state rule.[94]

9. Proceedings To Set Aside Composition. — a. *Generally.* — After a composition has been confirmed it can be set aside only on the ground that such composition was procured through fraud,[95] and if application is made within six months after confirmation[96] by the parties in interest, and it must appear that the knowledge of the fraud

terests of the creditors. *In re* Levy, 172 Fed. 780, 22 Am. B. R. 769.

If it appears that the bankrupt has been guilty of any act which would bar a discharge, the court is without power to confirm a composition even if it be satisfied that it would be for the best interests of the creditors to do so. *In re* Comstock, 154 Fed. 747 19 Am. B. R. 65; *In re* Godwin, 122 Fed. 111, 10 Am. B. R. 252.

90. **U. S.**—Ross *v.* Saunders, 105 Fed. 915, 45 C. C. A. 123, 5 Am. B. R. 350. **Ga.**—Glover Grocery Co. *v.* Dorne, 116 Ga. 216, 42 S. C. 347, 8 Am. B. R. 702. **N. Y.**—Broadway Trust Co. *v.* Marheim, 47 Misc. 415, 95 N. Y. Supp. 93, 14 Am. B. R. 122; Mandell *v.* Levy, 47 Misc. 147, 93 N. Y. Supp. 545, 14 Am. B. R. 549.

91. Bankruptcy Act (1898), §12e.

92. *In re* Brown, 123 Fed. 336, 10 Am. B. R. 588.

The court has no authority to order that a creditor whose claim was omitted from the schedules be paid the same proportion of his debt as was paid to other creditors under the composition. Matter of Abrams & Rubins, 23 Am. B. R. 25.

93. Bankruptcy Act (1898), §12e.

94. In New York it revives the original debt. *In re* A. B. Carton & Co., 148 Fed. 63, 17 Am. B. R. 343.

95. Bankruptcy Act (1898), §13a, *In re* Rudwick, 93 Fed. 787, 2 Am. B. R. 114; Matter of Abrams & Rubins, 23 Am. B. R. 25.

The provisions of §15 that a judge may "'upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it, if upon a trial it shall be made to appear that it was obtained through the fraud of the bankrupt,'" do not apply when the discharge results by operation of law from the confirmation of the bankrupt's offer of composition. *In re* Jersey Island Packing Co., 152 Fed. 839, 18 Am. B. R. 417.

Leave To File Refused.—When the petition to set aside the composition upon its face shows that, upon the facts set forth, the petitioner cannot under any circumstances be entitled to relief, leave to file will be refused. *In re* Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. B. R. 193.

96. Bankruptcy Act (1898), §13a; *In re* Jersey Island Packing Co., 152 Fed. 839, 18 Am. B. R. 417; Matter of Eisenberg, 148 Fed. 325, 16 Am. B. R. 776.

came to the petitioner's knowledge after the confirmation of the composition.[97]

b. *Parties.* — All creditors who assented to the proposition should be made parties and be cited to answer.[98]

c. *Form of Petition.* — The petition must allege petitioner's interest and all facts necessary to show his right to the order.[99]

d. *Form of Verification.* — A verification in the usual form for a bill in equity is sufficient on a petition of this character.[1]

10. Appointment of Trustee If Composition Set Aside. — At the first meeting of creditors after a composition is set aside the creditors are to appoint one trustee or three trustees. If the creditors fail to do so, the court is to make the appointment.[2]

G. Authority Over Referee. — **1. In General.** — The court has authority to consider and confirm, modify or overrule, or return with instructions for further proceedings, records and findings certified to them by referees.[3]

2. May Change Referee. — The judge may at any time for the convenience of parties, or for cause, transfer a case from one referee to another.[4]

H. Discharge and Refusal to Discharge of Bankrupts. — **1. Generally.** — The court may discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases.[5]

97. Bankruptcy Act (1898), §13a. One who has assigned his claim, though such assignment was induced by fraud, is not so long as the assignment stands effective a "party in interest." *In re* Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. B. R. 193.

98. *In re* Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. B. R. 193.

Special Demurrer.—Failure to conform to this rule may be taken advantage of by special demurrer. *In re* Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. B. R. 193.

As to authority to amend the petition in this respect see Amendments XIV, M.

99. *In re* Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. B. R. 193; *In re* Roukous, 128 Fed. 645, 12 Am. B. R. 128.

Allegations.—That he did not know of the fraud before the confirmation of the composition, and that his knowledge came to him since the confirmation. It is also necessary to allege the filing of the petition within six months of the confirmation. It is not necessary to aver that the petitioner has restored or offered to restore the consideration received by him, nor is he required to tender the same into court. General allegations of fraud are not sufficient; the allegations must be of sufficient particularity as to apprise the bankrupt of the exact matters which will be offered in evidence. It is not necessary to allege how the petitioner learned the facts set forth in the petition. *In re* Roukous, 128 Fed. 645, 12 Am. B. R. 128.

1. *In re* Roukous, 128 Fed. 645, 12 Am. B. R. 128.

2. Bankruptcy Act (1898), §44a.

3. Bankruptcy Act (1898), §2, (10).

4. Bankruptcy Act (1898), §22 (b).

5. Bankruptcy Act (1898), §2, (12). If the court had no jurisdiction to adjudicate, it cannot grant a discharge. *In re* Clisdell, 2 Am. B. R. 424. This question may be raised for the first time on the application to grant a discharge. *In re* Clisdell, 2 Am. B. R. 424. See, however, *In re* Polakoff, 1 Am. B. R. 358, holding that it is too late to raise a question of jurisdiction on the application for a discharge where the creditors who make the objection participated in the proceedings without objection.

2. **Statute Governing Application.** — The statute as it was in force at the time of the filing of the petition governs the proceedings on the application for the discharge.[6]

3. **When Discharge May Be Applied For.** — a. *Generally.* — Any person may after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending.[7]

b. *Time May Be Extended.* — If it be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, leave may be filed within but not after the expiration of the next six months.[8]

Application After Lapse of Eighteen Months. — The court has no power to enter an order *nunc pro tunc* after the lapse of eighteen months of the adjudication, unless the delay has resulted from some act of its own,[9] nor can the court reopen the adjudication for the express purpose of enabling the bankrupt to apply for a discharge, he having failed to make the application within the time prescribed by the statute.[10]

A corporation being a person may be granted a discharge. *In re* Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. B. R. 468.

6. *In re* Chamberlain, 125 Fed. 629, 11 Am. B. R. 95; *In re* Dauchy, 122 Fed. 688, 10 Am. B. R. 527; Matter of Peterson, 10 Am. B. R. 355.

New grounds added by subsequent statute are not available in a case where the petition was filed previons to the act taking effect. *In re* Dauchy, 122 Fed. 688, 10 Am. B. R. 527. See also *In re* Quackenbush, 102 Fed. 282, 4 Am. B. R. 274; *In re* Webb, 98 Fed. 404, 3 Am. B. R. 386.

7. Bankruptcy Act (1898), §14a; *In re* Wolff, 100 Fed. 430, 4 Am. B. R. 74.

Computation of Time.—This means that except where the delay in making the application was unavoidable and additional time be granted, the court has no jurisdiction to entertain the application for discharge after the lapse of a year and a day from the date of the adjudication. *In re* Holmes, 165 Fed. 225, 21 Am. B. R. 339.

8. Bankruptcy Act (1898), §14a; *In re* Wolff, 100 Fed. 430, 4 Am. B. R. 74; *In re* Harris & Alger, 15 Am. B. R. 705.

Unless the petition be filed within eighteen months after the date of the adjudication the court is without jurisdiction to grant a discharge. *In re* Wagner, 139 Fed. 87, 15 Am. B. R. 100; *In re* Fahy, 116 Fed. 239, 8 Am. B. R. 354.

"The statute contemplates that when a petition for discharge is not filed within twelve months after the adjudication, the same may be thereafter filed within the next six months, but that such filing shall only be allowed upon an order of the judge, based upon saitsfactory evidence that the bankrupt was unavoidably prevented from filing the application within twelve months after the adjudication." *In re* Wolff, 100 Fed. 430, 4 Am. B. R. 74.

The granting of the application is discretionary. The discretion to be exercised is judicial and not discretion of an arbitrary nature, and where it is apparent that it could have been filed within the 12 months' period, but failed to do so for reasons wholly inadequate, the application will be denied. *In re* Lewin, 135 Fed. 252, 14 Am. B. R. 358.

A petition for a discharge filed after the expiration of a year from adjudication, and without leave to file within eighteen months will cause the discharge to be denied. *In re* Knauer, 133 Fed. 805, 13 Am. B. R. 503.

9. *In re* Wolff, 100 Fed. 430, 4 Am. B. R. 74.

10. *In re* Morse, 168 Fed. 157, 21 Am. B. R. 709.

c. *Referee Need Not Notify Parties of Expiration of Time.* — It is no part of the duty of the referee to notify parties when such time will expire.[11]

4. To Whom Application Made. — The application for the discharge must be made to the judge and the day for hearing is to be fixed by him and not by the referee.[12]

5. Notice of Application Must Be Given. — Notice of the application must be given to the creditors.[13]

6. Judge Must Hear Application. — The application for the discharge must be heard and decided by the judge.[14]

7. Reference To Hear and Report May Be Ordered. — The judge may send the application to the referee, as special master and direct that notice of the application be given creditors, and that he report the action of the creditors thereon and his recommendation on the application.[15] All proceedings and testimony by either party that is objected to with the rulings thereon, should be preserved and reported to the court.[16]

11. *In re* Knauer, 133 Fed. 805, 13 Am. B. R. 503.

12. *In re* McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. B. R. 110; *In re* Johnson, 158 Fed. 342, 19 Am. B. R. 814.

13. *In re* Johnson, 158 Fed. 342, 19 Am. B. R. 814. See, however, *In re* Fritz, 173 Fed. 560, 23 Am. B. R. 84, holding that the matter is *ex parte* and that no notice of the application need be given to creditors.

Such notice may be sent out by the clerk. *In re* Sykes, 106 Fed. 669, 6 Am. B. R. 264.

14. Gen. Order XII (3), 172 U. S. 657, 43 L. ed. 1196, 89 Fed. vii, 32 C. C. A. xvi; *In re* McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. B. R. 110; *In re* Ranchenplat, 9 Am. B. R. 763.

The Referee Has No Authority.— *In re* H. M. Taylor, 26 Am. B. R. 143; *In re* Elby, 157 Fed. 935, 19 Am. B. R. 734.

15. Fellows *v.* Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. B. R. 490; *In re* McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. B. R. 110; *In re* Glickman & Pisnoff, 164 Fed. 209, 21 Am. B. R. 171; *In re* Randall, 159 Fed. 298, 20 Am. B. R. 305; *In re* Holman, 92 Fed. 512, 1 Am. B. R. 600; *In re* H. M. Taylor, 26 Am. B. R. 143; *In re* Ranchenplat, 9 Am. B. R. 763. See *In re* Walder, 152 Fed. 489, 18 Am. B. R. 419, for the rules governing the duties of a special master. *Compare* *In re* Johnson, 158 Fed. 342, 19 Am. B. R. 814, holding that the referee had no authority to make the order requiring notice to creditors, nor can he pass upon the regularity of the proceedings or make a report regarding same.

In the Southern District of New York a rule has been adopted "by which the objecting creditors have been compelled to arrange for the hearings before the referee as special master, and therefore, inferentially, to see that an order of reference is entered." In the Eastern District of New York in the absence of the adoption of a uniform rule the rule adopted in the Southern District will be followed. *In re* Eldred, 152 Fed. 491, 18 Am. B. R. 243.

16. *In re* Isaacson, 174 Fed. 406, 98 C. C. A. 614, 23 Am. B. R. 665; First Nat. Bank of Philadelphia *v.* Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. B. R. 436; *In re* Kanaszak, 151 Fed. 503, 18 Am. B. R. 187.

The referee does not pass upon the specifications of objections nor their sufficiency. Matter of Breckman, 21 Am. B. R. 251. See also, Matter of Nathanson, 19 Am. B. R. 56. See Matter of Burstein, 20 Am. B. R. 399, in which the bankrupt's motion to dismiss objections was declined by the referee.

Exception.—Evidence that is plainly privileged, and evidence which clearly affirmatively appears to be so incompetent, irrelevant or immaterial that it would be an abuse of the process or

8. **Necessary Facts Must Appear.** — Sufficient facts must appear to require the granting of the application, regardless of whether or not objections to the application have been filed.[17]

9. **Right To Discharge If Bankrupt Insane Or Deceased.** — The right to a discharge is not affected by the insanity,[18] or death of the bankrupt.[19]

10. **Effect of Failure To Apply For Discharge.** — The failure to apply for a discharge within the prescribed time amounts in law to a conclusive determination as to the parties then before the court.[20]

11. **Second Application for Discharge.** — If an application for a discharge is denied after an investigation of the merits, the bankrupt is not permitted to file a second application.[21]

12. **Form of Petition For Discharge.** — The petition for a discharge shall state concisely, in accordance with the provisions of the

power of the court to compel its production or permit its introduction need not be so reported. First National Bank of Philadelphia *v.* Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. B. R. 436, *citing* Blease *v.* Garlington, 92 U. S. 1, 23 L. ed. 521; Dowagiac Mfg. Co. *v.* Lochren, 143 Fed. 211, 74 C. C. A. 341.

17. *In re* Glickman & Pisniff, 164 Fed. 209, 21 Am. B. R. 171.

Motion to vacate is the remedy if the application is granted on insufficient grounds. *In re* Haynes & Sons, 122 Fed. 560, 10 Am. B. R. 13.

18. *In re* Miller, 133 Fed. 1017, 13 Am. B. R. 345.

19. *In re* Miller, 133 Fed. 1017, 13 Am. B. R. 345.

20. *In re* Kuffler, 151 Fed. 12, 80 C. C. A. 508, 19 Am. B. R. 181; Kuntz *v.* Young, 131 Fed. 719, 65 C. C. A. 477, 12 Am. B. R. 505; *In re* Von Borries, 168 Fed. 718, 21 Am. B. R. 849; *In re* Bramlett, 161 Fed. 588, 20 Am. B. R. 402. This is on the principle of *res judicata* in view of the provisions of the act. *In re* Von Borries, *supra.*

In subsequent bankruptcy proceedings the bankrupt will be entitled to a discharge only as to such debts as were incurred subsequent to the commencement of the first proceeding. *In re* Von Borries, 168 Fed. 718, 21 Am. B. R. 849; *In re* Bramlett, 161 Fed. 588, 20 Am. B. R. 402.

A subsequent proceeding for the mere purpose of obtaining a discharge from debts scheduled or provable in the former proceeding cannot be maintained. *In re* Silverman, 157 Fed. 675, 85 C. C. A. 224, 19 Am. B. R. 460; *In re* Kuffler, 151 Fed. 12, 80 C. C. A. 508, 18 Am. B. R. 16; *In re* Stone, 172 Fed. 947, 23 Am. B. R. 24; *In re* Pullian, 171 Fed. 595, 22 Am. B. R. 513; *In re* Schnabel, 166 Fed. 383, 23 Am. B. R. 22; *In re* Elby, 19 Am. B. R. 734. See, however, Bluthenthal *v.* Jones, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. ed. 390, 19 Am. B. R. 288, *affirming* 51 Fla. 396, 41 So. 533, holding that when a discharge is refused on the objection of a creditor and on a subsequent proceeding the creditor intentionally absents himself he is bound by the discharge.

21. Matter of Feigenbaum, 121 Fed. 69, 57 C. C. A. 409, 9 Am. B. R. 595, *reversing* 7 Am. B. R. 339; *In re* Royal, 113 Fed. 140, 7 Am. B. R. 636. See, however, Bluthenthal *v.* Jones, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. ed. 390, 19 Am. B. R. 288, when the creditor objecting on the first application intentionally absents himself when the second application is made.

Where a bankruptcy proceeding was pending under the Act of 1867, in which an application for a discharge was still pending and undetermined, and the bankrupt was also adjudicated a bankrupt under the Act of 1898, and applied for a discharge, such discharge may be granted under the Act of 1898, notwithstanding the application for a discharge under the previous Act was still undetermined. *In re* Herrman, 102 Fed. 753, 4 Am. B. R. 139.

See, however, *In re* Claff, 111 Fed. 506, 7 Am. B. R. 128, in which, though a discharge was refused for fraudulent concealment of assets, a second appli-

act the orders of the court, the proceedings in the case and the acts of the bankrupt.[22]

13. Verification of Petition. — The petition must be signed and verified by the bankrupt.[23]

14. Filing Petition. — The petition should be filed with the clerk of the court.[24]

15. Hearing On Application. — a. *Entering Appearance.* — A creditor opposing the application for a discharge must enter his appearance in opposition thereto on the day when creditors are required to show cause.[25] The time to enter an appearance may, however, be extended by the judge, even after the time for filing objections has expired.[26]

The creditor may appear in person or by his attorney.[27]

cation was made and the discharge granted.

22. Gen. Orders XXXI, 172 U. S. 664, 43 L. ed. 1193, 89 Fed. xii, 32 C. C. A. xxxi.

If a discharge from partnership debts is sought, the petition for the discharge must contain an allegation showing such intent. *In re* Hale, 107 Fed. 432, 6 Am. B. R. 35; *In re* Russell, 97 Fed. 32, 3 Am. B. R. 91; *In re* Laughlin, 96 Fed. 589, 3 Am. B. R. 1; *In re* McFaun, 96 Fed. 592, 3 Am. B. R. 66. It must furthermore appear that the petition and the adjudication included copartnership property. *In re* Carmichael, 96 Fed. 594, 2 Am. B. R. 815; *In re* McFaun, 96 Fed. 592, 3 Am. B. R. 66; *In re* Laughlin, 96 Fed. 589, 3 Am. B. R. 1. If a member of a partnership asks also for a discharge from individual debts, that also must appear. *In re* Russell, 97 Fed. 32, 3 Am. B. R. 91.

23. *In re* Brown, 112 Fed. 49, 50 C. C. A. 118, 7 Am. B. R. 252; *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391.

Not by the attorney unless special permission has been given by the court, which should be stated. *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391.

The application for a discharge is a pleading setting up matters of fact and must be verified. *In re* H. M. Taylor, 26 Am. B. R. 143.

Verification is waived by failure to make a timely objection. Such objection cannot for the first time be made after the evidence on the application for discharge before the referee. *In re* H. M. Taylor, 26 Am. B. R. 143.

24. *In re* Sykes, 106 Fed. 669, 6 Am. B. R. 264.

In the Northern District of Alabama the application for discharge must be filed in the office of the clerk of the court in that district; the office of the referee is not the office of the court, and an application for a discharge filed in the office of the referee within the twelve months period without any action on the part of the court cannot be taken up thereafter as the court loses jurisdiction. *In re* H. M. Taylor, 26 Am. B. R. 143.

In the Southern District of New York the office of the referee is, by Rule 11, made the office of the court, and in that district petitions may be filed with the referee. *In re* Pineus, 147 Fed. 621, 17 Am. B. R. 331.

25. Gen. Orders XXXII, 172 U. S. 664, 43 L. ed. 1194, 89 Fed. xiii, 32 C. C. A. xxxi; *In re* Grant, 135 Fed. 889, 14 Am. B. R. 398; *In re* Ginsburg, 130 Fed. 627, 12 Am. B. R. 459.

Neglect to enter appearance will preclude the creditor from filing objections to the discharge, even though such objections be offered within the time prescribed. *In re* Ginsburg, 130 Fed. 627, 12 Am. B. R. 459.

26. *In re* Lewin, 176 Fed. 177, 99 C. C. A. 531, 23 Am. B. R. 845.

27. If the appearance be by an attorney at law admitted to practice in the United States District Court, he will be presumed to have authority to appear without any special written authority to do so. *In re* Gasser, 104 Fed. 537, 44 C. C. A. 20, 5 Am. B. R. 32.

b. *Filing Objections.* — (I.) Who May File. — Objections may be filed by the trustee[28] or by other parties in interest,[29] such right not being restricted to creditors who have proven their claims.[30]

(II.) Prosecuting Objections In Forma Pauperis. — In a proper case permission will be given to a creditor to prosecute his objection to the discharge in *forma pauperis*.[31]

(III.) Continuation of Prosecution by One Creditor of Objections Filed By Another. — A creditor may adopt and prosecute the objections of another, after the latter has declared his unwillingness to go on and his intention to abandon the litigation.[32]

(IV.) Signature To Objections. — The objection to the discharge must be signed by the objector.[33]

28. Bankruptcy Act (1898), §14b; *In re* Levey, 133 Fed. 572, 13 Am. B. R. 312; *In re* Sykes, 106 Fed. 669, 6 Am. B. R. 264.

29. Bankruptcy Act (1898), §14b; *In re* Servis, 140 Fed. 222, 15 Am. B. R. 271; *In re* Levey, 133 Fed. 572, 13 Am. B. R. 312.

The plaintiff in a pending action upon a promissory note on which the bankrupt is a joint maker, may file objections as an interested party, though he did not file proof of claim. *In re* Conroy, 134 Fed. 764, 14 Am. B. R. 249.

Objections by Partner After Dissolution.—After the dissolution of a copartnership, if objections be filed by one of the individual partners, it must affirmatively appear that he is acting in accordance with the wishes of the other joint owners of the claim, otherwise he is not such a party in interest as will permit him to file objections. *In re* Hendrick, 143 Fed. 647, 16 Am. B. R. 218.

30. Matter of Nathanson, 155 Fed. 645, 19 Am. B. R. 56; *In re* Frice, 96 Fed. 611, 2 Am. B. R. 674.

Party In Interest.—"This court is of the opinion that it was the purpose of Congress to enable any person having a personal pecuiary interest, or a representative pecuniary interest in preventing a discharge, to oppose the discharge of the bankrupt." *In re* Levey, 133 Fed. 572, 13 Am. B. R. 312.

The following cases illustrating by whom objections may be filed are cited with approval in *In re* Conroy, 134 Fed. 764, 14 Am. B. R. 249: *In re* Bimberg, 121 Fed. 942, 9 Am. B. R. 601 (although the claim is no longer provable); *Ex parte* Traphagen, 24 Fed. Cas. No. 14,140 (that one whose claim is contingent and unliquidated so as not to be capable of being proved, may file); *In re* Tebbetts, 23 Fed. Cas. No. 13,817 (where the claim was only an equitable one); *In re* Belden, 4 Ben. 225, 3 Fed. Cas. No. 1,238 (where the claim is being contested).

31. *In re* Guilbert, 154 Fed. 676, 18 Am. B. R. 830.

32. *In re* Guilbert, 154 Fed. 676, 18 Am. B. R. 830; *In re* Houghton, 2 Low. 328, 12 Fed. Cas. No. 6,730, 10 N. B. R. 337.

Leave of judge has been held necessary. *In re* Wetmore, 99 Fed. 703, 6 Am. B. R. 703 (the referee has no power to grant leave).

33. *In re* Milgraum & Ost, 129 Fed. 827, 12 Am. B. R. 306; *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391.

If more than one creditor join in the specifications, all must so sign it. *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391.

Signing by Attorney.—The rule forbidding the signing of objections by either attorney at law or in fact will be departed from only in exceptional cases. *In re* Milgraum & Ost, 129 Fed. 827, 12 Am. B. R. 306. See, however, *In re* Peck, 120 Fed. 972, 9 Am. B. R. 747 (in which it was permitted without special reasons appearing).

Partnership.—Where the opposing creditor is a partnership, the signature of the firm name by one of the partners authorized to sign the firm name thereto will be sufficient. *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391.

Corporation.—If the opposing creditor be a corporation the signature to the specifications should be accompanied by a statement that it is signed by a proper officer, and the seal of the corporation be affixed. "In witness

(V.) Verification. — (A.) NECESSITY THEREFOR. — Specifications or grounds in opposition to an application for a discharge are in the nature of a pleading and require verification.[34]

(B.) FORM IN GENERAL. — The verification must be made by the objecting party. Except under special circumstances verification by either an attorney at law or in fact will not be permitted.[35]

The form of verification for specifications in opposition to a discharge should be positive and certain, not vague and argumentative, and the verification should be by positive oath to the existence of the facts relied on as grounds for same.[36] The use of the form of verification attached to the official form of specification of objections in composition[37] has been approved when used on objections to discharge,[38] as is also the form of verification attached to the creditor's petition on involuntary bankruptcy.[39] If the verification is made by either the attorney at law or in fact of the objecting party, the special facts showing the reason for the departure from ordinary practice must be set out.[40]

whereof, I have hereunto subscribed my name as president (or other officer or agent) of said corporation, and applied the seal of the same this —— day of ——, A. D. ——.

(Signature of the officer.)"

(Seal of the corporation.)

In re Glass, 119 Fed. 509, 9 Am. B. R. 391.

34. *In re* Brown, 112 Fed. 49, 50 C. C. A. 118, 7 Am. B. R. 252; Matter of Glass, 119 Fed. 509, 9 Am. B. R. 391. See, however, *In re* Jamieson, 9 Am. B. R. 681, holding that a specification of objections need not be verified.

35. *In re* Randall, 159 Fed. 298, 20 Am. B. R. 305; *In re* Milgraum & Ost, 129 Fed. 827, 12 Am. B. R. 306; *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391 (in which it is intimated that a special order of court is necessary). See, however, *In re* Peck, 120 Fed. 972, 9 Am. B. R. 747, in which verification is made by the attorney without any reason therefor being shown.

36. *In re* Brown, 112 Fed. 49, 50 C. C. A. 118, 7 Am. B. R. 252; *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391.

A verification stating that "I am informed on reliable information, and have good reasons to believe, and do believe, that the allegations and statements contained in the foregoing opposition to discharge are true, has been held insufficient." *In re* Brown, 112 Fed. 49, 50 C. C. A. 118, 7 Am. B. R. 252.

37. "I, ——, the objecting creditor mentioned and described in the foregoing specification of objection, do hereby make solemn oath that the statements of fact contained therein are true, according to the best of my knowledge, information, and belief."

38. Matter of Milgraum & Ost, 129 Fed. 827, 12 Am. B. R. 306.

39. United States of America, } ss.
District of —————— }

——, the objecting creditor mentioned and described in the foregoing specification of errors, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by him are true.

Sworn to, etc."

Matter of Nathanson, 155 Fed. 645, 19 Am. B. R. 56; *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391.

40. *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391.

The following verification, however, was held sufficient:

"State of Connecticut, Hartford County, ss.:—Hartford, Dec. 20th, 1902.

"Personally appeared Benedict M. Holden, who made oath and says that he is the attorney for the creditors above named, and that the matters alleged above are true, to the best of his knowledge and belief, before me.

"Kate F. Wolfe, Notary Public.
(L. S.)"

(C.) JOINT VERIFICATION.— When a number of creditors have joined in the same objections they may join in the verification.[41]

(D.) PARTNERSHIP. — The verification may be made by the partner authorized to sign the objections, or if the facts be not known to him, it may be made by a partner having knowledge of the facts and not by the partner signing the pleading, the form of oath stating the fact as it may be.[42]

(E.) BY CORPORATION.— The oath of verification prescribed for other creditors is to be used in the case of corporations with the necessary changes in matters of detail.[43]

(VI.) Time for Filing. — Objections to the discharge must be filed within ten days from the day on which creditors are required to show cause.[44] It has been held, however, that the time for filing objections may be extended by the judge,[45] or may be permitted by *nunc pro tunc* order after the time for filing has expired.[46]

(VII.) When No Objections Are Filed. — When no objections are filed the court will presume that no reason exists why a discharge should not be granted.[47]

c. *Grounds of Objection.* — **(I.) Generally.** — The only grounds of objection available are those specified by the statute.[48]

In re Peck, 120 Fed. 972, 9 Am. B. R. 747.

41. *In re* Milgraum & Ost, 129 Fed. 827, 12 Am. B. R. 306; *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391.

42. *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391.

43. *In re* Glass, *supra.*

The following verification was held to be insufficient as being vague and argumentative, and the objections filed therewith were dismissed. "I, C. S. Battle, vice-president and general manager of the Carter-Battle Grocer Co., one of the petitioning creditors above named, and duly authorized to make this oath, do solemnly swear that I am informed on reliable information, and have good reason to believe, and do believe, that the allegations and statements contained in the foregoing opposition to discharge are true.

"C. S. Battle.

"Sworn to and subscribed before me this the 6th day of April, 1901.

"J. H. Finks, Clerk, (Seal.)

"By J. B. Finks, Deputy."

In re Brown, 112 Fed. 49, 50 C. C. A. 118, 7 Am. B. R. 252.

44. Gen. Order XXXII, 172 U. S. 664, 43 L. ed. 1193, 89 Fed. xiii, 32 C. C. A. xxxi.

The exceptions should be filed before the judge. Mahoney *v.* Ward, 100 Fed. 278, 3 Am. B. R. 770.

The time may be enlarged by special order of the judge. Gen. Order XXXII, 172 U. S. 664, 43 L. ed 1193, 89 Fed, xiii, 32 C. C. A. xxxi.

This general order should be strictly complied with and failure to do so will only be excused when excellent reasons therefor are shown to the court. *In re* Clothier, 108 Fed. 199, 6 Am. B. R. 203.

Objections filed subsequent to the time prescribed will be dismissed. *In re* Alberecht, 104 Fed. 974, 5 Am. B. R. 223.

45. *In re* Levin, 176 Fed. 177, 99 C. C. A. 531, 23 Am. B. R. 845.

46. *In re* Frice, 96 Fed. 611, 2 Am. B. R. 674.

47. *In re* Royal, 113 Fed. 140, 7 Am. B. R. 636.

48. *In re* Griffin Bros., 154 Fed. 537, 19 Am. B. R. 78; Matter of Wetmore, 99 Fed. 703, 6 Am. B. R. 703; *In re* Thomas, 92 Fed. 912, 1 Am. B. R. 515.

Acts Before the Law.—No act can be the subject of an objection to a discharge which was committed prior to the enactment of the bankruptcy law. *In re* Neely, 134 Fed. 667; *In re* Webb, 98 Fed. 404, 3 Am. B. R. 386; *In re* Shorer, 96 Fed. 90, 2 Am. B. R. 165;

(II.) Non-Residence of Bankrupt. — The objection that the bankrupt has not been a resident of the district the required time will not be entertained on the application for discharge.[49]

d. *Stating Grounds of Objection.* — **(I.) In General.** — The specifications of objection are in the nature of a pleading,[50] and at least one of the statutory grounds for refusing a discharge must be alleged.[51] The specification must be sufficiently definite and explicit so that the bankrupt may have notice of the exact charge made and what he is expected to meet.[52] Specifications must not be disjunctive or alter-

In re Lieber, 3 Am. B. R. 217; *In re* Moore, 1 Hask. 134, 17 Fed. Cas. No. 9,751; *In re* Hollenshade, 2 Bond. 210, 2 N. B. R. 651, 12 Fed. Cas. No. 6,610; *In re* Delavan, 7 Fed. Cas. No. 3,758.

(1) That the bankrupt has committed an offense punishable by imprisonment, which offenses are set forth in §29 of the Act; (2) that the bankrupt "with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained;" (3) that the bankrupt "obtained money or property on credit upon a materially false statement in writing, made by him to any person or representative for the purpose of obtaining credit from such person;" (4) that "subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors;" (5) that a discharge in voluntary proceedings has been granted the bankrupt within six years; (6) that "in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court." Bankruptcy Act (1898), §14b.

Effect of Previous Discharge.—The statute referring to granting discharges where there has been a previous discharge in bankruptcy, applies to both voluntary and involuntary proceedings. *In re* Neely, 134 Fed. 667.

49. *In re* Goodale, 109 Fed. 783, 6 Am. B. R. 493. As to objections to jurisdiction of court, see "Jurisdiction of Proceedings."

50. Matter of Wetmore, 99 Fed. 703, 6 Am. B. R. 703; *In re* Hirsch, 2 Am. B. R. 715.

There must be a distinct averment of facts bringing the case within the statute, and when the language of the statute does not of itself serve the purpose of giving notice to the offender of the particular acts charged against him as an offense, the use of the language of the statute is not sufficient. *In re* Parish, 122 Fed. 553, 10 Am. B. R. 548 (the facts must be stated with reasonable particularity); *In re* Quackenbush, 102 Fed. 282, 4 Am. B. R. 274; Matter of Wetmore, 99 Fed. 703, 6 Am. B. R. 703; *In re* McNamara, 2 Am. B. R. 566. See, however, Crooks *v.* People's National Bank, 46 App. Div. 335, 61 N. Y. Supp. 604, 3 Am. B. R. 238 (holding that an allegation in the language of the statute must be considered the allegation of a fact and not a conclusion.) *In re* Ginsburg, 130 Fed. 627, 12 Am. B. R. 459 (that charging on the language of the statute is sufficient when failure to keep books is charged).

51. *In re* Griffin Bros., 154 Fed. 537, 19 Am. B. R. 78; *In re* McGurn, 102 Fed. 743, 4 Am. B. R. 459; *In re* Thomas, 92 Fed. 912, 1 Am. B. R. 515.

52. Merchants' Laclede Nat. Bank *v.* Remmers, 173 Fed. 484, 97 C. C. A. 490, 23 Am. B. R. 78; *In re* Servis, 140 Fed. 222, 15 Am. B. R. 271; *In re* Levey, 133 Fed. 572, 13 Am. B. R. 312; *In re* Milgraum & Ost, 129 Fed. 827, 12 Am. B. R. 306; *In re* Steed, 107 Fed. 682, 6 Am. B. R. 73; Matter of Wetmore, 99 Fed. 703, 6 Am. B. R. 703; *In re* Holman, 92 Fed. 512, 1 Am. B. R. 600; *In re* Hirsch, 91 Fed. 371, 2 Am. B. R. 715. See also *In re* Peacock, 101 Fed. 560, 4 Am. B. R. 136.

"Substantially, the pleading must be as specific as a criminal information

native.[53] Nor can two grounds of objection be contained in one specification,[54] while the objections are not to be pleaded with the strictness of common law pleading.[55] Issuable facts must be stated[56] and the particular grounds relied on to defeat the discharge must be alleged.[57] General averments are not sufficient.[58]

(II.) Interest of Objector Must Appear. — It should also appear how the party objecting is interested.[59] Facts showing that the person objecting will be affected by the discharge should also be alleged.[60]

(III.) Necessity For Definiteness and Particularity. — (A.) WHEN COMMISSION OF CRIME ALLEGED — If the specifications charge or attempt to charge the commission of a crime, the facts must be stated with substantially the same exactness and particularity required in an indictment.[61]

(B.) "FRAUDULENTLY AND KNOWINGLY." — When knowledge and fraudulent intent are elements of the offense set forth in the objections, the specification must allege that they were done "knowingly and fraudulently."[62]

or indictment; the purpose being that the bankrupt shall have notice of that particular conduct of his which is challenged as an objection to his discharge. This is particularly so under the Act of 1898, because by the fourteenth section it is provided that most of the grounds of the opposition to the discharge shall be based upon some offense committed by the bankrupt which is made punishable with imprisonment by the act itself." *In re* Hirsch, 97 Fed. 571, 2 Am. B. R. 715.

53. *In re* Quackenbush, 102 Fed. 282, 4 Am. B. R. 274. See also *In re* Laskaris, 1 Am. B. R. 480.

54. Matter of Wetmore, 99 Fed. 703, 6 Am. B. R. 703, in which an allegation that the bankrupt made false oath was included in a specification alleging concealment of property.

55. *In re* Holman, 92 Fed. 512, 1 Am. B. R. 600.

56. *In re* Quackenbush, 102 Fed. 282, 4 Am. B. R. 274.

57. *In re* Servis, 140 Fed. 222, 15 Am. B. R. 271; *In re* Levey, 133 Fed. 572, 13 Am. B. R. 312; *In re* Milgraum & Ost, 129 Fed. 827, 12 Am. B. R. 306.

58. *In re* Steed, 107 Fed. 682, 6 Am. B. R. 73.

59. *In re* Servis, 140 Fed. 222, 15 Am. B. R. 271; *In re* Levey, 133 Fed. 572, 13 Am. B. R. 312.

But a creditor may merely state that fact. *In re* Levey, 133 Fed. 572, 13 Am. B. R. 312. See, however, *In re* Chandler, 138 Fed. 637, 71 C. C. A. 87, 14 Am. B. R. 512, holding mere statement to be insufficient, and that the statement should be that the objecting party had at the time a provable debt against the bankrupt which would be affected by the discharge.

An allegation either that "——— a party interested in the estate of said ——— bankrupt" or "——— being interested as a creditor in the estate of said ———, bankrupt," is sufficient. Matter of Nathanson, 155 Fed. 645, 19 Am. B. R. 56.

60. *In re* Servis, 140 Fed. 222, 15 Am. B. R. 271.

The court may itself notice the failure to allege this fact without exception. *In re* Servis, 140 Fed. 222, 15 Am. B. R. 271.

61. *In re* Levey, 133 Fed. 572, 13 Am. B. R. 312; Matter of Wetmore, 99 Fed. 703, 6 Am. B. R. 703.

62. *In re* Griffin Bros., 154 Fed. 537, 19 Am. B. R. 78; *In re* Talpin, 135 Fed. 861, 14 Am. B. R. 360; *In re* Levey, 133 Fed. 572, 13 Am. B. R. 312; *In re* Patterson, 121 Fed. 921, 10 Am. B. R. 371; *In re* Peck, 120 Fed. 972, 9 Am. B. R. 747; *In re* Blalock, 118 Fed. 69, 9 Am. B. R. 266; *In re* Mudd, 105 Fed. 348, 5 Am. B. R. 242; *In re* Quackenbush, 102 Fed. 282, 4 Am. B. R. 274; Matter of Wetmore, 99 Fed. 703, 6 Am. B. R. 703; *In re* Kaiser, 99 Fed. 689, 3 Am. B. R. 767.

As to amendments of specifications, objection setting up knowledge and fraudulent intent, see *supra*, XIV.

(C.) ALLEGING PERJURY. — Where perjury of the bankrupt before the referee is set up as a ground of objection, the testimony on which the charge is based should not be set out in the objections, but it should plainly appear upon what true statement of facts the charge of falsehood is based.[63]

(D.) CONCEALMENT AND FRAUDULENT TRANSFER. — When the ground of objection is the concealment or fraudulent transfer of property, the property should be described, and the names of the persons holding the title together with the time of the transfer and any other facts, necessary to identify the transaction should be stated in the specifications.[64]

(E.) ALLEGING FAILURE TO KEEP BOOKS. — It has been held that a specification in the language of the statute charging a failure to keep books was good, provided the intent was to show failure to keep any book whatever, or some necessary book, but that any minor transgression as to books must be particularized.[65]

(F.) ALLEGING FALSE STATEMENT TO PROCURE CREDIT. — Where it is alleged that the bankrupt obtained property on credit from a person upon a false statement in writing made for the purpose of obtaining such property on credit, not only must the false representations be set out, but the name or names of the persons so alleged to have been defrauded must be given.[66]

63. Matter of Nathanson, 155 Fed. 645, 19 Am. B. R. 56. *Compare* Matter of Goodale, 109 Fed. 783, 6 Am. B. R. 493, in which the court says "the testimony alleged to be false should be specially pointed out," but in the Matter of Nathanson, *supra*, in referring to this case, the court says the language here quoted "does not mean that the evidence must be set forth."

64. *In re* Parish, 122 Fed. 553, 10 Am. B. R. 548.

Alleging concealment of property from *the bankrupt's estate,* instead of *from his trustee* is insufficient, and will be overruled, though no trustee of the bankrupt was appointed. Bankruptcy Act (1898), §29b, (1); *In re* Adams, 171 Fed. 599, 22 Am. B. R. 613.

65. *In re* Quackenbush, 102 Fed. 282, 4 Am. B. R. 274. See also *In re* Brod, 166 Fed. 1011, 21 Am. B. R. 426; *In re* Ginsburg, 130 Fed. 627, 12 Am. B. R. 459; *In re* Patterson, 121 Fed. 921, 10 Am. B. R. 371.

A specification "that said bankrupts have with intent to conceal their financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained," has been held not sufficiently specific. *In re* Milgraum & Ost, 129 Fed. 827, 12 Am. B. R. 306. See also *In re* Hirsch, 99 Fed. 571, 2 Am. B. R. 715.

A specification that the bankrupt "wrongfully, fraudulently, wilfully and knowingly and with intent to conceal the true financial condition, and in contemplation of bankruptcy, has concealed his books of account or record from which his true financial condition might be ascertained," has been held sufficient. Matter of Nathanson, 155 Fed. 645, 19 Am. B. R. 56.

66. *In re* Levey, 133 Fed. 572, 13 Am. B. R. 312.

Tested by Demurrer.—The allegations must be specific and of such a character that their sufficiency may be met by demurrer or by exceptions analogous to those allowed in equity. *In re* Troeder, 150 Fed. 710, 80 C. C. A. 376, 17 Am. B. R. 723.

Allegation of Concealment of Property.—The following has been held sufficienty specific: "That said bankrupts have within a time subsequent to the first day of the four months immediately preceding the filing of the petition against them, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed or concealed, their property, with intent

(IV.) Objections By Trustees. — Specifications by a trustee should not only state that the trustee is a party in interest, but should allege how and why.[67]

(V.) Joint Specifications. — Several creditors may join in and sign the same specifications.[68]

e. *Who May Not Oppose.* — One whose claim against the bankrupt is not dischargeable, cannot be heard in opposition to the discharge.[69]

f. *When and How Sufficiency of Objection May Be Attacked.* **(I.) In General.** — While all technical objections to specifications filed in opposition to a discharge should be disposed of by the judge before the reference, objections both as to their form and sufficiency may be taken before the referee.[70]

In most instances defects in the form of specifications of objection will be disregarded unless exception is taken thereto; where they fail to allege any fact which would be ground for denying a discharge, they will be disregarded though not excepted to.[71]

(II.) When Defects Waived. — Objections to the sufficiency of the specifications of objection must be made before trial thereof, otherwise the defect will as a rule be waived.[72]

to hinder, delay and defraud their creditors; in this, that said bankrupts did, on or about December 1st, 1903, or about one week prior to the filing of the petition against them, and at other times, remove and conceal large quantities of their merchandise to the house of Leon Wiesen, No. 529 N. 6th Street, in the city of Philadelphia, with intent to hinder, delay and defraud their creditors; and in this, that said bankrupts did further, on the 19th day of November, 1903, and at other times, remove and conceal, or permit to be removed and concealed, large quantities of merchandise, consisting of toys, notions and pens, from their place of business at 303 Market Street, Philadelphia, with the intent to hinder, delay and defraud their creditors.'' *In re* Milgraum & Ost, 129 Fed. 827, 12 Am. B. R. 306.

67. *In re* Levey, 133 Fed. 572, 13 Am. B. R. 312.

68. *In re* Milgraum & Ost, 129 Fed. 827, 12 Am. B. R. 306.

69. *In re* Servis, 140 Fed. 222, 15 Am. B. R. 271; *In re* Maples, 105 Fed. 919, 5 Am. B. R. 426.

70. *In re* Quackenbush, 102 Fed. 282, 4 Am. B. R. 274; *In re* Kaiser, 99 Fed. 689, 3 Am. B. R. 767; *In re* McNamara, 2 Am. B. R. 566.

Answer to Specifications of Objection.—Defects in the specifications of objection may be taken advantage of by demurrer or by motion in the nature of a demurrer. *In re* Baldwin, 119 Fed. 796, 9 Am. B. R. 591.

71. *In re* McCarthy, 170 Fed. 859, 22 Am. B. R. 499.

If the allegations of the specifications are vague and general, or unauthorized by law, the bankrupt may move to have them stricken out, or he may rely upon his defense at the time of the hearing. *In re* Crist, 116 Fed. 1007, 9 Am. B. R. 1.

Insufficient Allegations.—If the allegations are insufficient in law, the bankrupt may file exceptions to them analogous to those allowed in equity, or he may demur, or he may leave it to the court to hear the application and such pleas and proofs as may be made in opposition by parties in interest. *In re* Crist, 116 Fed. 1007, 9 Am. B. R. 1.

72. *In re* Baldwin, 119 Fed. 796, 9 Am. B. R. 591.

The lack of verification or an improper verification are defects that must be so noticed. Godshalk *v.* Sterling, 129 Fed. 580, 64 C. C. A. 148, 12 Am. B. R. 302; *In re* Robinson, 123 Fed. 844, 10 Am. B. R. 477; *In re* Baernoff, 117 Fed. 975, 9 Am. B. R. 133; and the failure to allege that acts of the bankrupt were knowingly and fraudulently done with reference to the matter charged, must be so taken advantage of (*In re* Osborne, 115 Fed.

(III.) Failure To Allege Jurisdictional Fact Not Waived. — Failure to allege a jurisdictional requirement is not, however, waived.[73]

g. *Pleading in Reply to Objections.* — When the bankrupt presents his application in due form and specifications in opposition are filed by creditors, no further pleading on the part of the bankrupt is necessary. The allegations of the specifications are not to be taken as confessed for want of an answer by the bankrupt.[74]

h. *Appearance of Bankrupt at Hearing.* — If the creditors so request, the bankrupt must be required to appear on the hearing of objections, and should he fail to do so his application for a discharge will be dismissed.[75]

16. The Discharge. — a. *Generally.* — The discharge cannot be granted until the specifications of objection have been disposed of,[76] and whether it shall be granted or refused rests in the judicial discretion of the court.[77]

The order of discharge cannot be attacked collaterally.[78]

b. *Order Refusing Discharge.* — If an order refusing discharge be entered, it is *res adjudicata* and none of the parties thereto will be again permitted to try the question.[79]

c. *Dismissal for Failure To Prosecute.* — When the application for discharge is filed in due time, the failure to bring the same on promptly

1, 52 C. C. A. 595, 8 Am. B. R. 165).

73. *In re* Servis, 140 Fed. 222, 15 Am. B. R. 271.

74. *In re* Crist, 116 Fed. 1007, 9 Am. B. R. 1; *In re* Logan, 102 Fed. 876, 4 Am. B. R. 525.

75. *In re* Shanker, 138 Fed. 682, 15 Am. B. R. 109; *In re* Holman, 92 Fed. 512, 1 Am. B. R. 600.

76. *In re* Randall, 159 Fed. 298, 20 Am. B. R. 305.

Discharge of Corporation.—When a corporation has been adjudged a bankrupt it is entitled to a discharge, unless for some reason provided for by the bankruptcy act which would prevent a discharge. Bankruptcy Act (1898), §14; *In re* Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. B. R. 468, *reversing* 95 Fed. 419, 2 Am. B. R. 653.

77. Woods *v.* Little, 134 Fed. 229, 67 C. C. A. 157, 13 Am. B. R. 742. See, however, *In re* Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. B. R. 468, *reversing* 95 Fed. 419, 2 Am. B. R. 653, holding that unless one of the statutory prohibitions appear, the matter does not rest in discretion.

There is no constitutional right to a discharge, and regulations governing it do not make the act constitutional. Hanover Nat. Bank *v.* Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. ed. 1113, 8 Am. B. R. 1; *In re* Neely, 134 Fed. 667.

It is a mere privilege granted to the bankrupt under certain conditions which congress may alter from time to time, or even entirely deprive the debtor of. *In re* Neely, 134 Fed. 667.

78. *In re* Shaffer, 104 Fed. 982, 4 Am. B. R. 728.

79. Matter of Feigenbaum, 121 Fed. 69, 57 C. C. A. 409, 9 Am. B. R. 595, *reversing* 7 Am. B. R. 339. See, however, Bluthenthal *v.* Jones, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. ed. 390, 19 Am. B. R. 288, *affirming* 51 Fla. 396, 41 So. 533, that where, on the objection of a creditor, a discharge is refused, and in a subsequent proceeding the creditor intentionally absents himself, his debt is barred by the discharge.

Necessity of Pleading.—Such previous action to be availed of by the parties must, however, be pleaded or in some manner brought to the attention of the court. Bluthenthal *v.* Jones, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. ed. 390, 19 Am. B. R. 288, *affirming* 51 Fla. 396, 41 So. 533.

for hearing after the filing of objections is no ground for dismissing the application.[80]

17. Revocation of Discharge. — a. *Generally.* — The act makes provision for revoking a discharge.[81]

b. *Grounds.* — The grounds for revoking a discharge as well as the form of the proceedings and the time within which the application may be made are prescribed by the statute.[82]

c. *The Petition.* — **(I.) In General.** —Facts must be alleged showing the petitioner did not have knowledge of the acts complained of until after the granting of the discharge, also facts showing there was no undue laches.[83]

(II.) "Parties in Interest." —It should appear from the petition that petitioner had a provable debt against the bankrupt which was affected by the discharge.[84]

80. *In re* Wolff, 132 Fed. 396, 13 Am. B. R. 95.

But in Matter of Lederer, 125 Fed. 96, 10 Am. B. R. 492, it was said that on the failure to prosecute the proceedings with reasonable diligence the court may dismiss if a proper application is made. This, however, was not the crucial question in the case.

81. Upon the application of parties in interest, who have not been guilty of undue laches filed at any time within one year after a discharge shall have been granted, the judge may revoke it upon a trial, if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge and that the actual facts did not warrant the discharge. Bankruptcy Act (1898), §15a; *In re* Griffin Bros., 154 Fed. 537, 19 Am. B. R. 78; *In re* Oleson, 110 Fed. 796, 7 Am. B. R. 22; *In re* Meyers, 100 Fed. 775, 3 Am. B. R. 722.

This provision does not apply if the discharge results by operation of law from the confirmation of the bankrupt's offer of composition. *In re* Jersey Island Pkg. Co., 152 Fed. 839, 18 Am. B. R. 417.

Application must be made to the court which granted the discharge. *In re* Shaffer, 104 Fed. 982, 4 Am. B. R. 728.

82. The bankrupt can neither surrender the discharge or consent that it be revoked. *In re* Shaffer, 104 Fed. 982, 4 Am. B. R. 728.

83. *In re* Griffin Bros., 154 Fed. 537, 19 Am. B. R. 78; *In re* Oleson, 110 Fed. 796, 7 Am. B. R. 22.

Facts must also be alleged showing that the knowledge of the alleged facts came to the petitioner since the granting of the discharge. *In re* Oliver, 133 Fed. 832, 13 Am. B. R. 582, holding that it is not enough that these facts be alleged in an affidavit of the petitioner annexed thereto. As to right to amend petition in this regard, see *infra,* XIV.

General Averment of Conclusion Not Sufficient.—*In re* Oleson, 110 Fed. 796, 7 Am. B. R. 22, *citing* Wood *v.* Carpenter, 101 U. S. 135, 25 L. ed. 807.

An allegation that "the bankrupt's discharge was granted before the facts herein set out were known to the creditors or brought to the attention of the court, because they have been recently discovered," is too general. Vary *v.* Jackson, 164 Fed. 840, 90 C. C. A. 602, 21 Am. B. R. 334.

If facts are set forth in detail it is unnecessary to allege the conclusion "that the actual facts did not warrant the discharge." *In re* Toothaker Bros., 128 Fed. 187, 12 Am. B. R. 99.

84. *In re* Chandler, 138 Fed. 637, 71 C. C. A. 87, 14 Am. B. R. 512.

As to who are parties in interest, see *supra* II, B, 2.

As to whether the bankrupt may apply for a revocation of the discharge, see *In re* Hawk, 114 Fed. 916, 52 C. C. A. 536, 8 Am. B. R. 71, where an application on the part of the bankrupt was refused on other grounds, his right to apply not being discussed.

d. *Time of Making Application.* — If no petition is filed within one year, it is abosolutely barred.[85]

"Undue Laches." — The court may refuse to revoke a discharge on the ground of undue laches, though the application be made within a year after the same was granted.[86]

e. *The Hearing.* — The judge may order a hearing before the referee as special commissioner to ascertain and report the facts, upon notice to the bankrupt.[87]

I. AUTHORITY TO COMPEL OBEDIENCE TO ITS ORDERS. — **1. In General.** — Bankruptcy courts have the authority to punish for contempt,[88] and to enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment,[89] but it is not invested with broader or more enlarged jurisdiction to punish for contempt than is possessed by other United States courts.[90]

In Proceedings Before Referee. — The court may also punish persons for contempts committed before referees.[91]

2. Procedure To Be Followed. — In the absence of a statute prescribing a different procedure, the usual practice generally pursued in contempt proceedings will apply in bankruptcy.[92]

85. Matter of Bimberg, 121 Fed. 942, 9 Am. B. R. 601; *In re* Shaffer, 104 Fed. 982, 4 Am. B. R. 728.

The year begins to run from the date the discharge is granted. *In re* Shaffer, 104 Fed. 982, 4 Am. B. R. 728. See also Mall & Co. *v.* Ullrich, 37 Fed. 653; *In re* Brown, 4 Fed. Cas. No. 1,983, 19 N. B. R. 312. See, however, *In re* Hawk, 114 Fed. 916, 52 C. C. A. 536, 8 Am. B. R. 71, holding that the court is without jurisdiction to set aside a discharge and reinstate a case and permit an amendment of the schedules more than a year after the adjudication, without notice to the creditor.

86. Arrington *v.* Arrington, 132 Fed. 200, 13 Am. B. R. 89; *In re* Upson, 124 Fed. 980, 10 Am. B. R. 758; *In re* Oleson, 110 Fed. 796.

As to what is "undue laches," see *In re* Hawk, 114 Fed. 916, 52 C. C. A. 536, 8 Am. B. R. 71; *In re* Griffin Bros., 154 Fed. 537, 19 Am. B. R. 78; *In re* Upson, 124 Fed. 980, 10 Am. B. R. 758.

87. *In re* Meyers, 100 Fed. 775, 3 Am. B. R. 722.

88. *In re* Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933; Mueller *v.* Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. ed. 405, 7 Am. B. R. 224, *reversing* 5 Am. B. R. 176, and *affirming* 4 Am. B. R. 747; Matter of Lacov, 142 Fed. 960, 74 C. C. A. 130, 15 Am. B. R. 290; *In re* Taylor, 114 Fed. 607, 7 Am. B. R. 410; Ripon Knitting Wks. *v.* Schreiber, 101 Fed. 810, 4 Am. B. R. 299; Matter of Natelle De Gottardi, 7 Am. B. R. 723. See also *Ex parte* Robinson, 19 Wall. (U. S.) 505, 22 L. ed. 205, holding that the power to punish for contempt is inherent.

89. Bankruptcy Act (1898), §2, (13).

90. Boyd *v.* Glucklich, 116 Fed. 131, 53 C. C. A. 451, 8 Am. B. R. 393.

91. Bankruptcy Act (1898), §2, (16); Mueller *v.* Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. ed. 405, 7 Am. B. R. 224, *reversing* 5 Am. B. R. 176, and *affirming* 4 Am. B. R. 747.

Power Vests in the Court.—"The power to punish for contempt is vested in the court—judge. It is a judicial power and cannot be referred or delegated. Smith *v.* Belford, 106 Fed. 658, 5 Am. B. R. 291; Boyd *v.* Glucklich, 116 Fed. 131, 8 Am. B. R. 393". Bank of Ravenswood *v.* Johnson, 143 Fed. 463, 74 C. C. A. 597, 16 Am. B. R. 206.

92. Ripon Knitting Wks. *v.* Schreiber, 101 Fed. 810, 4 Am. B. R. 299. See the title "Contempt."

Trial by Jury.—Though a quasi-criminal proceeding the accused is not entitled to a jury trial. Ripon Knitting Wks. *v.* Schreiber, 101 Fed. 810, 4 Am. B. R. 299.

J. Extradition of Bankrupts. — The bankruptcy court has authority to extradite bankrupts from one district to another.[93]

K. General Powers. — 1. **Authority Conferred.** — To make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the act.[94]

2. Right To Grant Injunction. — a. *In General.* — Under this authority the bankruptcy court may enjoin the prosecution of a suit

Order of Contempt.—An order of commitment for contempt under the bankruptcy act is not invalid because it did not run in the name of the United States; nor can such objection for the first time be made on appeal. Mueller *v.* Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. ed. 405, 7 Am. B. R. 224, *reversing* 5 Am. B. R. 176, and *affirming* 4 Am. B. R. 747.

93. Bankruptcy Act (1898), §2, (14).

Procedure Governing.—A bankrupt may be extradited in the same manner in which persons under indictment are extradited from one district within which a district court has jurisdiction to another. Bankruptcy act (1898), §10.

Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a court has jurisdiction to another. Bankruptcy Act (1898), §10a.

The authority to extradite cannot by any fair implication be extended to enlarge the jurisdiction conferred by §9 (b) of the act of 1898, so as to confer jurisdiction upon the district court to issue its warrant as a basis for extradition proceedings to bring the bankrupt before the court for examination after he has left the district and settled in another district. *In re* M. C. Ketchum, 5 Am. B. R. 532, *distinguishing* on this question *In re* Lipke, 98 Fed. 970, 3 Am. B. R. 569. See also the title "**Extradition.**"

Practice in extradition proceedings is governed by U. S. Rev. St. 1014.

94. Bankruptcy Act (1898), §2, (15); *In re* Home Discount Co., 147 Fed. 538, 17 Am. B. R. 168; *In re* Hicks, 133 Fed. 739, 13 Am. B. R. 654.

The bankruptcy court is without jurisdiction to stay a sale of real estate under a judgment in the state court rendered long prior to the four months preceding the filing of the petition. Sample *v.* Beasley, 158 Fed. 606, 85 C. C. A. 429, 20 Am. B. R. 164, *citing* Pickens *v.* Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. ed. 128, 9 Am. B. R. 47; Metcalf *v.* Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. ed. 122, 9 Am. B. R. 36; White *v.* Thompson, 119 Fed. 868, 56 C. C. A. 398, 9 Am. B. R. 653. See also Matter of Mayer, Leslie & Baylis, 156 Fed. 432, 19 Am. B. R. 356; Tennessee Producer Marble Co. *v.* Grant, 14 Am. B. R. 288. *Compare,* however, *In re* Sterlingworth R. Supply Co., 164 Fed. 591, 21 Am. B. R. 341 (holding that a stay will not be granted unless it appear that the interests of the general creditors will be jeopardized by the sale); *In re* Baughman, 15 Am. B. R. 23; *In re* Vastbinder, 13 Am. B. R. 148, in which cases injunctions were granted.

Issuance of Writ of Ne Exeat.—Under this provision it seems the court would have authority to issue a writ of *ne exeat. In re* Lipke, 98 Fed. 970, 3 Am. B. R. 569. See also Matter of Berkowitz, 173 Fed. 1012, 22 Am. B. R. 231; Matter of Fleischer, 151 Fed. 82, 18 Am. B. R. 194; *In re* Cohen, 136 Fed. 999, 14 Am. B. R. 355. *Compare In re* Ketchum, 5 Am. B. R. 532, in which the court *distinguishes In re* Lipke, *supra.*

Discharge From Imprisonment for Debt.—Under this provision the court may, pending the adjudication, discharge the bankrupt from arrest under civil process in a state court, the debt upon which the process was issued being one dischargeable in bankruptcy. United States *v.* Peters, 166 Fed. 613, 22 Am. B. R. 177.

Powers of Referee.—As to whether such powers may be exercised by referees and to what extent, see *In re*

in a state court by which a creditor seeks to obtain a preference or advantage over the other creditors.[95]

b. *Who May Apply.* — The better practice is to have the petition made by the moving creditors, though it may be made by their attorney.[96]

c. *Filing Petition.* — When the application for an injunction is made to the referee, the petition must be filed with the clerk of the court.[97]

d. *Form of Petition.* — The petition for such an injunction should state the necessary jurisdictional facts.[98]

e. *Verification.* — A verification of the petition by the attorney representing the moving creditors is sufficient.[99]

L. OVER TRUSTEES. — **1. Appointment.** — To appoint trustees upon the recommendation of creditors, or if they fail or neglect to make a recommendation the court may appoint a trustee on its own motion.[1] Under this section the word "court" includes the referee

Berkowitz, 143 Fed. 598, 16 Am. B. R. 251; *In re* Steuer, 104 Fed. 976, 5 Am. B. R. 209.

95. *In re* Goldberg, 117 Fed. 692, 9 Am. B. R. 156.

Under this provision conferring general powers, "the court may, upon proper application and cause shown, restrain not only the debtor, but any other party, from making any transfer or disposition of any part of the debtor's property, or from any interference therewith." *In re* Jersey Island Pack. Co., 138 Fed. 625, 71 C. C. A. 75, 14 Am. B. R. 689.

96. *In re* Goldberg, 117 Fed. 692, 9 Am. B. R. 156.

97. *In re* Gerdes, 102 Fed. 318, 4 Am. B. R. 346.

98. While it is held to be the better practice to state "specifically that the petition in bankruptcy was filed 'with the clerk in said district' or 'with the clerk of the court in the Northern District of New York,'" the court sustained a petition where the moving papers were as follows: "In the District Court of the United States for the Northern District of New York. In Bankruptcy No. 1,141," and the petition for the injunction stated that the petition in bankruptcy was filed August 7, 1902, and a writ of subpoena issued therein. *In re* Goldberg, 117 Fed. 692, 9 Am. B. R. 156.

99. *In re* Goldberg, 117 Fed. 692, 9 Am. B. R. 156.

1. Bankruptcy Act (1898), §44; Matter of Cohen, 131 Fed. 391, 11 Am. B. R. 439; *In re* Lewensohn, 98 Fed. 576, 3 Am. B. R. 299.

The policy of the bankrupt act is to give to the creditors the free, unbiased and deliberate choice in the first instance. *In re* Smith, 2 Ben. 113, 22 Fed. Cas. No. 12, 971, 1 N. B. R. 37.

Subject to Approval.—The appointment of the trustee shall be subject to approval or disapproval by the referee or the judge. Gen. Order XIII, 172 U. S. 657, 43 L. ed. 1191, 89 Fed. vii, 32 C. C. A. xvii.

"It is evident that the Supreme Court intended by this order to establish a rule concerning the approval or disapproval of elections by creditors similar to that which existed under the act of 1867. The decisions under the present law on this point show that such has been the understanding of our federal courts." *In re* Eastlack, 145 Fed. 68, 16 Am. B. R. 529.

Approval Discretionary.—The referee or the judge is vested with discretionary power to either approve or disapprove the selection made by the creditors, notwithstanding a majority of the creditors, both as to numbers and amount, favor the appointment. *In re* Emil Henschel, 6 Am. B. R. 25. See also *In re* Hare, 119 Fed. 246, 9 Am. B. R. 520. *In re* Bekersdres, 108 Fed. 206, 5 Am. B. R. 811; Falter *v.* Reinhardt, 104 Fed. 292, 4 Am. B. R. 782, *affirmed*, 106 Fed. 57, 45 C. C. A. 218, 5 Am. B. R. 155; *In re* Lewensohn, 98 Fed. 576, 3 Am. B. R. 299.

When Selection Disapproved.—"It is to be remembered, in all such

and he has authority to appoint the trustee if the creditors fail to make a selection;[2] the action of the referee being subject to the approval of the judge.[3]

2. Power of Removal. — The court has the power to remove trustees for cause upon complaint of creditors, after notice and hearing.[4]

M. To Collect Estates and to Determine Controversies Relating Thereto. – Under the authority to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto,[5] except as is by statute otherwise pro-

cases, that the choice of a trustee is lodged by the law with the creditors constituting a majority in numbers and amount, and that their selection is not to be interefered with unless it clearly imperils the fair and efficient administration of the estate.'' *In re* Blue Ridge Packing Co., 125 Fed. 619, 11 Am. B. R. 36.

Construction of General Order XIII. Limitation of Power of Referee.—Where an appointment by creditors has been made it is the duty of the referee to make an order in writing approving or disapproving the appointment, but he has no authority to remove a trustee so appointed or to ignore such appointment and summarily appoint another. In case of his disapproval the creditors may proceed to appoint some other person or the matter may be reported to the judge, as ''he (the trustee) shall be removable by the judge only.'' The creditors are entitled to an opportunity to select a trustee even if the first selection be disapproved, because the power of the referee to appoint a trustee is only ''pursuant to the recommendation of the creditors or when they neglect to recommend.'' Bankruptcy Act, §2, subd. 17. There is no failure by the creditors to recommend where the referee disapproved an appointment already made by the creditors. *In re* Hare, 119 Fed. 246, 9 Am. B. R. 520.

2. When the creditors fail to make a selection the referee may appoint the person favored by a majority of the creditors. *In re* Richards, 103 Fed. 849, 4 Am. B. R. 631.

3. *In re* Eastlack, 145 Fed. 68, 16 Am. B. R. 529; *In re* Gordon Supply & Mfg. Co., 129 Fed. 622, 12 Am. B. R. 94; *In re* Hare, 119 Fed. 246, 9 Am. B. R. 520; *In re* Dayville Woolen Co., 114 Fed. 674, 8 Am. B. R. 85; Rekersdres Case, 108 Fed. 206, 5 Am. B. R. 811.

4. Bankruptcy Act (1898), §2 (17). **Removal of Trustee.**—The trustee is only removable by the judge. General Order XIII, 172 U. S. 657, 43 L. ed. 1191, 89 Fed. vii, 32 C. C. A. xvii.

5. Bankruptcy Act (1898), §2 (7); Bryan *v.* Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. ed. 814, 5 Am. B. R. 623; *In re* Weinreb, 146 Fed. 243, 76 C. C. A. 609, 16 Am. B. R. 702 (may order bankrupt to pay over money concealed from creditors); Brumly *v.* Jones, 141 Fed. 318, 72 C. C. A 466, 15 Am. B. R. 578; Matter of Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530, 14 Am. B. R. 70 (may order the property in the possession of a bailee or agent to be delivered into the custody of a receiver pending the appointment of a trustee); *In re* Beujamin, 136 Fed. 175, 69 C. C. A. 191, 14 Am. B. R. 481, *affirming* 13 Am. B. R. 18 (and has power to appoint a particular auctioneer to sell the estate); *In re* Antigo Screen Co., 123 Fed. 249, 59 C. C. A. 248, 10 Am. B. R. 359; *In re* MacDougall, 175 Fed. 400, 23 Am. B. R. 762; *In re* Fidler & Son, 163 Fed. 973, 21 Am. B. R. 101 (holding that the court might order the return of goods to the trustee, the removal of which had not been accounted for); *In re* Kane, 161 Fed. 633, 20 Am. B. R. 616; *In re* Alpin & Lake Cotton Co., 134 Fed. 477, 14 Am. B. R. 194 (may order third party to turn over to trustee property of the bankrupt); *In re* Leeds Woolen Mills, 129 Fed. 922, 12 Am. B. R. 136; *In re* Sievers, 91 Fed. 366, 1 Am. B. R. 117; Cleminshaw *v.* International Shirt Roller Co., 21 Am. B. R. 616.

The bankruptcy court within its territorial limits is under the act vested with such original jurisdiction as

vided,[6] the court may direct that the estate be sold subject to, or

will enable it to administer the bankrupt's estate and in addition to the jurisdiction generally and specifically conferred it has jurisdiction "to entertain and determine any suits, at the instance of the trustee or otherwise, necessary for collecting, reducing to money and distributing the estates of bankrupts, and for determining controversies in relation thereto," etc. *In re* Sievers, 91 Fed. 366, 1 Am. B. R. 117.

The court has no jurisdiction to determine the validity of an assignment of wages made prior to the bankruptcy. Such question must be determined by plenary suit. *In re* Driggs, 171 Fed. 897, 22 Am. B. R. 621.

"There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation." Babbitt *v.* Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. ed. 402, 23 Am. B. R. 519, 526.

6. Bankruptcy Act (1898), §2, (7).

This exception "refers to the provisions of section 23, by virtue of which, as adjudged at the last term of this court, the District Court can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy against third persons to recover property fraudulently conveyed by the bankrupt to them before the institution of proceedings in bankruptcy." Bryan *v.* Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. ed. 814, 5 Am. B. R. 623; Hicks *v.* Knost, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. ed. 1183, 4 Am. B. R. 178; Mitchell *v.* McClure, 178 U. S. 539, 20 Sup. Ct. 1000, 44 L. ed. 1182, 4 Am. B. R. 177; Bardes *v.* Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. ed. 1175, 4 Am. B. R. 163. See also Chauncey *v.* Dyke Bros., 119 Fed. 1, 55 C. C. A. 579, 9 Am. B. R. 444 (appearance without objection); *In re* Platteville Fdry. & Mach. Co., 147 Fed. 828, 17 Am. B. R. 291 (a chattel mortgagee consents to the jurisdiction to try the validity of his lien by petitioning for payment of the mortgage debt); Ryttenberg *v.* Schefer, 131 Fed. 313, 11 Am. B. R. 652; *In re* Durham, 114 Fed. 750, 8 Am. B. R. 115; *In re* Steuer, 104 Fed. 976, 5 Am. B. R. 209 (objection must be seasonably made).

"It now becomes necessary to consider . . . and to ascertain what controversies, if any, are therein referred to 'as otherwise provided for.' It seems to me that, when full and comprehensive jurisdiction is first clearly conferred upon a court to do certain acts for certain purposes, any of such acts so generally comprehended cannot be withdrawn from such jurisdiction, under the exception referred to, unless it comes clearly and necessarily within the terms of the exception, and that the exception ought not to be so construed as to absolutely nullify the rule. There are obviously certain actions which a trustee may be required to bring in order to fully collect the assets of a bankrupt, which cannot be instituted in the particular District Court having general charge of the proceedings, such as those in which the debtor to the bankrupt, or the adverse claimant to some right claimed by the trustee, resides without the territorial limits of the court. There are other suits which may, at the time of the adjudication of the bankruptcy, be pending in a State court, in which the trustee may be required to enter his appearance to prosecute or defend, under the provisions of section 11, subd. (b) and (c). So, also, differences between the trus-

tee and adverse claimants may be submitted to arbitration, in which case the award of the arbitrators determines the controversy—Sec. 26. Suits and controversies like these are clearly within the exception referred to, and afford scope for its application." *In re* Sievers, 91 Fed. 366, 1 Am. B. R. 117, 124.

This qualification has no bearing on actions against the estate or against the trustee as its representative. *In re* McCallum, 113 Fed. 393, 7 Am. B. R. 596.

"In the light of this decision, considering the scope of section 2, subds. 6, 7, of the bankrupt act, the jurisdiction here depends upon (1) whether the controversy is one having reference to property actually in the possession of the bankruptcy court or belonging to the bankrupt's estate; or (2) whether it arises in the bankruptcy proceedings, and the property in question, therefore, becomes subject to distribution to creditors; or (3) whether by the nature of the controversy power is conferred on the court to determine as to conflicting liens and apportion assets." *In re* Kellogg, 113 Fed. 120, 7 Am. B. R. 623, *affirmed*, 121 Fed. 333, 57 C. C. A. 574, 10 Am. B. R. 7. See IV, A, 8.

By consent of the parties a court of bankruptcy may acquire jurisdiction of a controversy between the trustee and an adverse claimant concerning the indebtedness of a third party and the right to adjudicate all the claims of the parties thereto and enforce their rights against each other by decree and execution; the court having acquired jurisdiction of the parties and the subject-matter to determine and enforce the rights of the parties against each other to the end that a multiplicity of suits may be avoided and litigation cease. *In re* Blake, 150 Fed. 279, 80 C. C. A. 167, 17 Am. B. R. 668.

Facts Not Amounting to Consent.—When objection to the jurisdiction is made prior to a hearing on the merits, a party cannot be deemed to have consented to the jurisdiction of the court although he participated in the hearing. Louisville Trust Co. *v.* Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. ed. 413, 7 Am. B. R. 421. To the same effect, First Nat. Bank of Chicago *v.* Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 50 L. ed. 1050, 14 Am. B. R. 102; *In re* Horgan, 158 Fed. 774, 86 C. C. A. 130, 19 Am. B. R. 857.

General Appearance After Denial of Motion.—When a motion to dismiss for want of jurisdiction has been overruled and a claimant then appears generally and takes part in a hearing on the merits, he cannot be said to have consented to the jurisdiction of the court. *In re* Hayden, 172 Fed. 623, 22 Am. B. R. 764.

Consent by Failure To Object.—When a party fails to object to the jurisdiction of the court and submits his claim and asks for action by the court as may be necessary for his protection, he sufficiently consents to the acquisition of jurisdiction. Bryan *v.* Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. ed. 814, 5 Am. B. R. 623. See also *In re* White, 24 Am. B. R. 197.

When Objection Too Late.—Too late to urge this objection to jurisdiction when the judge is asked to review referee's decision (*In re* Steuer, 104 Fed. 976, 5 Am. B. R. 209), or for the first time upon an appeal (Booneville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 615, 6 Am. B. R. 13), or upon an adverse decision being rendered (*In re* Emrick, 101 Fed. 231, 4 Am. B. R. 89), or upon an exception to an adverse report. *In re* Connolly, 100 Fed. 620, 3 Am. B. R. 842.

Controversy Between Trustees of Bankrupts' Estates.—As between two trustees in bankruptcy involving the ownership of property or of the fund arising from the sale of the property, the court has jurisdiction to determine the ownership of the fund and to which set of creditors the fund shall be distributed, without the necessity of the bankrupt or the trustee consenting to the jurisdiction. *In re* Rosenberg, 116 Fed. 402, 8 Am. B. R. 624.

Court Without Jurisdiction.—An action by a trustee to recover property which it is alleged belonged to the bankrupt and was deposited by him with a bank as collateral security, is not within the jurisdiction of the district court without the consent of the proposed defendant; subd. e of §70 only providing for avoiding transfers of property which the creditors might have avoided and for the recovery of

clear of, encumbrances;[7] that the property shall be surrendered to the trustee;[8] that an assessment shall be levied on stockholders for unpaid subscriptions;[9] to establish or liquidate a claim or demand or right of action for damages against a creditor who has filed a claim against the estate,[10] and generally to determine controversies in relation to the disposition of the property and the extent and character of liens thereon or rights therein.[11]

such property, or its value, from persons who are not *bona fide* holders for value. No such transfer is alleged and no attack is made upon the transfer which would have made it void as to creditors. Harris *v.* First Nat. Bank, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. ed. 528, 23 Am. B. R. 632.

When Consent Necessary. — "By this section, as amended, Congress, in my opinion, intended to, and did, confer jurisdiction without the consent of the proposed defendant in cases contemplated in the exception, namely, those for the recovery of preferential payments provided for by section 60b, and to set aside fraudulent conveyances provided for by section 67e, provided the payments or the conveyances were made within four months prior to the filing of the petition for adjudication. In all other cases I think the law is left as it was prior to the amendatory act. Section 70e, as amended, clearly enough confers jurisdiction upon this court over the subject-matter of fraudulent conveyances in violation of State statutes, irrespective of the time when made. But does it go further and confer jurisdiction over the persons of the defendants without their consent? . . . It is reasonable to conclude that it (Congress) expressly mentioned all of the exceptions it intended to make. The amendment of February 5, 1903, conferring jurisdiction upon courts of bankruptcy, in common with State courts, for the recovery contemplated by section 70e, must, in my opinion, be read in connection with section 23b, and, when so read, means that jurisdiction over the subject-matter of section 70e is conferred upon this court, but can be exercised only on the condition imposed by section 23b, of securing the consent of the proposed defendants." Gregory *v.* Atkinson, 127 Fed. 183, 11 Am. B. R. 495. And see, *In re* Rathman, 25 Am. B. R. 246.

7. *In re* Pittelkow, 92 Fed. 901, 1 Am. B. R. 472; *In re* Worland, 92 Fed. 893, 1 Am. B. R. 450; *In re* Kerski, 2 Am. B. R. 79.

8. Mason *v.* Wolkowich, 150 Fed. 699, 80 C. C. A. 435, 17 Am. B. R. 709; *In re* Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. B. R. 153; Ripon Knitting Wks. *v.* Schreiber, 101 Fed. 810, 4 Am. B. R. 299.

This applies "to the powers of the receiver or the marshal to take charge of property of bankrupts in the possession of third persons after the filing of the petition and until it is dismissed or the trustee is qualified." McNulty *v.* Feingold, 129 Fed. 1001, 12 Am. B. R. 338.

It is only in clear cases in which the proof is decisive that the court will by peremptory order require third parties to turn over property of the bankrupt to the trustee, and this will not be done when the original receipt of the property is denied and the proof is uncorroborated. Matter of Gilroy & Bloomfield, 140 Fed. 733, 14 Am. B. R. 627.

9. Matter of Miller Electrical Maintenance Co., 111 Fed. 515, 6 Am. B. R. 701.

10. "Claim may be used as an offset or counter claim to the claim of such alleged creditor." *In re* Harper, 175 Fed. 412, 23 Am. B. R. 918.

11. Whitney *v.* Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 50 L. ed. 1157, 14 Am. B. R. 45; Bryan *v.* Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. ed. 814, 5 Am. B. R. 623; White *v.* Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. ed. 1143, 4 Am. B. R. 178; Bardes *v.* Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 42 L. ed. 1175, 4 Am. B. R. 163; *In re* Santiago Screen & Door Co., 123 Fed. 249, 59 C. C. A. 248, 10 Am. B. R. 359; *In re* Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. B. R. 198; *In re* Kellogg, 121 Fed. 333, 10 Am. B. R. 67.

No Right To Sue in State Court. — In view of the above general authority, one claiming a fund in the hands of a trustee should present it to the referee, and will not be granted leave to sue the trustee in a state court.[12]

N. Over Actions by and Against Bankrupts. — **1. To Stay Proceedings.** — a. *When Granted.* — A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt such action may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then until the question of such discharge is determined.[13] If the claim on which the suit is based is not one from which the discharge would be a release, no stay will be granted.[14] This power exists in both voluntary and involuntary proceedings.[15]

b. *Application to Court in Which Action Is Pending.* — The application for the stay should be first made to the court, whether state or federal, in which the action is pending.[16] If the stay be refused by that court, such action is not final, and application for the stay may nevertheless be made to the bankruptcy court.[17] The application should be heard and decided by the judge,[18] who may refer the

12. **Determining Claim to Fund.**— The bankruptcy court has the authority to hear and determine a claim to a fund in the hands of the trustee under §2, cl. 7 of the bankruptcy act; such claim should be presented to the referee in bankruptcy, and leave to sue the trustee in a state court will in such case be refused. *In re* McCallum, 113 Fed. 393, 7 Am. B. R. 596.

13. Baukruptcy Act (1898), §11a; White *v.* Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. ed. 1143, 4 Am. B. R. 178; *In re* Mustin, 165 Fed. 506, 21 Am. B. R. 147; *In re* Wollock, 120 Fed. 516, 9 Am. B. R. 685; *In re* Gutman, 114 Fed. 1009, 8 Am. B. R. 252; *In re* Kleinhaus, 113 Fed. 107, 7 Am. B. R. 604; *In re* Basch, 97 Fed. 761, 3 Am. B. R. 235.

Failure to comply with the order is punishable as for a contempt of court. *In re* Mustin, 165 Fed. 506, 21 Am. B. R. 147.

14. White *v.* Thompson, 119 Fed. 868, 56 C. C. A. 398, 9 Am. B. R. 653; Mackel *v.* Rochester, 135 Fed. 904, 14 Am. B. R. 429; *In re* Butts, 120 Fed. 966, 10 Am. B. R. 16; *In re* Cole, 106 Fed. 837, 5 Am. B. R. 780; *In re* Basch, 97 Fed. 761, 3 Am. B. R. 235; Matter of Floyd, 15 Am. B. R. 277.

The stay should not be granted unless it *clearly* appear that the claim on which the suit is pending is dischargeable. *In re* Sullivan, 2 Am. B. R. 30.

15. *In re* Geister, 97 Fed. 322, 3 Am. B. R. 228.

16. *In re* Siebert, 133 Fed. 781, 13 Am. B. R. 348; *In re* Geister, 97 Fed. 322, 3 Am. B. R. 228. See also Hill *v.* Hareling, 107 U. S. 631, 2 Sup. Ct. 404, 27 L. ed. 493.

17. New River Coal Land Co. *v.* Ruffner, 165 Fed. 881, 91 C. C. A. 559, 21 Am. B. R. 474.

18. Gen. Order XII, 172 U. S. 657, 43 L. ed. 1196, 89 Fed. vii, 32 C. C. A. xvi; *In re* Siebert, 133 Fed. 781, 13 Am. B. R. 348. See also *In re* Berkowitz, 143 Fed. 598, 16 Am. B. R. 251; *In re* Benjamin, 140 Fed. 320, 15 Am. B. R. 351; *In re* Steuer, 5 Am. B. R. 214.

Granting is discretionary, and the exercise of the power will not be interfered with by the appellate court except in case of clear abuse. New River Coal Land Co. *v.* Ruffner, 165 Fed. 881, 91 C. C. A. 559, 21 Am. B. R. 474; *In re* Lesser, 100 Fed. 433, 3 Am. B. R. 758.

application or any specified issue arising thereon to the referee to ascertain and report the facts.[19]

c. *Dissolving Stay.* — When the discharge has been granted, the stay should ordinarily be vacated as matter of course.[20]

d. *Who May Make Application.* — This application may be made by a creditor,[21] or by the bankrupt.[22]

2. Prosecution of Suits By Trustee. — A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.[23]

3. Trustee May Be Ordered To Defend. — The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.[24] An application to join him as a party defendant may be made by the plaintiff in the action,[25] and the court in which the action is pending may make such an order,[26] but he cannot be compelled to answer or make an active defense except by direction of the bankruptcy court, that tribunal having complete authority to determine the advisability of the trustees' making a defense.[27] Upon permission having been granted he may interpose any defense that

19. Gen. Order XII, 172 U. S. 657, 43 L. ed. 1196, 89 Fed. vii, 32 C. C. A. xvi.

20. *In re* Flanders, 121 Fed. 936, 10 Am. B. R. 379; *In re* Rosenthal, 108 Fed. 368, 5 Am. B. R. 799.

"Such a stay is merely a temporary one for the purpose of enabling the bankrupt to plead his discharge when obtained. When the discharge is granted the stay should ordinarily be vacated as matter of course on application of the creditor, in order that the validity of the discharge as against the creditor's debt, may be duly tested, in case the creditor should wish to litigate its application to his debt." *In re* Rosenthal, 108 Fed. 368, 5 Am. B. R. 799.

21. Mackel *v.* Rochester, 135 Fed. 904, 14 Am. B. R. 429; *In re* Siebert, 133 Fed. 781, 13 Am. B. R. 348; *In re* Rosenthal, 108 Fed. 368, 5 Am. B. R. 799.

22. *In re* Geister, 97 Fed. 322, 3 Am. B. R. 228.

As to whether such application may be made by the trustee, see New River Coal Land Co. *v.* Ruffner Bros., 165 Fed. 881, 91 C. C. A. 559, 21 Am. B. R. 474.

23. Bankruptcy Act (1898), §11c. And see *In re* Porter, 109 Fed. 111, 6 Am. B. R. 259.

This refers only to actions that are part of the bankrupt's estate or in which his estate has an interest. *In re* Haensell, 91 Fed. 355, 1 Am. B. R. 286.

The application for substitution should be made to the state court (*In re* Price, 92 Fed. 987, 1 Am. B. R. 606; Bank of Commerce *v.* Elliott, 6 Am. B. R. 409); but there should be no substitution unless the consent of the bankruptcy court be first obtained and affirmatively shown (Bear *v.* Chase, 99 Fed. 920, 40 C. C. A. 182, 3 Am. B. R. 746; Hahlo *v.* Cole, 112 App. Div. 636, 98 N. Y. Supp. 1049, 15 Am. B. R. 591. See also Bank of Commerce *v.* Elliott, 6 Am. B. R. 409).

The trustee should intervene in pending litigation only after he has obtained the approval of the court. Kessler *v.* Herklotz, 132 App. Div. 278, 117 N. Y. Supp. 45, 22 Am. B. R. 257; Hahlo *v.* Cole, 112 App. Div. 636, 98 N. Y. Supp. 1049, 15 Am. B. R. 591.

24. Bankruptcy Act (1898), §11b; *In re* San Gabriel Sanatorium Co., 111 Fed. 892, 50 C. C. A. 56, 7 Am. B. R. 206.

25. *In re* San Gabriel Sanitorium Co., 111 Fed. 892, 50 C. C. A. 56, 7 Am. B. R. 206; Victor Talking Machine Co. *v.* Hawthorne, 173 Fed. 617, 23 Am. B. R. 234.

26. Victor Talking Machine Co. *v.* Hawthorne, *supra.*

27. Victor Talking Machine Co. *v.* Hawthorne, *supra.*

would have been available to the bankrupt, or even an affirmative defense that would have been available to a creditor.[28]

4. Statute of Limitations as to Suits By or Against Trustee. — No suit shall be brought by or against a trustee of a bankrupt estate, subsequent to two years after the estate has been closed.[29]

IV. GENERAL POWERS AND AUTHORITY OF COURTS AND REFEREES. — A. DISTRICT COURT. — **1. Generally.** — The present National Bankruptcy Act confers jurisdiction in bankruptcy on the district courts in the states and territories, and corresponding courts in the District of Columbia and Alaska, within their respective territorial limits.[30] Within such territorial limits the court has summary jurisdiction to take possession by its officers of the property of the bankrupt situate therein.[31]

28. **U. S.**—Knox *v.* Exchange Bank, 12 Wall. 379, 20 L. ed. 414. **Ga.**—Loudon *v* Blandford, 56 Ga. 150. **N. Y.**—Sanford *v.* Sanford, 58 N. Y. 67.

29. Bankruptcy Act (1898), §11a.

The word "closed" in this provision means properly and finally closed. If the estate be reopened for further administration, the time is to be calculated from the subsequent closing of the estate. Bilafsky *v.* Abraham, 183 Mass. 401, 67 N. E. 318.

Action barred by state statute is not revived. Sheldon *v.* Parker, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015, 11 Am. B. R. 152.

An application to reopen a bankruptcy proceeding that has been closed is not a "suit," and so is not affected by this provision. Matter of Paine, 127 Fed. 246, 11 Am. B. R. 351.

30. Bankruptcy Act, §1; *In re* Owings, 140 Fed. 739, 15 Am. B. R. 472. And see Lathrop *v.* Drake, 91 U. S. 516, 23 L. ed. 414; *In re* Isaac Harris Co., 173 Fed. 735, 23 Am. B. R. 237; *In re* Steele, 161 Fed. 886, 20 Am. B. R. 446.

The question of jurisdiction may be raised at any stage of the proceeding and is not waived by the voluntary appearance and answer of the defendant. Jobbins *v.* Montague, 13 Fed. Cas. No. 7,330, 6 Am. B. R. 509.

Jurisdiction of Circuit Courts.—Such exclusive jurisdiction as was possessed by the circuit courts under §23 of the Bankruptcy Act seems to be conferred on the district courts by §291, sub. ch. 13, ch. 231 of March 3, 1911, when this act ("The Judicial Code") goes into effect.

The jurisdiction of the district courts under the act of 1867, as was stated in Lathrop *v.* Drake, 91 U. S. 516, 23 L. ed. 414, extended, first, over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets, and the discharge or refusal to discharge the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. Under the act of 1898 no such jurisdiction is conferred "on the District Courts as is mentioned by Justice Bradley in the second subdivision. On the contrary, section 23 of the act of 1898 vests jurisdiction over: 'All controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants,' in the Circuit Courts of the United States and the State courts. And subdivision b. of that section limits the jurisdiction of the Circuit Courts of the United States to such suits as the bankrupt might have brought or prosecuted in them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. Bardes *v.* Hawarden Bank, 178 U. S. 524, 4 Am. B. R. 163." *In re* R. H. Williams, 9 Am. B. R. 741.

31. Hull *v.* Burr, 153 Fed. 945, 83 C. C. A. 61, 18 Am. B. R. 541.

2. Bankruptcy Court Is a Separate Court. — While sitting in bankruptcy the court is in effect a separate court and exercising a distinct jurisdiction.[32]

3. Not Court of Inferior Jurisdiction. — The district court as a court of bankruptcy while a court of limited jurisdiction, is vested with exclusive jurisdiction of bankruptcy proceedings and controversies arising therein, and such other incidental matters specifically made subject to its jurisdiction by the bankruptcy act.[33] But while the court is one of limited jurisdiction, it is not a court of inferior jurisdiction,[34] as would require the recital of the jurisdictional facts.[35]

4. No Terms of Court. — The district court for all purposes of its bankruptcy jurisdiction is always open and has no separate terms.[36]

32. *In re* Norris, 18 Fed. Cas. No. 10,304.

33. Gilbertson *v.* United States, 168 Fed. 672, 94 C. C. A. 158, 22 Am. B. R. 32; Edelstein *v.* United States, 149 Fed. 636, 79 C. C. A. 328; Taft Co. *v.* Century Sav. Bank, 141 Fed. 369, 72 C. C. A. 671, 15 Am. B. R. 594; American Graphophone Co. *v.* Leeds & Catlin Co., 174 Fed. 158, 23 Am. B. R. 337; *In re* Billing, 143 Fed. 395, 17 Am. B. R. 80.

Effect of Judgment.—When judgments are rendered by the district court upon questions arising in bankruptcy proceedings, they possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction. Edelstein *v.* United States, 149 Fed. 636, 79 C. C. A. 328, 17 Am. B. R. 649.

"Bankruptcy courts can hardly be called courts of limited jurisdiction, inasmuch as they are vested exclusively with all jurisdiction in bankruptcy proceedings throughout the entire country." *In re* Marion Contract & Const. Co., 166 Fed. 618, 22 Am. B. R. 81.

Exclusive Jurisdiction.—The court in bankruptcy has exclusive jurisdiction to take and administer the assets of the bankrupt, pay his debts in so far as the assets will pay them and discharge him if he is entitled to a discharge from further payment. Carpenter Bros. *v.* O'Conner, 16 Ohio C. C. 526, 9 Ohio Cir. Dec. 201, 1 Am. B. R. 381. And see to the same effect *In re* Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933, 10 Am. B. R. 113; Mueller *v.* Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. ed. 405, 7 Am. B. R. 224, *reversing* 5 Am. B. R. 176; Bryan *v.* Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. ed. 814, 5 Am. B. R. 623; Brumley *v.* Jones, 141 Fed. 318, 72 C. C. A. 466, 15 Am. B. R. 578; *In re* Knight, 125 Fed. 35, 11 Am. B. R. 1; Matter of Lengert Wagon Co., 110 Fed. 927, 6 Am. B. R. 535; *In re* Schloerb, 97 Fed. 326, 3 Am. B. R. 224.

34. *In re* First Nat. Bank of Belle Fourche, 152 Fed. 64, 81 C. C. A. 260, 18 Am. B. R. 265; *In re* Billing, 145 Fed. 395, 17 Am. B. R. 80; *In re* Columbia Real Estate Co., 101 Fed. 965, 4 Am. B. R. 411; Hays *v.* Ford, 55 Ind. 52.

"Judgments rendered by that court upon questions arising in such proceedings, possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction." Edelstein *v.* United States, 149 Fed. 636, 79 C. C. A. 32, 17 Am. B. R. 649.

35. **U. S.**—McCormick *v.* Sullivant, 10 Wheat. 192, 6 L. ed. 300; *In re* First Nat. Bank of Belle Fourche, 152 Fed. 64, 81 C. C. A. 260, 18 Am. B. R. 265; *In re* Billing, 145 Fed. 395, 17 Am. B. R. 80; *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. B. R. 484; *In re* Columbia Real Estate Co., 101 Fed. 965, 4 Am. B. R. 411. See also Matter of New York Tunnel Co., 166 Fed. 284, 92 C. C. A. 202, 21 Am. B. R. 531. **Mich.**—Bryant *v.* Kinyon, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 871, 6 Am. B. R. 237. **N. Y.**—Chemung Canal Bank *v.* Judson, 8 N. Y. 254.

36. Sandusky *v.* First Nat. Bank, 23 Wall. (U. S.) 289, 23 L. ed. 155; *In re* Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. B. R. 692, *affirming* 111 Fed. 495, 6 Am. B. R. 653 (the circuit court of appeals states the rule in the text which is contrary to that stated by

5. Jurisdiction Acquired by Filing of Petition. — Jurisdiction of the proceeding attaches on the filing of the petition.[37] Such jurisdiction is not necessarily lost by delay in the proceedings, or failure to serve the subpoena.[38]

6. Proceedings Are in Their Nature Equitable. — Bankruptcy proceedings are equitable in character and are to be administered in accordance with the general principles and practice of equity.[39] The difference is that the court acts under specific statutory authority.[40]

7. Jurisdiction Over Particular Actions. — Suits by the trustee for the recovery of property under §60, subd. b, §67e, and §70, subd. e, may be brought in any bankruptcy court or state court which would

the district judge); Matter of Henschel, 114 Fed. 968, 8 Am. B. R. 201. See, however, *In re* Hawk, 114 Fed. 916, 52 C. C. A. 536, 8 Am. B. R. 71, in which the court declines to pass on the question whether or not the terms of the district court are terms of the bankruptcy court.

Matters arising in a bankruptcy proceeding may be heard in vacation or term time. *In re* Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. B. R. 692, *affirming* 111 Fed. 495, 6 Am. B. R. 653.

37. *In re* Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. B. R. 692, *affirming* 111 Fed. 495, 6 Am. B. R. 653; Matter of Weinger, Bergman & Co., 126 Fed. 875, 11 Am. B. R. 424; Green River Deposit Bank *v.* Craig, 110 Fed. 137, 6 Am. B. R. 381; *In re* Appel, 103 Fed. 931, 4 Am. B. R. 722; *In re* Lewis, 91 Fed. 632, 1 Am. B. R. 458. See also Mueller *v.* Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. ed. 405, 7 Am. B. R. 224; *In re* Hughes, 170 Fed. 809, 22 Am. B. R. 303. But *compare* York Mfg. Co. *v.* Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. ed. 782, 15 Am. B. R. 633 (in which the court limits certain language used in Mueller *v.* Nugent, *supra*, to the particular facts of that case); *In re* Wells, 114 Fed. 222, 8 Am. B. R. 75 (in which the court declines so to hold).

38. Gleason *v.* Smith, 145 Fed. 895, 76 C. C. A. 427, 16 Am. B. R. 602; *In re* Stein, 105 Fed. 749, 45 C. C. A. 29, 5 Am. B. R. 288; Matter of Frischberg, 8 Am. B. R. 607.

39. Bardes *v.* Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. ed. 1175, 4 Am. B. R. 163; Westall *v.* Avery, 171 Fed. 626, 96 C. C. A. 428, 22 Am. B. R. 673; First Nat. Bank of Philadelphia *v.* Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. B. R. 436; Mason *v.* Walkowich, 150 Fed. 699, 80 C. C. A. 435, 17 Am. B. R. 709; *In re* Waugh, 133 Fed. 281, 66 C. C. A. 659, 13 Am. B. R. 187; Lockman *v.* Lang, 132 Fed. 1, 65 C. C. A. 621, 11 Am. B. R. 597; *In re* Broadway Sav. Trust Co., 18 Am. B. R. 254; Elliott *v.* Toeppner, 9 Am. B. R. 50.

A Branch of Equity Jurisprudence. The administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by congress it becomes a branch of equity jurisprudence. Bardes *v.* Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. ed. 1175, 4 Am. B. R. 163; *In re* Rochford, 124 Fed. 182, 59 C. C. A. 388; Swarts *v.* Siegel, 117 Fed. 13, 54 C. C. A. 399.

"Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words 'at law,' in the opening sentence conferring on the courts of bankruptcy 'such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law and not in equity." Bardes *v.* Hawarden Bank, 178 U. S. 555, 20 Sup. Ct. 1000, 44 L. ed. 1175, 4 Am. B. R. 163.

40. Bardes *v.* Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. ed. 1175, 4 Am. B. R. 163; Hull *v.* Burr, 153 Fed. 945, 83 C. C. A. 61, 18 Am. B. R. 541; Brumley *v.* Jones, 141 Fed. 318, 72 C. C. A. 466, 15 Am. B. R. 578; Elliott *v.* Toeppner, 9 Am. B. R. 54; *In re* Morris, 17 Fed. Cas. No. 9,825; Jobbins *v.* Montague, 13 Fed. Cas. No. 7,330. See also Sonneborn *v.* Libbey, 12 Daly (N. Y.) 509.

have had jurisdiction if bankruptcy had not intervened.[41] District courts have jurisdiction concurrent with that of the state courts in actions to avoid preferences, such actions being analogous to a judgment creditor's suit to set aside a fraudulent conveyance.[42] They have no general jurisdiction in actions of a plenary nature,[43] but may by

In England the authority of the court of chancery in bankrupt cases is not by virtue of its chancery jurisdiction, but is derived entirely from the statutes and the inferences therefrom. *In re* Morris, 17 Fed. Cas. No. 9,825.

"The District Court does not possess the general power to entertain a suit in equity, and, unless the bankrupt act has conferred upon it jurisdiction to entertain a plenary suit in equity, such a suit cannot be maintained. * * * The jurisdiction of the District Court, as granted by the bankruptcy act, is unquestionably bankrupt jurisdiction, and not general jurisdiction to hear and determine controversies between adverse third parties, which are not strictly and properly a part of the bankruptcy proceedings." It has no authority to entertain a plenary action to set aside and annul the cancellation of a mortgage made by the bankrupt to himself as executor, brought by the beneficiaries under the will, the general creditors having no interest therein and the property not being in hands of the trustee. Brumley *v.* Jones, 141 Fed. 318, 72 C. C. A. 466, 15 Am. B. R. 578.

41. Bankruptcy Act (1898), §23b, as amended by act of June 25, 1910.

42. Off *v.* Hakes, 142 Fed. 364, 73 C. C. A. 464, 15 Am. B. R. 696; Parker *v.* Black, 143 Fed. 560, 16 Am. B. R. 202, *affirmed*, 18 Am. B. R. 15; Lawrence *v.* Lowrie, 133 Fed. 995, 13 Am. B. R. 297; Pond *v.* New York Exch. Bank, 124 Fed. 992, 10 Am. B. R. 343; Drew *v.* Meyers, 81 Neb. 750, 116 N. W. 781, 22 Am. B. R. 656.

A district court in which bankruptcy proceedings are pending has jurisdiction to re-examine, on the petition of the trustee in bankruptcy, a payment of money, although at the time of the institution of the proceedings for re-examination the party receiving such payment was a non-resident both of the state and district in which the court was located, and where the money was paid to and held by parties outside of the district in which the court sits. *In re* Wood, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. ed. 1046, 20 Am. B. R. 1.

Action To Recover Preference.—The action to recover a preference by a trustee is analogous to a judgment creditor's suit to set aside a fraudulent conveyance, and the jurisdiction thereof has always been in equity. Stucky *v.* Masonic Sav. Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. ed. 640; Rogers *v.* Palmer, 102 U. S. 263, 26 L. ed. 164; Grant *v.* National Bank, 97 U. S. 80, 24 L. ed. 971; Pond *v.* New York Nat. Exch. Bank, 124 Fed. 992. See also Bardes *v.* Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L ed. 1175; Wall *v.* Cox, 101 Fed. 403, 41 C. C. A. 408.

Bankruptcy Act (1898), §23b, as amended by act of June 25th, 1910, being §7 of ch. 412 of the 2nd session of the 61st congress, settled the disputed question as to jurisdiction in this class of cases. The jurisdiction had been asserted in a number of cases prior thereto. See *In re* Hutchinson, 158 Fed. 74, 85 C. C. A. 404, 19 Am. B. R. 313; Hurley *v.* Devlin, 149 Fed. 268, 17 Am. B. R. 793.

43. Bardes *v.* Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. ed. 1175, 4 Am. B. R. 163; *In re* Hutchinson & Wilmoth, 158 Fed. 74, 85 C. C. A. 404, 19 Am. B. R. 313 (except by defendant's consent); Brumly *v.* Jones, 141 Fed. 318, 72 C. C. A. 466, 15 Am. B. R. 578; Havens & Geddes Co. *v.* Pierek, 120 Fed. 244, 57 C. C. 37, 9 Am. B. R. 569; Real Estate Trust Co. *v.* Thompson, 112 Fed. 945, 7 Am. B. R. 520. See, however, *In re* Dempster, 22 Am. B. R. 751, holding that the court in which the petition is filed has plenary jurisdiction throughout the United States and takes no account of districts or states.

Plenary Actions.—Plenary causes are those in which the order and solemnity of the law are strictly observed in the regular contestation of the suit. Arellano *v.* Chacons, 1 N. M. 269.

plenary suit in equity determine the title to property surrendered by a receiver in bankruptcy to third parties.[44]

8. Ancillary Jurisdiction. — To what extent the amendment of 1910[45] has settled the disputed question as to whether or not and to what extent the district court has ancillary jurisdiction has not been passed on; it is unquestioned, however, that if the court had no jurisdiction in the first instance, there would be nothing on which to base ancillary jurisdiction.[46] Under the act as it existed prior to the amendment of 1910 there is a conflict of authority.[47] The right to exercise such authority has been affirmed in a number of instances;[48]

When Plenary Action and When Summary Action Proper.—"I think the distinction between the controversies arising in bankruptcy which must be determined by plenary independent suits and those which may be heard on summary petition depends upon who has possession of the subject matter of the controversy. If the bankruptcy court has possession, then, as a rule, the matter may be heard upon petition and answer. If a stranger has possession, and is holding by adverse claim, then an independent plenary suit is in most cases proper." *In re* Noel, 137 Fed. 694, 14 Am. B. R. 715.

As to distinction between proceedings in bankruptcy and plenary action by trustee, see also *In re* Walsh Bros., 163 Fed. 352, 21 Am. B. R. 14.

44. Whitney *v.* Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. ed. 1157, 14 Am. B. R. 45. See also Goodnough Mercantile & Stock Co. *v.* Galloway, 156 Fed. 504, 19 Am. B. R. 244.

Action To Determine Lien.—The district court has jurisdiction in a plenary action in equity to determine whether the complainant has a lien on the property of the bankrupt in possession of the receiver, and the extent of it. Cleminshaw *v.* International Shirt & Collar Co., 165 Fed. 797, 21 Am. B. R. 616.

45. Bankruptcy Act (1910), §2, (20).

46. Henrie *v.* Henderson, 145 Fed. 316, 76 C. C. A. 196, 16 Am. B. R. 617, *reversing* 15 Am. B. R. 760.

47. *In re* Benedict, 140 Fed. 55, 15 Am. B. R. 232.

The jurisdiction of the bankruptcy courts under the act of 1898, especially as to ancillary proceedings, is not as extensive as under the act of 1867, and many of the decisions cited under the latter act have for that reason no application. *In re* R. H. Williams, 120 Fed. 38, 9 Am. B. R. 741.

48. *In re* MacDougall, 175 Fed. 400, 23 Am. B. R. 762; Matter of Dunseath, 168 Fed. 973, 21 Am. B. R. 742, 22 Am. B. R. 75 (holding that though a receiver be appointed by the court in which the proceedings are filed, the court in another jurisdiction may appoint an ancillary receiver for the purpose of preserving the assets); *In re* Owings, 140 Fed. 30, 15 Am. B. R. 472 (in which the court says: "There is ample authority for the institution of ancillary proceedings in other jurisdictions, where the court would have jurisdiction over the property"); *In re* John L. Nelson & Bro., 149 Fed. 590, 18 Am. B. R. 66 (in which the district court for the Southern District of New York appointed an ancillary receiver, the bankruptcy proceedings being in the district court for the district of Illinois); *In re* Benedict, 140 Fed. 55, 15 Am. B. R. 232 (holding that a district court may by ancillary proceedings appoint a receiver to gather up assets of the bankrupt in a jurisdiction outside of the one in which the bankruptcy proceedings are pending); Matter of Sutter Bros., 131 Fed. 654, 11 Am. B. R. 632 (where an order and subpoena for examination before a special commissioner was granted in New York, the bankruptcy proceedings being pending in Illinois, the court declining to concur with the opinion in *In re* Williams, 120 Fed. 38, 10 Am. B. R. 538; *In re* Peiser, 115 Fed. 199, 7 Am. B. R. 690 (where a receiver appointed by the court in the Southern District of New York was given ancillary aid to collect assets by the court in the Eastern District of Pennsylvania); Matter of Westfall Bros. & Co., 8 Am. B. R. 431 (in which an order for examination of the bankrupt

while it is also held that in bankruptcy proceedings there is no such thing as courts of primary and ancillary jurisdiction.[49]

9. Extra-Territorial Jurisdiction. — Without statutory authority the process of the court cannot run beyond the territorial limits of the district.[50]

10. Jurisdiction as Affected by Domicile and Place of Business. To vest jurisdiction in a court of bankruptcy it must appear either

was made by the district court for the Northern District of California and a subpoena therein issued by the district court of the Southern District of New York).

Authority Over Ancillary Receiver. The court in *In re* Benedict, 140 Fed. 55, 15 Am. B. R. 232, while sustaining the right of a court to appoint an ancillary receiver, holds that "the receiver so appointed must account to, and be largely controlled by, the original court that is charged with the administration of the estate."

49. *In re* Von Hartz, 142 Fed. 726, 74 C. C. A. 58, 15 Am. B. R. 747 (in which the court bases its decision on *In re* R. H. Williams, and *In re* Williams, referred to *infra*); Henrie *v.* Henderson, 16 Am. B. R. 617, *reversing* 15 Am. B. R. 760 holding that an ancillary jurisdiction pre-supposes primary jurisdiction and can only be invoked in aid thereof, and that a court cannot exercise ancillary jurisdiction where it did not in the first instance possess jurisdiction); *In re* Granite City Bank of Dell Rapids, 14 Am. B. R. 404, *affirming* 12 Am. B. R. 727; *In re* Tybo Min. & Reduction Co., 132 Fed. 697, 13 Am. B. R. 62; Ross-Meeham Foundry Co. *v.* Southern Car & Foundry Co., 124 Fed. 403, 10 Am. B. R. 624.

"There seems to be prevailing some misapprehension on the subject of ancillary jurisdiction in bankruptcy, several similar applications having been made of late on the supposed theory that every district court of the United States possesses the power under the bankruptcy statute to aid bankruptcy proceedings in every other district court engaged in the administration of bankruptcy assets. . . . The elastic or expansive quality of the word 'ancillary' is misleading possibly in relation to this subject, and care must be had not to misapply the practice of proceedings known in the general law as ancillary to the practice under the bankruptcy statute." The court after citing a number of examples showing ancillary jurisdiction and stating the reasons therefor, goes on to say: "It is not necessary to go into the technicalities of any of these examples of ancillary or auxiliary jurisdiction, because the existing bankruptcy statute is absolutely destitute of any hint of such a jurisdiction in aid of proceedings in bankruptcy pending in another district or court of bankruptcy. . . . The district courts in the several states have no such ancillary or auxiliary jurisdiction as has been invoked by these applications." *In re* Williams, 120 Fed. 38, 10 Am. B. R. 538.

"No order appointing a receiver or otherwise disturbing the possession of property should be granted by any court without notice to the parties in possession and those otherwise interested; notice that would constitute due process of law, as required by the constitution of the United States. . . . There is no special provision allowing the court having charge of the bankruptcy case to use its authority to protect the property located in other districts, such as might have been had. How a receiver appointed by the court of original jurisdiction shall proceed to obtain possession of the property in another jurisdiction is not declared either by the act or the rules of the supreme court made to govern the practice." Ross-Meeham Foundry Co. *v.* Southern Car & F. Co., 124 Fed. 403, 10 Am. B. R. 624.

It was held under the act of 1867 that the district court possessed ancillary jurisdiction. Lathrop *v.* Drake, 91 U. S. 516, 93 L. ed. 414; Shainwald *v.* Lewis, 5 Fed. 510; *In re* Tifft, 23 Fed. Cas. No. 14,034; Sherman *v.* Bingham, 21 Fed. Cas. No. 12,762; *Ex parte* Martin, 16 Fed. Cas. No. 9,149; Markson *v.* Heaney, 1 Dill. 497, 16 Fed. Cas. No. 9,098.

50. *In re* Waukesha Water Co., 116 Fed. 1009, 8 Am. B. R. 715.

(1) that the person had his principal place of business within the district, or (2) resided therein, or (3) had his domicile therein; it must also appear that such place of business had been maintained, or the residence or domicile therein been had, within such jurisdiction for the greater part of the six months prior to the time of the filing of the petition.[51]

Leading Case.—Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093, though not a bankruptcy case is referred to in the Waukesha Water Co. case, *supra*, as being a leading case on this question.

A United States district judge though of the Northern and Middle Districts of Alabama, while holding court in the middle district and another judge was holding court in the northern district, has no authority to go into the northern district and make an order appointing a referee in bankruptcy and prescribing a rule for the reference of proceedings in bankruptcy to said referee, without the concurrence of the judge holding court in the northern district. *In re* Steele, 161 Fed. 886, 20 Am. B. R. 446.

A restraining order so far as it assumed jurisdiction over parties outside of its territorial limits could only be exerted over parties to the bankruptcy proceedings or over those that participate in the affairs of the estate, and will be vacated in so far as it contemplates directions to a person outside of the territorial jurisdiction of the court and not personally subject to its orders within the jurisdiction. *In re* Isaac Harris Co., 173 Fed. 735, 23 Am. B. R. 237. But see *In re* Wood & Henderson, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. ed. 1046, 20 Am. B. R. 1 (in which it is held that for the purpose of examining payments made by the bankrupt to an attorney, the court may on application of the trustee examine into the reasonableness of the payment and direct that any excess payment be recovered for the benefit of the estate, though the attorney be a non-resident of the state and district in which the court was sitting, both at the time of the payment and when the proceedings were instituted and though the money was paid outside of the district; but that a plenary suit by the trustee could not be maintained by such trustee against such attorney outside the district); *In re* Marion Contract & Const. Co., 166 Fed. 618, 22 Am. B. R. 81 (holding that the bankruptcy courts are vested exclusively with all jurisdiction in bankruptcy proceedings throughout the entire country).

51. *In re* Plotke, 104 Fed. 964, 44 C. C. A. 282, 5 Am. B. R. 171 ("the essential fact must appear affirmatively and distinctly, and it is not sufficient that jurisdiction may be inferred argumentatively"); *In re* Harris, 11 Am. B. R. 649 (in which it is held sufficient if any one of the three requisites appear); *In re* Fred V. Clisdell, 2 Am. B. R. 424; *In re* Magie, 2 Ben. 369, 16 Fed. Cas. No. 8,951, 1 N. B. R. 522. See, however, *In re* Carneau, 127 Fed. 677, 11 Am. B. R. 679, holding that it is not necessary for a creditor to object to the jurisdiction, but that it is the duty of the court *sua sponte* to inquire into the facts, especially when it is led to suspect that its jurisdiction has been imposed upon.

Where a corporation had its nominal office in the state in which it was incorporated and had in another state a manufacturing plant in one district and a central office in another, and that within six months prior to the filing of the petition its manufacturing plant was destroyed and thereafter its business was being settled up through the central office, it was held that the bankruptcy court in the district in which this central office was situated had jurisdiction. Tiffany *v.* La Plume Condensed Milk Co., 15 Am. B. R. 413. But where a corporation is being wound up by a receiver and not liquidating its affairs of its own ac-

The residence, domicile or place of business must be *bona fide*.[52] That the alleged bankrupt has his principal place of business in the district where the petition is filed is sufficient to confer jurisdiction,[53]

cord and by its own officers, and more than three months had elapsed from the time when the receivers were appointed, it had no principal place of business on which a court of bankruptcy might base its jurisdiction. Matter of Perry Aldrich Co., 165 Fed. 249, 21 Am. B. R. 244.

Temporary Absence.—The provision regarding the time within which the proposed bankrupt must have resided in the district does not mean that a residence of three and a half months would be sufficient, but requires a six months' minimum residence, though it permits a temporary absence during that period which in the aggregate must have exceeded three months. *In re* Samuel S. Stokes, 1 Am. B. R. 35.

Length of Residence.—"The debtor may file his petition in the district in which he has resided or carried on business for the six months next immediately preceding the filing of the petition, or for the longest period during or within such six months that he has resided or carried on business in any district." *In re* Ira L. Ray & Louise S. Ray, 2 Am. B. R. 158. See also *In re* Elisha Foster, 3 N. B. R. 236; *In re* Goodfellow, 3 N. B. R. 452. *Compare In re* Samuel Stokes, 1 Am. B. R. 35, that a residence of three and a half months was not sufficient to confer jurisdiction.

Partnership.—If any member of a firm be within the provision of the statute, it is sufficient on which to predicate a petition on the part of the firm. *In re* Blair, 99 Fed. 76, 3 Am. B. R. 588.

52. *In re* Garneau, 127 Fed. 677, 62 C. C. A. 403, 11 Am. B. R. 679.

Estoppel.—Where the debtor enters a plea to the jurisdiction denying his residence in the state and alleging another place as his residence, his administrator is estopped from denying his residence in such state in a proceeding begun during the life of the testator. Long *v.* Lockman, 14 Am. B. R. 172.

53. *In re* Pennsylvania Consol. Coal Co., 163 Fed. 579, 20 Am. B. R. 872; Dressel *v.* North State Lumb. Co., 107 Fed. 255, 5 Am. B. R. 744 (the statement in the articles of the association as to the principal place of business is not controlling); *In re* Brice, 93 Fed. 942, 2 Am. B. R. 197 (this notwithstanding the fact that his domicil and place of residence was without the district and was employed as a clerk outside the district. The court in the district where he had his domicil and residence would also have had jurisdiction); *In re* Marine Machine & C. Co., 91 Fed. 630, 1 Am. B. R. 421.

What Is Principal Place of Business.—Matter of Matthews Consol. Slate Co., 144 Fed. 737, 75 C. C. A. 603, 16 Am. B. R. 407, *affirming* 144 Fed. 724, 16 Am. B. R. 3..); *In re* Mackey, 110 Fed. 355, 6 Am. B. R. 577.

When New Order of Adjudication May be Entered.—"If the petition shows that the bankrupt has not resided within the district, in the case of a voluntary bankruptcy, for the greater portion of the necessary six months, or if the issue is raised by any creditor, the court can refuse to adjudicate, and dismiss the proceedings, if satisfied that fraud exists, or that the petitioner is misleading the court, intentionally or through ignorance. . . . But it would be a hardship which certainly no court would allow, unless it is without jurisdiction to prevent, for a creditor, as in the case at bar, to conceal from the court the defect in the allegation of residence, to stand by and allow proceedings to go on before the referee, and then, when the estate has been administered and the matter progressed to a point where the bankrupt applied for a discharge, successfully nullify the proceeding to which he has been a party, and cause the bankrupt the expense of an additional proceeding, where no end would apparently be accomplished except harassing the bankrupt. A new proceeding could now be brought nowhere but in this district, and no advantage would result." *In re* Tully, 156 Fed. 634, 19 Am. B. R. 604, 608.

Failure To File Certificate.—"If a foreign corporation has, in fact, had its principal place of business for six months in this district, this court has

notwithstanding that his residence or domicile is in another district.[54]

11. Whether Person Within Excepted Class. — Whether the person sought to be adjudged a bankrupt is within the class contemplated by the statute, is a jurisdictional question rather than one of personal privilege available only to the bankrupt himself.[55]

12. Priority of Jurisdiction as Between Different Bankruptcy Courts. — Where a bankrupt does business in more than one district,[56] or where the business of two concerns is so intermingled that a separation of the two concerns in bankruptcy would be impossible,[57] the court which first upon proper pleadings and by proper process acquires jurisdiction of the persons and possession of the property may proceed to final adjudication and distribution of assets, and adjudicate the rights of all parties.

13. Court First Obtaining Jurisdiction Retains Same. — The general rule is, that the court which first obtains rightful jurisdiction

jurisdiction, and the fact that it has not obtained a certificate from the secretary of state, permitting it to do business here, does not divest this court of jurisdiction. If it has not complied with the law of this state in obtaining such a certificate, it is liable to the consequences provided by that law. But, in my opinion, the fact that no certificate was obtained does not change the fact that the principal place of business is where the principal business is done.'' Matter of Duplex Radiator Co., 142 Fed. 906, 15 Am. B. R. 324. See also *In re* Pennsylvania Consol. Coal Co., 163 Fed. 579, 20 Am. B. R. 872.

54. *In re* Magid-Hope Silk Mfg. Co., 110 Fed. 352, 6 Am. B. R. 610; Dressel *v.* North State Lumb. Co., 107 Fed. 255, 5 Am. B. R. 744; *In re* Brice, 93 Fed. 942, 2 Am. B. R. 197. See also *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. B. R. 484.

55. First Nat. Bank of Denver *v.* Klug, 186 U. S. 202, 22 Sup. Ct. 899, 46 L. ed. 1127, 8 Am. B. R. 12; *In re* Taylor, 102 Fed. 728, 44 C. C. A. 1, 4 Am. B. R. 515; *In re* Keystone Coal Co., 109 Fed. 872, 6 Am. B. R. 377. See also *In re* Brett, 130 Fed. 981, 12 Am. B. R. 492. But see next paragraph.

''The contention of counsel for the petitioner that the omitted allegation, or the fact that the desk company was engaged principally in one of the pursuits which subjected it to the adjudication, was jurisdictional, has received deliberate and studious consideration, and our conclusion, the reasons for it, and authorities in support of it may be found in our opinion *In re* First National Bank of Belle Fourche, which is filed herewith. Our judgment is that neither the allegation nor the fact was jurisdictional, because neither conditioned the power of the court to hear the cause and decide every issue in it between the parties. It had the same jurisdiction of the cause and of the parties, and the same power to determine the issues between them, whether the desk company was or was not engaged in one of the pursuits mentioned in section 4b of the bankruptcy law. The only difference the decision of that issue made was that if it was so engaged the court should have given judgment for the petitioners, and if it was not so occupied it should have refused to adjudicate the desk company a bankrupt.'' *In re* Broadway Sav. Trust Co., 18 Am. B. R. 254. See also *In re* First Nat. Bank of Belle Fourche, 152 Fed. 64, 18 Am. B. R. 265.

56. *In re* Southwestern Bridge & Iron Co., 133 Fed. 568, 13 Am. B. R. 304; *In re* Tybo Min. & Reduc. Co., 132 Fed. 697, 13 Am. B. R. 62; *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. B. R. 484; Matter of United Button Co., 13 Am. B. R. 454.

57. *In re* Alaska American Fish Co., 162 Fed. 498, 20 Am. B. R. 712. See however. *In re* Isaacson, 174 Fed. 406, 98 C. C. A. 614, 20 Am. B. R. 437, holding that when a petition is filed in a district in which the bankrupt had his principal place of business, that court would have jurisdiction and could adjudicate, but if subsequently a petition be also filed in the district in which the bankrupt had his domicil

over the subject-matter will not be interfered with.[58] And when an action respecting property of the bankrupt has been instituted in a state court more than four months before the adjudication in bank-

the latter would have superior jurisdiction, unless it be a case within §32, which permits the consolidation of proceedings in the court which can proceed therewith for the greatest convenience of the parties in interest.

58. Pickens *v.* Dent, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. ed. 128, 9 Am. B. R. 47, *affirming* 5 Am. B. R. 644; Metcalf *v.* Baker, 187 U. S. 163, 23 Sup. Ct. 78, 47 L. ed. 122, 9 Am. B. R. 36; *In re* Rohrer, 177 Fed. 381, 100 C. C. A. 613, 24 Am. B. R. 52; Linstroth Wagon Co. *v.* Ballew, 149 Fed. 960, 79 C. C. A. 470, 18 Am. B. R. 23; *In re* English, 127 Fed. 940, 62 C. C. A. 572, 11 Am. B. R. 674; *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. B. R. 358; *In re* Wells, 114 Fed. 222, 8 Am. B. R. 75; Des Moines Sav. Bank *v.* Morgan Jewelry Co., 123 Iowa 432, 99 N. W. 121, 12 Am. B. R. 781; Taylor *v.* Taylor, 59 N. J. Eq. 86, 45 Atl. 440, 4 Am. B. R. 211. But see *In re* Hymes Buggy & Imp. Co., 130 Fed. 977, 12 Am. B. R. 477 (holding that "no matter what the character of the suit, if the claim asserted be such as a discharge in bankruptcy would operate as a release therefrom, the bankrupt court is empowered to stay its prosecution, in furtherance of the policy of the act authorizing the bankrupt court to administer and distribute the insolvent estate. As the action of replevin might well be 'founded upon a claim from which a discharge would be a release,' it would seem to fall within the power given to the bankrupt court to stay such suit pending in the state court to the extent provided in said section 11); *In re* Tune, 115 Fed. 906, 8 Am. B. R. 285 (as to the state court losing jurisdiction when its right of possession is based on process which is annulled by the adjudication in bankruptcy).

Where prior to the filing of the petition in bankruptcy a chattel mortgagee seized the property covered by the mortgage and after the adjudication brought foreclosure proceedings, the bankruptcy court will not grant an order staying proceedings, but the trustee in bankruptcy should appear in the proceedings and assert his rights in the state court. Heath *v.* Shaffer, 93 Fed. 647, 2 Am. B. R. 98. And see *In re* St. Louis & Kansas Oil & Gas. Co., 168 Fed. 934, 22 Am. B. R. 56, as to effect of intervention.

Action to Enforce Lien.—When an action is instituted in a state court to enforce a lien, before an officer of the bankruptcy court takes possession of the property, such as for instance a foreclosure suit, which lien is not affected by the bankruptcy proceedings, the state court retains jurisdiction. **U. S.**—Eyster *v.* Goff, 91 U. S. 521, 23 L. ed. 403; *In re* Rohrer, 177 Fed. 381, 100 C. C. A. 613, 24 Am. B. R. 52; *In re* San Gabriel Sanitorium Co., 111 Fed. 892, 50 C. C. A. 56, 7 Am. B. R. 206; *In re* Porter, 109 Fed. 111, 6 Am. B. R. 259 (even after adjudication the bankruptcy court may in its discretion permit the matter to rest in the state court); Heath *v.* Shaffer, 93 Fed. 647, 2 Am. B. R. 98; Reed *v.* Equitable Trust Co., 8 Am. B. R. 242 (unless the holder of the lien prove his claim in the bankruptcy proceedings); Harvey *v.* Smith, 7 Am. B. R. 497; *In re* Greater American Exposition, 4 Am. B. R. 486. And see note to Keegan *v.* King, 3 Am. R. R. 79. **Ga.**—Carter *v.* People's Nat. Bank, 109 Ga. 573, 35 S. E. 61. **Ia.**—Des Moines Sav. Bank *v.* Morgan Jewelry Co., 123 Iowa 432, 99 N. W. 121, 12 Am. B. R. 781. **N. J.** Taylor *v.* Taylor, 59 N. J. Eq. 86, 45 Atl. 440, 4 Am. B. R. 211. **N. Y.**—Hillyer *v.* LeRoy, 179 N. Y. 369, 72 N. E. 237, 12 Am. B. R. 733. **Vt.**—Batchelder *v.* Wedge, 80 Vt. 353, 67 Atl. 828, 19 Am. B. R. 268.

Compare, however, Matter of Victor Color & Varnish Co., 175 Fed. 1023, 101 C. C. A. 439, 23 Am. B. R. 177; Carling *v.* Seymour Lumb. Co., 113 Fed. 483, 51 C. C. A. 1, 8 Am. B. R. 29 (where foreclosure of a mortgage was not alone involved); *In re* Holloway, 93 Fed. 638, 1 Am. B. R. 659 (holding it to be a matter of discretion); *In re* Helen A. M. Sabine, 1 Am. B. R. 315 (where a sale under judgment of foreclosure was stayed); Carpenter Bros. *v.* O'Connor, 16 Ohio C. C. 526, 1 Am. B. R. 381 (where an action to foreclose a chattel mortgage was stayed).

ruptcy, such court retains jurisdiction;[59] nor has the bankruptcy court

59. Pickens *v.* Dent, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. ed. 128, 9 Am. B. R. 47, *affirming* 5 Am. B. R. 644; Metcalf *v.* Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. ed. 122, 9 Am. B. R. 36; *In re* David Rohrer, 177 Fed. 381, 100 C. C. A. 613, 24 Am. B. R. 52; Sample *v.* Beasley, 158 Fed. 607, 85 C. C. A. 429, 20 Am. B. R. 164 (foreclosure suit instituted before the four months' period); Tennessee Producer Marble Co. *v.* Grant, 135 Fed. 322, 67 C. C. A. 676, 14 Am. B. R. 288; National Bank of the Republic *v.* Hobbs, 118 Fed. 626, 54 C. C. A. 682, 9 Am. B. R. 190; *In re* Snell, 125 Fed. 154, 11 Am. B. R. 35; Frazier *v.* Southern Loan & Trust Co., 99 Fed. 707, 3 Am. B. R. 710. See also *In re* New England Breeder's Club, 175 Fed. 501, 23 Am. B. R. 689 (and the bankruptcy court has authority to direct the trustee to appear in the state court action and make all reasonable efforts to have the matter brought to judgment); *In re* Koslowski, 153 Fed. 823, 18 Am. B. R. 723 (as to the effect of an award upon an arbitration); *In re* Heckman, 15 Am. B. R. 500 (where the property was sold under process of the state court more than four months before the adjudication in bankruptcy).

Similar adjudications in state courts are Ninth Nat. Bank *v.* Moses, 11 Am. B. R. 772; Batchelder *v.* Wedge, 80 Vt. 353, 67 Atl. 828, 19 Am. B. R. 268. The same rule applied under previous statutes. *In re* Biddle, 9 N. B. R. 144, And see Reid, Murdock & Co. *v.* Cross, 1 Am. B. R. 34, in which it was held in Illinois, that where an action in equity commenced a month before the filing of the petition in bankruptcy the plaintiff had obtained a lien, such lien was superior to the claim of the bankruptcy court.

Compare In re Baughman, 138 Fed. 742, 15 Am. B. R. 23 (holding that "in the present instance, while the execution creditor by virtue of its judgment has a lien upon the real estate proposed to be sold, which, antedating the bankruptcy proceedings by over four months as it does, may not be affected thereby, yet, bankruptcy having intervened, the sale and distribution of the property as well as the establishment of the correct amount due to the judgment creditor which seems to be in dispute, belongs to this court, unless it seems best to let it go on elsewhere, as might be the case if the liens were more than enough to exhaust the property, leaving nothing for general creditors, although this is not always controlling and is entirely optional"); *In re* Holloway, 1 Am. B. R. 659 (holding that "matters of this sort being in the discretion of the bankruptcy court, should there be unreasonable delay in the state court proceedings, or should any unexpected complications arise, it might be the duty of the court on that account to stay other proceedings, and permit the trustee to take charge of the scale in lieu of the state court officers; but, as there does not appear to be any purpose upon the part of the judgment creditor in the state court to delay the sale of the property, nor do anything to prevent its bringing a fair price, the motion of the trustee in this case will for the present be overruled, reserving power to take another course should the circumstances of the case require it"); *In re* Adams, 1 Am. B. R. 94 (holding that the referee may enjoin proceedings in an action to set aside a fraudulent conveyance begun more that four months prior to the filing of the petition in bankruptcy).

The mere fact that the trustee is interested in the result of the litigation is not sufficient to oust the state court of its jurisdiction and entitle him to have the proceedings stayed or the controversy transferred to the bankruptcy court. *In re* Greater American Exposition, 4 Am. B. R. 486. To same effect, see Matter of Rudnick & Co., 160 Fed. 903, 88 C. C. A. 85, 20 Am. B. R. 33.

Bankruptcy Act Binding on State Court.—"The state courts, in all proceedings pending before them, have the right to apply and enforce the provisions of the bankrupt act in the determination of the questions at issue before them, and can give full protection to the rights of the trustee. The bankrupt act is the law of the land, and the state courts have full right to enforce its mandate in all proceedings properly before them. Of course, it is not meant by this that a state court can adjudge a person to be bankrupt, or grant him a discharge, or control

jurisdiction by summary order to compel a state officer to deliver to a receiver in bankruptcy property held by him under a process of the state court issued in an action pending therein,[60] as that court, if it first obtains jurisdiction over the property of the bankrupt, retains such jurisdiction for the purpose of determining all rights

the distribution of the bankrupt's estate; but what is meant is that in all suits pending before them, wherein may be involved a contest between the trustee and a third party, which depends, in whole or in part, upon the provisions of the bankrupt act, the state courts must, of necessity, have full right and jurisdiction to apply and enforce the provisions of the bankrupt act, not only in deciding the question of right at issue, but in securing to the parties the proper protection accorded to them under the act.'' Heath *v.* Shaffer, 93 Fed. 647, 2 Am. B. R. 98.

When State Court Loses Jurisdiction. If at the time of the bankruptcy the property is in the possession of the state court under state insolvency proceedings or proceedings amounting to such, such proceedings are superseded by the bankruptcy proceedings and the state court loses jurisdiction. **U. S.**—*In re* Storck Lumb. Co., 114 Fed. 360, 8 Am. B. R. 86; *In re* Lengert Wagon Co., 110 Fed. 927, 6 Am. B. R. 535; *In re* Kersten, 110 Fed. 929, 6 Am. B. R. 516; *In re* Bruss-Ritter Co., 90 Fed. 651, 1 Am. B. R. 58; Singer *v.* National Bedstead Mfg. Co., 11 Am. B. R. 276. **Conn.**—Ketcham *v.* McNamara, 72 Conn. 709, 46 Atl. 146, 6 Am. B. R. 160. **N. H.**—E. C. Wescott Co. *v.* Berry, 69 N. H. 505, 45 Atl. 352, 4 Am. B. R. 264 (unless the proceedings be of such character as do not come within the purview of the bankruptcy act). **U. S.**—*Ex parte* Eames, 2 Story 322, 8 Fed. Cas. No. 4,237; Singer *v.* National Bedstead Mfg. Co., 11 Am. B. R. 276; McCullough *v.* Goodhardt, 3 Am. B. R. 85. **Conn.**—Ketcham *v.* McNamara, 72 Conn. 709, 46 Atl. 146, 6 Am. B. R. 160. **Md.**—Old Town Bank *v.* McCormick, 96 Md. 341, 53 Atl. 934, 10 Am. B. R. 767.

See also *In re* Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933, 10 Am. B. R. 113; Carling *v.* Seymour Lumb. Co., 113 Fed. 483, 51 C. C. A. 1, 8 Am. B. R. 113; *In re* F. A. Hall Co., 10 Am. B. R. 88; Scheuer *v.* Smith & Montgomery Book Co., 7 Am. B. R. 384; R. H. Herron Co. *v.* Superior Court, 136 Cal. 279, 68 Pac. 814, 8 Am. B. R. 493.

60. Jaquith *v.* Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. ed. 620, 9 Am. B. R. 525; Louisville Trust Co. *v.* Cominger, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. ed. 413, 7 Am. B. R. 421; Matter of Rudnick & Co., 160 Fed. 903, 88 C. C. A. 85, 20 Am. B. R. 33; Tennessee Producer Marble Co. *v.* Grant, 135 Fed. 322, 67 C. C. A. 676, 14 Am. B. R. 288; *In re* Seebold, 5 Am. B. R. 358.

Jurisdiction Over the Property.—Jurisdiction over the property is, however, vested in the bankruptcy court and the trustee takes subject to the levy, and the execution creditor will be entitled to be paid out of the proceeds realized from the goods without regard to who may happen to sell them. *In re* Vastbinder, 132 Fed. 718, 13 Am. B. R. 148.

Dissolution of Partnership.—When an action for dissolution of partnership is pending in the state court and a receiver *pendente lite* has been appointed and has taken into his possession the assets of the firm, and subsequently the partnership is adjudged bankrupt, the state court retains jurisdiction over the property. The proper course for the trustee in bankruptcy is to apply in the state court to be substituted as plaintiff and then to move for a decree settling the partnership accounts and for an order directing the receiver to transfer the assets to him. *In re* Price & Co., 92 Fed. 987, 1 Am. B. R. 606. To the same effect, see *In re* English, 127 Fed. 940, 62 C. C. A. 572, 11 Am. B. R. 674; Sedgwick *v.* Menck, 21 Fed. Cas. No. 12,616, 1 N. B. R. 675; Clark *v.* Binninger, 38 How. Pr. (N. Y.) 341, 3 N. B. R. 518. *Compare*, however, *In re* Rogers & Stefani, 156 Fed. 267, 19 Am. B. R. 266 (where the state receiver had surrendered the property to the trustee in bankruptcy); Wilson *v.* Parr, 115 Ga. 629, 42 S. E. 5, 8 Am. B. R. 230 (holding that the bankruptcy court should take

therein.[61] If, however, the action be instituted in the state court within four months of the time of filing the petition,[62] or after the filing of the adjudication in bankruptcy, the bankruptcy court obtains jurisdiction and may stay any action by the state court, and if necessary take charge of the property.[63]

As between a district court sitting in bankruptcy and state courts, there is no concurrent jurisdiction regarding the administration of an insolvent's estate.[64] The jurisdiction and authority of the bankruptcy

jurisdiction as it could more properly give full protection to the creditors).

61. Murphy *v.* John Hofman Co., 211 U. S. 560, 29 Sup. Ct. 156, 53 L. ed. 237; *In re* MacDougall, 175 Fed. 400, 23 Am. B. R. 762; *In re* Mustin, 165 Fed. 506, 21 Am. B. R. 147.

62. New River Coal Land Co. *v.* Ruffner Bros., 165 Fed. 881, 91 C. C. A. 559, 21 Am. B. R. 474; *In re* Kaplan, 144 Fed. 159, 16 Am. B. R. 267; *In re* Knight, 125 Fed. 35, 11 Am. B. R. 1; *In re* Wells, 114 Fed. 222, 8 Am. B. R. 75 (holding that where after the filing of the petition but before the adjudication the state court takes possession of the property under a writ of replevin, that court will retain jurisdiction for all purposes, and the prosecution of the action will not be enjoined by the bankruptcy court); *In re* Kenney, 5 Am. B. R. 355; Davis *v.* Bohle (*In re* Sievers), 1 Am. B. R. 412; *In re* Gutwillig, 1 Am. B. R. 388; *In re* Sabine, 1 Am. B. R. 315. *Compare* Reid-Murdock & Co. *v.* Cross, 1 Am. B. R. 34.

63. Linstroth Wagon Co. *v.* Ballew, 149 Fed. 960, 79 C. C. A. 470, 18 Am. B. R. 23; Morning Telegraph Pub. Co. *v.* S. B. Hutchinson Co., 17 Am. B. R. 425. See also White *v.* Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. ed. 1183, 4 Am. B. R. 178.

64. *In re* Knight, 125 Fed. 35, 11 Am. B. R. 1; Leidigh Carriage Co. *v.* Stengel, 95 Fed. 637, 2 Am. B. R. 383; *In re* Houston, 94 Fed. 119, 2 Am. B. R. 107; *In re* John A. Etheridge Furniture Co., 92 Fed. 329, 1 Am. B. R. 112. See also *In re* Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933, 10 Am. B. R. 113.

"The bankruptcy act does not generally impair in any way the jurisdiction of state courts; and in cases where the officers of state courts, prior to an adjudication in bankruptcy, have seized property of the bankrupt under state process, such levy cannot be interfered with by a federal court, unless it is fraudulent or contrary to the bankruptcy act, or upon some equitable ground. The moment, however, that an adjudication of bankruptcy has been made, the title to all the property of the bankrupt, as of that date, passes to the person who is subsequently chosen trustee. From the time of the adjudication the property of the bankrupt is in the custody and under the control of the bankruptcy court. From the time such property, by the adjudication of bankruptcy, comes into the custody of the bankruptcy court, it is in *custodia legis;* and that court will not permit any person, even though he be an officer of a state court, acting under its process, to interfere with the custody or possession by the bankruptcy court or its officers of the property thus in its custody." Keegan *v.* King, 96 Fed. 758, 3 Am. B. R. 79.

That in some respects the authority of the bankruptcy court is superior to that of the state court is undoubted, as there are many instances where the bankruptcy court has issued its restraining order against proceedings pending in the state courts. A number of these cases will be found collated and the authority discussed in the case of *In re* Globe Cycle Works, 2 Am. B. R. 447.

Authority Over Proceedings in State Court.—"Ordinarily if the state court has obtained jurisdiction this jurisdiction is not disturbed except in certain instances. . . . The bankruptcy act of 1898 does not, in the least modify this rule, but with unusual carefulness guards it in all its details, provided the suit started in the state court was instituted more than four months before the district court of the United States had adjudicated the bankrupt. . . . There are, however, exceptions to the general rule that a state court re-

court is paramount, the bankruptcy law superseding all state insolvency laws.[65] The orders of the bankruptcy court are superior to those of a state insolvency court, and where a bankruptcy court takes jurisdiction the state insolvency court must yield.[66] If the property, the

tains jurisdiction, and one of those exceptions is as follows: . . . 'Second exception to the rule that the state court retains jurisdiction if first obtaining custody. The second exception to the rule that the state court retains jurisdiction if it first obtains the custody of the property involved, is where the property at the time of the bankruptcy is in the possession of an assignee for the benefit of creditors or of a receiver or trustee appointed outside of bankruptcy, where the assignment, receivership or trusteeship is created within four months preceding the filing of the bankruptcy petition, in which event, upon the adjudication in bankruptcy occurring, the bankruptcy court supersedes the insolvency court and the court appointing the assignees, receiver or trustee, and takes over the property involved for administration in bankruptcy.' This is sustained by the case of Randolph *v.* Scruggs, 190 U. S page 533, 10 Am. B. R., page 1.'' Matter of Cameron Currie & Co., 20 Am. B. R. 790.

65. Hooks *v.* Aldridge, 16 Am. B. R. 665. See *supra*, I.

When Conflict Arises.—''It is the duty of both the federal and state courts to observe every precaution to avoid unseemly conflict of jurisdiction. It is for this reason, on principles of comity, that the application is made in the first instance, in a case like this, to the state court for directions to its receiver to surrender the property. The laws of the United States are equally binding on both federal and state courts, and it cannot be taken for granted that either will fail to be governed by them. But when a state court refuses to direct a surrender of the property, and the federal court to which application is then made is of opinion that it should be surrendered, what is to be done? In such cases it is said that, under the rules of comity, the possession of the property by the state court should not be interfered with without its consent; that the decision of the state court not to surrender the property is controlling till it is reversed; that parties objecting to it should reserve the federal question, and obtain relief by appeal or writ of error, and finally by application to the United States Supreme court if necessary. It is true that relief from an erroneous ruling on a federal question of even the highest state court could be finally corrected in that way, and in the meantime that process of injunction might be used to restrain the parties from a distribution of the assets in the state court (Rev. St. U. S. sec. 720 [U. S. Comp. St. 1901, p. 581]) till the final decision was obtained in the supreme court. On the other hand, we must not forget that the proceeding suggested would result in great delay, and that the jurisdiction and authority of the bankruptcy court is paramount, the bankruptcy law superseding all state insolvency laws; that its purpose to obtain speed and equal distribution of the bankrupt's assets will be defeated if the supremacy of the federal court's orders be not promptly recognized and enforced.'' Hooks *v.* Aldridge, 16 Am. B. R. 658, 664.

Issuance of Injunction.—Where a creditor begins an action to set aside certain transfers by the debtor, some eighteen months before the passage of the bankrupt act and diligently pursues it to a successful termination in the highest court of the state, but the decision of such court of appeal is made subsequent to the adjudication of the debtor as a bankrupt, the bankruptcy court has no jurisdiction to summarily enjoin the successful party in the creditor's action for taking any action under their judgment; when such party was not made a party nor appeared in the proceedings to adjudge said debtor a bankrupt, their special appearance on the order to show cause and filing objections to the jurisdiction is no waiver of jurisdiction. Metcalf *v.* Baker, 187 U. S. 165, 23 Sup. Ct. 78, 47 L. ed. 122, 9 Am. B. R. 46. See also Pickens *v.* Dent, 187 Fed. 177, 5 Am. B. R. 644.

66. *In re* Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933, 10 Am. B. R. 113; Leidigh Carriage Co. *v.* Stengel,

ownership of which is in dispute, is or has been in the possession of the bankruptcy court, or any of its officers, that court retains authority and control over it for all purposes.[67] The bankruptcy court may,

95 Fed. 637, 37 C. C. A. 210, 2 Am. B. R. 383.

Priority Over State Court.—When prior to the adjudication in bankruptcy the rent on a leasehold became due and remained unpaid, and under the state law the landlord was given the right to re-enter or recover possession and discharge from the lease, but no action was taken amounting to an election to discharge the lease until after the tenant had been adjudicated a bankrupt and a receiver appointed, and the landlord thereafter sued the receiver in ejectment in the state court and made proof of his claim before the referee in bankruptcy. It was held that as the bankruptcy court had taken possession of the property before any proceedings were begun in the state court such possession could not be ousted. *In re* Chambers, Calder Co., 98 Fed. 865, 3 Am. B. R. 537.

67. U. S.—White *v.* Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. ed. 1183, 4 Am. B. R. 178; Chauncey *v.* Dyke Bros., 119 Fed. 1, 55 C. C. A. 579, 9 Am. B. R. 444; *In re* Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. B. R. 198 (the bankruptcy court may enjoin sequestration proceedings in the state court to require the return of the property to the trustee); *In re* Noel, 137 Fed. 694, 14 Am. B. R. 715; Keegan *v.* King, 96 Fed. 758, 3 Am. B. R. 79; Carter *v.* Hobbs, 92 Fed. 594, 1 Am. B. R. 215 (and for this purpose all persons interested in the *res* are regarded as parties to the bankruptcy proceeding, including the bankrupt, the trustee and all creditors including lienors); *In re* Huddleston, 1 Am. B. R. 572. **Ala.**—Turrentine *v.* Blackwood, 125 Ala. 436, 28 So. 95, 4 Am. B. R. 338. **Me.**—Crosby *v.* Spear, 98 Me. 542, 57 Atl. 881, 11 Am. B. R. 613.

When the bankruptcy court is in actual possession of the property of the bankrupt, it has jurisdiction "to determine the amount and the order of priority of liens thereon, and to liquidate such liens, to the end that the property may be sold free of incumbrance, and in aid thereof to enjoin the lienholders from prosecuting the foreclosure of their liens in a suit brought in a state court before the commencement of the bankruptcy proceedings, but within four months thereof; and this, though the lienholders object to such jurisdiction." *In re* Dana, 167 Fed. 529, 93 C. C. A. 238, 21 Am. B. R. 683.

Possession by Appointment of Receiver.—Where a receiver is appointed by the bankruptcy court before the seizure of the property in replevin, the bankruptcy court obtains jurisdiction, though the receiver did not file his bond or take possession of the property until some time subsequent to the seizure under the replevin. *In re* Alton Mfg. Co., 158 Fed. 367, 19 Am. B. R. 805.

Property in Possession of Trustee.—If the property is or has been in possession of an officer of the bankruptcy court, that tribunal has jurisdiction to determine the validity of claims asserted against it. Plaut *v.* Gorham Mfg. Co., 159 Fed. 754, 20 Am. B. R. 269.

Possession at Time of Bankruptcy.—"The facts pertinent to the element of jurisdiction are that at the time of bankruptcy the goods in controversy were in the actual manual possession of the bankrupt corporation and passed from it into the manual possession of the referee as custodian, upon the surrender of these and all other goods to him. In my judgment, the simple fact of this possession by the referee in bankruptcy is conclusive in favor of our jurisdiction. By that possession the goods were in *custodia legis*—whether rightfully or wrongfully is another question. But that question may be rightfully decided by us. Whether it might also be rightfully decided by any other jurisdiction it is not necessary to determine. The bare possession by the court, through its officer, of the property was sufficient to give us jurisdiction to determine to whom the goods properly belonged." *In re* Leeds Woolen Mills, 12 Am. B. R. 136.

however, in its discretion allow the state court to retain jurisdiction,[68] or the state court may voluntarily divest itself of jurisdiction in favor of the bankruptcy court.[69] If the proceedings in the state court are not enjoined, they may be pursued to judgment therein, and such judgment will be binding upon all parties.[70]

14. Jurisdiction Over Partnership. — The bankruptcy court having jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.[71] In the event petitions are filed against the partnership or the members thereof in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred by order of the courts relinquishing jurisdiction to, and be consolidated by, the one of such courts which can proceed with the same for the greatest convenience of parties in interest.[72] The court having jurisdic-

68. *In re* San Gabriel Sanitorium Co., 111 Fed. 892, 50 C. C. A. 56, 7 Am. B. R. 206; *In re* New England Breeders' Club, 175 Fed. 501, 23 Am. B. R. 689; William Openhym & Son *v.* Blake, 157 Fed. 536, 19 Am. B. R. 639. See also *In re* Sterlingworth R. Supply Co., 164 Fed. 591, 165 Fed. 267, 21 Am. B. R. 342; Orr *v.* Tribble, 158 Fed. 897, 19 Am. B. R. 849.

When Jurisdiction Ought to Remain in State Court.—"The whole matter of the mortgage debt, and all the controversies growing directly out of it, could be comprehensively and more conveniently treated in the proceedings in the state court, where all matters between the conflicting interests of the various mortgage creditors and the trustee will doubtless be fairly and intelligently adjusted and adjudicated. The trustee, who stands for all the general creditors, and who, in a certain sense, represents all creditors of the bankrupt, can wisely and usefully intervene in the actions of the state court, and there litigate most, if not all, the questions involved between him and the mortgage creditors respecting the assets claimed by them and by the general creditors as represented by the trustee." *In re* Porter & Bros., 109 Fed. 111, 6 Am. B. R. 259.

Permitting Admiralty Court to Retain Jurisdiction.—When the interests of the parties will be best conserved by permitting the admiralty court to retain jurisdiction of the property such a course will be followed. *In re* Hughes, 170 Fed. 809, 22 Am. B. R. 303.

Time for Questioning Jurisdiction.—The question of the jurisdiction of the bankruptcy court can only arise after bankruptcy is adjudged and a trustee or other custodian is appointed and qualified to take possession. *In re* Kersten, 110 Fed. 929, 6 Am. B. R. 516.

69. *In re* Hymes Buggy & Imp. Co., 130 Fed. 577, 12 Am. B. R. 477.

70. Eyster *v.* Gaff, 91 U. S. 521, 23 L. ed. 403, 13 N. B. R. 546; *In re* Knight, 125 Fed. 35, 11 Am. B. R. 1; *In re* McGilton, 3 Bliss. 144, 16 Fed. Cas. No. 8,798, 7 N. B. R. 294; *In re* Cook & Gleason, 3 Biss. 116, 6 Fed. Cas. No. 3,151; *In re* Brinkman, 7 N. B. R. 421; Samson *v.* Clark, 9 Blatchf. 372, 6 N. B. R. 403; *In re* Iron Mountain, 9 Blatchf. 320, 4 N. B. R. 645; Winslow *v.* Clark, 47 N. Y. 261.

71. Bankruptcy Act (1898), §5, (c).

Petitions in Different Districts.—Gen. Order No. VI, 172 U. S. 654, 43 L. ed. 1189, 89 Fed. v, 32 C. C. A. ix.

72. Bankruptcy Act (1898), §32. This section applies to partnerships as well as individuals. *In re* Sears, 112 Fed. 58, 7 Am. B. R. 279.

Where Hearing to be Held.—"In cases where a partnership is proceeded against by two or more petitions in different courts, each having jurisdiction over the case, the hearing shall in such case be had where the petition was first filed, unless the court by order directs a transfer and consolidation, as provided by section 32 of the act." *In re* Sears, 112 Fed. 58, 7 Am. B. R. 279.

tion may also transfer the case to another court for convenience of the parties.[73]

15. Objections to the Jurisdiction. — Jurisdiction to hear and determine a controversy cannot be obtained by consent or agreement of the parties, unless the court has jurisdiction of the subject-matter.[74] And while jurisdiction over the person may be obtained by consent,[75] this is not sufficient unless the court has also jurisdiction over the subject-matter in controversy.[76] The want of jurisdiction over the subject-matter is a question that will be considered by the court whenever or however raised,[77] even if the parties forbear to make it or consent that the case be considered on its merits.[78] But where the objection goes to the want of jurisdiction of the person, there may be a waiver of the objection, or restriction as to the time and manner of making it.[79]

73. *In re* Waxelbaum, 98 Fed. 580, 3 Am. B. R. 392.

74. Henrie *v.* Henderson, 145 Fed. 316, 76 C. C. A. 196, 18 Am. B. R. 617; Hall *v.* Kincell, 102 Fed. 301, 42 C. C. A. 360; *In re* J. J. Reisler Amusement Co., 171 Fed. 283, 22 Am. B. R. 501; *In re* Walsh Bros., 163 Fed. 352, 21 Am. B. R. 14.

75. Matter of Frischberg, 8 Am. B. R. 607.

76. Hall *v.* Kincell, 102 Fed. 301, 42 C. C. A. 360.

"If the court had jurisdiction of the subject-matter, and this it undoubtedly had by reason of the doing business, residence or domicile of the alleged bankrupt within the district for the statutory period of time, then it is immaterial whether jurisdiction of the person was thereafter acquired by the service of the process or by the voluntary appearance of the bankrupt; such jurisdiction could be acquired by either method, and undoubtedly was acquired by the voluntary appearance of the bankrupt." Matter of Frischberg, 8 Am. B. R. 607.

"The object of the bankruptcy law is to afford the means by which the creditors of the bankrupt may secure an equitable and fair distribution of the bankrupt's property, etc., and the act contemplates that any collateral questions growing out of the settlement of the bankrupt's estate may be heard and determined in that court." But the court has no jurisdiction to determine "a controversy which does not in the slightest degree affect the creditors of H. C. Henderson, the bankrupt, nor is the trustee in any wise affected. Stripped of all extraneous matters, it appears to be an effort on the part of Henderson to compel specific performance of a contract relating to the sale of land. There is no provision which gives the bankruptcy court jurisdiction to hear and determine controversies of this kind." Henrie *v.* Henderson, 145 Fed. 316, 76 C. C. A. 196, 16 Am. B. R. 617.

77. Morris *v.* Gilbert, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. ed. 690; *In re* Garneau, 127 Fed. 677, 62 C. C. A. 403, 11 Am. B. R. 679; *In re* Walsh Bros., 163 Fed. 353, 21 Am. B. R. 14 (the court will notice the question of jurisdiction though not raised by the parties); *In re* Columbia Real Estate Co., 101 Fed. 965, 4 Am. B. R. 411 (the court will hear counsel *ex gratia* upon the question of *amicus curiae*); *In re* Mason, 99 Fed, 256, 3 Am. B. R. 599; *In re* Urban & Suburban, 12 Am. B. R. 690. See also *In re* New York Tunnel Co., 166 Fed. 284, 92 C. C. A. 202, 21 Am. B. R. 531.

78. *In re* Columbia Real Estate Co., 101 Fed. 965, 4 Am. B. R. 411. See also Metcalf *v.* Watertown, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. ed. 543.

79. Hall *v.* Kincell, 102 Fed. 301, 42 C. C. A. 360; *In re Smith,* 117 Fed. 961, 9 Am. B. R. 98; *In re* Mason, 99 Fed. 256, 3 Am. B. R. 599.

The objection that the particular court in which the proceeding is pending had no jurisdiction to entertain the proceedings must be promptly taken advantage of, and when a creditor upon notice attends the proceedings and examines the bankrupt, he cannot for the first time interpose an objection to the jurisdiction of the court

An objection that the court is without jurisdiction because of lack of residence, domicile, or that the bankrupt's principal place of business was not within the district should be promptly taken or it will be deemed waived.[80] The determination by the court that the bankrupt is not within one of the classes specified by the statute, while affecting the right of the debtor to be brought within the statute, does not affect the jurisdiction of the court and its authority to make the determination.[81]

B. Jurisdiction of Circuit Court. — The circuit court has jurisdiction of all controversies at law or in equity as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustee in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.[82]

on the application for a discharge. *In re* Charles Polakoff, 1 Am. B. R. 358. See also Allen *v.* Thompson, 10 Fed. 116; *In re* Thomas, 11 N. B. R. 330. See, however, *In re* Fred V. Clisdell, 2 Am. B. R. 424, in which a contrary opinion was intimated though not directly passed on. In the cases of *In re* Penn, 3 N. B. R. 582; *In re* Little, 2 N. B. R. 294, while apparently also holding to the contrary, the question was not directly passed on.

Action to Set Aside Fraudulent Transfer.—In an action to set aside a fraudulent transfer of property, an objection to the jurisdiction of the court is too late when urged on appeal for the first time. Booneville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. B. R. 13, *citing* Bardes *v.* Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. ed. 1175, 4 Am. B. R. 163.

80. *In re* Polakoff, 1 Am. B. R. 358. But see *In re* Berner, 3 Am. B. R. 325 (in which the referee while expressing serious doubt as to whether the question might be presented after the adjudication in bankruptcy, entertained the objection and overruled it); *In re* Clisdell, 2 Am. B. R. 424 (in which it is intimated that the objection may be made at any time).

81. *In re* New York Tunnel Co., 166 Fed. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *In re* First Nat. Bank of Belle Fourche, 152 Fed. 64, 81 C. C. A. 260, 18 Am. B. R. 265; Hill Co. *v.* Supply & Equipment Co., 24 Am. B. R. 84; *In re* Elmira Steel Co., 5 Am. B. R. 484; *In re* Tully, 156 Fed. 634, 19 Am. B. R. 604.

Allegation as to Occupation.—When the petition alleges that the debtor is engaged in an occupation covered by the bankruptcy act, the court acquires general jurisdiction, and the fact that it is subsequently determined that the allegation is untrue has no effect on the jurisdiction of the bankruptcy court and the proceeding will not be dismissed on the ground of lack of jurisdiction. Denver First Nat. Bank *v.* Klug, 186 U. S. 202, 22 Sup. Ct. 899, 46 L. ed. 1127, 8 Am. B. R. 12; *In re* New England Breeder's Club, 175 Fed. 501, 22 Am. B. R. 124; *In re* Hudson River Electric Co., 173 Fed. 943, 21 Am. B. R. 915.

"Upon the filing of the petition for an adjudication of bankruptcy against the corporation and service of process, jurisdiction over services and subject matter was established (First National Bank of Denver *v.* Klug, 186 U. S. 202, 204, 8 Am. B. R. 12, 22 Sup. Ct. 899, 46 L. ed. 1127, and cases cited), and was complete for the hearing and determination of all the issues involved, whatever the ultimate conclusions of the court upon such issues." *In re* T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263, 20 Am. B. R. 73.

82. Bankruptcy Act (1898), §23a.

It is to be remembered that by the act of congress, March 3, 1911, circuit and district courts are consolidated.

Action by Creditor.—The act does not give the court jurisdiction of an action by a creditor to set aside an alleged fraudulent transfer of property.

C. JURISDICTION OF REFEREE. — Certain powers, under certain limitations, are expressly conferred by the act on the referees therein provided for.[83]

The original act related only to "controversies between the trustee in bankruptcy and adverse claimants to property acquired or claimed by the trustee. So, also, 23b relates only to suits brought by trustees in bankruptcy. And the amendments, if applicable here, likewise only apply to suits by trustees in bankruptcy." Viquesney *v.* Allen, 131 Fed. 21, 65 C. C. A. 259, 12 Am. B. R. 402. See also Teschmacher *v.* Mrazay, 127 Fed. 728, 11 Am. B. R. 547.

83. Referees have jurisdiction within their districts to consider all petitions referred to them by the clerk and make the adjudication or dismiss the petition. Bankruptcy Act (1898), §38a. This has reference to petitions in bankruptcy which are referred to the referee by the clerk in the absence of the judge. Bankruptcy Act (1898), §18f.

Dismissal After Adjudication.—The referee has no authority to dismiss the proceedings after adjudication. *In re* Elby, 157 Fed. 935, 19 Am. B. R. 734.

No authority to make an adjudication except when the judge is absent from the district or division of the district. *In re* Humbert Co., 100 Fed. 439, 4 Am. B. R. 76. See also *In re* Polakoff, 1 Am. B. R. 358.

The want of jurisdiction of the referee to make the adjudication must be promptly raised or it will be waived. *In re* Polakoff, 1 Am. B. R. 358. But see *In re* Mason, 99 Fed. 256, 3 Am. B. R. 599, that the question of entire want of jurisdiction may be presented at any time.

Referees may exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment (bankruptcy act (1898), §538, (2), and may exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge for the judicial district, or the division of the district, or his sickness or inability to act (bankruptcy act (1898) §38, (3).

To perform such part of the duties, except as to questions arising out of the application of bankrupts for compositions or discharges, as are conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts except as otherwise provided by statute. Bankruptcy act (1898), §38, (4).

"The property or proceeds in question in the present case is in the hands of the trustee, *in custodia legis*, and the bankruptcy court is necessarily vested with both power and duty to determine all rights therein, upon proper notice, as 'controversies in relation thereto,' . . . section 38, subd. 4 (Act July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3436]), confers upon the referee power to 'perform such part of the duties, except as to questions arising out of the application of bankrupts for compositions and discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided;' and General Order 12 (32 C. C. A. xvi, 89 Fed. vii) directs that all proceedings after reference, 'except such as are required by the act or by general orders to be had before the judge, shall be had before the referee.' No provision of the act, general orders, or rule of this court requires claims of this nature to be primarily heard before the judge, and the jurisdiction of the referee to that end appears to be undoubted." *In re* Drayton, 135 Fed. 883, 13 Am. B. R. 602.

The jurisdiction of the referee is as extensive as that of the court for all purposes, except where the case is referred to him for a special purpose, as to matters of composition and discharge, or where one seeks to be adjudged a bankrupt. *In re* Huddleston, 1 Am. B. R. 572. See also *In re* Northrop, 1 Am. B. R. 427; *In re* Sabine, 1 Am. B. R. 315; *In re* Adams, 1 Am. B. R. 94.

When Jurisdiction Vests — The referee's jurisdiction dates from the time he is placed in possession of the order of reference.[84]

V. FILING OF THE PETITION. — A. Filing With the Clerk. Petitions must be filed with the clerk.[85]

B. Voluntary Bankruptcy. — **1. By Persons Other Than Partnerships.** — A voluntary petition may be filed by any person, except a municipal, railroad, insurance or banking corporation.[86] It is not

84. *In re* Florcken, 107 Fed. 241, 5 Am. B. R. 802. See also *In re* Scott, 7 Am. B. R. 35.

85. Gen. Order II, 172 U. S. 654, 43 L. ed. 1189, 89 Fed. iv, 32 C. C. A. vii; *In re* Sykes, 106 Fed. 669, 6 Am. B. R. 264.

A petition handed to the clerk for the purpose of filing, though delivered outside of office hours and outside of his office, but which was taken by him and marked "filed" amounts to a filing of the petition from the date of such filing. *In re* Wolf, 2 Am. B. R. 322.

86. Bankruptcy Act, 1898, §4a (as amended); Olive *v.* Armour & Co., 167 Fed. 517, 93 C. C. A. 153, 21 Am. B. R. 901 (holding that a petition may be filed by one of a class against whom an involuntary petition could not be filed).

Minors.—An infant cannot be adjudged a voluntary bankrupt. *In re* Duguid, 100 Fed. 274, 3 Am. B. R. 794. See also *Ex parte* Jones (1881), 18 Ch. Div. 109. *Compare*, however, *In re* Penzansky, 8 Am. B. R. 99 (that the test seems to be "whether the debts from which an infant seeks to be discharged are based upon contracts or obligations which he can disaffirm upon coming of age or upon such as render him absolutely liable"); *In re* Brice, 93 Fed. 942, 2 Am. B. R. 197 (holding that "if the infant is liable for the debts he schedules, he may, so far as the decisions above cited have expressly decided, avail himself of the benefits of the Bankrupt Law, in the absence in such law of any provision to the contrary").

Lunatics.—Whether a lunatic on his petition or that of his guardian may go into voluntary bankruptcy, the court declined to pass on. *In re* Marvin, 16 Fed. Cas. No. 9,178. But in Matter of Eisenberg, 117 Fed. 786, 8 Am. B. R. 551, where the petition was filed by the committee of the lunatic, it was held that the court had no jurisdiction to entertain the petition and make the adjudication. And see *In re* Cahen, 10 Ch. Div. (Eng.) 183; *In re* Farnham, 1 Ch. Div. (Eng.) 836; *In re* James, L. R. 12 Q. B. D. 332 (holding the court had jurisdiction if it appears to be for the benefit of the lunatic).

Aliens.—An alien may file a petition provided the other jurisdictional facts are present. *In re* Fred V. Clisdell, 2 Am. B. R. 424.

Indians.—How far the act is available to members of the Indian tribes depends upon whether or not he is subject to the statutory disability against the making of contracts (U. S. Rev. St., §2105), and so far as the Chickasaw and Choctaw Indians are concerned the bankruptcy courts have the same jurisdiction as over other citizens. *In re* Rennie, 2 Am. B. R. 182. See also *In re* Russie, 96 Fed. 609, 3 Am. B. R. 6.

Married Women.—A petition may be filed by a married woman provided under the state statute she is permitted to make contracts. McDonald *v.* Tefft-Weller Co., 128 Fed. 481, 63 C. C. A. 123, 11 Am. B. R. 800; *In re* Lyons, 3 Sawy. 524, 15 Fed. Cas. No. 8,649; *In re* Kinkead, 3 Biss. 405, 14 Fed. Cas. No. 7,824, 7 N. B. R. 439; *In re* Collins, 3 Biss. 415, 6 Fed. Cas. No. 3,006, 10 N. B. R. 335.

Creditor Cannot Oppose Petition.—In cases of voluntary petition a creditor cannot contest the adjudication or move to have it set aside, the statute giving the right only in cases of involuntary bankruptcy. *In re* Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. B. R. 692; *In re* Carleton, 115 Fed. 246, 8 Am. B. R. 207. See, however, Matter of Eisenberg, 117 Fed. 786, 8 Am. B. R. 551, where a petition filed by the committee of a lunatic was dismissed on creditor's application.

Debts Construed.—The fact that there is but one provable debt is sufficient

cause for opposing the adjudication that the bankrupt is solvent.[87]

2. Partnership. — a. *Generally.* — When it is desired that both the individual members of the firm and the copartnership be adjudicated bankrupts, there should be a petition on behalf of the firm and one for each individual partner.[88] A contrary view has, however, been expressed, and it has been held that but one petition is necessary.[89] There cannot, however, be one petition covering different and distinct firms, though one of the individuals be a member of the different copartnerships.[90]

b. *When All Partners Do Not Join.* — Where all of the partners do not join therein, the proceeding is voluntary as to those who join in the petition and involuntary as to the partners who do not join therein after notice.[91] The fact that all of the members do not join

to confer jurisdiction. *In re* Schwaninger, 144 Fed. 555, 16 Am. B. R. 427. See also McDonald *v.* Tefft-Weller Co., 128 Fed. 381, 63 C. C. A. 123, 11 Am. B. R. 800; *In re* Yates, 114 Fed. 365, 8 Am. B. R. 69; *In re* Maples, 105 Fed. 919, 922, 5 Am. B. R. 426. *Compare In re* Colaluca, 13 Am. B. R. 292, holding that though there is no provable debt, the question of dismissal of the petition rests in the discretion of the court.

Filing Voluntary Petition When Involuntary Proceeding Pending.—It has been held in one district under previous acts that when there is an involuntary proceeding pending and undetermined, the debtor cannot file a voluntary petition (*In re* Stewart, 23 Fed. Cas. No. 13,419, 3 N. B. R. 108); but in another district the court refused to follow this rule, and held notwithstanding the filing of an involuntary petition, that the court might entertain a proceeding on the filing of a voluntary petition (*In re* Flanagan, 5 Sawy. 312, 9 Fed. Cas. No. 4,850, 18 N. B. R. 439).

87. *In re* Carleton, 115 Fed. 246, 8 Am. B. R. 270; *In re* John Campbell, 113 Fed. 545, 7 Am. B. R. 608; *In re* Atlantic Mut. Life Ins. Co., 9 Ben. 270, 2 Fed. Cas. No. 628, 16 N. B. R. 541, 16 Alb. L. J. 453. See also Hanover Nat. Bank *v.* Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. ed. 1113, 8 Am. B. R. 1.

88. *In re* Farley, 115 Fed. 359, 8 Am. B. R. 266; *In re* Barden, 101 Fed. 553, 4 Am. B. R. 31. And see Mahoney *v.* Ward, 3 Am. B. R. 770.

Discharge From Firm and Individual Debts.—When a member of a firm desires a discharge from firm as well as individual debts he must set up in his petition that he is a member of the firm and that he seeks such discharge; a notice to that effect must also be contained in the notice of the first meeting of creditors in the petition for the discharge and in the notice therefor to creditors. *In re* Russell, 97 Fed. 32, 3 Am. B. R. 91. See also *In re* McFaun, 96 Fed. 592, 3 Am. B. R. 66; *In re* Laughlin, 96 Fed. 589, 3 Am. B. R. 1.

Effect of Undisclosed Partnership.—When the business is caried on in the name of an individual and in fact a secret partnership exists, the adjudication of the individual in whose name the business is carried on is also an adjudication of the partnership, and the partnership assets may be administered as a partnership estate by the individual trustee of the bankrupt partner. *In re Harris,* 108 Fed. 517, 4 Am. B. R. 132.

89. *In re* Langslow, 98 Fed. 869, 1 Am. B. R. 258; *In re* Gay, 98 Fed. 870, 3 Am. B. R. 529.

90. *In re* Wallace, 29 Fed. Cas. No. 17,095, 12 N. B. R. 191.

91. *In re* Ceballos & Co., 20 Am. B. R. 459; *In re* Carleton, 115 Fed. 240, 8 Am. B. R. 270; *In re* Murray, 96 Fed. 600, 3 Am. B. R. 601. *Compare,* however, Medsker *v.* Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. ed. 654, under a previous statute, holding it to be a case of involuntary bankruptcy.

Allegations When One Partner Filed Petition.—A partner may ask for an adjudication against the firm, either on the ground of the insolvency of the

in the petition must clearly appear in the petition,[92] and notice of the hearing must be given to the non-joining partners before the firm can be adjudged bankrupt.[93]

c. *Issuance of Service of Process When All Partners Do Not Join.* When all members of a copartnership do not join in a voluntary petition the prayer of the petition should ask that the firm be adjudged bankrupt and for the issuance of a subpoena to those not joining

firm and all its partners, or on the ground that the firm has through one or more non-joining partners committed an act of bankruptcy. *In re* Caballos & Co., 20 Am. B. R. 459.

It seems that in such a case the petition need not allege the commission of an act of bankruptcy. *In re* Carleton, 115 Fed. 246, 8 Am. B. R. 270.

The non-consenting partner cannot set up the want of an act of bankruptcy, but may set up the defense of solvency and upon that issue he is entitled to a jury trial. *In re* Forbes, 128 Fed. 137, 11 Am. B. R. 787.

92. *In re* Russell, 97 Fed. 32, 3 Am. B. R. 91.

93. *In re* Russell, 97 Fed. 32, 3 Am. B. R. 91.

Notice.—"If the non-joining member or members of the firm can be found, in the district or out of it, personal service of the notice must be made; but if personal service cannot be had, then, upon filing before the judge (or the referee, if the case has been referred by the clerk) an affidavit showing that personal service of notice cannot be made, an order of publication of notice will be made, as provided in section 18." *In re* Murray, 96 Fed. 600, 3 Am. B. R. 601.

The non-joining partner is entitled to the same notice as if a petition had been filed against him, and in answer to the petition may set up any fact which would be pertinent to a proceeding against the partnership. General Bankruptcy Order No. VIII, 89 Fed. vi, 32 C. C. A. xi; *In re* Russell, 97 Fed. 32, 3 Am. B. R. 91. See also *In re* Prankard, 19 Fed. Cas. No. 11,366, 1 N. B. R. 297; *In re* Moore, 5 Biss. 79, 17 Fed. Cas. No. 9,750; *In re* Lewis, 2 Ben. 96, 15 Fed. Cas. No. 8,311, 1 N. B. R. 239; *In re* Fowler, 1 Low. 161, 9 Fed. Cas. No. 4,998, 1 N. B. R. 689; *In re* Elliott, 2 N. B. R. 110.

"The practice of the petitioners was irregular, first, in omitting to give the required notice to the members of the co-partnership who did not join in the petition; and, second, in attempting to cure the defect in the adjudication by a subsequent unverified consent, qualified as to its terms, and signed only by the attorneys for the non-joining members. There seems to be no warrant for this practice." *In re* Altman, 95 Fed. 263, 2 Am. B. R. 407.

Secret Partner.—Notice to an undisclosed or secret partner is not necessary. *In re* Harris, 108 Fed. 517, 4 Am. B. R. 132.

Form of Notice to Non-Consenting Partner.—In United States District Court, Northern District of Iowa, —— Division.

In Bankruptcy.

In matter of ——, Alleged Bankrupt:

It appearing in the above cases, now pending before ——, referee in bankruptcy for the District of —— County, Iowa, that it is the purpose of the proceedings to adjudicate the firm of —— to be bankrupt, as well as the individuals composing said firm, and it further appearing that ——, —— a member (or members) of the firm, has not joined in the petition of his copartners herein filed:

It is therefore ordered that this case be set down for hearing before ——, referee in bankruptcy, at his office in ——, on the day of ——, at —— o'clock — m., and the said —— is hereby ordered to appear at that time and place, before the said referee, and then and there to plead to or answer the petition now on file, in case he desired to contest the same, or, in default of such appearance and pleading, the prayer of the petition will be granted.

It is further ordered that a copy of this order be personally served upon the said —— at least fifteen days before the time for said hearing, if personal service can be had, but, if such service cannot be made, then, upon filing with the referee an affidavit showing that fact, this order may be

in the petition, and as to them the petition is to be treated as an involuntary petition.[94]

3. Stating Jurisdictional Facts. — The jurisdictional facts as to residence, domicile, or place of business must affirmatively appear in the petition.[95]

4. Verification of Petition. — The petition must be verified.[96]

5. Adjudication on Filing Petition. — Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition.[97]

6. Clerk To Act in Absence of Judge. — If the judge is absent from the district or the division of the district in which the petition is filed, at the time of filing, the clerk shall forthwith refer the case to a referee.[98]

C. Involuntary Proceedings. — 1. By Whom Petition Filed. a. *In General.* — A petition in involuntary bankruptcy may be filed by three or more creditors who have provable claims against any person which amount in the aggregate in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then the petition may be filed by one of such creditors whose claim equals such amount.[99]

served by publishing the same once a week for six consecutive weeks in the ——. *In re* Murray, 96 Fed. 600, 3 Am. B. R. 601.

94. *In re* Russell, 95 Fed. 32, 3 Am. B. R. 91; *In re* Altman, 95 Fed. 263, 2 Am. B. R. 407; *In re* Murray & Winters, 3 Am. B. R. 90.

95. Bankruptcy Act (1898), §2, (1); Matter of McConnell, 11 Am. B. R. 418. Matter of R. A. Carbone, 13 Am. B. R. 55; *In re* Groome, 1 Fed. 464; *In re* Atlantic Mut. Life Ins. Co., 9 Ben. 270, 2 Fed. Cas. No. 628, 16 N. B. R. 541, 16 Alb. L. J. 453.

96. Bankruptcy Act (1898), §18c; Matter of McConnell, 11 Am. B. R. 418.

A verification made before one of the attorneys is defective. *In re* Brunmelkamp, 95 Fed. 814, 2 Am. B. R. 318.

See *infra*, XVIII.

97. Bankruptcy Act (1898), §18, (g).

Notice.—Neither a voluntary nor an involuntary petition can be dismissed by the petitioner, or for want of prosecution or by consent, until after notice to the creditors. Bankruptcy Act, §59, (g); *In re* Plymouth Cordage Co., 135 Fed. 1000, 13 Am. B. R. 665; Matter of Lederer, 125 Fed. 96, 10 Am. B. R. 492. See, however, *In re* Jemison Merc. Co., 112 Fed. 966, 50 C. C. A. 641, 7 Am. B. R. 588, that when a petition is so dismissed it is not void for failure to give notice.

How Notice Given.—Before entertaining an application for dismissal the court must require the bankrupt to file a list under oath, of all his creditors, with their addresses, and shall cause a notice of the pendency of such application to be sent to them; the hearing on such application shall be delayed for a reasonable time to allow creditors and other parties in interest opportunity to be heard. Bankruptcy Act (1898), §59 (g) as amended.

98. Bankruptcy Act (1898), §18, (g).

99. Bankruptcy Act (1898), §5, (b).

A "creditor," under the bankruptcy act, is "anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy." Bankruptcy Act (1898), §1, (9); *In re* Columbia Real Estate Co., 101 Fed. 965, 4 Am. B. R. 411; *In re* Milgraum *v.* Ost, 12 Am. B. R. 306.

If upon the hearing it appear that a sufficient number have joined, or if prior to or during such hearing a sufficient number join, the case may be proceeded with, but otherwise it shall be dismissed. Bankruptcy Act (1898), §59, (a).

Petition by Partnership.—A petition

Number of Creditors How Computed. — In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by the bankrupt at the time of filing the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.[1]

b. *Additional Parties May Be Joined.* — Creditors other than the original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition thereto.[2]

2. Petition Against Natural Persons. — A petition may be filed against any natural person who is insolvent[3] and who has committed an act of bankruptcy[4] within four months after the commission of the act,[5] (to be computed as shown below), except a wage-

filed by a copartnership will be sustained though the names of the members thereof be not stated, provided it clearly appear that the petitioners are a partnership. Matter of Livingston, 13 Am. B. R. 357.

1. Bankruptcy Act (1898), §59, (e).
2. Bankruptcy Act (1898), §59, (f).
3. Bankruptcy Act (1898), §4b.
4. Bankruptcy Act (1898), §4b.

What Are Acts of Bankruptcy.— "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, *or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States;* or (5) admitted in writing his liability to pay his debts and his willingness to be adjudged a bankrupt on that ground." Bankruptcy Act (1898), §3, (a).

5. **In making the computation** the day of filing is excluded and the last day included. Bankruptcy Act (1898), §31; *In re* Warner, 144 Fed. 987, 16 Am. B. R. 519; *In re* Dupree, 97 Fed. 28; Whitley Grocery Co. *v.* Roach, 115 Ga. 918, 42 S. E. 282, 8 Am. B. R. 505.

If the last day is a Sunday or a "holiday" the time does not expire until the next day. Dutcher *v.* Wright, 94 U. S. 532, 24 L. ed. 130; Parmenter Mfg. Co. *v.* Stoever, 97 Fed. 330, 38 C. C. A. 200, 3 Am. B. R. 220; *In re* Stevenson, 95 Fed. 110, 2 Am. B. R. 66.

The term "holiday" includes Christmas, the Fourth of July, February 22d, and any day appointed by the President or congress as a holiday or a day of public fasting or thanksgiving. Bankruptcy Act (1898), §1a, (14).

A day will not be split up into hours. *In re* Warner, 144 Fed. 987, 16 Am. B. R. 519; *In re* Tonawanda St. Planing Mill Co., 6 Am. B. R. 38; Jones *v.* Stevens, 94 Me. 582, 48 Atl. 170, 5 Am. B. R. 571.

Time of Computation.—"Generally, as to other acts of bankruptcy, the four months' limitation begins to run at the time of the commission of the act of bankruptcy, because the petition in involuntary bankruptcy must be filed 'within four months after the commission of such act.' As to the second act of bankruptcy—that is, the preferential transfer of property to a creditor, just quoted above—this section fixes the date from which the four months will begin to run in cases involving written transfers required or permitted to be recorded, and when

earner,[6] or a person chiefly engaged in farming or tilling the soil,[7]

there is no provision for such record the date of the beginning of the running of the four months is fixed at the time when the beneficiary of the transfer takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of the transfer. If they had actual notice, the four months would begin to run just as it would on the change of possession described.'' Little *v.* Holley Brooks Hdw. Co., 13 Am. B. R. 422. See also *In re* Bogen, 134 Fed. 1019, 13 Am. B. R. 529; *In re* Mingo Val. Creamery Assn., 100 Fed. 282, 4 Am. B. R. 67; *In re* Woodward, 95 Fed. 260, 2 Am. B. R. 233; *In re* Mersman, 7 Am. B. R. 46.

Record or Notice.—''When the alleged bankrupt defends against the petition by averring that the acts of bankruptcy charged against him were not committed within the four months, this subdivision (3b), without necessary reference to others, fixes the time when the four months begins to run. Time exceeding four months from the date of the execution of the transfer will not avail him as a defense if the transfer was one required or permitted to be recorded; and, if the registry laws of the State are not applicable to the transfer, the four months limitation will begin only on implied notice to the creditors arising from change of possession, or actual notice to them of the transfer. The strictness of the statute is against the bankrupt. The language of the statute limits the use by the bankrupt of the four months' limitation as a defense to the proceeding against him. The congress in this section is not dealing with the distribution of the bankrupt's assets, nor with the surrender of preferences.'' Little *v.* Holley Brooks Hdw. Co., 13 Am. B. R. 422.

6. **Definition.**—A ''wage earner'' is an individual who works for wages, salary or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year. Bankruptcy Act (1898), §1, (27).

A teamster working with his team by the day hauling logs is a wage earner. *In re* Yoder, 127 Fed. 894, 11 Am. B. R. 445.

''By this is meant that a person is classed as a wage earner—as distinguished from a merchant, manufacturer, capitalist, etc.—when he works for a salary, wage, or hire, and that doing so is his chief or principal occupation, business, or means of making his livelihood.'' Matter of Remaley, 23 Am. B. R. 29.

A person giving music lessons at so much per hour is not a ''wage earner.'' First Nat. Bank of Wilkes Barre *v.* Barnum, 160 Fed. 245, 20 Am. B. R. 439.

A married woman who at certain times when not engaged at home performs services for other persons is not a wage earner, the test being, does the person claiming to be a wage earner depend first and foremost upon the return from his personal service for his maintenance and support. Matter of Remaley, 23 Am. B. R. 29.

One who is alleged to have transferred and concealed his property while engaged as a merchant may be adjudged a bankrupt, though he subsequently become a wage earner (*In re* Crenshaw, 156 Fed. 638, 19 Am. B. R. 502), or engage in tilling the soil. *In re* Luckhardt, 101 Fed. 807, 4 Am. B. R. 307. See also Flickinger *v.* National Bank of Vandalia, 145 Fed. 162, 76 C. C. A. 132, 16 Am. B. R. 678; *In re* Burgin, 173 Fed. 726, 22 Am. B. R. 574; Tiffany *v.* La Plume Condensed Milk Co., 141 Fed. 444, 15 Am. B. R. 413.

7. **Farmers and Tillers of the Soil.**—''A person engaged chiefly in farming is one whose chief occupation or business is farming,'' and one's chief occupation or business, ''is that which is of principal concern to him, of some permanency in its nature, and on which he chiefly relies for his livelihood, or as the means of acquiring wealth, great or small.'' *In re* Mackey, 110 Fed. 355, 6 Am. B. R. 577. To same effect, see *In re* Drake, 114 Fed. 229, 8 Am. B. R. 137. See also Rise *v.* Bordner, 140 Fed. 566, 15 Am. B. R. 297 (in which the defendant's mercantile business was at one time of considerable importance but had deteriorated, and farming was held to be his principal occupation); Bank of Dearborn *v.* Matney, 132 Fed. 75, 12 Am. B. R. 482.

''Farming'' is not synonymous with ''tilling the soil.'' Bank of Dearborn *v.* Matney, 132 Fed. 75, 12 Am. B. R. 482.

or an infant,[8] or an adjudged insane person,[9] or an executor or

Distinction between "farming" and "tillage of the soil" is that one whose principal occupation is raising live stock and producing fodder for feeding them by cultivation of the soil is "chiefly engaged in farming," but not chiefly engaged in the "tillage of the soil." Hoffschlaeger Co. Ltd. *v.* Young Nap, 12 Am. B. R. 510.

What Is Included in Farming.—The business of farming includes the fattening of cattle and hogs for the market from the products of the farm. *In re* Thompson, 102 Fed. 287, 4 Am. B. R. 340. And see *In re* Ragsdale, 29 Fed. Cas. No. 12,123, 16 N. B. R. 215; Hoffschlaeger Co. Ltd. *v.* Young Nap, 12 Am. B. R. 510.

But one whose chief occupation is trading in cattle, the farm being used merely for feeding purposes, and relying more upon feed that he purchased than the product of his farm, is not within the exception. *In re* Brown, 132 Fed. 706, 13 Am. B. R. 140; Bank of Dearborn *v.* Matney, 132 Fed. 75, 12 Am. B. R. 482.

One who keeps a dairy as an incident to his business of farming is within the exception. Gregg *v.* Mitchell, 166 Fed. 725, 92 C. C. A. 415, 21 Am. B. R. 659. That one also carried on at the same time a small banking business makes no difference (Couts *v.* Townsend, 126 Fed. 249, 11 Am. B. R. 126), or also the carrying on of a law and collection business on a small scale (*In re* Hoy, 137 Fed. 175, 14 Am. B. R. 648), or running a small store, the income of which is inconsiderable compared with that of the farm. Rise *v.* Bordner, 140 Fed. 566, 15 Am. B. R. 297.

That in connection with the farm interests a commissary is also conducted, or that one member of the partnership is a justice of the peace and has an agency for fertilizers and plows, still leaves them within the exception. E. E. Sutherland Medicine Co. *v.* Rich & Bailey, 22 Am. B. R. 85.

One who leaves part of his farm and works the remainder is within the exception (Wulbern *v.* Drake, 120 Fed. 493, 56 C. C. A. 643, 9 Am. B. R. 695), but not one who leaves his farm for a money consideration (*In re* Matson, 123 Fed. 743, 10 Am. B. R. 473).

As one who owns a farm is not thereby a farmer. *In re* Johnson, 149 Fed. 864, 18 Am. B. R. 74.

Horticulturists, viticulturists and gardeners are included in the term farmers. *In re* Johnson, 149 Fed. 864, 18 Am. B. R. 74; *In re* Slade's Estate, 122 Cal. 434, 55 Pac. 158.

That a woman has the title to the farm in her name which is run by her husband, the products of which are treated as his, the wife doing the work usually performed by farmers' wives, she merely signing her name when necessary to keep up the appearance of ownership, does not bring her within the definition of a farmer under the bankruptcy act. *In re* Johnson, 149 Fed. 864, 18 Am. B. R. 74.

Market gardeners, nurserymen, and the like, are included within the term of those engaged in tilling the soil. *In re* Thompson, 102 Fed. 287, 4 Am. B. R. 340.

As to the effect of change of occupation from one not affected by the exception to one within the exception, see Bankruptcy Act (1898), §4b. As to "aliens," "Indians," and "married women," see note, *supra*.

8. *In re* Duguid, 100 Fed. 274, 3 Am. B. R. 794; *In re* Derby, 8 Ben. 118, 7 Fed. Cas. No. 3,815, 8 N. B. R. 106.

If the infant be a member of a copartnership the adjudication will be made against the partner who is of age and be dismissed as to the minor partner with a specific statement that the dismissal is made by reason of his minority (*In re* Dunnigan, 95 Fed. 428, 2 Am. B. R. 628. See also Lovell *v.* Beauchamp (1894), L. R. App. Cas. 607; *In re* Raineys, L. R. 3 Ir. Ch. 459). But the Derby case seems to be limited to contracts which the minor had the legal right to disaffirm. *In re* Brice, 93 Fed. 942, 2 Am. B. R. 197.

9. **Insane Persons.**—An insane person cannot commit an act of bankruptcy, and therefore an involuntary petition on behalf of creditors cannot be filed. *In re* Ward, 20 Am. B. R. 482; *In re* Pratt, 2 Lowell 96, 19 Fed. Cas. No. 11,371, 6 N. B. R. 276; *In re* Murphy, 17 Fed. Cas. No. 9,946, 10 N. B. R. 48; *In re* Marvin, 1 Dill. 178,

administrator,[10] or a person occupying some fiduciary relation.[11]

3. Petition Against Partnership. — It must appear from the petition that the partnership is not within the excepted classes and owes at least the amount set forth in the statute.[12] And if the petition be based on the insolvency of the firm it is necessary to allege its existence at the time of the filing of the petition.[13] Whether it is necessary to allege the insolvency of both the partnership and the individuals composing it seems not to be definitely adjudicated[14]

16 Fed. Cas. No. 9,178 (holding that a petition cannot be filed against the guardian's objection); *In re* Farnham (1895), 2 Ch. Div. 799.

"In cases wherein the party, although giving evidence of insanity, has not been adjudged insane, but remains in possession and control of his property, and his creditors seek his adjudication as a bankrupt, it might be held that the bankruptcy court could rightfully exercise jurisdiction, and could hold the party responsible for his acts done before the fact of his insanity had been ascertained and established; but, however this may be, it cannot be so held in cases like that now before the court, wherein it appears that, prior to the filing of the petition in bankruptcy on behalf of creditors, the party proceeded against had been adjudged to be insane by a competent court, and a guardian had been put in possession of his property." *In re* Funk, 101 Fed. 244, 4 Am. B. R. 96.

But if it be alleged that the acts were committed during sanity and the insanity of the bankrupt was subsequent thereto, a petition may be filed (*In re* Kehler, 153 Fed. 235, 19 Am. B. R. 513; *In re* Weitzel, 7 Biss. 289, 29 Fed. Cas. No 17,365, 14 N. B. R. 466; *In re* Pratt, 2 Lowell 96, 19 Fed. Cas. No. 11,371, 6 N. B. R. 276). But quaere, can a discharge be granted (*In re* Pratt, *supra*).

If issue be joined on the question of sanity, that question will be first determined and may be submitted to a jury. *In re* Weitzel, *supra*.

10. The estate of a decedent cannot be proceeded against in that way. Graves *v.* Winter, 1 Cent. L. J. 178, 10 Fed. Cas. No. 5,710, 9 N. B. R. 357. But if by the will the executor was authorized to continue the business for the acquisition of profits and the benefit of the beneficiaries it may be that a petition could be filed. Graves *v.* Winter, *supra*. And such procedure has been recognized in England. *Ex parte* Garland, 10 Ves. 111, 32 Eng. Reprint 786.

11. Graves *v.* Winter, 1 Cent. L. J. 178, 10 Fed. Cas. No. 5,710, 9 N. B. R. 357.

12. Bankruptcy Act (1898), §4b.

The petition must be made by at least the required number of creditors who have provable claims and facts showing that their provable claims come within the statutory requirement. Bankruptcy Act (1898), §59b.

Facts showing the commission of an act of bankruptcy within four months must appear. Bankruptcy Act (1898), §3b. See also *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re* Grant, 106 Fed. 496, 5 Am. B. R. 837; *In re* Shapiro, 106 Fed. 495, 5 Am. B. R. 839.

"The better rule seems to be that in such case the ordinary averment that the firm has not sufficient assets to pay its obligations, and is willing to submit its property for distribution, is sufficient, and the filing of such a petition by one of the partners is of itself considered the equivalent of an act of bankruptcy. Hanover Bank *v.* Moyses, 186 U. S. 181, 190, 22 Sup. Ct. 857, 46 L. ed. 1113; *In re* Forbes (D. C.) 128 Fed. 137. This conclusion was doubted by Judge Lanning in *In re* Ceballos & Co. (D. C.) 161 Fed. 445, because under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), it was explicitly provided that the filing of such a petition should constitute an act of bankruptcy, and because no such provision occurs in the present act." *In re* Junck & Balthazard, 169 Fed. 481.

13. Bankruptcy Act (1898), §4c.

14. In some districts the partnership may be adjudicated bankrupt without any adjudication of the individual partners (*In re* Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 19 Am.

4. Petition Against "Corporation." — A petition in involuntary bankruptcy may be filed against any incorporated company and against any moneyed, business or commercial corporation except a municipal, railroad, insurance or banking corporation, owing debts over the amount specified in the statute.[15]

B. R. 577; *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re* Everybody's Market, 173 Fed. 492; *In re* Solomon & Carvel, 163 Fed. 140; *In re* Perley & Hays, 138 Fed. 927, 15 Am. B. R. 54; *In re* Mercur, 116 Fed. 655, 8 Am. B. R. 275); while others take the view that the adjudication of the firm imports an adjudication of all of its members as well (Vaccaro *v.* Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. B. R. 474; Davis *v.* Stevens, 104 Fed. 235, 4 Am. B. R. 763; *In re* Blair, 99 Fed. 76, 3 Am. B. R. 588).

The United States supreme court in Miller *v.* New Orleans Fertilizer Co., 211 U. S. 496, 503, 29 Sup. Ct. 176, 53 L. ed. 300, declines to pass on the question as it was not decided by the court below.

Adjudication Nunc Pro Tunc.—Where two members of a partnership have been granted a discharge in bankruptcy and it appeared on the proceedings for their discharge that they were members of a copartnership which was not brought into the bankruptcy proceedings, the court will not after a lapse of time allow the reopening of the proceedings and permit to a petition against the copartnership to be filed *nunc pro tunc*. *In re* Mercur, 116 Fed. 655, 8 Am. B. R. 275.

When the petition alleges a preferential transfer and a transfer with intent to hinder and delay creditors, it is not necessary to allege either the insolvency of the individual partners, nor that the solvent partners, if any, consent to the adjudication. Matter of Everybody's Market, 173 Fed. 492, 21 Am. B. R. 925.

15. Bankruptcy Act (1898), §4b.

Incorporation Without Authority.—Where there was no authority by statute to incorporate a banking company, it cannot be a *de facto* corporation. The parties interested in such bank will be considered copartners, and a petition for involuntary bankruptcy may be filed, they not being within the exception provided for in the bankruptcy act. Davis *v.* Stevens, 104 Fed. 235, 4 Am. B. R. 763.

Corporation as Private Banker.—A corporation cannot be a "private banker." *In re* Surety & Guarantee Trust Co., 121 Fed. 73, 56 C. C. A. 654, 9 Am. B. R. 129. But a petition in involuntary bankruptcy may be filed against a partnership carrying on a private banking business. Burkhart *v.* German-American Bank, 137 Fed. 953, 14 Am. B. R. 222.

As to whether at the time of the filing of the petition the corporation must be actually engaged in the business excepted by the statute, see White Mt. Paper Co. *v.* Morse & Co., 127 Fed. 643, 62 C. C. A. 369, 11 Am. B. R. 633, *affirming* 11 Am. B. R. 491.

Dissolution of Corporation.—If a corporation commits an act of bankruptcy, a petition for involuntary bankruptcy may be filed within the four months prescribed by the statute. The jurisdiction of the bankruptcy court cannot be defeated by a prior institution of proceedings for dissolution. *In re* Adams & Hoyt Co., 21 Am. B. R. 161. See also *In re* Munger Vehicle Tire Co., 159 Fed. 901, 87 C. C. A. 81, 19 Am. B. R. 785; *In re* International Coal Min. Co., 143 Fed. 665, 16 Am. B. R. 309, *affirmed* in Cresson *v.* Clearfield Coal & Coke Co. *v.* Stauffer, 148 Fed. 981, 78 C. C. A. 609, 17 Am. B. R. 573; *In re* Sterlingworth R. Supply Co., 21 Am. B. R. 341.

"Engaged Principally in."—Prior to the amendment of 1910 this section provided that any corporation engaged principally in manufacturing, trading, publishing, mining or mercantile pursuits might be adjudged an involuntary bankrupt. The amended section it will be noted differs materially from this, the limitation "principally engaged in" being omitted. The original statute would still affect proceedings begun prior to the amendment and this phrase has been frequently considered and passed on by the courts. The test was declared to be: What pursuit was the corporation chiefly engaged in?

"Corporations" are defined in the bankruptcy act as all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under the laws making the capital subscribed alone responsible for the debts of the association.[16]

Unincorporated Companies. — An unincorporated company, though having some of the powers and privileges of a private corporation, is not a "corporation" as defined by the Act of 1898, but it is a "partnership" and may be adjudged a bankrupt as such.[17]

The purposes of the corporation as stated in the charter was not controlling on this question. Matter of Quimby, 121 Fed. 139, 10 Am. B. R. 424; *In re* Chicago-Joplin Lead & Zinc Co., 104 Fed. 712, 4 Am. B. R. 67. On this question, see also Calnan Co. *v.* Doherty, 174 Fed. 222, 98 C. C. A. 130, 23 Am. B. R. 297; White Mt. Paper Co. *v.* Morse & Co., 127 Fed. 643, 62 C. C. A. 369, 11 Am. B. R. 491; *In re* Bloomsburg Brew. Co., 172 Fed. 174, 22 Am. B. R. 625; Matter of Matthews Consol. Slate Co., 144 Fed. 724, 16 Am. B. R. 407; *In re* Tontine Surety Co., 116 Fed. 401, 8 Am. B. R. 421; *In re* Tecopa Min. & Smelt. Co., 110 Fed. 120, 6 Am. B. R. 250; McNamara *v.* Helena Coal Co., 5 Am. B. R. 48.

As to what constitutes a manufacturing corporation, see Friday *v.* Hall & Kaul Co., 216 U. S. 449, 30 Sup. Ct. 261, 54 L. ed. 562, 23 Am. B. R. 610; Matter of Concord Motor Co., cited in Cate *v.* Connell, 173 Fed. 445, 97 C. C. A. 641, 23 Am. B. R. 73; Butt *v.* C. F. MacNichol Construction Co., 140 Fed. 840, 72 C. C. A. 252, 15 Am. B. R. 515; *In re* Georgia Mfg. & Public Service Co., 166 Fed. 964, 21 Am. B. R. 878; *In re* Troy Steam Laundry Co., 132 Fed. 266, 13 Am. B. R. 97; *In re* Niagara Contracting Co., 127 Fed. 782, 11 Am. B. R. 643; *In re* White Star Laundry Co., 117 Fed. 570, 9 Am. B. R. 30.

Trading Corporations.—*In re* United States Hotel Co., 134 Fed. 225, 67 C. C. A. 153, 13 Am. B. R. 403; *In re* Surety, Guaranty & Trust Co., 121 Fed. 73, 56 C. C. A. 654, 9 Am. B. R. 129; *In re* Snyder & Johnson Co., 133 Fed. 806, 13 Am. B. R. 325; Matter of New York Bldg. & Loan Bank Co., 127 Fed. 471, 11 Am. B. R. 51; *In re* Pacific Coast Warehouse Co., 123 Fed. 749, 10 Am. B. R. 474; *In re* Philadelphia, etc., Co., 114 Fed. 403, 7 Am. B. R. 707; *In re* Fulton Club, 113 Fed. 997, 7 Am. B. R. 670; *In re* Chesapeake Oyster & Fish Co., 112 Fed. 960, 7 Am. B. R. 173; *In re* Oriental Society, 104 Fed. 975, 5 Am. B. R. 219; *In re* New York & Westchester Water Co., 98 Fed. 711, 3 Am. B. R. 508; *In re* Cameron Town Mut. Fire Ins. Co., 96 Fed. 756, 2 Am. B. R. 372; Matter of Altonwood Park Co., 20 Am. B. R. 31; Matter of Wentworth Lunch Co., 20 Am. B. R. 29.

Mining Corporations. — Burdick *v.* Dillon, 144 Fed. 737, 75 C. C. A. 603; *In re* Quincy Granite Quarries Co., 147 Fed. 279, 16 Am. B. R. 850; Matter of Matthews' Consol. Slate Co., 144 Fed. 724, 16 Am. B. R. 407, *affirming* 16 Am. B. R. 350; *In re* Tecopa Min. & Smelt. Co., 110 Fed. 120, 6 Am. B. R. 250; *In re* Keystone Coal Co., 109 Fed. 872, 6 Am. B. R. 377; *In re* Woodside Coal Co., 105 Fed. 56, 5 Am. B. R. 186; McNamara *v.* Helena Coal Co., 105 Fed. 56, 5 Am. B. R. 186; *In re* Rollins Gold & Silver Min. Co., 102 Fed. 982, 4 Am. B. R. 327; *In re* Elk Park Min. Co., 101 Fed. 422, 4 Am. B. R. 131.

Prima Facie Jurisdiction.—Pending the determination whether or not a corporation is within an excepted class, the bankruptcy court has authority to take into its possession the property of the bankrupt. *In re* De Lancey Stables Co., 170 Fed. 860, 22 Am. B. R. 406.

16. Bankruptcy Act (1898), §1, (6).

17. Burkhart *v.* German-American Bank, 137 Fed. 958, 14 Am. B. R. 222. See also Matter of Seaboard Fire Underwriters, 137 Fed. 987, 13 Am. B. R. 722 (which was a Lloyd fire association); *In re* Hercules Atkin Co., 133 Fed. 813, 13 Am. B. R. 369 (which was a joint stock association); Matter of Alden, 16 Am. B. R. 362. See the title "Partnership."

These cases were decided prior to the amendment of 1910. The section as it

Banks. — The intention of congress plainly was to exempt all banks, whether incorporated under state or territorial laws,[18] or under the National Banking Act.[19]

Allegations in Petition. — It must appear by the petition that the corporation is not within one of the excepted classes.[20]

5. When Bond Required. — Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner must file a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of the court, to be approved by the court or a judge thereof in such sum as the court shall direct, conditioned for the payment to the respondent in case the petition be dismissed, of all costs, damages and expenses occasioned by reason of the seizure, taking or detention of the property.[21]

then existed made special reference to unincorporated companies; this being omitted in the act as amended.

18. *In re* Oregon Trust & Sav. Bank, 156 Fed. 319, 19 Am. B. R. 484.

Private Banks.—An unincorporated company carrying on business as a private banker, which by the state law is a partnership, may be adjudged a bankrupt as such. Burkhart *v.* German-American Bank, 137 Fed. 958, 14 Am. B. R. 222. See also Davis *v.* Stevens, 104 Fed. 235, 4 Am. B. R. 763.

19. *In re* Manufacturers' Nat. Bank, 5 Biss. 499, 16 Fed. Cas. No. 9,051, 8 Am. Law Rev. 614, 1 Cent. Law J. 19.

20. *In re* Elmira Steel Co., 109 Fed. 456, 5 Am. B. R. 484.

As to effect of failure to allege facts as to defendant not being within excepted class, see VII, D, 4.

As to amendment of petition where petition fails to allege such facts, see *infra* XIV.

21. Bankruptcy Act (1898), §3, (c). See also *infra*. VIII, D.

Number of Sureties.—Although the requirement in §50e is for two sureties it is not applicable to a bond given by a corporation authorized to give bonds under the act of Aug. 13, 1894 (2 Rev. St. ch. 282) one surety in such case being sufficient. *In re* Max Kalter, 2 Am. B. R. 590.

Petitioner Need Not Join in Bond. The bond required by §3e of the bankrupcty act need not be joined in by the petitioners. Matter of Sears, Humbert & Co., 117 Fed. 294, 54 C. C. A. 532, 10 Am. B. R. 389.

Who Protected.—The liability upon the bond is to those who were respondents when the bond was given. Parties subsequently becoming respondents who desire to be protected must move for a new bond. *In re* Spalding, 150 Fed. 120, 80 C. C. A. 74, 17 Am. B. R. 667.

Bill of Costs To Be Filed.—Before the alleged bankrupt is entitled to the order he should file his bill of costs with the clerk and give the petitioning creditors notice of filing, and the amount thereof. The petitioning creditors are entitled to a hearing on the question of their liability for the amount claimed or any part thereof. *In re* Haesler-Kohlhoff Carbon Co., 135 Fed. 867, 14 Am. B. R. 381.

Where there is no seizure of the debtor's property and merely a petition to have him adjudicated a bankrupt, the proceedings are like any ordinary action. No bond is required and no damages can be allowed to the successful debtor. "It confers on the creditors the right to institute proceedings against insolvent or fraudulent debtors, in order that the estate may be administered by the bankruptcy court and an equal distribution of the assets had. But in order to prevent a fraudulent disposition of the property pending the proceedings, it permits a seizure of the assets before the hearing, upon certain allegations and the execution of a bond to pay the dam-

If the petition be dismissed the counsel fees, costs, expenses and damages shall be fixed and allowed by the court and paid by the obligors in such bond.[22]

6. **Form of Petition.** — a. *The Caption.* — The caption in the petition is no part of the petition; the forms of petitions established by the supreme court are without captions, and a petition will not be dismissed for defective caption.[23]

b. *Rules to be Observed.* — (I.) **Generally.** — The essential jurisdictional facts must be distinctly pleaded, it not being sufficient that jurisdiction may be inferred therefrom argumentatively.[24] Issuable facts and not conclusions should be stated.[25] The petition may allege more than one act of bankruptcy, but they must each be within the time prescribed.[26] The rule that when proceeding on a statute the pleader must negative an exception in the enacting clause[27] applies in bankruptcy.[28]

ages which the debtor may sustain by reason of the seizure if upon a final hearing it is adjudged that the same was wrongful, in the same manner as in ordinary cases when the same object is sought by resort to proceedings by attachment. The only innovation to be found in the act is that attorney's fees and expenses incurred by the successful debtor are to be elements of damages awarded to him, not for the wrongful proceedings to have him adjudged a bankrupt, but for the wrongful 'seizure, taking and detention' of his property.'' *In re* Williams, 120 Fed. 34, 9 Am. B. R. 736.

22. Bankruptcy Act (1898), §3, (e).

What Allowed.—Counsel fees for services performed ''in proper efforts to secure the discharge of the property from the writ of seizure, and for services rendered in opposing the petition and securing its dismissal'' will be allowed; but damages for loss of credit by reason of the seizure will not be allowed, nor will the amount allowed the marshal as receiver for costs and expenses of caring for and selling the goods under the order of seizure be allowed where such allowance was paid out of the proceeds of the sale, where the value of the entire property seized was awarded as damages; nor will costs on the motion for award of damages be granted, and taxes assessed against the debtor and paid by the receiver will be deducted. *In re* Smith, 146 Fed. 923, 16 Am. B. R. 478.

Damages to the property caused by the freezing and bursting of pipes while the marshal was in possession of the property will be allowed. Selkregg *v.* Hamilton Bros., 144 Fed. 557, 16 Am. B. R. 474.

Claim for Damages Not Divisible. When an application for allowance of counsel fees, costs, disbursements and expenses is made and allowed under §3e of the bankruptcy act, a subsequent application for damages under §69a of the act will be denied as the claim for damages cannot be divided. Nixon *v.* Fidelity & Deposit Co., 18 Am. B. R. 174.

Allowing Damages for Malicious Proceeding.—Damages for instituting a proceeding without probable cause and maliciously cannot be allowed out of the petitioner's bond, there being no liability except for the usual costs. Matter of Moehs & Rechnitzer, 174 Fed. 165, 22 Am. B. R. 286. See also XXI.

23. Matter of Gorman, 15 Am. B. R. 587, *citing* Jackson *v.* Ashton, 8 Pet. (U. S.) 93, 8 L. ed. 898.

24. *In re* Plotke, 104 Fed. 964, 44 C. C. A. 28, 5 Am. B. R. 171.

Jurisdictional allegations should not be in the disjunctive. *In re* Laskaris, 1 Am. B. R. 480.

25. Hoffchlaeger *v.* Young Nap, 12 Am. B. R. 515; *In re* Nelson, 98 Fed. 76, 1 Am. B. R. 63.

26. Bradley Timber Co. *v.* White, 121 Fed. 779, 58 C. C. A. 55, 10 Am. B. R. 329.

27. Ledbetter *v.* United States, 170 U. S. 606, 611, 18 Sup. Ct. 774, 42 L. ed. 1162.

28. *In re* White, 135 Fed. 199, 14 Am. B. R. 241; *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310. See, however,

It has been held sufficient to allege facts showing that the defendant is not within the excepted classes,[29] or facts which negative the exception and exclude the idea that he is within the excepted class;[30] but the better practice is to aver that the defendant was not a wage earner, nor a person chiefly engaged in farming or the tillage of the soil, or otherwise within one of the excepted classes.[31] The objection that the person sought to be declared a bankrupt is within the exception of §4b goes to the jurisdiction of the court,[32] and is not simply personal to the bankrupt,[33] and so may be raised by any creditor.[34] A petition may be dismissed for failure to so allege;[35] unless the defect be corrected by amendment.[36] If the objection is not met by replication it is conclusive, and will cause a dismissal of the petition.[37]

(II.) Alleging Concealment of Property. – An allegation that defendant disposed of property to hinder, delay and defraud creditors is insufficient if stated merely in the language of the statute,[38] it being necessary to state facts and circumstances from which the inference can be drawn that the disposition of the property was with evil intent.[39]

Green River Deposit Bank *v.* Craig, 110 Fed. 137, 6 Am. B. R. 381, in which the court expresses a contrary opinion.

29. Beach *v.* Macon Grocery Co., 120 Fed. 736, 57 C. C. A. 150, 9 Am. B. R. 762.

30. *In re* White, 135 Fed. 199, 14 Am. B. R. 241; *In re* Brett, 130 Fed. 981, 12 Am. B. R. 492; Matter of Levingston, 13 Am. B. R. 357.

31. Beach *v.* Macon Grocery Co., 120 Fed. 736, 57 C. C. A. 150, 9 Am. B. R. 762; *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. B. R. 515; *In re* Callison, 130 Fed. 987, 12 Am. B. R. 344; *In re* Mero, 128 Fed. 630, 12 Am. B. R. 171; *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310.

32. *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. B. R. 515.

33. *In re* Taylor, *supra.*

34. *In re* Taylor, *supra.*

35. *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310. See, however, Green River Deposit Bank *v.* Craig, 110 Fed. 137, 6 Am. B. R. 381, in which the court takes a contrary view, but an amended petition was subsequently filed.

36. *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310. See also XIV, C.

37. *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. B. R. 515; Rise *v.* Bordner, 140 Fed. 566, 15 Am. B. R. 297.

38. *In re* White, 135 Fed. 199, 14 Am. B. R. 241. See also *In re* Milgraum & Ost, 129 Fed. 827, 12 Am. B. R. 306.

39. Matter of Hark, 135 Fed. 603, 14 Am. B. R. 400; *In re* White, 135 Fed. 199, 14 Am. B. R. 241. See also *In re* Empire Metallic Bedstead Co., 98 Fed. 981, 39 C. C. A. 372, 3 Am. B. R. 575, in which the petition was based on what was claimed to be an act of insolvency, and the petition failed to allege that it was done with intent to hinder, delay and defraud creditors. *Compare,* however, *In re* Carrier, 47 Fed. 438 (specifications were filed alleging that after the adjudication and the choosing of the assignees, the bankrupt "refused to surrender to the assignees papers relating to the estate, and concealed from the said assignees 'certain papers' relating to judgments recovered against him prior to his adjudication, 'the papers' so concealed being a receipt of one Alexander Smith for the notes upon which the judgments were recovered." It was held that the charge of concealment was bad, it not being sufficiently specific); *In re* Rathbone, 2 Ben. 138, 20 Fed. Cas. No. 11,580, 1 N. B. R. 294 (a specification that a bankrupt "has been guilty of fraud in covering, concealing and distributing his property" is too general); *In re* Mawson, 2 Ben. 332, 16 Fed. Cas. No. 9,318, 1 N. B. R. 437 (that a specification that the bankrupt "in contemplation of becoming bankrupt, has made a transfer or conveyance of part of his property, for the purpose of preventing the same from coming into the hands of the as-

An averment in a petition in involuntary bankruptcy which indicates distinctly and with particularity the identity, and receipt by the defendant of a specific sum from a specific source is sufficient.[40] When the concealment of the property is not based on any particular act, nor in any particular manner, nor at any particular time, nor under any particular circumstances, it is not necessary to allege any particular act of concealment, or to show how, when or where such concealment was effected, the manner and details being matters of evidence and not of averment;[41] the important feature being the concealment of the specified property with the specified evil intent.[42]

Allegation of Insolvency Unnecessary. — When this act of bankruptcy is alleged it is not necessary to allege insolvency,[43] and if it be alleged in the petition it need not be traversed, the allegation of insolvency not being material, the statute making the other facts sufficient cause for an adjudication.[44]

The rule applicable to the allegations in indictments for larceny and embezzlement making it unnecessary to specify the manner, details or the circumstances attending the act of theft, applies when fraudulent disposition of his property by the bankrupt is charged.[45]

(III.) When Petition Filed by Agent. — If the petition be filed by an agent, his authority to act should be pleaded.[46]

7. Verification. —a. *Generally.* — The petition being a pleading setting up matters of fact must be verified under oath.[47] In verify-

signee and of being distributed according to law in satisfaction of his debts," is vague and too general in failing to state what part of his property was so transferred); *In re* Butterfield, 5 Biss. 120, 4 Fed. Cas. No. 2,247, 14 N. B. R. 147 (that a bankrupt "has given a fraudulent preference contrary to the statute, without showing what property was the subject-matter of the preference," is bad); *In re* Beardsley, 2 Fed. Cas. No. 1,183, 1 N. B. R. 304 (holding on an application for the bankrupt's discharge a specification that the bankrupt had concealed and covered up his property for the purpose of defrauding his creditors, without specifying what property had been concealed and covered up, was too vague and indefinite).

40. *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310.

41. *In re* Bellah, *supra.*

42. *In re* Bellah, *supra.*

43. West Co. *v.* Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. ed. 1098, 2 Am. B. R. 463, *affirming* 1 Am. B. R. 261; *In re* Pease, 129 Fed. 446, 12 Am. B. R. 66.

44. West Co. *v.* Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. ed. 1098, 2 Am. B. R. 463, *affirming* 1 Am. B. R. 261.

45. *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310.

So an allegation that the defendant at a specified time "concealed and secreted" a specified sum "with intent to hinder, delay and defraud his creditors," sufficiently sets forth the necessary facts. *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310. See also Matter of Hark, 135 Fed. 603, 14 Am. B. R. 400.

46. *In re* Nelson, 98 Fed. 76, 1 Am. B. R. 63; Matter of Levingston, 13 Am. B. R. 357.

47. Bankruptcy Act (1898), §18, (c); Matter of McConnell, 11 Am. B. R. 418.

A verification cannot be made before one of the attorneys for the party making the verification. *In re* Brumelkamp, 95 Fed. 814, 2 Am. B. R. 318. See also *supra,* XVIII.

A defect in the verification is not jurisdictional (Green River Deposit Bank *v.* Craig, 110 Fed. 137, 6 Am. B. R. 381), though a failure to make the verification required will upon the defendant's objection result in checking the progress of the proceeding until a

ing a petition in involuntary bankruptcy it is not necessary that there be an affidavit subscribed by the petitioner,[48] it being sufficient if the petition contain a *jurat* by the proper officer showing that the statements contained in the petition subscribed by the petitioner are true.[49]

b. *By an Agent.* — The verification if made by an agent should set forth that it is made by the affiant in his representative capacity.[50]

c. *By a Corporation.* — A verification by an officer or agent of a corporation must contain a statement that he was authorized to sign and verify the petition on behalf of the corporation.[51]

d. *Remedy To Correct Verification.* — If a verification is defective the better practice is a motion for a rule to require a proper verification, rather than a motion to dismiss for want of jurisdiction,[52] and if such rule is not complied with the petition may for that reason be dismissed.[53]

8. When Objections Waived. — Objections should be taken either previous to or when the answer is filed; otherwise they will be waived,[54] and such waiver cannot afterward be retracted.[55]

9. Must Be in Duplicate. — Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.[56]

VI. THE SCHEDULE. — A. PREPARATION AND FILING. — **1. In General.** — The provisions of the statute requiring the filing of schedules and the statement therein of the requisite facts are imperative.[57]

proper verification be made (Green River Deposit Bank *v.* Craig, 110 Fed. 137, 6 Am. B. R. 381; *In re* Simmonson, Whiteson & Co., 1 Am. B. R. 197).

Where the petition was filed by three creditors and was only verified by two, the remaining creditor may verify even after a motion to dismiss the petition on that ground. Green River Deposit Bank *v.* Craig, 110 Fed. 137, 6 Am. B. R. 381.

48. *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310.

49. *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310.

50. *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310; Matter of Levingston, 13 Am. B. R. 357; *In re* Simonson Whiteson & Co., 1 Am. B. R. 197 (this does not include a solicitor or attorney at law).

51. *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310; Matter of Levingston, 13 Am. B. R. 357.

The omission to so state is a fatal defect (*In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310), unless it be remedied by amendment (*In re* Bellah, *supra.*)

52. Green River Deposit Bank *v.* Craig, 110 Fed. 137, 6 Am. B. R. 381.

53. Green River Deposit Bank *v.* Craig, *supra.*

54. *In re* Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *In re* Simmons, 22 Fed. Cas. No. 12,864, 10 N. B. R. 253; *In re* Sargent, 21 Fed. Cas. No. 12,361, 13 N. B. R. 144; *In re* McNaughton, 8 N. B. R. 44; *In re* Simonson, Whiteson & Co., 1 Am. B. R. 197.

This applies to the form of the petition or the verification. *In re* Simonson, Whiteson & Co., 1 Am. B. R. 197.

55. *In re* Simonson, Whiteson & Co., 1 Am. B. R. 197.

56. Bankruptcy Act (1898), §59, (e); *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310; *In re* Stevenson, 94 Fed. 110, 2 Am. B. R. 66.

57. Matter of Back Bay Automobile Co., 19 Am. B. R. 33, 37.

Of the essence of the law and not merely formal. *In re* Gailey, 127 Fed. 538, 62 C. C. A. 336, 11 Am. B. R. 539.

2. Must Be on Oath. — The bankrupt must file a schedule of his property[58] under his oath.[59]

3. Contents. — a. *Liabilities.* — Therein must be given a list of the creditors showing their residences, if known, if unknown, that fact to be stated.[60]

Outlawed Debts. — Creditors whose debts are barred by the statute of limitations should be scheduled; such action does not, however, revive the debt.[61]

Statement of Amount Due Creditors and Security Held. — He must state therein the nature and amount of the debt due to each creditor and the particulars of any security held by them.[62]

58. Bankruptcy Act (1898), §7a, (8).

59. Bankruptcy Act (1898), §7a, (8).

The oath may be administered by a referee in bankruptcy, an officer authorized to administer oaths in proceedings before courts of the United States, or under the law of the state where the same is taken and diplomatic or consular officers of the United States in any foreign country. Bankruptcy Act (1898), §20a.

Any person conscientiously opposed to taking an oath may in lieu thereof affirm. Bankruptcy Act (1898), §20b.

60. Bankruptcy Act (1898), §7a, (8).

Error in Name of Creditor.—A mistake as to a creditor's name in the schedule prevents the debt from being discharged, it not having been duly scheduled. Liesum *v.* Kraus, 35 Misc. 376, 71 N. Y. Supp. 1022; Custard *v.* Wiggerson, 17 Am. B. R. 337. See also Haack *v.* Theise, 99 N. Y. Supp. 905, 16 Am. B. R. 699.

Full Name of Creditors To Be Stated. The full name of the creditor, that is, the Christian name and the surname should appear. The use of initials is not a commendable practice. *In re* Mackey & Co., 1 Am. B. R. 593.

Scheduling Judgment Creditor.—The name of the record holder of a judgment should appear regardless of who the actual holder may be. Sellers *v.* Bell, 94 Fed. 811, 2 Am. B. R. 529.

Abbreviations in Address.—Common abbreviations for the names of the states may be permitted, but names of towns, villages and cities and post offices should be written in full. As an illustration, the use of "Phila." for "Philadelphia" is improper. *In re* Mackey & Co., 1 Am. B. R. 593.

Address.—The designation of the address of a creditor at "135 Bdwy." without any further statement as to which street is meant, there being a street of that name in each of the five boroughs of a city, is insufficient. Sutherland *v.* Lasher, 41 Misc. 249, 84 N. Y. Supp. 56, 11 Am. B. R. 780.

In large cities the street number or post-office box number should be stated, or a statement appear that after diligent effort no better address could be obtained. *In re* Brumelkamp, 95 Fed. 814, 2 Am. B. R. 318.

A statement that the address of the creditors is unknown is insufficient, it should also appear what efforts were made to ascertain the addresses. *In re* Dvorak, 107 Fed. 76, 6 Am. B. R. 63; Schiller *v.* Weinstein, 47 Misc. 622, 94 N. Y. Supp. 763, 15 Am. B. R. 183; Feldmark *v.* Weinstein, 45 Misc. 329, 90 N. Y. Supp. 478.

Giving an "office address" instead of the residence is not a compliance with the statute. Weidenfeld *v.* Tillinghast, 18 Am. B. R. 531.

Rule in Southern District of New York.—Rule 1 of the Rules of Bankruptcy for the Southern District of New York provides that "the schedules as respects creditors in the city of New York, should state the street and number of their residence or place of business so far as known." Weidenfeld *v.* Tillinghast, 18 Am. B. R. 531.

61. *In re* Resler, 95 Fed. 804, 2 Am. B. R. 602; *In re* Lipman, 94 Fed. 353, 2 Am. B. R. 46; *In re* Kingsley, 1 Low. 216, 14 Fed. Cas. No. 7,819, 1 N. B. R. 52, 1 N. B. R. 329.

62. *In re* Gailey, 127 Fed. 538, 62 C. C. A. 336, 11 Am. B. R. 539.

b. *Assets.* — The bankrupt should schedule all property in which he has an interest, the amount, kind and location thereof, and its money value in detail.[63]

c. *Claim for Exemption.* — (I.) **In General.** — The bankrupt is required to make claim for exemptions in his schedules,[64] the claim being passed on by the bankruptcy court; that tribunal being vested with the necessary jurisdiction.[65] The bankruptcy act and the general orders and forms applicable thereto, regulate the time and manner of claiming the exemption.[66]

63. Bankruptcy Act (1898), §7a, (8); *In re* Beal, 1 Low. 323, 2 Fed. Cas. No. 1,156, 2 N. B. R. 587.

A bank account should be scheduled. Steinhardt *v.* National Park Bank, 120 App. Div. 255, 105 N. Y. Supp. 23, 19 Am. B. R. 72, *reversing* 18 Am. B. R. 86.

Growing crops in which debtor has an interest should be scheduled. *In re* Barrow, 98 Fed. 582, 3 Am. B. R. 414.

Contingent interest in a life insurance policy. *In re* Becker, 106 Fed. 54.

Property in reversion, remainder or expectancy, property held in trust for the debtor, or subject to any power or right to dispose of or to charge. *In re* Gailey, 127 Fed. 538, 62 C. C. A. 336, 11 Am. B. R. 539; *In re* Shenberger, 102 Fed. 978; *In re* Wood, 95 Fed. 946, 3 Am. B. R. 572.

Exempt property and a statement of the exemption. *In re* Todd, 112 Fed. 315, 7 Am. B. R. 770.

Pension money should be scheduled though exempt. *In re* Bean, 100 Fed. 262, 4 Am. B. R. 53.

See, *infra,* next section.

64. Bankruptcy Act (1898), §7, (8).

65. Bankruptcy Act (1898), §2, (11); Smalley *v.* Langenour, 196 U. S. 93, 25 Sup. Ct. 216, 49 L. ed. 400, 13 Am. B. R. 692.

Exclusive Jurisdiction.—The bankruptcy court has exclusive jurisdiction to determine all claims of the bankrupt to exemptions. *In re* McCrary Bros., 169 Fed. 485, 22 Am. B. R. 161; McGahan *v.* Anderson, 113 Fed. 115, 51 C. C. A. 92, 7 Am. B. R. 641; *In re* Lucius, 10 Am. B. R. 653; Powers Dry Goods Co. *v.* Nelson, 10 N. D. 580, 88 N. W. 703, 7 Am. B. R. 506, 58 L. R. A. 770.

Limitation of Jurisdiction. — The bankruptcy court has as a rule no authority over the specific property claimed as exempt except to appraise and set it off, leaving to the state courts to work out and enforce conflicting claims with regard to it. *In re* Highfield, 21 Am. B. R. 92. To same effect, see **U. S.**—Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. ed. 1061, 10 Am. B. R. 107; *In re* MacKissic, 171 Fed. 259, 22 Am. B. R. 817; *In re* Castleberry, 143 Fed. 1018, 16 Am. B. R. 159; *In re* Hartsell, 140 Fed. 30, 15 Am. B. R. 177; *In re* Brumbaugh, 128 Fed. 971, 12 Am. B. R. 204; *In re* Boyd, 120 Fed. 999, 10 Am. B. R. 337. **Ga.**—McKenney *v.* Cheney, 118 Ga. 387, 45 S. E. 433, 11 Am. B. R. 54. **N. D.**—Powers Dry Goods Co. *v.* Nelson, 10 N. D. 580, 88 N. W. 703, 7 Am. B. R. 506.

A bankruptcy court has no authority to direct a sale of property of the bankrupt exempt by the state law as a homestead upon the petition of a creditor, even though under the state law such creditor had a right to subject the homestead to the payment of his debts. He must seek his remedy in the state courts. Ingram *v.* Wilson, 125 Fed. 913, 60 C. C. A. 618, 11 Am. B. R. 192. See also *In re* Hatch, 102 Fed. 280, 4 Am. B. R. 349. *Compare,* however, *In re* Sisler, 2 Am. B. R. 760; *In re* Woodruff, 2 Am. B. R. 678 (where the property was sold by the trustee).

Nor can the bankruptcy court enforce a mortgage against such property. *In re* Hatch, *supra.*

66. Burke *v.* Guarantee Title & Trust Co., 134 Fed. 562, 67 C. C. A. 486, 14 Am. B. R. 31; Lipman *v.* Stein, 134 Fed. 235, 67 C. C. A. 17, 14 Am. B. R. 30, *affirming* 12 Am. B. R. 384; *In re* Kane, 127 Fed. 552, 62 C. C. A. 616, 11 Am. B. R. 533; *In re* Friedrich, 100 Fed. 284, 40 C. C. A. 378, 3 Am. B. R. 801; *In re* Culwell, 165 Fed. 828, 21 Am. B. R. 614; *In re* Fisher, 142 Fed. 205, 15 Am. B. R. 652; Matter of McClintock, 13 Am.

(II.) What Law To Govern. — The law of the state of the bankrupt's domicil during the greater portion of the six months preceding the filing of the petition, is the statute under which exemptions are allowed.[67] Such state law as interpreted by the court of last resort controls,[68] unless the decisions of the state court are in conflict and point to no definite rule of construction, or there be no rule of decision

B. R. 606; *In re* Lucius, 10 Am. B. R. 653.

The claim for exemption should be contained in Schedule B, (5), attached to the petition of a voluntary bankrupt. *In re* Friedrich, 100 Fed. 284, 40 C. C. A. 378, 3 Am. B. R. 801; *In re* Groves, 6 Am. B. R. 728.

The claim for exemptions by an involuntary bankrupt should be contained in Schedule B, (5), when filed by him after his adjudication. *In re* Friedrich, 100 Fed. 284, 40 C. C. A. 378, 3 Am. B. R. 801; *In re* Groves, 6 Am. B. R. 728.

Description of Property.—That the property on which the exemption is claimed was only described generally does not render it invalid. *In re* Hastings, 24 Am. B. R. 360.

Claim for Exemption by Intervention.—When the wife failed to claim an exemption in her schedules the husband may by petition intervene and set up a claim for an exemption allowed him by the state law. *In re* Maxson, 22 Am. B. R. 424, 428.

67. McCarty *v.* Coffin, 150 Fed. 307, 80 C. C. A. 195, 18 Am. B. R. 148; Duncan *v.* Ferguson, McKinney Co., 150 Fed. 269, 80 C. C. A. 157, 18 Am. B. R. 155; *In re* Lynch, 101 Fed. 579, 4 Am. B. R. 262; *In re* McCutchen, 100 Fed. 779, 4 Am. B. R. 81; *In re* Buelow, 98 Fed. 86, 3 Am. B. R. 389; *In re* Woodard, 95 Fed. 260, 2 Am. B. R. 339; *In re* Grimes, 94 Fed. 800, 2 Am. B. R. 160.

The bankruptcy act does not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition. Bankruptcy Act (1898), §6.

It is held that this subdivision of §2 is restricted by the provisions of §6 above set forth, "which contemplates that this shall be done without enlargement or diminution of such exemption as is allowed by the laws of the state where the bankrupt has his domicile. *In re* J. F. Woodward, 2 Am. B. R. 339.

Effect of Failure To Comply With State Law.—Though the bankrupt make his claim for exemption in his schedules, if he fail to comply with the requirements of the state law in regard thereto it will not be allowed. *In re* Wunder, 133 Fed. 821, 13 Am. B. R. 701; *In re* West, 116 Fed. 767, 8 Am. B. R. 564; *In re* Garner, 115 Fed. 200, 8 Am. B. R. 263; *In re* Boorstin, 114 Fed. 696, 8 Am. B. R. 89; *In re* Stephens, 114 Fed. 192, 8 Am. B. R. 53.

The debtor must comply with the state law in order to claim exemptions. **U. S.**—*In re* Jackson, 13 Fed. Cas. No. 7,127, 2 N. B. R. 508; *In re* Gainey, 9 Fed. Cas. No. 5,181, 2 N. B. R. 525; *In re* Farish, 8 Fed. Cas. No. 4,647, 2 N. B. R. 168. **Ark.**—Giuse *v.* State, 41 Ark. 249. **Cal.**—Briggs *v.* McCullough, 36 Cal. 542. **N. Y.**—Griffin *v.* Sutherland, 14 Barb. 456.

It is not the intent of this section to enlarge the exemptions available to the bankrupt under the state law. *In re* Boyd, 120 Fed. 999, 10 Am. B. R. 337.

Where Property Located, Immaterial. Where property is exempt by the law of the state of the bankrupt's domicile, the place of actual situation of the property is immaterial. *In re* Stevens, 2 Biss. 373, 23 Fed. Cas. No. 13,392, 5 N. B. R. 298.

68. Page *v.* Edmunds, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. ed. 318, 9 Am. B. R. 277, *affirming* 5 Am. B. R. 707; *In re* McCrary Bros., 169 Fed. 485, 22 Am. B. R. 161; *In re* Burke, 168 Fed. 994, 22 Am. B. R. 69; *In re* Paramore & Ricks, 156 Fed. 208, 19 Am. B. R. 130; *In re* Pfeiffer, 155 Fed. 892, 19 Am. B. R. 230; *In re* Wood, 147 Fed. 877, 17 Am. B. R. 93; *In re* Owings, 140 Fed. 739, 15 Am. B. R. 472; Matter of Baker, 24 Am. B. R.

which is reasonably clear with respect to a given statute, in which case the federal courts may place their own construction upon the law.[69]

(III.) Action of Bankruptcy Court Conclusive. — To test a claim for exemption application must be made to the district court, or the supervision or revision of the order may be had in the circuit court of appeals; its validity cannot be questioned in the state court unless it be absolutely void.[70]

(IV.) Exemption of Partnership Assets.— As to the right of a partner to claim an exemption in the partnership assets there is considerable conflict of opinion; the rule as laid down by the courts in the respective states where the question arises is most generally followed.[71]

(V.) Duties of Trustee Regarding Exempt Property. (A.) GENERAL RULE. — The severance from the general property is made by the trustee and he determines the value of the property upon which the exemption is claimed.[72] He is required to make an itemized report setting them off, within twenty days after receiving notice of his appointment.[73]

(VI.) When Exemption Set off by The Court. — When the appointment of a trustee has been dispensed with under General Order XV, the court may in the first instance set off the exemption.[74] And any

411; *In re* Hastings, 24 Am. B. R. 360.

Unconstitutional Exemption Statute. The bankruptcy court will not recognize a state statute regarding exemption which is unconstitutional (*In re* Everitt, 8 Fed. Cas. No. 4,579, 9 N. B. R. 90; *In re* Dillard, 2 Hughes 190, 7 Fed. Cas. No. 3,912, 9 N. B. R. 8), as for instance one that would impair the obligation of a contract. Gunn *v.* Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212, 8 N. B. R. 1.

69. Matter of Baker, 96 Fed. 954, 3 Am. B. R. 101.

70. Smalley *v.* Langenour, 196 U. S. 93, 25 Sup. Ct. 216, 49 L. ed. 400, 13 Am. B. R. 692. *Compare* cases cited under first paragraph of this section.

Review by State Court.—A determination of the bankruptcy court as to what property is exempt will not be reviewed by a state court. Woolfolk *v.* Murray, 44 Ga. 133; Maxwell *v.* McCune, 37 Tex. 515.

71. *In re* Camp, 91 Fed. 745, 1 Am. B. R. 165; *In re* W. S. Jennings & Co., 22 Am. B. R. 160.

If in such a case exemption is desired the applicant must conform strictly to the law and make the application seasonably and in conformity with the rules of practice in bankruptcy. *In re* W. S. Jennings & Co., 22 Am. B. R. 160.

72. *In re* Friedrich, 100 Fed. 284, 40 C. C. A. 378, 3 Am. B. R. 801; *In re* Grimes, 2 Am. B. R. 730.

Value Not Fixed by Appraisers.— The value of the exempt property cannot be fixed by appraisers. *In re* Grimes, 96 Fed. 529, 2 Am. B. R. 730. See *In re* McCutchen, 100 Fed. 779, 4 Am. B. R. 81, holding the contrary.

73. General Order No. XVII, 172 U. S. 658, 43 L. ed. 1191, 89 Fed. xi, 32 C. C. A. xix; *In re* Manning, 112 Fed. 948, 7 Am. B. R. 571 (each item must be valued separately).

On failure to file his report within five days after the same is due, the referee must order the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. General Order No. XVII, 172 U. S. 662, 43 L. ed. 1191, 89 Fed. x, 32 C. C. A. xix.

A copy of the order is to be served on the trustee at least seven days before the time fixed for the hearing. General Order No. XVII, 172 U. S. 662, 43 L. ed. 1191, 89 Fed. x, 32 C. C. A. xix.

74. **Proof of service** of the order must be filed with the clerk of the court. Smalley *v.* Lanegnour, 196 U. S. 93, 25 Sup. Ct. 216, 49 L. ed. 400. See also *In re* Allen, 134 Fed. 620, 13 Am. B. R. 518. See Rule 15, Western District of New York.

When No Trustee Has Been Ap-

creditor may file exceptions to the determination of the trustee within twenty days after the filing of the report.[75] The bankrupt also may file exceptions.[76] The reference may require the exceptions to be argued before him and is required to certify them to the court for final determination at the request of either party.[77]

B. REQUIREMENT AS TO FORM. — **1. Generally.** — The schedules must be plainly written or printed, without abbreviation or interlineation except where such abbreviation and interlineation may be for the purpose of reference.[78]

2. Prescribed Forms To Be Used. — The failure of the bankrupt to precisely observe the prescribed forms is not necessarily fatal; substantial compliance therewith being sufficient.[79] In the Eastern District of North Carolina it has, however, been held that the printed blank containing the prescribed forms must be used and that neither written nor type written schedules will be accepted.[80]

C. FILING SCHEDULES. — **1. Time For Filing.** — Upon a voluntary proceeding the schedules must be filed with the petition; if an involuntary proceeding they must be filed within ten days after the adjudication unless further time be granted.[81]

pointed.—See, however, *In re* Smith, 93 Fed. 791, 2 Am. B. R. 190. When no trustee has been appointed, and instead the referee proceeds to make the exemptions on which exceptions are filed which are certified to the court by the referee, the record will be returned with instructions that the proper steps be taken to appoint a trustee that the matter may be proceeded with regularly.

75. General Order No. XVII, 172 U. S. 658, 43 L. ed. 1191, 89 Fed. xi, 32 C. C. A. xix; *In re* Campbell, 124 Fed. 417, 10 Am. B. R. 723.

Trustee.—The trustee acts ministerially in setting aside the exemption, and while he may decide preliminarily that the bankrupt is not entitled to the exemption and refuse to set the property aside, he on the other hand may set aside the property and file objections as the representative of the whole body of creditors to the report. *In re* Rice, 164 Fed. 589, 21 Am. B. R. 202.

Exceptions Filed Thereafter Dismissed.—Exceptions filed more than twenty days after the filing of trustee's report will be dismissed (Matter of Cotton & Preston, 23 Am. B. R. 586; Matter of Amos, 19 Am. B. R. 804); nor can a creditor after that time amend his original exceptions by adding grounds which do not amplify the original exceptions but set forth new matter. Matter of Cotton & Preston, *supra*.

76. *In re* Ellis, 10 Am. B. R. 754, *explaining In re* White, 4 Am. B. R. 613.

77. General Order XVII, 172 U. S. 658, 43 L. ed. 1191, 89 Fed. x, 32 C. C. A. xix.

78. General Order V, 172 U. S. 654, 43 L. ed. 1189, 89 Fed. v, 32 C. C. A. viii.

79. Burke *v.* Guarantee, Title & Trust Co., 134 Fed. 562, 67 C. C. A. 486, 14 Am. B. R. 31; *In re* Soper, 1 Am. B. R. 193.

A defect therein may be cured by amendment. *In re* Fisher, 142 Fed. 205, 15 Am. B. R. 652; Burke *v.* Guarantee Title and Trust Co., *supra*. See also, XIV.

Using ditto marks violates this rule. *In re* Mackey, 1 Am. B. R. 593; Haach *v.* Theise, 99 N. Y. Supp. 905, 16 Am. B. R. 699; *In re* Orne, 1 Ben. 420, 18 Fed. Cas. No. 10,582, 1 N. B. R. 79.

80. Mahoney *v.* Ward, 100 Fed. 278, 3 Am. B. R. 770.

81. Bankruptcy Act (1898), §7a, (8).

Motion Does Not Operate as Extension of Time.—A motion or other proceeding looking to a rehearing on the adjudication does not operate to extend the statutory period of limitation if made after the time to appeal has expired. Conboy *v.* First Nat. Bank,

2. **Must Be In Triplicate.** — The schedules must be in triplicate, one copy of each for the clerk, referee and trustee.[82]

3. **When Schedules May Be Filed by Referee.** — Should the bankrupt fail, refuse or neglect to file his schedules, it is the duty of the referee to prepare them or cause them to be prepared and filed.[83]

4. **Proceedings Against Bankrupt for Failure To File.** — When a bankrupt fails to file schedules within the statutory time, the creditors may apply for an attachment upon order to show cause.[84]

VII. PROCESS AND PLEADINGS.— A. THE SUBPOENA. — The subpoena must be tested by the clerk of the court from which it issues, and under the seal thereof.[85]

B. SERVICE OF PETITION AND SUBPOENA. — Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, must be made upon the defendant named therein in the same manner that service of process is made upon the commencement of a suit in equity in the courts of the United States.[86]

C. APPEARANCE.— **1. Generally.** — a. *Within What Time.* — The bankrupt or any creditor may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.[87] The time will usually be extended unless it appear that the extension is requested merely for the purpose of delay.[88]

203 U. S. 141, 27 Sup. Ct. 50, 51 L. ed. 128, 16 Am. B. R. 773; Mills *v.* Fisher & Co., 159 Fed. 897, 87 C. C. A. 77, 20 Am. B. R. 237; Matter of Brady, 21 Am. B. R. 364.

82. Bankruptcy Act (1898), §7a, (8).

83. Bankruptcy Act (1898), §39a, (6).

84. Matter of Brady, 21 Am. B. R. 364.

Without Notice.—Matter of Brady, 21 Am. B. R. 364.

Contempt.—Such failure may be punished as for a contempt of court. Matter of Fellerman, 149 Fed. 244, 17 Am. B. R. 785; Matter of Schulman & Goldstein, 20 Am. B. R. 707.

85. General Order III, 172 U. S. 654, 43 L. ed. 1189, 89 Fed. iv, 32 C. C. A. vii.

Waiver of defect by appearance without objection. Matter of The Abbey Press, 134 Fed. 51, 67 C. C. A. 161, 13 Am. B. R. 11; *In re* Smith, 117 Fed. 961, 9 Am. B. R. 98.

The process is returnable within fifteen days, unless the judge for cause shall fix a longer time. Bankruptcy Act (1898), §18, (a).

86. Bankruptcy Act (1898), §18, (a).

Service in the absence of the defendant made by delivering to, and leaving a copy with, some adult person who is a member of, or resident in, the family is sufficient. *In re* Norton, 148 Fed. 301, 17 Am. B. R. 504.

Service on the clerk of a hotel of which the alleged bankrupt was the proprietor, and where he usually resided, is sufficient. *In re* Risteen, 122 Fed. 732, 10 Am. B. R. 494.

By Publication.—In case personal service cannot be made, notice shall then be given by publication in the same manner, and for the same time as provided for notice of publication in suits to enforce a legal or equitable lien in courts of the United States, except that unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication, unless the judge shall for cause fix a longer time. Bankruptcy Act (1898), §18, (a).

87. Bankruptcy Act (1898), §18, (b).

The whole of the day is meant by this provision. Day *v.* Beck & Gregg Hdw. Co., 114 Fed. 834, 52 C. C. A. 468, 8 Am. B. R. 175.

88. *In re* Cooper Bros., 159 Fed. 956, 20 Am. B. R. 392.

b. *Extension by Stipulation.* — The time cannot be extended by stipulation unless the court also consent thereto.[89]

2. Voluntary Appearance. — The bankrupt's voluntary appearance is equivalent to personal service, but only confers jurisdiction of the person.[90]

3. Appearance or Pleading After Return Day. — The court may in its discretion permit a creditor to appear or plead after the expiration of the time set.[91]

4. Who May Appear. — Appearance may be made either in person or by an attorney admitted to practice in the District or Circuit Court.[92]

5. Proceedings After Appearances. — If the bankrupt or any of his creditors shall appear within the time limited and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by the act, and make the adjudication or dismiss the petition.[93]

6. When no Appearance Made. — If on the last day within which pleadings may be filed, none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as may be practicable, make the adjudication or dismiss the petition.[94]

7. Clerk To Act in Absence of Judge. — If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.[95]

D. THE ANSWER. — **1. General Rule.** — An answer may be filed by any creditor and by the bankrupt.[96] The form prescribed only indicates the form of the answer in substance, and is not exclusive in its provisions. Not only may the insolvency be denied, but it may also set up any other available defense or counterclaim.[97] An answer that

89. *In re* Simonson, 92 Fed. 904, 1 Am. B. R. 197.

90. *In re* Mason, 99 Fed. 256, 3 Am. B. R. 599; Shutts *v.* First Nat. Bank of Aurora, 98 Fed. 705, 3 Am. B. R. 492; *In re* Western Investment Co., 21 Am. B. R. 367; *In re* Frischberg, 8 Am. B. R. 607; *In re* Altman, 1 Am. B. R. 689.

Irregularity in service is waived by such appearance. Matter of Frischberg, 8 Am. B. R. 607; *In re* McNaughton, 8 N. B. R. 44.

91. *In re* First Nat. Bank of Belle Fourche, 152 Fed. 64, 81 C. C. A. 260, 18 Am. B. R. 265.

92. Gen. Order IV., 172 U. S. 654, 43 L. ed. 1189, 89 Fed. iv, 32 C. C. A. viii.

93. Bankruptcy Act (1898), §18, (d).

94. Bankruptcy Act (1898), §18, (e).

95. Bankruptcy Act (1898), §18, (f).

The clerk's duties in this regard are merely ministerial, and the order of reference may be made by a deputy clerk. Gilbertson *v.* United States, 168 Fed. 672, 94 C. C. A. 158, 22 Am. B. R. 32.

96. *In re* Stern, 116 Fed. 604, 54 C. C. A. 60, 8 Am. B. R. 569; *In re* Ewing, 115 Fed. 707, 53 C. C. A. 289, 8 Am. B. R. 269.

97. *In re* Paige, 99 Fed. 538, 3 Am. B. R. 679.

does not admit or unevasively deny the material facts alleged in the petition and that is prolix and mingled with grounds of demurrer will be stricken out.[98]

2. Who May Plead Solvency. — Solvency may be pleaded either by the bankrupt or by a responding creditor.[99]

3. Setting Up Insufficient Number of Creditors. — If it be alleged in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors join as petitioners therein, and it be alleged in the answer that a larger number of creditors exist, there shall be filed with the answer a list under oath of the creditors with their addresses and the court must notify all such creditors of the pendency of the petition and shall delay the hearing thereon for a reasonable time so that all parties interested may have opportunity to be heard.[1]

4. Setting Up Defense of Excepted Class. — The objection that the debtor is within the excepted classes, though jurisdictional, may be taken by answer.[2]

E. Demurrer. — A demurrer may be filed by any creditor and by the bankrupt.[3]

No Demurrer to Answer. — The sufficiency of the answer can be tested only by setting the case for hearing on petition and answer.[4]

F. Right To Interpose Answer and Demurrer. — Both an answer and a demurrer may be filed to a petition in involuntary bankruptcy, the answer affecting one part of the bill and the demurrer another. If, however, they overlap each other, the demurrer will be waived by the answer.[5]

G. Replication. — If petitioning creditors wish to contest or deny

98. Bradley Timber Co. *v.* White, 121 Fed. 779, 58 C. C. A. 55, 10 Am. B. R. 329.

Denying Insolvency.—A general averment that no act of bankruptcy, such as is charged, has been committed is at best inferential, but where the parties proceeded to take proof was held a sufficient denial of insolvency. Troy Wagon Wks. *v.* Vastbinder, 130 Fed. 232, 12 Am. B. R. 352, where the allegation was that he did not "at any time commit any act of bankruptcy alleged in the petition."

A corporation against whom a petition in bankruptcy is filed is entitled to a hearing on the question of its insolvency and is not concluded by the finding of a state court, though a receiver was appointed by it upon the ground of insolvency. *In re* Pickins Mfg. Co., 20 Am. B. R. 202. See also Blue Mt. Iron & Steel Co. *v.* Portner, 131 Fed. 57, 65 C. C. A. 295, 12 Am. B. R. 559; *In re* Belfast Mesh Underwear Co., 153 Fed. 224, 18 Am. B. R. 620.

99. *In re* West, 1 Am. B. R. 261.

1. Bankruptcy Act (1898), §59d.

2. *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. B. R. 515, pointing out that when the case is submitted on the pleadings, without proofs taken, the allegations of the answer must be taken as true.

3. *In re* Stern, 116 Fed. 604, 54 C. C. A. 60, 8 Am. B. R. 569; *In re* Ewing, 115 Fed. 707, 53 C. C. A. 289, 8 Am. B. R. 269.

When the petition fails to allege necessary jurisdictional facts, advantage thereof should be taken by demurrer. Green River Dep. Bank *v.* Craig, 110 Fed. 137, 6 Am. B. R. 381.

4. Goldman *v.* Smith, 93 Fed. 182, 1 Am. B. R. 266.

5. *In re* Cooper Bros., 159 Fed. 956, 20 Am. B. R. 392.

a question raised by the answer they should put in a replication denying the allegations.[6]

VIII. PROCEEDINGS ON RETURN OF SUBPOENA. — A. GENERALLY. — The judge is required, except in cases where there is a trial by jury, to determine the issues "as soon as may be" and make the adjudication or dismiss the petition.[7]

B. ADJUDICATION. — **1. In General.** — The adjudication should conform to the petition and the relief granted will be only what is prayed for, and when a partnership adjudication alone is asked for that alone should be granted.[8] The order is conclusive only against those entitled to be heard in the proceedings, and not against one who was not permitted to intervene.[9]

2. Form of Adjudication as Affecting Discharge. — When only the copartnership is adjudged bankrupt, the discharge only bars firm debts,[10] and likewise the adjudication of the individual will not affect firm liabilities.[11]

6. *In re* Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. B. R. 515.

7. Bankruptcy Act (1898), §18, (d).

"The statute is mandatory and insistent that the adjudication be had or the petition dismissed as soon as possible after the time has expired in which the debtor and creditors may plead." *In re* Billing, 145 Fed. 395, 17 Am. B. R. 80.

8. *In re* Sanderlin, 109 Fed. 857, 6 Am. B. R. 384; Chemical Nat. Bank *v.* Meyer, 92 Fed. 896, 1 Am. B. R. 565. See also *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. B. R. 559 (that when the petition asks for the adjudication of the partnership no adjudication of the individuals will be granted though they each be insolvent); *In re* Ceballos, 20 Am. B. R. 459.

9. Manson *v.* Williams, 213 U. S. 453, 29 Sup. Ct. 519, 53 L. ed. 869, 22 Am. B. R. 22, *affirming* 18 Am. B. R. 674.

10. *In re* Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 19 Am. B. R. 577; *In re* Pincus, 147 Fed. 621, 17 Am. B. R. 331; *In re* Hale, 107 Fed. 432, 6 Am. B. R. 35; Dodge *v.* Kaufman, 46 Misc. 248, 91 N. Y. Supp. 727, 15 Am. B. R. 542. See also *In re* Stein Co., 127 Fed. 547, 62 C. C. A. 272, 11 Am. B. R. 536; Strause *v.* Hooper, 105 Fed. 590, 5 Am. B. R. 225; *In re* Duguid, 100 Fed. 274, 3 Am. B. R. 794; *In re* Blair, 99 Fed. 76, 3 Am. B. R. 588.

11. *In re* Morrison, 127 Fed. 186, 11 Am. B. R. 498; *In re* Meyers, 97 Fed. 757, 3 Am. B. R. 260.

After Denial of Partnership Discharge.—A member of a copartnership may file his individual petition after a discharge to the firm has been refused, though he sets forth the same debts and the same assets. Matter of Feigenbaum, 7 Am. B. R. 339.

How Individual May Be Discharged From Partnership Debts.—"To become entitled, however, to a discharge barring the firm creditors, under such circumstances, the proper foundation must be laid in the proceedings instituted on behalf of the bankrupt partner. In the petition originally filed it should be averred that the petitioner is indebted in his individual capacity, if such be the fact, and also as a member of a firm, naming it, and giving the names of the several partners; and the petition should pray for a discharge from the firm as well as his individual debts. To this petition should be attached the proper schedules, setting forth the firm debts, the firm property, if any, and all other matters, the same as is required in the case of a proceeding brought by all the partners. Schedules of the individual property and debts should also be attached to the petition. In the notice to the creditors to attend the first meeting, it should be stated that the firm, as well as the individual creditors, are notified to attend, as the bankrupt is seeking a discharge from both classes of claims; and also in the petition for a discharge a release from the firm as well as the individual debts should be asked; and in the notice to

3. Reference Upon Adjudication. — After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee, or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court if the convenience of the parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district.[12]

4. Effect of Adjudication. — An adjudication of bankruptcy is a decree of court and beyond legislative control.[13]

5. Motion for Adjudication on the Pleadings. — When a motion for an adjudication of bankruptcy is made on the pleadings, the petitioners thereby admit all the averments of fact properly pleaded in the answers.[14] And if the motion be denied, the respondents are entitled to a final decree dismissing the petition.[15]

6. Vacating the Adjudication. — a. *Generally.* — The court has no power to vacate an adjudication, other than on the grounds prescribed by the statute.[16]

creditors of the filing and hearing upon the petition for discharge the fact that a release from the firm debts is prayed for should be specifically set forth. Notice of the filing of the petition and of the creditors' meetings should be sent to the non-joining partner or partners, in order that, if necessary, they may appear and protect their rights and interests in the proceedings." *In re* Laughlin, 96 Fed. 589, 3 Am. B. R. 1.

A discharge based on an individual adjudication will be a bar to subsequent suits on the bankrupt's partnership liabilities, provided there be no firm assets and the firm creditors were set forth in the schedules and received notice. **U. S.**—*In re* Kaufman, 136 Fed. 262, 14 Am. B. R. 393; *In re* Laughlin, 96 Fed. 589, 3 Am. B. R. 1; Jarecki Mfg. Co. *v.* McElwaine, 5 Am. B. R. 751. **Minn.**—Loomis *v.* Wallblom, 94 Minn. 392, 102 N. W. 1114, 13 Am. B. R. 687. **N. Y.**—Institution for the Deaf & Dumb *v.* Crockett, 117 App. Div. 269, 102 N. Y. Supp. 412; Dodge *v.* Kaufman, 46 Misc. 248, 91 N. Y. Supp. 727, 15 Am. B. R. 542.

See, however, *In re* McFaun, 96 Fed. 592, 3 Am. B. R. 66 (where no notice was given to firm creditors); *In re* Meyers, 96 Fed. 408, 2 Am. B. R. 707, 3 Am. B. R. 260 (in which there appeared to be firm assets).

Individual Adjudication as Affecting Partnership Liability.—When an individual petition is silent as to partnership assets and liabilities, though the schedules disclose a few individual debts and quite a large number of partnership liabilities, but no other reference is elsewhere made to the partnership, and in his petition for discharge the bankrupt prays "that he may be decreed by the court to have a full discharge from all debts provable against his estate." It furthermore appearing from a sworn statement filed by the bankrupt that he seeks to be discharged from both firm and individual liabilities, he will not be discharged from partnership debts, though the firm no longer exists, is without assets and its debts are barred by the statute of limitations. *In re* Morrison, 127 Fed. 186, 11 Am. B. R. 498.

12. Bankruptcy Act (1898), §22, (a).

13. *In re* Raffauf, 6 Biss. 150, 1 Cent. L. J. 364, 20 Fed. Cas. No. 11,525, 10 N. B. R. 69.

14. *In re* Waugh, 133 Fed. 281, 66 C. C. A. 659, 13 Am. B. R. 187, *citing* Banks *v.* Manchester, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. ed. 425.

15. *In re* Waugh, 133 Fed. 281, 66 C. C. A. 659, 13 Am. B. R. 187, *citing* *In re* Sanford Fork & Tool Co., 160 U. S. 247, 16 Sup. Ct. 291, 40 L. ed. 414.

16. Matter of Ives, 111 Fed. 495, 6 Am. B. R. 653.

Not Open to Collateral Attack. — The adjudication cannot be attacked collaterally, it being as binding and conclusive as a judgment *inter partes,* on due hearing in a court of competent jurisdiction.[17]

b. *Who May Make Application.* — The application may be made by a creditor, though his claim be not a provable one.[18]

c. *To Be Promptly Made.* — The application must be promptly made; there must be no laches.[19]

d. *To Whom Made.* — The application must be made to the court granting the order of adjudication.[20]

C. SECOND PETITION. — If a petition be dismissed, a new proceeding may be instituted by other creditors, and the judgment previously rendered cannot be pleaded against them.[21]

D. COSTS. — If the debtor resists an adjudication and the court after hearing adjudges the debtor a bankrupt, the petitioning creditor shall recover the same costs that are allowed to a party recovering in a suit in equity, which costs are to be paid out of the estate.[22] If the petition be dismissed the debtor is entitled to like costs against the petitioner.[23]

17. *In re* Dempster, 172 Fed. 353, 97 C. C. A. 51, 22 Am. B. R. 751; Gilbertson *v.* United States, 168 Fed. 672, 94 C. C. A. 158, 22 Am. B. R. 32; *In re* Hecox, 164 Fed. 823, 90 C. C. A. 627, 21 Am. B. R. 314. See also Huttig Mfg. Co. *v.* Edwards, 160 Fed. 619, 87 C. C. A. 521, 20 Am. B. R. 349, when the record shows jurisdiction.

18. Matter of New York Tunnel Co., 166 Fed. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *In re* Yates, 114 Fed. 365, 8 Am. B. R. 69.

That the creditor appeared specially for the purposes of the application is no ground for refusing the application. Matter of Altonwood Park Co., 160 Fed. 448, 87 C. C. A. 409, 20 Am. B. R. 31.

19. Matter of Altonwood Park Co., 160 Fed. 448, 87 C. C. A. 409, 20 Am. B. R. 31; *In re* Worsham, 142 Fed. 121, 73 C. C. A. 665, 15 Am. B. R. 672; *In re* Billing, 145 Fed. 395, 17 Am. B. R. 80; *In re* Niagara Contracting Co., 127 Fed. 782, 11 Am. B. R. 643; *In re* Ives, 111 Fed. 495, 6 Am. B. R. 653.

20. Chapman *v.* Brewer, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. ed. 83; *In re* Ives, 5 Dill. 146, 13 Fed. Cas. No. 7,115, 19 N. B. R. 97; Lewis *v.* Sloan, 68 N. C. 557.

21. Neustadter *v.* Chicago Dry Goods Co., 96 Fed. 830, 3 Am. B. R. 96.

22. General Order No. XXXIV, 172 U. S. 665, 43 L. ed. 1194, 89 Fed. xiii, 32 C. C. A. xxxiii. And see Selkregg *v.* Hamilton Bros., 144 Fed. 557, 16 Am. B. R. 474. See also, *supra,* V, C, 5.

Priority of Costs.—The payment of the actual and necessary costs of preserving and administering the estate has priority over taxes. *In re* Halsey Electric Generator Co., 163 Fed. 118, 23 Am. B. R. 401.

23. General Order No. XXXIV, 172 U. S. 665, 43 L. ed. 1194, 89 Fed. xiii, 32 C. C. A. xxxiii; *In re* Wolpert, 1 Am. B. R. 436 (this power is inherent in the district court).

General Order No. XXXIV is confined to involuntary bankruptcy and contested adjudications. *In re* Barrett, 16 Am. B. R. 46.

Dismissal for Want of Jurisdiction. Where a petition is dismissed for want of jurisdiction of the parties (in this case the debtor was within an excepted class) the court has no power to award costs. The rule laid down in Citizens' Bank *v.* Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. ed. 451, was held to apply. *In re* Philadelphia & Lewis Transp. Co., 127 Fed. 896, 11 Am. B. R. 444. To the same effect, *In re* Williams, 120 Fed. 34, 9 Am. B. R. 736.

The granting of a temporary injunction restraining certain creditors from paying over money to the debtor is not such a seizure as to authorize the allowance of counsel fees. *In re* Williams, 120 Fed. 34, 9 Am. B. R. 736.

Allowance of Costs. —When prior to the adjudication application is made to take charge of and hold the property of the proposed bankrupt, and the petition be dismissed by the court or withdrawn by the petitioner, the respondent will be allowed his costs and counsel fees, expenses and damages occasioned by reason of the seizure, taking or detention of the property.[24]

IX. EXAMINATION OF BANKRUPT. — A. In General. — The bankrupt is required to submit to an examination concerning the various matters prescribed by the statute, which examination may take place at the first meeting of creditors.[25] Upon the request of creditors the bankrupt may be required to attend on the hearing of objections to the discharge,[26] or he may be examined for the purpose of obtaining information on which to base objections to the discharge.[27]

B. Notice to Creditors. — Ten days' notice of such examination should be given to creditors.[28]

C. After Discharge. — An examination of the bankrupt may be had after his discharge and within a year therefrom, for the purpose of ascertaining whether after his discharge he concealed any property from the trustee.[29]

24. Bankruptcy Act (1898), §3, (e).

Allowance of Damages. — Counsel fees, expenses, and damages in addition to costs will only be allowed where the property has been seized under 3e of the bankruptcy act. *In re* Hines, 144 Fed. 147, 16 Am. B. R. 538; *In re* Ghilglione, 93 Fed. 186, 1 Am. B. R. 580.

Where a petition was filed against five persons alleged to be copartners and is dismissed as to two of them, and under a bond as provided by §3e property belonging to them was seized, the court will as to them allow their costs and disbursements as well as a reasonable counsel fee. *In re* Nixon, 110 Fed. 633, 6 Am. B. R. 693.

25. Bankruptcy Act (1898), §7a, (9).

No Particular Time.—Neither the Bankrupt Act nor the rules limit the examination of the bankrupt to any particular time or occasion. *In re* Price, 91 Fed. 635, 1 Am. B. R. 419.

As a rule but one such examination should be had. *In re* Price, *supra.*

And when the examination had is apparently full, an application for further examination will be refused. *In re* Isidor, 2 Ben. 123, 13 Fed. Cas. No. 7,105, 1 N. B. R. 264; *In re* Frisbie, 9 Fed. Cas. No. 5,131, 13 N. B. R. 349.

This examination may be for the purpose of making up the schedules (*In re* Franklin Syndicate, 101 Fed. 402, 4 Am. B. R. 244), but cannot be ordered prior to the adjudication (*In re* Crenshaw, 155 Fed. 271, 19 Am. B. R. 266).

26. *In re* Shanker, 138 Fed. 862, 15 Am. B. R. 109.

27. *In re* Price, 91 Fed. 635, 1 Am. B. R. 419.

The bankrupt may be required to attend for examination whenever reasonably required by creditors for the purpose of establishing their objections to his discharge. *In re* Miller, 97 Fed. 326, 3 Am. B. R. 226.

That the bankrupt has been examined by one creditor is no reason for refusing an application by another creditor. *In re* Vogel, 28 Fed. Cas. No. 16,984, 5 N. B. R. 393; *In re* Gilbert, 1 Low. 340, 10 Fed. Cas. No. 5,410, 3 N. B. R. 162; *In re* Adams, 3 Ben. 7, 1 Fed. Cas. No. 40, 2 N. B. R. 272, 36 How. Pr. (N. Y.) 270.

28. Bankruptcy Act (1898), §58; *In re* Price, 91 Fed. 635, 1 Am. B. R. 419.

On application for a discharge this notice may accompany the notice of such application. *In re* Price, 91 Fed. 635, 1 Am. B. R. 419.

29. *In re* Westfall Bros. & Co., 8 Am. B. R. 431; *In re* Peters, 1 Am. B. R. 248.

For similar authority under Act of 1867, see *In re* Heath, 11 Fed. Cas. No. 6,304, 7 N. B. R. 448.

D. Securing Attendance of Bankrupt Confined in Penal or Other Institution. — The attendance of a bankrupt who may be confined in a penal institution or in a state hospital for the criminal insane may be compelled by writ of *habeas corpus ad testificandum.*[30]

The writ will not be issued if the bankrupt is neither competent or qualified to testify, nor if he could not testify when brought by reason of his being disqualified as a witness.[31]

E. Who May Examine. — A creditor who has neither filed nor proven his claim, nevertheless has the right to examine the bankrupt.[32]

30. General Order XXX, 172 U. S. 663, 43 L. ed. 1193, 89 Fed. xii, 32 C. C. A. xxx; *In re* Thaw, 166 Fed. 71, 91 C. C. A. 657, 21 Am. B. R. 561.

Writ of Habeas Corpus ad Testificandum.—"1. In the District Court of the United States for the Western District of Pennsylvania.

In the Matter of Henry Kendall Thaw, Bankrupt,

No. 4,290, in Bankruptcy.

Western District of Pennsylvania, United States of America, ss. The President of the United States of America, to Dr. Robert B. Lamb, Superintendent of Matteawan State Hospital, New York, or Dr. Baker, His Assistant—Greeting:

We command that you have the body of Henry Kendall Thaw, detained in the Matteawan State Hospital under your custody, as it is said, under safe and secure conduct before the judge of our district court within and for the Western District of Pennsylvania, at Pittsburg, Pennsylvania, forthwith, there to testify the truth according to his knowledge in a certain cause now pending in said court, and then and there to be tried in the matter of the said Henry Kendall Thaw, Bankrupt, at No. 4,290 in Bankruptcy, before the said court, and immediately after the said Henry Kendall Thaw shall have given his testimony in the above-entitled manner that you return him to the said Matteawan State Hospital of New York under safe and secure conduct, and have you then and there this writ.

Witness, the Honorable R. W. Archbald, Judge of the District Court of the United States for the Western District of Pennsylvania, by special assignment, at Pittsburg, Pennsylvania, and the seal of the said court, this 13th day of October, A. D. 1908.

Wm. T. Lindsey, Clerk.

(Seal of the U. S. District Court for the Western District of Penna.)"

In re Thaw, 166 Fed. 71, 91 C. C. A. 657, 21 Am. B. R. 561.

The writ need not be returned to the particular judge who issued it, but may be acted upon by whomsoever presiding in the court to which it is returnable when the bankrupt is produced. *In re* Thaw, 166 Fed. 71, 91 C. C. A. 657, 21 Am. B. R. 561. The judge then presiding may quash the writ or take such action in regard thereto as the circumstances of the case may warrant. *In re* Thaw, 166 Fed. 71, 91 C. C. A. 657, 21 Am. B. R. 561.

Order Quashing Writ.—"2. In the District Court of the United States for the Western District of Pennsylvania. In the Matter of Henry Kendall Thaw,

Bankrupt. No. 4,290, in Bankruptcy.

At the City of Pittsburg, in Said District, This 20th day of October, 1908. Western District of Pennsylvania, ss:

And now, 20th of October, 1908, this matter came on to be heard upon the petition for a writ of *habeas corpus ad testificandum,* the reply thereto of the respondent, and the answer to the reply by the trustee in bankruptcy of said Henry Kendall Thaw, and after argument by counsel and consideration by the court.

It is ordered that the writ of *habeas corpus ad testificandum* heretofore issued, directed to said Dr. Robert B. Lamb, Superintendent of the Matteawan State Hospital, in the State of New York, be quashed, and the petition for said writ be dismissed, with costs.

Per Curiam."

31. *In re* Thaw, 166 Fed. 71, 91 C. C. A. 657, 21 Am. B. R. 561. See also *Ex parte* Marmaduke, 91 Mo. 228, 4 S. W. 91, 60 Am. Rep. 250.

32. *In re* Samuelsohn, 174 Fed. 911, 23 Am. B. R. 528; *In re* Walker, 96

F. MANNER OF CONDUCTING EXAMINATION. — The examination is to be taken in narrative form unless the referee determine that it shall be by question and answer,[33] and when completed it is to be read over to the witness and signed by him in the presence of the referee.[34] The examination should not be conducted on behalf of the trustee by counsel for the bankrupt, and it is improper for him to represent the trustee for that purpose.[35]

G. NOTING OBJECTIONS. — The referee must note thereon all questions objected to with his decision thereon.[36]

H. EXAMINATION OF WIFE OF BANKRUPT. — The statute furthermore provides that the wife of a bankrupt may be compelled to attend as a witness and be examined touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.[37]

X. DETENTION OF BANKRUPT. — A. IN GENERAL. — At any time after the filing of the petition by or against a person and before the expiration of one month after the qualification of the trustee, a judge of the district court may, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal directing him to bring such bankrupt forthwith before the court for examination.[38]

Fed. 550, 3 Am. B. R. 35; *In re* Jehn, 94 Fed. 638, 2 Am. B. R. 498; *In re* Price, 91 Fed. 635, 1 Am. B. R. 419. But see *In re* Winship, 7 Ben. 194, 30 Fed. Cas. No. 17,878; *In re* Kingsley, 6 Ben. 300, 14 Fed. Cas. No. 7,818, 7 N. B. R. 558; *In re* Belden, 3 Fed. Cas. No. 1,241, 4 N. B. R. 194, as to the right of the bankrupt to decline to submit to examination at the instance of one not having a valid debt.

33. General Order XXII, 172 U. S. 661, 43 L. ed. 1192, 89 Fed. x, 32 C. C. A. xxv.

Employment of Stenographer.—For this purpose the referee may employ a stenographer who is to be paid out of the estate. Bankruptcy Act (1898), §38a, (5).

By rule of court in some districts, as for example the Western District of New York, all testimony is taken down by the official stenographer in the form of question and answer, and transcribed.

The bankrupt may be cross-examined by his own counsel. *In re* Levy, 1 Ben. 496, 15 Fed. Cas. No. 8,296, 1 N. B. R. 136; *In re* Leachman, 15 Fed. Cas. No. 8,157, 1 N. B. R. 391. But see *In re* Bragg, 4 Fed. Cas. No. 1,799, holding that the bankrupt might, under advice of counsel, give explanations and corrections of his statements, but that his counsel could not put questions to him in the way of cross-examination.

34. General Order XXII, 172 U. S. 661, 43 L. ed. 1192, 89 Fed. x, 32 C. C. A. xxv.

35. *In re* Tenthorn, 5 Am. B. R. 767.

36. General Order XXII, 172 U. S. 661, 43 L. ed. 1192, 89 Fed. x, 32 C. C. A. xxv; Bank of Ravenswood *v.* Johnson, 143 Fed. 463, 74 C. C. A. 597, 16 Am. B. R. 206; *In re* Sturgeon, 139 Fed. 608, 71 C. C. A. 592, 14 Am. B. R. 68; *In re* Romine, 138 Fed. 837, 14 Am. B. R. 785; Dressel *v.* North State Lumber Co., 119 Fed. 531, 9 Am. B. R. 541; *In re* Lipset, 119 Fed. 379, 9 Am. B. R. 32; *In re* De Gottardi, 114 Fed. 328, 7 Am. B. R. 723.

Court Rule.—See Rule XXII, Western District of New York.

37. Bankruptcy Act (1898), §21a; *In re* Worrell, 125 Fed. 159, 10 Am. B. R. 744.

38. Bankruptcy Act (1898), §9b.

If upon hearing the evidence it shall appear to the court or a judge thereof that the allegations are true and that

B. Not a Basis for Extradition Proceedings. — Such warrant cannot be issued as a basis for extradition proceedings.[39]

XI. PROTECTION OF BANKRUPT FROM ARREST. —A. In General. — A bankrupt is exempt from arrest in civil cases, except in the following cases: (1) when issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a state court having jurisdiction and served within such state, upon a debt or claim from which the discharge in bankruptcy would not be a release. In such case the bankrupt shall be exempt from arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the bankruptcy act.[40]

it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditional for his appearance for examination, from time to time, not exceeding in all, ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto. Bankruptcy Act (1898), §9b.

Form of Recognizance for Appearance.—

"Recognizance for Appearance.

(Filed July 30, 1906.)

"United States of America, District of Massachusetts, ss. City of Pittsfield.

"Be it remembered that on this twenty-seventh day of July, A. D. 1906, before me, a commissioner duly appointed by the District Court of the United States for the said District of Massachusetts, personally came Majer Appel of Brooklyn in the State of New York and David Appel of the city, county and state of New York, and jointly and severally acknowledged themselves to owe the United States of America the sum of two thousand five hundred dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

"The condition of this recognizance is such, that if the said Majer Appel will not go or attempt to go into parts beyond the jurisdiction of the District Court of the United States for the District of Massachusetts without the leave of said court or until further order of said court, and then and there abide the judgment of the said court, and not depart from said district without leave, then this recognizance to be void, otherwise to remain in full force and virtue.

Majer Appel. (Seal.)

"David Appel. (Seal.)

"Taken and acknowledged before me on the day and year first above written.

"(Seal.) Arthur H. Wood,

"Commissioner of the United States for the District of Massachusetts.

"United States of America, District of Massachusetts, ss.—

"David Appel, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at 248 East 7th street, in the city of New York, that he is a freeholder in the city of Brooklyn, New York, that he is worth the sum of three thousand dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of real estate in said Brooklyn. David Appel has deposited with me two thousand five hundred dollars in cash as bail money.

"(Affiant's Signature) David Appel.

"Sworn to and subscribed before me, this twenty-seventh day of July, A. D. 1906.

"(Seal.) Arthur H. Woods,

"Commissioner of the United States, for the District of ——." *In re* Appel, 163 Fed. 1002, 90 C. C. A. 172, 20 Am. B. R. 890.

The absence of the bankrupt from the district from time to time without leave of court is a breach of the bond. *In re* Appel, 163 Fed. 1002, 90 C. C. A. 172, 20 Am. B. R. 890.

39. *In re* Ketchum, 108 Fed. 35, 5 Am. B. R. 532.

40. Bankruptcy Act (1898), §9a; Matter of Dresser, 124 Fed. 915, 10

Under the provisions of the statute taken together with the general orders applicable thereto it is held that a bankrupt is virtually within the exemption, from the time of his adjudication until his discharge.[41]

B. Applies Only to Dischargeable Debts. — The protection from arrest applies only to such debts as are provable and dischargeable in bankruptcy.[42]

C. Who May Grant Order. — **1. Generally.** — If the debtor after the filing of the petition or during the pendency of the proceedings in bankruptcy be arrested or imprisoned upon process in any civil action, the district court may upon application issue a writ of *habeas corpus*. If it appear on the return of such writ that he is imprisoned on a debt provable and dischargeable in bankruptcy, he shall be discharged; if not, he is to be remanded to the custody in which he may lawfully be.[43]

2. Application to State Court. — As a matter of comity the application should first be addressed to the state court.[44]

D. Notice to Creditors. — Before granting the order of discharge notice must be served upon the creditor or his attorney, and they have a right to be heard upon the application.[45]

Am. B. R. 270; *In re* Lewensohn, 98 Fed. 576, 3 Am. B. R. 594.

May Be Granted by Referee.—The order protecting the bankrupt from arrest may be granted by the referee. General Order XII, 172 U. S. 657, 43 L. ed. 1190, 89 Fed. vii, 32 C. C. A. xvi; *In re* Grist, 1 Am. B. R. 89.

41. General Orders, XII, XXX, 172 U S. 657, 663, 43 L. ed. 1190, 1193, 89 Fed. x, xii, 32 C. C. A. xvi, xxx. Matter of Adler, 144 Fed. 659, 75 C. C. A. 461, 16 Am. B. R. 414; Matter of Dresser, 124 Fed. 915, 10 Am. B. R. 270; *In re* Lewensohn, 98 Fed. 576, 3 Am. B. R. 594.

The right is not available after the discharge is granted (*In re* Wiggers, 29 Fed. Cas. No. 17,623; *In re* Kimball, 6 Blatchf. 292, 14 Fed. Cas. No. 7,769, 2 N. B. R. 354; *In re* Dole, 11 Blatchf. 499, 7 Fed. Cas. No. 3,964, 9 N. B. R. 193), but may be invoked so long as there is pending any proceeding to review the granting of the discharge (*In re* Chandler, 135 Fed. 893, 13 Am. B. R. 614).

This provision of the statute has been construed by one of the judges of the district court for the southern district of New York to authorize the bankrupt's discharge from custody, where he was arrested before the beginning of bankruptcy proceedings in a civil action brought on a debt provable and dischargeable in bankruptcy (People *v.* Erlanger, 132 Fed. 883, 13 Am. B. R. 197. See also Matter of Wenham, 153 Fed. 910, 16 Am. B. R. 690), and by another of the judges in the same district the contrary is held (*In re* Claiborne, 109 Fed. 74, 5 Am. B. R. 812).

42. Matter of Adler, 144 Fed. 659, 75 C. C. A. 461, 16 Am. B. R. 414; *In re* Fife, 109 Fed. 880, 6 Am. B. R. 258; *In re* Hilton, 104 Fed. 981, 4 Am. B. R. 774.

If the debt be not dischargeable there is no protection from arrest. *In re* Marcus, 105 Fed. 907, 45 C. C. A. 115, 5 Am. B. R. 365; *In re* Baker, 96 Fed. 954, 3 Am. B. R. 101.

A bankrupt imprisoned upon a judgment for the support of a bastard child will not be released. *In re* Baker, 96 Fed. 954, 3 Am. B. R. 101.

43. Gen. Order XXX, 172 U. S. 663, 43 L. ed. 1193, 89 Fed. xii, 32 C. C. A. xxx.

When Order Not Effective.—When a bankrupt is punished by a state for disregarding its authority, such process is not interfered with by a general restraining order of a court of bankruptcy. *In re* Fritz, 152 Fed. 562, 18 Am. B. R. 244.

44. United States *v.* McAleese, 1 Am. B. R. 650.

45. General Order XXX, 172 U. S. 663, 43 L. ed. 1193, 89 Fed. xii, 32 C. C. A. xxx.

E. Bail. — If the court deem it proper to order the bankrupt's discharge from arrest, the court is not authorized to require him to give bail.[46]

XII. EFFECT OF DEATH OR INSANITY OF BANKRUPT. — A. Death. — The death of a bankrupt does not abate the proceedings, though it occur before adjudication.[47]

B. When Death Occurs Before Adjudication. — Should the death occur before adjudication, process should issue to the heirs and personal representatives.[48]

C. Discharge Though Bankrupt Be Deceased. — A discharge may be granted notwithstanding the bankrupt be deceased.[49]

D. Insanity. — The act also provides that the insanity of the bankrupt does not abate the proceedings.[50] If at the time of the commission of the act of bankruptcy the debtor was insane, the petition will be dismissed.[51]

E. Examination of Insane Bankrupt Before Trial. — The court has no authority to require the bankrupt in such a case to submit to an examination before trial.[52]

F. Appointment of Guardian Ad Litem of Insane Bankrupt. — When it is sought to maintain proceedings against an insane debtor the court will appoint a guardian *ad litem* to represent him.[53]

G. Who To Be Made Parties When Bankrupt Insane. — The

46. United States *v.* Peters, 166 Fed. 613, 22 Am. B. R. 177.

47. Bankruptcy Act (1898), §8; Shute *v.* Patterson, 147 Fed. 509, 78 C. C. A. 75, 17 Am. B. R. 99; Matter of Spaulding, 137 Fed. 1020, 70 C. C. A. 681, 14 Am. B. R. 129, *reversing* 13 Am. B. R. 223; *In re* Hicks, 107 Fed. 910, 6 Am. B. R. 182.

They are to be conducted and concluded in the same manner, as far as possible, as though he had not died. Bankruptcy Act (1898), §8; Shute *v.* Patterson, 147 Fed. 509, 78 C. C. A. 75, 17 Am. B. R. 99.

The proceedings are deemed commenced when the petition is filed (Shute *v.* Patterson, 147 Fed. 509, 78 C. C. A. 75, 17 Am. B. R. 99; *In re* Larkin, 168 Fed. 100, 21 Am. B. R. 711); and do not abate though process had not been served on the debtor prior to his death (Shute *v.* Patterson, 147 Fed. 509, 78 C. C. A. 75, 17 Am. B. R. 99; *In re* Hicks, 107 Fed. 910, 6 Am. B. R. 182).

48. Shute *v.* Patterson, 147 Fed. 509, 78 C. C. A. 75, 17 Am. B. R. 99.

49. *In re* Miller, 133 Fed. 1017, 13 Am. B. R. 345; *In re* Risteen, 122 Fed. 832, 10 Am. B. R. 494; *In re* Parker, 1 Am. B. R. 615. See also *In re* Hicks, 107 Fed. 910, 6 Am. B. R. 182.

50. Bankruptcy Act (1898), §8; *In re* Kehler, 162 Fed. 674, 89 C. C. A. 466, 19 Am. B. R. 513, *reversing* 153 Fed. 235, 18 Am. B. R. 596.

A bankrupt's right to a discharge is not affected by his insanity. *In re* Miller, 133 Fed. 1017, 13 Am. B. R. 345; *In re* Risteen, 122 Fed. 732, 10 Am. B. R. 494.

51. *In re* Ward, 161 Fed. 755, 20 Am. B. R. 482.

When the adjudication in lunacy is made before the filing of the petition in bankruptcy, such adjudication is binding on the bankruptcy court (*In re* Funk, 101 Fed. 244, 4 Am. B. R. 96), otherwise that court will try whether the question of insanity existed at the time of the commission of the act of bankruptcy (*In re* Ward, 161 Fed. 755, 20 Am. B. R. 482).

The issues are to be tried by a jury. *In re* Ward, 161 Fed. 755, 20 Am. B. R. 482.

52. *In re* Ward, 161 Fed. 755, 20 Am. B. R. 482.

53. *In re* Burka, 107 Fed. 674, 5 Am. B. R. 843.

insane person, his committee or guardian, should be made parties, and the committee or guardian should apply to be appointed guardian *ad litem* for the purpose of defending.[54]

XIII. PARTNERSHIPS AND CORPORATIONS. — A. PARTNERSHIP. — **1. Definition.** — The term "partnership" is not specifically defined in the Bankruptcy Act. It is, however, included within the term "persons."[55] Individual members and the partnership are entities separate and distinct from each other.[56]

2. Partner May Institute Proceedings. — A proceeding may be instituted by one or more of the partners against the partnership.[57]

54. *In re* Burka, 107 Fed. 674, 5 Am. B. R. 843.

If there be no guardian or committee, or they be antagonistic in interest, a guardian *ad litem* will be appointed on the application of any party to the proceedings. *In re* Burka, 107 Fed. 674, 5 Am. B. R. 843.

55. Bankruptcy Act (1898), §1, (19); *In re* Stein, 127 Fed. 547, 62 C. C. A. 472, 11 Am. B. R. 536; Mills *v.* Fisher, 20 Am. B. R. 237.

See *infra*, XIII, B, 1.

A partnership is considered in bankruptcy as having a legal entity which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual partners. *In re* Henry L. Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re* Perley, 138 Fed. 927, 15 Am. B. R. 54; *In re* McLaren, 125 Fed. 835, 11 Am. B. R. 141; *In re* Sanderlin, 109 Fed. 857, 6 Am. B. R. 384; Mills *v.* Fisher, 20 Am. B. R. 237. *Compare In re* Forbes, 128 Fed. 137, 11 Am. B. R. 787 (in which the court says that this treatment of a partnership is irreconcilable with other provisions of the statute); Vaccaro *v.* Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. B. R. 474 (holding that there can be no adjudication of a partnership unless the insolvency of the firm and of every member would have to be averred and shown before it could be adjudicated a bankrupt).

Previous Acts.—"Section 5 differs significantly in its phraseology from that of the former acts in regard to the bankruptcy of partners. It takes the place of section 14 of the Bankruptcy Act of 1841, and of section 36 of the Bankruptcy Act of 1867. These sections of the earlier acts authorized an adjudication of bankruptcy of 'persons who are partners in trade,' instead of 'a partnership;' and, while providing for the administration of the joint and separate estates substantially like section 5, provided, as section 5 does not, for granting or refusing a discharge to each partner." *In re* Henry L. Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. B. R. 559.

New Departure.—"The right to proceed in bankruptcy against a partnership as a legal entity is new, and before the act of 1898 was unheard of." *In re* Pincus, 147 Fed. 621, 17 Am. B. R. 331.

Appointment of Receiver.—A copartnership does not commit an act of bankruptcy because the surviving member joins in an application made by the administrator of the deceased partner for the appointment of a receiver (Moss Nat. Bank *v.* Arend, 146 Fed. 351, 16 Am. B. R. 867), but if the application for a receiver be based upon the insolvency of the firm the appointment of a receiver is an act of bankruptcy. *In re* Beatty, 150 Fed. 293, 80 C. C. A. 181, 17 Am. B. R. 738, *distinguishing* Moss Nat. Bank *v.* Arend, *supra*.

Temporary Receiver.—The appointpointment of a temporary receiver is not equivalent to a general assignment and will not support an application for involuntary adjudication. *In re* Boyd *v.* Boyd Fry Stove & China Co., 20 Am. B. R. 330.

56. *In re* McMurtrey & Smith, 142 Fed. 853, 15 Am. B. R. 427; *In re* Sanderlin, 109 Fed. 857, 6 Am. B. R. 384.

57. *In re* Levy & Richman, 95 Fed. 812, 2 Am. B. R. 21.

"While the present Bankruptcy Act (act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) contains no provision expressly authoriz-

3. Adjudication Of. — A partnership may be adjudged bankrupt, though the partners composing it are not so adjudicated.[58] There must be an actual copartnership,[59] and the adjudication must occur during the continuation of the partnership business,[60] or after its dissolution and before the final settlement thereof.[61]

ing a partner to file a petition against his copartners, such power must be implied from section 5 of the Act and General Order 8 which, in substance, embodies the language of General Order 18, promulgated under the Act of 1867." *In re* Ceballos & Co., 20 Am. B. R. 459.

The filing of a petition by one partner against his copartners is not an act of bankruptcy on the part of the partnership. *In re* Ceballos & Co., 20 Am. B. R. 459.

58. *In re* Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 19 Am. B. R. 577; *In re* Stein & Co., 127 Fed. 547, 62 C. C. A. 472, 11 Am. B. R. 536; *In re* Mercur, 122 Fed. 384, 58 C. C. A. 472, 10 Am. B. R. 505; Matter of Everybody's Market, 173 Fed. 492, 21 Am. B. R. 925; *In re* Junck & Balthazard, 169 Fed. 481, 22 Am. B. R. 298; *In re* Farley, 115 Fed. 359, 8 Am. B. R. 266; *In re* Ceballos & Co., 20 Am. B. R. 459.

Petition Against Copartnership.—A petition containing an allegation setting out the names of the individuals composing the partnership, that none of the copartners are within the excepted classes, and that the copartnership owes debts to the amount of one thousand dollars; the prayer for relief being "that said copartnership may be adjudged by this court to be bankrupt," it was held to be an application solely for the adjudication of the partnership. Matter of Ying Wick Co., 13 Am. B. R. 757.

Allegation of Insolvency.—When the act of bankruptcy charged against a partnership "is a preference through legal proceedings, it is necessary to allege in sufficient language such actual insolvency, which would be covered by the words 'the said' partners owe debts which they are unable to pay in full,' according to Form 2." A petition containing an allegation "that said copartners, doing business as Wing Yick & Co., are insolvent," held to be sufficient on the authority of Vaccaro *v.* Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. B. R. 474; *In re* Blair, 99 Fed. 76, 3 Am. B. R. 588; Matter of Wing Yick Co., 13 Am. B. R. 757.

59. A partnership in fact must be shown to exist, and not a mere holding out, by which one might become liable to creditors as a partner. *In re* Beckwith, 130 Fed. 475, 12 Am. B. R. 453.

An adjudication will not be made against a copartnership unless it appear that a partnership existed, and when the fact is denied an adjudication will be refused until the uncertainty be removed. *In re* McLaren, 11 Am. B. R. 141. See also Manson *v.* Williams, 153 Fed. 525, 82 C. C. A. 475, 18 Am. B. R. 674, *affirming* 148 Fed. 305, 17 Am. B. R. 826, *affirmed*, 213 U. S. 453, 22 Am. B. R. 22; Jones *v.* Burnham, Williams & Co., 138 Fed. 986, 71 C. C. A. 240, 15 Am. B. R. 85; Buckingham *v.* First Nat. Bank, 131 Fed. 192, 65 C. C. A. 498, 12 Am. B. R. 465; Rush *v.* Lake, 122 Fed. 561, 58 C. C. A. 447, 10 Am. B. R. 455; Lott *v.* Young, 109 Fed. 798, 48 C. C. A. 654, 6 Am. B. R. 436; *In re* Hudson Clothing Co., 148 Fed. 305, 17 Am. B. R. 826; Buffalo Milling Co. *v.* Lewisburg Dairy Co., 20 Am. B. R. 279.

60. Bankruptcy Act (1891), §5, (a); *In re* Stein & Co., 127 Fed. 547, 62 C. C. A. 472, 11 Am. B. R. 536.

61. **After Dissolution.**—The rule is well settled that where debts or assets remain after dissolution the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims. Holmes *v.* Baker & Hamilton, 20 Am. B. R. 252. See also *In re* Hirsch, 97 Fed. 571, 3 Am. B. R. 344; *In re* Levy, 95 Fed. 812, 2 Am. B. R. 21; *In re* Stowers, 1 Low. 528, 23 Fed. Cas. No. 13,516; *In re* Noonan, 3 Biss. 491, 18 Fed. Cas. No. 10,292, 10 N. B. R. 330; *In re* Foster, 3 Ben. 386, 9 Fed. Cas. No. 4,962, 3 N. B. R. 236; *In re* Crockett, 2 Ben. 514, 6 Fed. Cas. No. 3,402, 2 N. B. R. 208.

When no Partnership Assets in Existence.—When a firm makes an assignment for the benefit of creditors eight

4. Estate of Deceased Partner. — The estate of a deceased partner cannot be adjudged a bankrupt.[62] But if the surviving partner files a petition, the partnership may be adjudged bankrupt, and the court may in that manner acquire jurisdiction of the estate of the deceased partner.[63]

5. Effect of Acts of One Partner. — The commission of an act of bankruptcy by one member, as to partnership property, amounts to an act of bankruptcy of the copartnership.[64]

6. When Some Copartners Are Solvent. — In the event of one or more but not all the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.[65]

years before the filing of the petition for involuntary bankruptcy and there do not appear to be any partnership assets in existence, an application that such firm be adjudged bankrupt will be denied. Royston *v.* Weis, 112 Fed. 962, 50 C. C. A. 638, 7 Am. B. R. 584.

Insanity of Partner. — Involuntary proceedings may be instituted against a partnership notwithstanding one of the members of the firm has been adjudged insane. *In re* L. Stein & Co., 127 Fed. 547, 62 C. C. A. 272, 11 Am. B. R. 536. See also *In re* Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. B. R. 692.

Infancy of One Partner.—A partnership, one of the members of which is an infant, may nevertheless be adjudicated bankrupt. *In re* Duguid, 100 Fed. 274, 3 Am. B. R. 794; *In re* Dunnigan Bros., 95 Fed. 428, 2 Am. B. R. 628.

62. Graves *v.* Winter, 1 Cent. L. J. 178, 10 Fed. Cas. No. 5,710, 9 N. B. R. 357.

The death of a partner after the adjudication does not affect the proceeding. Bankruptcy Act (1898), §8.

Under the Act of 1867, the death of a partner after the issuance of the warrant though prior to the adjudication is no legal cause for dismissal of the petition as against both copartners. Hunt *v.* Pooke, 12 Fed. Cas. No. 6,896, 5 N. B. R. 161.

63. If the partnership be dissolved by death of a partner, the filing of a petition by the surviving partner affects only his individual estate. *In re* Pierce, 102 Fed. 977, 4 Am. B. R. 489; *In re* Evans, 20 Am. B. R. 406.

64. *In re* Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. B. R. 559, *affirming* 92 Fed. 896, 1 Am. B. R. 565; *In re* Borelli & Callahan, 142 Fed. 296, 16 Am. B. R. 115; *In re* Kersten, 110 Fed. 929, 6 Am. B. R. 516; *In re* Grant Bros., 5 Am. B. R. 837. See also *In re* Shapiro, 106 Fed. 495, 5 Am. B. R. 839; *In re* Duguid, 100 Fed. 274, 3 Am. B. R. 794.

A preferment of one firm creditor by a member of the firm out of his individual property would be an act of bankruptcy on the part of the firm. Mills *v.* Fisher & Co., 20 Am. B. R. 237.

Act of Bankruptcy by Partner.—A transfer of individual property by one who is a member of a copartnership will not sustain bankruptcy proceedings against the firm. Hartman *v.* Peters, 146 Fed. 82, 17 Am. B. R. 61.

Under previous statute, see *In re* Redmond, 20 Fed. Cas. No. 11,632, 9 N. B. R. 408.

65. Bankruptcy Act (1898), §5, (h); Mills *v.* Fisher & Co., 20 Am. B. R. 237.

As to when consent may be implied, see *In re* Harris, 108 Fed. 517, 4 Am. B. R. 132, where the relation was undisclosed.

Clauses "c" and "h" of §5 of the Bankruptcy Act should be read together. "They provide, in effect, that when a partnership and one or more

A petition filed against an individual partner will not be extended so as to permit all of the partners to avail themselves of its benefits and save themselves from making the necessary deposit.[66]

7. Appointment of Trustee. — The creditors of the partnership appoint the trustee; in other respects so far as possible the estate is to be administered in the same manner as other estates.[67]

8. Proof of Debts and Marshaling and Distribution of Assets. a. *Generally.* — The court may permit the proof of the claim of the partnership estate against the individual estates and vice versa,[68] and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribu-

of the partners, but not all of them, are adjudged bankrupt, those who are not so adjudged may administer the partnership property and *a fortiori* their individual property, and the court may not do so without their consent, but, if the unadjudicated members consent, the court may administer the partnership property and their individual estates. These provisions thus interpreted are fair, just and reasonable. The solvent partner cannot in any event escape payment of the debts of the partnership. His individual property is subject to attachment, execution, and to all the ordinary processes of the law to satisfy them. He is more competent to manage the individual property and the property of his firm which he had the shrewdness and ability to accumulate, more competent to convert them into money and to apply them upon his obligations, than any trustee chosen by his creditors can be. He knows the property, its value, its availability for various uses, its market. He has a vital interest in securing the best price for it, and the fact that it is his property, that it is to be applied to his debts, gives him a preferential equity to apply it speedily and efficiently to the payment of his obligations. The opposite practice would be unreasonable, unfair to those who have accumulated, and preserved the property and liable to much injustice:'' *In re* Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 19 Am. B. R. 577, 583.

Application of Statute.—This section applies in a case where the partnership itself is not before the court, but one or more of the individual partners are. *In re* Junck & Balthazard, 169 Fed. 481, 22 Am. B. R. 298.

66. *In re* Mercur, 122 Fed. 384, 58 C. C. A. 472, 10 Am. B. R. 505; Mahoney *v.* Ward, 100 Fed. 278, 3 Am. B. R. 770.

67. Bankruptcy Act (1898), §5, (b).

This applies only in the case of a joint petition. *In re* Beck, 110 Fed. 140, 6 Am. B. R. 554. In all other respects the proceedings for the appointment of a trustee of a copartnership is the same as that of an individual. Bankruptcy Act (1898), §§44, 56.

The rule depends upon the nature of the petition and not upon outside facts. *In re* Beck, 110 Fed. 140, 6 Am. B. R. 554.

68. Bankruptcy Act (1898), §5, (g); *In re* Hee, 13 Am. B. R. 8. See also *In re* Gillette, 104 Fed. 769; Wilkins *v.* Davis, 2 Low. 511, 29 Fed. Cas. No. 17,664, 15 N. B. R. 60; *In re* Webb, 4 Sawy. 326, 29 Fed. Cas. No. 17,317, 16 N. B. R. 258; *In re* Frear, 2 Ben. 467, 9 Fed. Cas. No. 5,074, 1 N. B. R. 660, 35 How. Pr. 249.

As to when individual debts cannot be proved against firm assets, see Pollock *v.* Jones, 124 Fed. 163, 61 C. C. A. 555, 10 Am. B. R. 616 (*affirming* 9 Am. B. R. 262); Merchants' Bank *v.* Thomas, 121 Fed. 306, 57 C. C. A. 374, 10 Am. B. R. 299; Davis *v.* Turner, 120 Fed. 605, 56 C. C. A. 669, 9 Am. B. R. 704; *In re* Hardie & Co., 143 Fed. 553, 16 Am. B. R. 381; *In re* Lehigh Lumb. Co., 101 Fed. 216, 4 Am. B. R. 221; *In re* Jones, 100 Fed. 781, 4 Am. B. R. 141.

As to when firm debts cannot be proved against individual assets, see *In re* Groetzinger, 110 Fed. 368, 6 Am. B. R. 399; *In re* Sanderlin, 108 Fed.

tion of the property of the several estates.[69] The net proceeds of the partnership property shall be appropriated to the payment of partnership debts, and the net proceeds of the individual estate of each partner to the payment of individual debts.[70]

b. *On Joint and Several Liability.* — If there be both a joint and several liability a creditor may file proof both against the partnership assets and against the individual assets of each partner.[71]

B. CORPORATIONS. — **1. Definition.** — Limited or other partnership associations organized under law making the capital subscribed alone responsible for the debts of the association are included within the term "corporations."[72]

2. Effect of Dissolution of Corporation on Proceedings. — This provision of the bankruptcy act also applies to corporations. It is held thereunder that after bankruptcy proceedings are instituted against a corporation, they will not be abated by the institution of proceedings in the state court to dissolve the corporation.[73]

XIV. AMENDMENTS. — A. IN GENERAL. — The right to amend is of general application in bankruptcy proceedings and will usually be permitted regardless of the lapse of time,[74] in cases of mistake or

857, 6 Am. B. R. 384; *In re* Mills, 95 Fed. 269, 2 Am. B. R. 667.

As to when firm creditors may prove claims against the individual estates of a partner, see *In re* Denning, 114 Fed. 219, 8 Am. B. R. 133; Lamoille Bank *v.* Stevens, 107 Fed. 245, 6 Am. B. R. 164; *In re* Stevens, 104 Fed. 323, 5 Am. B. R. 9; *In re* Carmichael, 96 Fed. 594, 2 Am. B. R. 815.

69. Bankruptcy Act (1898), §5g; *In re* Terens, 175 Fed. 495, 23 Am. B. R. 680.

70. Bankruptcy Act (1898), §5f.

"This section treats of administration in the bankruptcy court, and, hence, of the partnership and individual property, the title to which is in the bankrupt at the time the petition against him is presented to the court and that which he had transferred in fraud of his creditors." Sargent *v.* Blake, 160 Fed. 57, 87 C. C. A. 213, 20 Am. B. R. 115.

"The right of the creditors of the partnership to payment out of the partnership property in preference to the individual creditors is the mere right by subrogation or derivation to enforce this right of one of the partners after the partnership property has been placed in the custody of the law. Until it has been so placed each partner has plenary power at any time to release or waive this right, and if each partner has done so, and at the time the property comes within the jurisdiction of a court no partner has this right, then no creditor of the partnership has it, for a stream cannot rise higher than its source." Sargent *v.* Blake, 160 Fed. 57, 87 C. C. A. 213, 20 Am. B. R. 115, 125.

71. *In re* McCoy, 150 Fed. 106, 80 C. C. A. 60, 17 Am. B. R. 760; Buckingham *v.* First Nat. Bank, 131 Fed. 192, 65 C. C. A. 498, 12 Am. B. R. 465; *In re* Coe, 169 Fed. 1002, 22 Am. B. R. 384.

72. Bankruptcy Act (1898), §1, (6).

73. White Mountain Paper Co. *v.* Morse & Co., 127 Fed. 643, 62 C. C. A. 369, 11 Am. B. R. 633; Scheuer *v.* Smith, 112 Fed. 407, 50 C. C. A. 312, 7 Am. B. R. 384.

74. Sandusky *v.* First Nat. Bank, 23 Wall. (U. S.) 289, 23 L. ed. 155; Hark *v.* Allen Co., 146 Fed. 665, 77 C. C. A. 91, 17 Am. B. R. 3; *In re* Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. B. R. 692; *In re* Knaszak, 151 Fed. 503, 18 Am. B. R. 187; *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391; *In re* Henschel, 114 Fed. 969, 8 Am. B. R. 201; *In re* Mercur, 8 Am. B. R. 275. *Compare In re* Kentucky Nat. Bank *v.* Carley, 121 Fed. 822, 58 C. C. A. 158, 10 Am. B. R. 375 (where the application was made fifteen months after the creditors had closed their case, and

ignorance, either of fact or law, in the absence of fraud,[75] the only limitation being that it must bring forward or make effective matter that is already in the record,[76] and that no injustice to the bankrupt will be done thereby.[77] Such forbearance, however, will not be extended to aid and favor a bankrupt whose business career is tainted and whose conduct towards his creditors has not been formulated on lines of honest, fair dealing.[78] The amendment to the petition, when filed, relates to and takes effect as of the date of the filing of the original petition.[79] The petition for leave to amend should state why the matter set forth in the proposed amendment was not included in the original petition.[80]

The court has the power to allow the petition to be amended when it appears to be required in the interests of substantial justice,[81] such power resting in the discretion of the court,[82] rule 11 of the general orders of bankruptcy[83] not being intended to abrogate or restrict the general power of amendment vested in the court.[84]

B. Charging Additional Acts of Bankruptcy. — It has been held that leave may be given to amend the petition so as to set up new and additional acts of bankruptcy,[85] but that this will be permitted only when it appears to be in furtherance of justice.[86]

C. Permissible Amendments to Petition. — The omission to specifically charge that the alleged bankrupt is not within the excepted

the facts set up in the amended objections were known to the petitioner before they closed their case); *In re* Carley, 117 Fed. 130, 55 C. C. A. 146, 8 Am. B. R. 720 (holding that there must be no laches); *In re* Hale, 107 Fed. 432, 6 Am. B. R. 35 (holding that the application to amend must be promptly made).

75. *In re* Meyers, 3 Am. B. R. 760.

76. *In re* Mercur, 8 Am. B. R. 275; *In re* Hixon, 1 Am. B. R. 610.

77. *In re* Carley, 117 Fed. 130, 55 C. C. A. 146, 8 Am. B. R. 720; *In re* Knaszak, 151 Fed. 503, 18 Am. B. R. 187; *In re* Meyers, 3 Am. B. R. 760.

78. *In re* Gross, 5 Am. B. R. 271.

79. First State Bank of Corinth *v.* Haswell, 174 Fed. 209, 98 C. C. A. 217, 23 Am. B. R. 330; Ryan *v.* Hendricks, 166 Fed. 94, 92 C. C. A. 78, 21 Am. B. R. 570; *In re* Shoesmith, 135 Fed. 684, 68 C. C. A. 322, 13 Am. B. R. 645.

80. *In re* Pure Milk Co., 154 Fed. 682, 18 Am. B. R. 735; *In re* Portner, 149 Fed. 799, 18 Am. B. R. 89; White *v.* Bradley Timber Co., 116 Fed. 768, 8 Am. B. R. 671.

81. *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310, permitting the amendment of date of expiration of notary's commission. See also White *v.* Bradley Timber Co., 116 Fed. 768, 8 Am. B. R. 671, in which the court intimates that an amendment to a petition may be granted though an additional or new ground of bankruptcy is sought to be set up.

82. Armstrong *v.* Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. ed. 514, 19 Am. B. R. 746; Pittsburgh Laundry Co. *v.* Imperial Laundry Co., 154 Fed. 662, 83 C. C. A. 486, 18 Am. B. R. 756; Woolford *v.* Diamond State Steel Co., 138 Fed. 582, 15 Am. B. R. 31 (in which an amendment was refused); Wilder *v.* Watts, 138 Fed. 426, 15 Am. B. R. 57.

83. General Order No. XI, 172 U. S. 657, 43 L. ed. 1190, 89 Fed. vii., 32 C. C. A. xiv.

84. Gleason *v.* Smith, 145 Fed. 895, 76 C. C. A. 427, 16 Am. B. R. 602; *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310.

85. *In re* Hambrick, 175 Fed. 279, 23 Am. B. R. 721; *In re* Nusbaum, 162 Fed. 735, 18 Am. B. R. 598; *In re* Mercur, 95 Fed. 634, 2 Am. B. R. 626.

86. Pittsburgh Laundry Supply Co. *v.* Imperial Laundry Co., 154 Fed. 662, 83 C. C. A. 486, 10 Am. B. R. 756; Wilder *v.* Watts, 138 Fed. 426, 15 Am. B. R. 57.

It is, however, also held that a pe-

class may be cured by amendment,[87] as may a specification regarding an illegal preference.[88] An amendment may be permitted by inserting an allegation that the total number of bankrupt's creditors is less than twelve,[89] or so as to permit creditors to join in the petition where it appears that such petition was not originally signed by the required number.[90] An insufficient allegation by creditors as to nature and amount of their claims may be corrected.[91] The amendment of a petition will be granted so as to permit a partner to make the necessary allegations so that he may be discharged from both firm and individual debts,[92] or so as to bring in non-consenting partners,[93] or to show jurisdiction.[94] A mistake in the name of the alleged bankrupt in an involuntary petition may be corrected by amendment.[95] A defective verification to a petition may be amended.[96]

D. Amending Petition To Conform to Proof. — Leave may be granted amending the petition to conform to the proof,[97] such amendment to relate back as of the date of the filing of the petition.[98] The

tition cannot be amended by inserting a further and later act of bankruptcy than is originally set up. *In re* Sears, 117 Fed. 294, 55 C. C. A. 146, 8 Am. B. R. 713. See also General Order No. VI, 172 U. S. 654, 43 L. ed. 1189, 89 Fed. v, 32 C. C. A. ix.

87. Armstrong *v.* Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. ed. 514, 19 Am. B. R. 746; *In re* Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434, 13 Am. B. R. 663; Beach *v.* Macon Grocery Co., 120 Fed. 736, 58 C. C. A. 150, 9 Am. B. R. 762; *In re* Crenshaw, 156 Fed. 638, 19 Am. B. R. 502; *In re* White, 135 Fed. 199, 14 Am. B. R. 241; *In re* Brett, 130 Fed. 981, 12 Am. B. R. 492; *In re* Mero, 128 Fed. 630, 12 Am. B. R. 171; *In re* Pilger, 118 Fed. 206, 9 Am. B. R. 244; *In re* Bellah, 116 Fed. 69, 8 Am. B. R. 310.

88. *In re* Nelson, 98 Fed. 76, 1 Am. B. R. 63; *In re* Cliffe, 94 Fed. 354, 2 Am. B. R. 317.

89. Matter of Haff, 136 Fed. 78, 68 C. C. A. 646, 13 Am. B. R. 362; *In re* Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434, 13 Am. B. R. 665.

90. Ryan *v.* Hendricks, 166 Fed. 94, 21 Am. B. R. 570; *In re* Mackey, 110 Fed. 355, 6 Am. B. R. 577; *In re* Mercur, 95 Fed. 634, 2 Am. B. R. 626; *In re* Biddingfield, 2 Am. B. R. 355; *In re* Romanow, 1 Am. B. R. 461. See *In re* Ryan, 114 Fed. 373, 92 C. C. A. 78, 7 Am. B. R. 562. See, however, *In re* Stein, 130 Fed. 377, 12 Am. B. R. 364, where the court refused to allow an amendment to join other creditors, it appearing that the claims of the petitioning creditors amounted to less than $500. The court in reviewing the cases which seem to hold a contrary view, says: "An examination of the cases will show that in each one of them the discussion was confined to amendments allowable upon a petition *containing the necessary averments*, required by the act, in which it was subsequently developed that there was an insufficient number of creditors, or that the provable claims were less than $500."

91. Conway *v.* German, 166 Fed. 67, 91 C. C. A. 653, 21 Am. B. R. 577.

92. *In re* McFaun, 96 Fed. 592, 3 Am. B. R. 66.

93. *In re* Freund, 1 Am. B. R. 25.

94. *In re* Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *In re* Blair, 99 Fed. 76, 3 Am. B. R. 588.

95. Gleason *v.* Smith, 145 Fed. 895, 76 C. C. A. 427, 16 Am. B. R. 602.

96. *In re* Brumelkamp, 95 Fed. 814, 2 Am. B. R. 318, where there was a defective statement of the venue and it failed to state definitely whether it was sworn to or on affirmation.

97. Chicago Motor Vehicle Co. *v.* American Oak Leather Co., 141 Fed. 518, 72 C. C. A. 576, 15 Am. B. R. 804.

98. Chicago Motor Vehicle Co. *v.* American Oak Leather Co., 141 Fed. 518, 72 C. C. A. 576, 15 Am. B. R. 804.

amendment in such a case will be deemed to be made without being actually made.[99]

E. Amending Petition Before New Trial. — When a new trial has been ordered, and an amendment to the petition is necessary by reason of testimony offered at the first trial, the amendment will be permitted if seasonably applied for.[1] Leave to amend a petition that is fatally defective will as a rule be refused.[2]

F. Amendments of Schedule. — Amendments to the schedules are permitted by General Order No. 11. They must be printed or written, signed and verified in like manner as the original. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.[3] The referee is required by the bankruptcy act to have incomplete or defective schedules corrected by amendment.[4] The manner of making a claim for exemption is merely a matter of procedure, and the court may permit the schedules to be amended where timely application is made therefor.[5]

G. Amendments to Schedules After Objections to Discharge. The court may permit the schedules to be amended even after the filing of objections to the bankrupt's discharge.[6]

H. Amendment of Schedules After Discharge. — Leave may be granted if applied for by the bankrupt within one year of the adjudication to open the discharge and amend the schedules.[7]

99. *In re* Miller, 104 Fed. 764, 5 Am. B. R. 140; *In re* Lange, 97 Fed. 197, 3 Am. B. R. 231.

1. Hark *v.* C. M. Allen Co., 146 Fed. 665, 77 C. C. A. 91, 17 Am. B. R. 3, *affirming* 142 Fed. 179, 15 Am. B. R. 460.

2. Woolford *v.* Diamond State Steel Co., 138 Fed. 582, 15 Am. B. R. 31.

3. General Order XI, 172 U. S. 660, 43 L. ed. 1190, 89 Fed. vii, 32 C. C. A. xiv; *In re* Goodman, 174 Fed. 644, 98 C. C. A. 398, 23 Am. B. R. 504; Matter of Neal, 14 Am. B. R. 550.

4. Bankruptcy Act (1898), §39, (2); *In re* Brumelkamp, 95 Fed. 814, 2 Am. B. R. 318.

5. *In re* Goodman, 174 Fed. 644, 98 C. C. A. 398, 23 Am. B. R. 504; *In re* Falconer, 110 Fed. 111, 49 C. C. A. 50, 6 Am. B. R. 557; *In re* Tollett, 106 Fed. 866, 46 C. C. A. 11, 5 Am. B. R. 404; *In re* Maxson, 170 Fed. 356, 22 Am. B. R. 424; *In re* Kaufman, 142 Fed. 898, 16 Am. B. R. 118; *In re* Fisher, 142 Fed. 205, 15 Am. B. R. 652; *In re* White, 128 Fed. 513, 11 Am. B. R. 556 (application was made one year after schedules were filed); *In re* Duffy, 118 Fed. 926, 9 Am. B. R. 358.

Application Promptly Made. — An application to amend a claim for exemption should be made within a reasonable time after discovering the facts which will justify the amendment. *In re* Irwin, 174 Fed. 642, 98 C. C. A. 396, 23 Am. B. R. 487, *reversing* 177 Fed. 284, 22 Am. B. R. 165.

6. *In re* Eaton, 110 Fed. 731, 6 Am. B. R. 531. See also *In re* Royal, 112 Fed. 135, 7 Am. B. R. 106. This was also permitted under former acts. *In re* Preston, 19 Fed. Cas. No. 11,392, 3 N. B. R. 103; *In re* Heller, 41 How. Pr. 213, 11 Fed. Cas. No. 6,339, 5 N. B. R. 46; *In re* Connell, 6 Fed. Cas. No. 3,110, 3 N. B. R. 443.

7. *In re* McKee, 21 Am. B. R. 306. But see *In re* Spicer, 145 Fed. 431, 16 Am. B. R. 802 (where the application was refused because not made until after the expiration of one year after adjudication); *In re* Hawk, 114 Fed. 916, 52 C. C. A. 536, 8 Am. B. R. 71 (in which it is held that the court cannot after the lapse of more than a year after the granting of discharge

I. Leave to Amend Refused. — A bankrupt is not entitled to amend his schedules so as to claim exemption of property which he did not have title to at the time of the filing of his petition, and which he could not have claimed and did not claim in his petition.[8]

An amendment will not be allowed by which it is sought to increase the claim for exemption out of property or its proceeds, the title to which has passed to the trustee, for the avowed purpose of paying debts due to a person in whose favor the bankrupt waived exemption.[9]

When the application for the amendment of a claim for exemption is not made until after a sale of the bankrupt's property it will be refused.[10]

J. Amendment of Answer. — If an amendment of the answer is desired, it must appear from the proposed answer what new defense, if any, it is desired to bring forward.[11]

K. Amending Proof of Claim. — A proof of claim may also be amended.[12] If filed within the required time it may be amended after the lapse of the year.[13] An amendment amounting to the presentment of a new claim will not be permitted.[14]

L. Amendment of Orders. — All orders including the order of adjudication may be amended to conform to the proceedings.[15]

M. Amending Petition To Set Aside Composition. — Failure to join all creditors who assented to a composition as parties to an application to set aside the composition may be corrected by amendment.[16]

set it aside and reinstate a case and permit the schedules to be amended by adding a creditor, without notice to the creditor).

8. Matter of Neal, 14 Am. B. R. 550.

When Denied.—While the rule allowing claims for exemption is a liberal one, it ought not to be allowed after a discharge has been granted, so as to permit a bankrupt to claim out of newly discovered assets sufficient to make up exemptions which he should have been allowed in the first instance. *In re* Irwin, 174 Fed. 642, 98 C. C. A. 396, 23 Am. B. R. 487, *reversing* 177 Fed. 284, 22 Am. B. R. 165.

9. Moran *v.* King, 111 Fed. 730, 49 C. C. A. 578, 7 Am. B. R. 176.

10. *In re* Von Kerm, 135 Fed. 447, 14 Am. B. R. 403; *In re* Wunder, 133 Fed. 821, 13 Am. B. R. 701; *In re* Prince & Walter, 131 Fed. 546, 12 Am. B. R. 675; *In re* Manning, 112 Fed. 948, 7 Am. B. R. 571; *In re* Haskin, 6 Am. B. R. 485. See, however, *In re* Berman, 140 Fed. 761, 15 Am. B. R. 463, in which an amendment was permitted after sale of the property.

11. Knapp & Spencer Co. *v.* Drew, 160 Fed. 413, 87 C. C. A. 365, 20 Am. B. R. 355.

12. *In re* Meyers & Charni, 3 Am. B. R. 760.

13. Hutchinson *v.* Otis, 190 U. S. 552, 10 Am. B. R. 135, *affirming* 115 Fed. 937, 8 Am. B. R. 382; *In re* Faulkner, 161 Fed. 900, 20 Am. B. R. 542; Bennett *v.* American Credit Indemnity Co., 159 Fed. 624, 20 Am. B. R. 260; Matter of Creasinger, 145 Fed. 224, 17 Am. B. R. 538; Buckingham *v.* Estes, 128 Fed. 584, 12 Am. B. R. 182; *In re* Roeber, 127 Fed. 122, 11 Am. B. R. 464. See, however, *In re* Moebius, 8 Am. B. R. 590. No amendment can be made to a proof of claim after the expiration of one year after the adjudication. *In re* Wilder, 3 Am. B. R. 761 note (in which the amendment of a proof of claim was refused where the granting of it will benefit the applicant to the prejudice of the other creditors).

14. Hutchinson *v.* Otis, 190 U. S. 552, 10 Am. B. R. 135, 115 Fed. 937, 8 Am. B. R. 382; *In re* McCallum, 127 Fed. 768, 11 Am. B. R. 447.

15. *In re* Hale, 107 Fed. 432, 6 Am. B. R. 35.

16. *In re* Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. B. R. 193.

N. Amending Objections To Discharge. — A most liberal rule permitting amendments to objections to a discharge will be observed, and only negligence of a culpable character on the part of a creditor will debar him from the benefit of the statute allowing amendments. Amendments will be permitted though entirely new grounds of objection be set up in the amended specifications.[17]

It is held that the omission of an opposing creditor to allege that the acts complained of were "knowingly and fraudulently" committed by the bankrupt may be corrected by amendment.[18] And when evidence was taken on the theory that the specification was properly drawn, an amendment setting up that averment will be permitted *nunc pro tunc*.[19] A defective verification may be corrected by amendment.[20] And an unverified specification of objection may be amended by adding a verification.[21]

The court may permit the specifications of objections to the bankrupt's discharge to be amended, even after the expiration of the time allowed for the filing thereof.[22] They will only be allowed at that stage, however, when they relate to matters that are formal and not matters of substance, unless there is already sufficient of record to justify it.[23]

17. *In re* Wittenberg, 160 Fed. 991, 20 Am. B. R. 398 (where an amendment was permitted, the specifications being vague and indefinite); *In re* Glass, 119 Fed. 509, 9 Am. B. R. 391. See, however, Kentucky Nat. Bank *v.* Carley, 121 Fed. 822, 58 C. C. A. 158, 10 Am. B. R. 375 (holding that an application is properly refused when the application to amend was made nineteen months after the objections had been filed and fifteen months after the creditor had closed his case, and the facts were known to the creditor before he closed his case); *In re* Peck, 120 Fed. 972, 9 Am. B. R. 747 (in which the court held that an amendment will not be permitted "where there is not even a twig in sight above the ground upon which it can be grafted"); *In re* Hixon, 1 Am. B. R. 610 (in which it is said that "amendments ought to be permitted only where there is manifestly an attempt on the part of the creditor to specify").

Amending Specifications To Conform to Proof.—In a proper case the court will permit the amendment of the specifications to conform to the proof. *In re* Knazak, 151 Fed. 503, 18 Am. B. R. 187; *In re* Lesser Bros., 108 Fed. 205, 5 Am. B. R. 330.

Application for Leave To Amend. The application for leave to amend the specifications should be made to the judge and not the referee. Matter of Wetmore, 99 Fed. 703, 6 Am. B. R. 703; *In re* Wolfensohn, 5 Am. B. R. 60; *In re* Kaiser, 3 Am. B. R. 767.

18. *In re* Knaszak, 151 Fed. 503, 18 Am. B. R. 187.

19. *In re* Bemis, 104 Fed. 672, 5 Am. B. R. 36; *In re* Pierce, 103 Fed. 64, 4 Am. B. R. 554.

20. *In re* Hanna, 168 Fed. 238, 93 C. C. A. 452, 21 Am. B. R. 843; *In re* Neurer, 144 Fed. 445, 15 Am. B. R. 823; *In re* Baerncopf, 117 Fed. 975, 9 Am. B. R. 133.

21. *In re* Gift, 130 Fed. 230, 12 Am. B. R. 244.

22. *In re* Osborne, 8 Am. B. R. 165. See also *In re* Morgan, 101 Fed. 982, 4 Am. B. R. 402. See, however, *In re* Hixon, 1 Am. B. R. 610, that the amendment will only be permitted when there is manifestly an attempt on the part of the creditor to specify.

23. *In re* Gift, 130 Fed. 230, 12 Am. B. R. 244 (in this case an amendment adding the verification was permitted); *In re* Mercur, 8 Am. B. R. 275, 10 Am. B. R. 505.

O. When Leave To Amend Specification Refused. — When only the language of the statute was used in preparing the specifications of objection, leave to amend will not be granted.[24]

P. Amending the Discharge. — A discharge may be amended even after the term at which it was granted has passed, so as to discharge the bankrupt from liability on partnership debts, which were scheduled as well as his liability on individual debts.[25]

Q. Amending Petition To Revoke Discharge. — The court may in its discretion grant leave to amend a petition to revoke a discharge, though a demurrer thereto is sustained.[26]

R. Signing and Verification of Amended Papers. — The rules regarding original papers apply fully to amended papers. They must be printed or written, signed and verified like originals.[27]

S. Order Denying Amendment Appealable. — The right to amend has been held to be a valuable legal right, and an order refusing an amendment is appealable.[28]

XV. JURY TRIAL. — A. When on Demand. — A person against whom an involuntary petition has been filed is entitled to a jury trial, upon filing a written application therefor at or before the time within which an answer may be filed.[29] It cannot be demanded by a creditor, though in his answer he raises the issues, on which a debtor has the right to demand such a trial.[30]

B. In Court's Discretion. — The court may, in its discretion, though no demand is made, submit any specified issue of fact to a jury.[31] The verdict of the jury in such case is merely advisory and not binding on the court.[32]

C. Issue Triable. — Except as otherwise provided by statute a person against whom an involuntary petition has been filed has a right to a jury trial respecting the question of his insolvency and any act of bankruptcy alleged in the petition to have been committed.[33]

24. *In re* Bromley, 152 Fed. 493, 18 Am. B. R. 227; *In re* Peck, 120 Fed. 972, 9 Am. B. R. 747.

25. *In re* Kaufman, 136 Fed. 262, 14 Am. B. R. 393. The court distinguishes this case from *In re* Hawk, 114 Fed. 916, 52 C. C. A. 536, 8 Am. B. R. 71, where the application was to set aside the discharge for the purpose of inserting a creditor in the schedules and Matter of Mercer, 116 Fed. 655, 8 Am. B. R. 275, *affirmed* in 122 Fed. 384, 58 C. C. A. 472, of bringing in a partnership and having it adjudicated and its affairs administered.

26. *In re* Griffin Bros., 154 Fed. 537, 19 Am. B. R. 78; *In re* Oliver, 133 Fed. 832, 13 Am. B. R. 582.

27. *In re* Shaffer, 104 Fed. 982, 4 Am. B. R. 728.

28. *In re* Goodman, 174 Fed. 644, 98 C. C. A. 398, 23 Am. B. R. 504; *In re* Carley, 117 Fed. 130, 55 C. C. A. 146, 8 Am. B. R. 720.

29. Bankruptcy Act (1898), §19, (a); *In re* Neasmith, 147 Fed. 160, 77 C. C. A. 402, 17 Am. B. R. 128.

Waiver.—If the application is not filed within such time, a jury trial is deemed to have been waived. Bankruptcy Act (1898), §19, (a).

30. *In re* Herzikopf, 121 Fed. 544, 57 C. C. A. 606, 9 Am. B. R. 745.

31. *In re* Neasmith, 147 Fed. 160, 77 C. C. A. 402, 17 Am. B. R. 128; Oil Well Supply Co. *v.* Hall, 128 Fed. 875, 63 C. C. A. 343, 11 Am. B. R. 738; Morss *v.* Franklin Coal Co., 125 Fed. 998, 11 Am. B. R. 423.

32. *In re* Neasmith, 147 Fed. 160, 77 C. C. A. 402, 18 Am. B. R. 128; Oil Well Supply Co. *v.* Hall, 128 Fed. 875, 63 C. C. A. 343, 11 Am. B. R. 738.

33. Bankruptcy Act (1898), §19a;

In the cases just set forth the right is absolute and cannot be withheld at the discretion of the court.[34]

D. PROCEDURE GOVERNING. — Except as otherwise provided the right to submit matters in controversy shall be determined and enjoyed according to the laws at present in force, or such as may be hereafter enacted in relation to trials by jury.[35]

If a jury is not in attendance on the court one may be specially summoned, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court, it may be certified for trial to the circuit court sitting at the same place, or by consent of the parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.[36]

XVI. COMPROMISES. — The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.[37]

XVII. ARBITRATION OF CONTROVERSIES. — A. IN GENERAL. — The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.[38]

Bernard *v.* Abel, 156 Fed. 649, 84 C. C. A. 361, 19 Am. B. R. 383; *In re* Neasmith, 147 Fed. 160, 77 C. C. A. 402, 17 Am. B. R. 128; Day *v.* Beck. & Gregg Hdw. Co., 114 Fed. 834, 52 C. C. A. 468, 8 Am. B. R. 175; Simonson *v.* Sinsheimer, 100 Fed. 426, 40 C. C. A. 474, 3 Am. B. R. 824; *In re* Christensen, 101 Fed. 802, 4 Am. B. R. 99. *Compare In re* Harris, 156 Fed. 875, 19 Am. B. R. 204, as to such right when the debtor qualifies his denial of bankruptcy with a statement which in effect is an admission of insolvency.

Insanity of Bankrupt.—It is held that the question of the alleged bankrupt's insanity is triable by jury, under the defense that he did not commit the act of bankruptcy charged in the petition. *In re* Ward, 161 Fed. 755, 20 Am. B. R. 482.

Motion To Limit Issues.—On motion the issues will be limited to those set forth in §19a. Morss *v.* Franklin Coal Co., 125 Fed. 998, 11 Am. B. R. 423.

34. Elliott *v.* Toeppner, 187 U. S. 327, 27 Sup. Ct. 133, 47 L. ed. 200, 9 Am. B. R. 50; Day *v.* Beck & Gregg Hdw. Co., 114 Fed. 834, 52 C. C. A. 468, 8 Am. B. R. 175; Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666.

35. Bankruptcy Act (1898), §19, (c).

36. Bankruptcy Act (1898), §19, (b).

37. Bankruptcy Act (1898), §27, (a).

Who May Make Application.—Application therefor may be made by petition of the trustee, the bankrupt, or any creditor who has proved his claim. General Order XXVIII, 172 U. S. 662, 43 L. ed. 1193, 89 Fed. xi, 32 C. C. A. xxviii.

Petition.—The petition should state the subject-matter of the controversy and why it is best for the interests of the estate that the controversy be compromised. General Order XXXIII, 172 U. S. 662, 43 L. ed. 1193, 89 Fed. xi., 32 C. C. A. xxviii.

Hearing Application.—Upon the filing of the petition the court will appoint a time and place for the hearing and direct what notice shall be given to creditors and other parties interested. General Order XXVIII, 172 U. S. 662, 43 L. ed. 1193, 89 Fed. xi, 32 C. C. A. xxviii.

38. Bankruptcy Act (1898), §26, (a).

"Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or

B. AWARD. — The written finding of the arbitrators or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.[39]

C. CONFIRMATION. — The finding may be set aside by the judge,[40] but if not set aside is binding on all parties to the proceeding.[41]

XVIII. OATHS AND AFFIRMATIONS. — A. OATHS. — Oaths required by the act, except upon a hearing in court, may be administered by (1) referees, (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.[42]

Taking Oath Before Attorney of Record. — The better practice is to have the oath taken before an officer who is not the attorney of record of the person to whom it is administered, and a verification so taken has been held defective.[43] It has been held, however, that a verification to a proof of debt may be so taken.[44]

B. AFFIRMATION. — Any person conscientiously opposed to taking an oath may affirm.[45]

XIX. REVIEW. — A. JURISDICTION. — **1. In General.** — The Supreme Court of the United States, the circuit court of appeals and the supreme court of the territories are invested with appellate jurisdiction arising in bankruptcy proceedings[46] from the courts of bank-

for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise." Gen. Order XXXIII, 172 U. S. 664, 43 L. ed. 1194, 89 Fed. xiii, 32 C. C. A. xxxiii.

Choosing Arbitrators. — Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment, the court shall appoint the third arbitrator. Bankruptcy Act (1898), §26, (b).

If this course is not followed, the award will be set aside. *In re* McLam, 97 Fed. 922, 3 Am. B. R. 245.

39. Bankruptcy Act (1898), §26, (c).

40. *In re* McLam, 97 Fed. 922, 3 Am. B. R. 245.

41. Johnson *v.* Worden, 13 N. B. R. 335.

42. Bankruptcy Act (1898), §20. **Federal Law Governs.** — In bankruptcy the power of the notary to administer the oath is tested by the Bankrupt Act itself and not by state statutes; and an oath taken before a notary public in one state may be used in another state, without further proof in the first instance of the notary's official character than a signature and official seal that purports to be his. *In re* Pancoast, 129 Fed. 643, 12 Am. B. R. 275.

43. *In re* Brunelkamp, 95 Fed. 814, 2 Am. B. R. 318. See also *In re* Kindt, 98 Fed. 403, 3 Am. B. R. 443.

If the notary did not become such attorney until subsequent to administering the oath, a verification would not on that account be defective. *In re* Kindt, 98 Fed. 403, 3 Am. B. R. 443.

44. *In re* Kimball, 100 Fed. 777, 4 Am. B. R. 144.

45. Bankruptcy Act (1898), §20, (b).

Whenever used in the statute, the word "oath" includes "affirmation." Bankruptcy Act (1898), §1, (17).

46. Bankruptcy Act (1898), §24a; York Mfg. Co. *v.* Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 43 L. ed. 782, 15 Am. B. R. 633; Hewitt *v.* Berlin Mach. Co., 194 U. S. 296, 24 Sup. Ct. 690, 48 L. ed. 986, 11 Am. B. R. 709; Holden *v.*

ruptcy in which they have appellate jurisdiction in other cases.[47]

Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. ed. 116, 10 Am. B. R. 768; Thompson *v.* Mauzy, 174 Fed. 611, 98 C. C. A. 457, 23 Am. B. R. 489; Thomas *v.* Woods, 173 Fed. 585, 97 C. C. A. 535, 23 Am. B. R. 132; O'Dell *v.* Boyden, 150 Fed. 731, 80 C. C. A. 397, 17 Am. B. R. 751; Mason *v.* Wolkowich, 150 Fed. 699, 80 C. C. A. 435, 17 Am. B. R. 709; McCarty *v.* Coffin, 150 Fed. 307, 80 C. C. A. 195, 18 Am. B. R. 148; *In re* McMahon, 147 Fed. 684, 77 C. C. A. 668, 17 Am. B. R. 530; *In re* First Nat. Bank of Canton, 135 Fed. 62, 67 C. C. A. 536, 14 Am. B. R. 180; Dodge *v.* Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. B. R. 176; Morehouse *v.* Pacific Hdw. & Steel Co., 24 Am. B. R. 178.

The right of the circuit court of appeals to review rests on the inquiry whether the order appealed from constitutes a final order or decree. *In re* Columbia Real Estate Co., 112 Fed. 643, 50 C. C. A. 406, 7 Am. B. R. 441.

The section does not broaden the jurisdiction of the United States Supreme Court in any particular. Hutchinson *v.* Otis, 123 Fed. 14, 59 C. C. A. 94, 10 Am. B. R. 275.

Judgment on Verdict of Jury.—If the judgment be upon the verdict of a jury under §19 of the Bankruptcy Law, it cannot be revised under an appeal as in an equity case, but only by writ of error. Elliott *v.* Toepper, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. ed. 200, 9 Am. B. R. 50; Lenox *v.* Allen Lane Co., 167 Fed. 114, 92 C. C. A. 566, 21 Am. B. R. 648; Bower *v.* Holzworth, 138 Fed. 28, 70 C. C. A. 396, 15 Am. B. R. 22; Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. B. R. 649; *In re* Mueller, 14 Am. B. R. 256 (holding that there may be an appeal on the statutory grounds from the rulings of a court of bankruptcy after a jury trial).

Action by Trustee To Set Aside Conveyance.—Appeals may be taken under this section from the action of the bankruptcy court in a suit by the trustee to set aside a conveyance by the bankrupt and cancel the grantee's title, and to have title decreed in the trustee. McCarty *v.* Coffin, 150 Fed. 307, 80 C. C. A. 195, 18 Am. B. R. 148.

An appeal from a decree of the bankruptcy court sustaining a chattel mortgage made by the bankrupt and holding it enforceable against the bankrupt's trustee, may be taken under the authority conferred by §24a. Loeser *v.* Savings Deposit Bank & Trust Co., 163 Fed. 212, 20 Am. B. R. 845. See also Dodge *v.* Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. B. R. 176; Knapp *v.* Milwaukee Trust Co., 162 Fed. 675, 20 Am. B. R. 671.

A decision in a proceeding "instituted by the trustee to have certain adverse claims and liens upon property belonging to the estate declared void and for a sale of the property free and clear of the same," is reviewable on an appeal under §24. Thomas *v.* Woods, 173 Fed. 585, 97 C. C. A. 535, 23 Am. B. R. 132.

47. Bankruptcy Act (1898), §24a.

"The power conferred on the circuit court of appeals by this provision is to superintend and revise proceedings of the inferior court of bankruptcy 'within their jurisdiction;' that is, the bankrupt court must be within the jurisdiction of the United States Circuit Court of Appeals before the courts can superintend or revise the proceedings of the former. The phrase 'within their jurisdiction' has reference to an existing jurisdiction, and an existing appellate jurisdiction, and is to be construed the same as if it read 'within their appellate jurisdiction;' in other words, the phrase 'within their jurisdiction' means jurisdiction over courts from which appeals lie to the United States Circuit Courts of Appeals. It does not bring within the jurisdiction of the United States Circuit Courts of Appeals the proceedings of courts of bankruptcy unless those courts were then within the jurisdiction of the circuit courts of appeals." *In re* Blair, 106 Fed. 662, 45 C. C. A. 530, 5 Am. B. R. 793.

"The words 'within their jurisdiction' manifestly relate to territorial limits, confining this court to the exercise of the jurisdiction conferred to superintend and revise in matter of law the proceedings of the several courts of bankruptcy in this circuit." *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. B. R. 358.

This jurisdiction exists in vacation in chambers and during the respective terms.[48] The jurisdiction conferred on the circuit court of appeals by §24a of the bankruptcy act is not curtailed or limited by the provisions of §25a.[49]

2. Appeals to Supreme Court From District Court.— The Supreme Court of the United States exercises a like jurisdiction from courts of bankruptcy not within any organized circuit and from the supreme court of the District of Columbia.[50]

B. What Cases May Be Appealed. — **1. In General.** — Cases which are appealable are of two classes: Those appealable under the jurisdiction conferred by §6 of the Act of March 6, 1891,[51] by appeal or writ of error from the final decisions of the district court "in all cases other than those provided for in the preceding section of this act,"[52] and those provided for by §§24a and 25a of the bankruptcy act.[53] Neither the 5th or 6th section of the act of 1891 was changed by the bankruptcy act.[54]

2. Appeals "as in Equity." — "Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme courts of the territories, in the following cases, to-wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."[55]

See as to jurisdiction in territories, *In re* Blair, 106 Fed. 662, 45 C. C. A. 530, 5 Am. B. R. 793.

48. Bankruptcy Act (1898), §24a.

49. *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256; *In re* Friend, 134 Fed. 778, 67 C. C. A. 500, 13 Am. B. R. 595; Dodge *v.* Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. B. R. 176.

50. Bankruptcy Act (1898), §24a.

51. 26 St. at L. 826.

52. *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

53. *In re* Mueller, *supra*.

"§25a provides for appeals from judgments in three certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required." Morehouse *v.* Pacific Hdw. & Steel Co., 24 Am. B. R. 178, *citing* Holden *v.* Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. ed. 116, 10 Am. B. R. 786.

54. Elliott *v.* Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. ed. 200, 9 Am. B. R. 50; Bardes *v.* Hawarden Bank, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. ed. 261, 4 Am. B. R. 163; *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

55. Bankruptcy Act (1898), §25a; Cook Inlet Coal Fields Co. *v.* Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. B. R. 135; *In re* Rouse Hazard & Co., 91 Fed. 96, 33 C. C. A. 356, 1 Am. B. R. 234.

If the case falls within one of the three classes set forth in §25a it can be reviewed only on appeal. Cook Inlet Coal Fields Co. *v.* Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. B. R. 135.

Final Judgment.—"A decision which finally determines the rights of parties to secure in that suit the relief they seek is a 'final decision,' within the meaning of that term in the act creating the circuit court of appeals, although it is not a decision of the merits of the case and does not bar another suit or proceeding for the same cause. It is a final adjudication of the particular case, and that is sufficient to vest in the defeated parties the right of review." Stevens *v.* Nave-McCord Co., 150 Fed. 71, 80 C. C. A. 25, 17 Am. B. R. 609.

3. How Regulated. — The appeal must be allowed by a judge of the court appealed from or of the court appealed to, and are regulated, except as otherwise provided by statute, by the rules governing appeals in equity in the courts of the United States.[56]

4. Time for Taking. — a. *Under* §25*a.* — If it be an appeal under §25a it must be taken within ten days after the judgment appealed from has been rendered.[57]

b. *Under* §24*a.* — But writ of error may be taken out or an appeal prayed for from a judgment or decree of a district court in a "controversy arising in bankruptcy," such as is referred to in §24a, within six months.[58]

5. How Time Computed. — The time is to be computed from the filing of the judgment by the clerk.[59]

6. Time Extended by Rehearing. — The court may, however, upon timely application grant a rehearing of the original application,

Interlocutory Decree Not Appealable. An interlocutory decree such as an order reversing a ruling of a referee refusing to compel the bankrupt to produce his books, is not appealable. Goodman *v.* Brenner, 109 Fed. 481, 48 C. C. A. 516, 6 Am. B. R. 470.

The court is without jurisdiction to entertain an appeal from an order adjudging an appellant who has not been adjudicated a bankrupt, to be a member of a partnership which has been adjudged bankrupt, it not being one of the cases when an appeal is allowed by the statute. Francis *v.* McNeal, 170 Fed. 445, 95 C. C. A. 168, 22 Am. B. R. 337.

56. Gen. Order XXXVI, (1), 172 U. S. 665, 43 L. ed. 1194, 89 Fed. xiii, 32 C. C. A. xxxiii; Matter of Robertshaw Mfg. Co., 135 Fed. 220, 14 Am. B. R. 341.

57. Bankruptcy Act (1898), §25a; Mills *v.* J. H. Fisher & Co., 159 Fed. 897, 87 C. C. A. 77, 20 Am. B. R. 237; *In re* McCall, 145 Fed. 898, 76 C. C. A. 430, 16 Am. B. R. 670; *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256; *In re* Wright, 96 Fed. 820, 3 Am. B. R. 184. *Compare* Brady *v.* Bernard & Kittinger, 170 Fed. 576, 95 C. C. A. 656, 22 Am. B. R. 342, holding that the time to appeal cannot be extended by any subsequent proceedings in the case.

This provision requiring an appeal within ten days has application only to the appeals allowed by under §24a and §25a, and "has no reference to independent suits to assert title to money or property as assets of the bankrupt against strangers to the proceedings." Appeals in such cases come under the provisions of the act creating the circuit court of appeals with respect to the period of limitation for an appeal. Boonville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. B. R. 13. To same effect, Steele *v.* Buel, 104 Fed. 968, 44 C. C. A. 287, 5 Am. B. R. 165.

58. *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256. See, however, Lockman *v.* Lang, 128 Fed. 279, 62 C. C. A. 550, 11 Am. B. R. 597, holding that a proceeding in bankruptcy is a proceeding in equity, and cannot be reviewed by a writ of error. *Compare* this case on rehearing in 132 Fed. 1, 65 C. C. A. 621, 12 Am. B. R. 497, where the court said that the practice of suing out a writ of error and taking an appeal where counsel doubt which is the proper proceeding is commendable practice.

59. Peterson *v.* Nash Bros., 112 Fed. 311, 50 C. C. A. 260, 7 Am. B. R. 181. And see *In re* McCall, 145 Fed. 898, 76 C. C. A. 430, 16 Am. B. R. 670.

Denial of Motion for Rehearing.—If there be a motion for rehearing the time begins to run from the entry of the order on the motion for rehearing upon the records of the court. *In re* McCall, 145 Fed. 898, 76 C. C. A. 430, 16 Am. B. R. 670.

and in such case the time to appeal does not begin to run until the determination of the motion for rehearing.[60]

7. Result of Failure To File Return. — When the return on appeal is not filed within the time required, the appeal will be dismissed.[61]

8. The Record. — The practice and the requirements upon appeals in bankruptcy cases are substantially the same as in other cases, and the record required to be certified and filed in such cases is the record of the case in the bankruptcy court.[62] The rules of the circuit court of appeals requiring the filing of a complete record containing in itself and not by reference, all the papers, exhibits, depositions and other proceedings necessary to the hearing in the appellate court must be substantially complied with.[63] The certificate cannot be made by the referee but by the clerk, and the record should be on file in his office.[64]

9. How Appeal Perfected. — The appeal is perfected by the bond being accepted within the statutory time and the docketing of the case in the appellate court.[65]

60. **The time cannot be extended** by filing a motion for rehearing and on the denial of that application file an appeal on the original application (Conboy *v.* National Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. ed. 128, 12 Am. B. R. 773; Morgan *v.* Benedum, 157 Fed. 232, 84 C. C. A. 675, 19 Am. B. R. 601; *In re* Alden Elec. Co., 123 Fed. 415, 59 C. C. A. 509, 10 Am. B. R. 370; *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. B. R. 496), nor by the subsequent entry of an alias adjudication (*In re* Berkebile, 144 Fed. 577, 75 C. C. A. 333, 16 Am. B. R. 277), or by a motion to vacate the adjudication (*In re* Goldberg, 167 Fed. 808, 93 C. C. A. 203, 21 Am. B. R. 828).

While the court has a right to grant a rehearing for the purpose of allowing an appeal to be taken, it must exercise a guarded discretion in granting a rehearing, especially in such a case, and should never do so unless the facts clearly warrant it. *In re* Hudson Clothing Co., 140 Fed. 49, 15 Am. B. R. 254. To same effect, see West *v.* McLaughlin Co., 162 Fed. 124, 89 C. C. A. 124, 20 Am. B. R. 654; *In re* Girard Glazed Kid Co., 129 Fed. 841, 12 Am. B. R. 295.

61. *In re* Alden Elec. Co., 123 Fed. 415, 59 C. C. A. 509, 10 Am. B. R. 370.

62. Cook Inlet Coal Fields *v.* Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. B. R. 135.

63. **Flickinger *v.* First Nat. Bank,** 145 Fed. 162, 76 C. C. A. 132, 16 Am. B. R. 678; Devries *v.* Shanahan, 122 Fed. 497, 58 C. C. A. 482, 9 Am. B. R. 518; Williams Bros. *v.* Savage, 120 Fed. 497, 56 C. C. A. 647, 9 Am. B. R. 720.

What Contained in Record.—In the absence of a local rule or practice which required an appellant to file a praecipe with the clerk, pointing out specifically what records in his judgment are necessary to be certified on appeal, and that if appellee is of the opinion that these are not sufficient, he can suggest a diminution of the record and ask for a *certiorari*, and the question of additional matter be determined by the appellate court. The lower court has no authority to limit or restrict the record on appeal. Matter of Robertshaw Mfg. Co., 135 Fed. 220, 14 Am. B. R. 341.

If the transcript is imperfect, a certiorari to send up the missing matter may be applied for. Flickinger *v.* First Nat. Bank, 145 Fed. 162, 76 C. C. A. 132, 16 Am. B. R. 678. And see Cunningham *v.* German Ins. Co., 103 Fed. 932, 43 C. C. A. 377, 4 Am. B. R. 192, holding that the remedy is by motion to require appellant to complete the record by filing a transcript of such other papers and evidence as he deems necessary and points out.

64. Cook Inlet Coal Fields Co. *v.* Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. B. R. 135.

65. Lockman *v.* Lang, 132 Fed. 1, 65 C. C. A. 621, 12 Am. B. R. 497.

10. Bond on Appeal. — Trustees are not required to give bond when they take appeals or sue out writs of error;[66] in other cases the appellant must on the filing or perfecting of the appeal file a bond to be approved by the judge.[67]

11. Issuance of Citation. — The issuance of a citation is necessary.[68] Its purpose is to give notice to the appellees that the appeal will be prosecuted, so that they may appear and have a hearing if they so desire, but it is not necessary to the acquirement of jurisdiction by the appellate court.[69] If it be omitted by accident or mistake the court may continue the case until reasonable notice of the hearing be given.[70] The citation should contain the names of all the parties applying for the writ of error or joining in the appeal; naming one and describing the others by "*et al.*" is irregular.[71] The appeal cannot be dismissed for failure to issue the citation,[72] and defects therein may be corrected after the time limited for the appeal.[73]

12. Law and Facts Reviewable. — If it be an appeal the appellate

An appeal is not taken until the appeal bond and the citation are presented to and filed in the court which made the decree appealed from. This must be done within ten days after the rendering of the judgment appealed from. Norcross *v.* Nave-McCord Merc. Co., 101 Fed. 796, 42 C. C. A. 29, 4 Am. B. R. 317.

If it be impossible to tell from the record when the record was perfected, or whether the steps were taken within the proper time, the appeal may be dismissed. Williams Bros. *v.* Savage, 120 Fed. 497, 56 C. C. A. 647, 9 Am. B. R. 720.

Failure To Perfect Appeal Within Time.—When the appeal is prayed for and allowed within the time prescribed, but the bond was not filed, nor the citation issued and served until a few days after the expiration of the ten days, the court will ordinarily decline to dismiss the appeal because of the delay in filing the bond and serving the citation. Columbia Ironworks *v.* National Lead Co., 127 Fed. 99, 62 C. C. A. 99, 11 Am. B. R. 340.

66. Bankruptcy Act (1898), §25c.

67. Williams Bros. *v.* Savage, 120 Fed. 497, 56 C. C. A. 647, 9 Am. B. R. 720. See also Credit Company *v.* Arkansas Cent. R. Co., 128 U. S. 258, 9 Sup. Ct. 107, 32 L. ed. 448.

As to when delay in filing bond excused see preceding paragraph.

Bond on Appeal From Order of Adjudication.—On appeal from an order of adjudication the appeal bond though it does not run to all the petitioners for the adjudication is sufficient. In this case the bond was only to the original petitioners and omitted intervening creditors. Flickinger *v.* First Nat. Bank, 145 Fed. 162, 76 C. C. A. 132, 16 Am. B. R. 678.

Delay in Filing Bond.—"The filing of the bond and the service of the citation are steps to be taken in perfecting the appeal, and if these steps are taken before a motion to dismiss the appeal is made, the court will ordinarily decline to dismiss the appeal because of the delay in filing the bond and serving the citation. In the present case the delay was for a few days only, and we do not think the interests of the opposite party were, to any appreciable extent, impaired thereby." Columbia Ironworks *v.* National Lead Co., 127 Fed. 99, 62 C. C. A. 99, 11 Am. B. R. 340.

68. Lockman *v.* Lang, 132 Fed. 1, 65 C. C. A. 621, 12 Am. B. R. 497.

69. *In re* Hill Co. 148 Fed. 823, 78 C. C. A. 522, 17 Am. B. R. 517; Lockman *v.* Lang, 132 Fed. 1, 65 C. C. A. 621, 12 Am. B. R. 497.

70. Lockman *v.* Lang, 132 Fed. 1, 65 C. C. A. 621, 12 Am. B. R. 497.

71. Kerrch *v.* United States, 171 Fed. 366, 96 C. C. A. 258, 22 Am. B. R. 544.

72. Lockman *v.* Lang, 132 Fed. 1, 65 C. C. A. 621, 12 Am. B. R. 497.

73. *In re* Hill, 148 Fed. 832, 78 C. C. A. 522, 17 Am. B. R. 517.

court reviews both the law and the facts.[74] It is, however, held that on appeal from a judgment granting a discharge, the bankruptcy court is not required to make findings of fact.[75]

13. Appeal Does Not Act as Stay. — Unless a supersedeas be issued, the appeal does not suspend the execution of an order, nor stay its enforcement.[76]

14. Necessity for Assignment of Errors. — The filing of an assignment of error at or before the time when the appeal is allowed is indispensable, and the appeal will be dismissed if the assignment of errors be not filed.[77]

15. Effect of Judgment in Non-Appealable Case. — A judgment entered on appeal in bankruptcy which was only reviewable by petition under section 24b is not a nullity, and after the end of the term at which it was rendered cannot be expunged on motion.[78]

16. Specific Illustrations. — a. *Appeal From Adjudication.* — An order granting or refusing adjudication is appealable to the circuit court of appeals, under §25a,[79] though the question of jurisdiction of the district court to make the adjudication is involved.[80] The appeal must be taken within ten days from entry of the order. Such entry cannot be extended or reviewed by any subsequent proceeding in the case.[81] No appeal can be taken from an order refusing to set aside

74. Courier Journal Job Prtg. Co. *v.* Schaefer-Meyer Brew. Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. B. R. 183; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. B. R. 145; *In re* Rouse Hazard & Co., 91 Fed. 96, 33 C. C. A. 356, 1 Am. B. R. 234.

75. *In re* Meyers, 105 Fed. 353, 5 Am. B. R. 4. *Compare* Van Iderstine *v.* National Discount Co., 174 Fed. 518, 98 C. C. A. 300, 23 Am. B. R. 345, in which the court said: "Without any special findings (by the district court) we cannot tell except by inference what facts were or were not found."

76. Matter of Brady, 21 Am. B. R. 364.

77. Lockman *v.* Lang, 128 Fed. 279, 11 Am. B. R. 597, 132 Fed. 1, 62 C. C. A. 550, 12 Am. B. R. 497. See also the title "Error, Assignments of."

78. Loeser *v.* Savings Dep. Bank & Trust Co., 163 Fed. 212, 89 C. C. A. 642, 20 Am. B. R. 845.

79. Merchants' Nat. Bank *v.* Cole, 149 Fed. 708, 79 C. C. A. 414, 18 Am. B. R. 44 (an appeal from the order opens up the whole case); C. C. Taft Co. *v.* Century Sav. Bank, 141 Fed. 369, 72 C. C. A. 671, 15 Am. B. R. 594; *In re* Good, 99 Fed. 389, 39 C. C. A. 581, 3 Am. B. R. 605; Zugalla *v.* International Merc. Agency, 142 Fed. 927, 16 Am. B. R. 67.

Order of Adjudication Nunc Pro Tunc.—An appeal will lie to test the validity of an order of adjudication entered *nunc pro tunc.* Cook Inlet Coal Fields Co. *v.* Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. B. R. 135.

An order dismissing a petition on the ground that it does not state facts sufficient to constitute an act of bankruptcy is a judgment refusing an adjudication therefore appealable. Stevens *v.* Nave-McCord Merc. Co., 150 Fed. 71, 80 C. C. A. 25, 17 Am. B. R. 609.

An appeal from an order of adjudication will not be dismissed for failure to incorporate the evidence, when there is nothing to show that there was evidence taken. C. C. Taft Co. *v.* Century Sav. Bank, 141 Fed. 369, 72 C. C. A. 671, 15 Am. B. R. 594.

80. Denver First Nat. Bank *v.* Klug, 186 U. S. 202, 23 Sup. Ct. 899, 46 L. ed. 1127; Columbia Ironworks *v.* National Lead Co., 127 Fed. 99, 62 C. C. A. 99, 11 Am. B. R. 340.

81. Conboy *v.* First Nat. Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. ed. 128, 16 Am. B. R. 773; Brady *v.* Bernard & Kittenger, 170 Fed. 576, 95 C. C. A. 656, 22 Am. B. R. 342; *In re* Alden Elec. Co., 123 Fed. 415, 59 C. C. A. 509, 10 Am. B. R. 370.

an adjudication, this being reviewable by a petition for review.[82]

b. *Appeal From Orders Confirming or Refusing To Confirm Compositions.* — A judgment confirming a composition, being in effect a judgment granting a discharge is appealable,[83] and all creditors who have received the amount due them thereunder should be included as appellees,[84] but if their number make it impracticable to make them all parties to the appeal, at least a sufficient number to insure an effective representation of the assenting creditors should be made parties.[85]

c. *Order Staying Action Against Bankrupt.* — If an order granting a stay of proceedings of an action against a bankrupt be improperly issued, the proper method of reviewing same is by appeal.[86]

d. *Order Dismissing Application for Discharge.* — An order dismissing an application for a discharge for want of prosecution, being in effect a judgment denying a discharge, is appealable.[87]

e. *Order Allowing or Rejecting Claim.* — (I.) Generally. — An appeal is the proper remedy for reviewing an order allowing or rejecting a claim amounting to five hundred dollars or over.[88] The provision

82. Brady *v.* Bernard & Kittenger, 170 Fed. 576, 95 C. C. A. 656, 22 Am. B. R. 342.

"An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication in bankruptcy is not a judgment for which an appeal will lie, under §25 of the bankruptcy act, but is reviewable by petition in matters of law." Brady *v.* Bernard & Kittenger, 170 Fed. 576, 22 Am. B. R. 342. To the same effect, see *In re* Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. B. R. 692.

83. *In re* Friend, 134 Fed. 778, 67 C. C. A. 500, 13 Am. B. R. 595.

The circuit court of appeals for the sixth circuit has held that an appeal will lie from an order refusing to confirm a composition (Adler *v.* Jones, 109 Fed. 967, 48 C. C. A. 761, 6 Am. B. R. 245; United States *v.* Hammond, 104 Fed. 862, 44 C. C. A. 229, 4 Am. B. R. 736; and the circuit court of appeals for the first circuit has dismissed an appeal from such an order (Ross *v.* Saunders, 105 Fed. 915, 45 C. C. A. 123, 5 Am. B. R. 350). The circuit court of appeals for the first circuit distinguished the case before them from United States *v.* Hammond, *supra*, on the ground that in the latter case there were objecting creditors and an issue made, and so were proper parties to the appeal, while in the former case no creditors appeared in opposition, the trustee alone doing so and he was not made a party to the record. Ross *v.* Saunders, 105 Fed. 915, 45 C. C. A. 123, 5 Am. B. R. 350.

84. Marshall Field & Co. *v.* Wolf & Bro. Co., 120 Fed. 815, 57 C. C. A. 326, 9 Am. B. R. 693.

85. Marshall Field & Co. *v.* Wolf & Bro. Co., 120 Fed. 815, 57 C. C. A. 326, 9 Am. B. R. 693.

86. *In re* Mustin, 166 Fed. 506, 21 Am. B. R. 147.

87. Matter of Semons, 140 Fed. 989, 72 C. C. A. 683, 15 Am. B. R. 832 (the validity of the order cannot be questioned in any other way); *In re* Kuffler, 127 Fed. 125, 61 C. C. A. 259, 11 Am. B. R. 469.

Order Dismissing a Petition to Revoke a Discharge.—Whether an order dismissing a petition to revoke a discharge is appealable has not as yet been the subject of authoritative decision. Thompson *v.* Mauzy, 174 Fed. 611, 98 C. C. A. 457, 23 Am. B. R. 489

88. Postlethwaite *v.* Hicks, 165 Fed. 897, 91 C. C. A. 575, 21 Am. B. R. 70; Union Nat. Bank of Kansas City *v.* Neill, 149 Fed. 720, 79 C. C. A. 426, 17 Am. B. R. 853; Cook Inlet Coal Fields Co. *v.* Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. B. R. 135; *In re* Cosmopolitan Power Co., 137 Fed. 858, 70 C. C. A. 388, 14 Am. B. R. 604; *In re* Friend, 134 Fed. 778, 67 C. C. A. 500, 13 Am. B. R. 595; *In re* Jourdan, 111 Fed. 726, 7 Am. B. R. 186. See also Pirie *v.* Chicago Title & Trust Co., 182

regarding amount has reference not to the amount of the original

U. S. 438, 21 Sup. Ct. 906, 45 L. ed. 1171, 5 Am. B. R. 814. See, however, Courier-Journal Prtg. Co. *v.* Schaefer-Meyer Brew. Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. B. R. 183, in a circuit holding that appeal and revision by petition are cumulative remedies.

When Question of Law Alone Involved.—An appeal from an order disallowing a claim may be treated as a petition for a revision when a question of law is alone involved, though the amount involved be in excess of $500. Chesapeake Shoe Co. *v.* Seldner, 122 Fed. 593, 58 C. C. A. 261, 10 Am. B. R. 466.

A decree entered on a petition filed by a creditor asserting a lien on the proceeds of the sale of a stock exchange seat formerly belonging to the bankrupt, is not "a judgment allowing or rejecting a debt or claim of five hundred dollars or over," and not appealable under §25a. Hutchinson *v.* Otis, Wilcox & Co., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. ed. 1179, 10 Am. B. R. 135.

Order Directing Sale of Homestead To Satisfy Claim.—An order holding that the bankrupt was not entitled to a business homestead and directing a sale to satisfy the claim of a creditor is reviewable under subdivision 3 of §25a. Burrow *v.* Grand Lodge of Sons of Herman, 133 Fed. 708, 66 C. C. A. 538, 13 Am. B. R. 542, *explaining In re* Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. B. R. 198.

Claims of Third Parties.—An order of the referee requiring a third party to appear and present his claim so that the referee may adjudicate the rights of the parties in respect thereof is appealable. Mound Mines Co. *v.* Hawthorne, 173 Fed. 882, 97 C. C. A. 394, 53 Am. B. R. 242, *citing* Hewit *v.* Berlin Mach. Wks., 194 U. S. 296, 24 Sup. Ct. 690, 48 L. ed. 986, 11 Am. B. R. 709; Franklin *v.* Stoughton Wagon Co., 168 Fed. 857, 94 C. C. A. 269, 22 Am. B. R. 63; John Deere Plow Co. *v.* McDavid, 137 Fed. 802, 70 C. C. A. 422, 14 Am. B. R. 653; Dudge v. Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. B. R. 176. See, however, *In re* Rose Shoe Mfg. Co., 168 Fed. 39, 93 C. C. A. 461, 21 Am. B. R. 725 (holding that "an order directing the turning over of property or money by a third person to a trustee is not an order which can be reviewed by appeal under §25a of the bankruptcy act") *citing* First Nat. Bank *v.* Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. ed. 1051, 14 Am. B. R. 102; Holden *v.* Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. ed 116, 14 Am. B. R. 94; *In re* Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. B. R. 198.

Lien or Priority May be Considered. "Where the appeal is from a judgment allowing or disallowing a debt, any question of lien or priority of the debt, if allowed, may be considered upon the appeal as an incident of the debt." *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256. See also Coder *v.* Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. ed. 772, 22 Am. B. R. 1; Hutchinson *v.* Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. ed. 1179, 10 Am. B. R. 135; *In re* Cosmopolitan Power Co., 137 Fed. 858, 70 C. C. A. 388, 14 Am. B. R. 604; Livingston *v.* Heineman, 120 Fed. 786, 57 C. C. A. 154, 10 Am. B. R. 39; Cunningham *v.* German Ins. Bank, 103 Fed. 932, 43 C. C. A. 377, 4 Am. B. R. 192; *In re* First Nat. Bank of Louisville, 155 Fed. 100, 41 C. C. A. 699, 18 Am. B. R. 766; Courier-Journal Co. *v.* Schaefer Brew. Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. B. R. 183. But see *In re* First Nat. Bank of Canton, 135 Fed. 62, 67 C. C. A. 536, 14 Am. B. R. 180, that an order disallowing a claim arising out of a chattel mortgage is appealable under §24a.

When Priority Only Question.—If the debt be allowed but priority is disallowed, an appeal cannot be brought under this section, but may under §24a. *In re* Doran, 154 Fed. 467, 83 C. C. A. 265, 18 Am. B. R. 760. See also *In re* Cosmopolitan Power Co., 137 Fed. 858, 70 C. C. A. 388, 14 Am. B. R. 604; *In re* Rouse, Hazard & Co., 91 Fed. 96, 33 C. C. A. 356, 1 Am. B. R. 234.

Claim for Compensation When Appealable.—The allowance of compensation to an attorney for an involuntary bankrupt for services rendered to the bankrupt in the bankruptcy proceedings may be considered on appeal. Pratt *v.* Bothe, 130 Fed. 670, 65 C. C. A. 48, 12 Am. B. R. 529.

Adjudging Amount Due on Claim.—

claim, but to the amount which will be put in controversy by the appeal.[89]

(II.) How "Claim" Defined. — The word "claim" as used in this section refers to a money demand only,[90] and has also been defined as a "debt."[91]

17. Matters Not Appealable. — a. *Order Refusing To Require Production of Books.*— There is no right of appeal under section 25a from an interlocutory order reversing the referee's ruling refusing to require production of a bankrupt's books for examination, nor is there any other statutory provision authorizing such an appeal.[92]

b. *Order on Motion for Leave To Intervene.* — An order denying an application of a third party for leave to intervene is not appealable, such order not being a final order or decree within the meaning of the act creating the Circuit Court of Appeals.[93]

C. Parties to the Appeal. — **1. Generally.** — All parties aggrieved by a final decision whereby a petition in bankruptcy is dismissed, may join in an appeal,[94] although some complain of one alleged error and some another. On such an appeal all prior rulings are reviewable.[95] In the absence of severance, all parties against whom the judgment or decree is entered must join in suing out a writ of error or prosecuting the appeal; but this has application only to a joint judgment or decree, and has no application to separate judgments or decrees against such parties, though rendered at the same time and contained in the same entry.[96]

2. Appeal by Trustee for Creditors. — The trustee should take the appeal as the representative of the creditors if they feel aggrieved,[97] and may be ordered to do so by the court, or the court may by order permit a creditor to appeal in the name of the trustee.[98]

An appeal will lie from an order fixing the amount due on a second claim. *In re* Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. B. R. 369.

89. Gray *v.* Grand Forks Merc. Co., 138 Fed. 344, 70 C. C. A. 634, 14 Am. B. R. 780, *citing* Dows *v.* Johnson, 110 U. S. 223, 3 Sup. Ct. 640, 28 L. ed. 128; Hilton *v.* Dickinson, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. ed. 688.

90. *In re* Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. B. R. 198.

91. Holden *v.* Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. ed. 116, 10 Am. B. R. 786; *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

92. Goodman *v.* Brenner, 109 Fed. 481, 48 C. C. A. 516, 6 Am. B. R. 470.

93. *In re* Columbia Real Estate Co., 112 Fed. 643, 50 C. C. A. 406, 7 Am. B. R. 441.

94. Stevens *v.* Nave-McCord Merc. Co., 150 Fed. 71, 80 C. C. A. 25, 17 Am. B. R. 609; *In re* Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. B. R. 369 (a creditor who is dissatisfied with the allowance of the claim of another may appeal).

95. Stevens *v.* Nave-McCord Merc. Co., 150 Fed. 71, 80 C. C. A. 25, 17 Am. B. R. 609.

96. Love *v.* Export Storage Co., 143 Fed. 1, 74 C. C. A. 155, 16 Am. B. R. 171.

97. Foreman *v.* Burleigh, 109 Fed. 313, 48 C. C. A. 376, 6 Am. B. R. 230; Chatfield *v.* O'Dwyer, 101 Fed. 797, 42 C. C. A. 30, 4 Am. B. R. 313; McDaniel *v.* Stroud, 5 Am. B. R. 685.

98. Ohio Val. Bank *v.* Mack, 163 Fed. 155, 89 C. C. A. 605, 20 Am. B. R. 40; Chatfield *v.* O'Dwyer, 101 Fed. 797, 42 C. C. A. 30, 4 Am. B. R. 313. *Compare*, however, *In re* Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. B. R. 369, holding that the right is not limited to the trustee, and any credi-

D. Appeal and Writ of Error Cumulative Remedies. — It is permissible to take an appeal and a writ of error to review the same adjudication, if there be doubt as to which is proper; the court will review both proceedings, will dismiss the one that is ineffective and review the ruling of the court below in the proper proceeding.[99]

E. Writ of Error Only Remedy After Jury Trial. — A judgment on the verdict of a jury, that a person is not a bankrupt, can be reviewed in the supreme court and the circuit court of appeals only by writ of error.[1]

F. Distinction Between "Controversies Arising in Bankruptcy Proceedings" and "Proceedings in Bankruptcy." — There is an important distinction to be kept in mind between "controversies arising in bankruptcy proceedings," which are reviewable by appeal,[2]

tor injured or affected by the decree may appeal. See *In re* Lorillard, 107 Fed. 677, 5 Am. B. R. 602, where there was an appeal by creditors from an order of the district court allowing two claims, but the right to take the appeal was not raised nor considered by the court.

99. Lockman *v.* Lang, 132 Fed. 1, 65 C. C. A. 621, 12 Am. B. R. 497, *citing* Plymouth Min. Co. *v.* Amador & S. Canal Co., 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. ed. 232; Hurt *v.* Hollingsworth, 100 U. S. 100, 25 L. ed. 569; Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403; Hooven, Owens & Rentschler Co. *v.* John Featherstone's Sons, 111 Fed. 81, 49 C. C. A. 229; McFadden *v.* Mt. View Min. & Mill. Co., 97 Fed. 670, 38 C. C. A. 354.

1. Grant Shoe Co. *v.* Laird Co., 203 U. S. 502, 27 Sup. Ct. 161, 51 L. ed. 292, 17 Am. B. R. 1; Elliott *v.* Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. ed. 200, 9 Am. B. R. 50; Duncan *v.* Landis, 106 Fed. 839, 5 Am. B. R. 649; Bower *v.* Holzworth, 15 Am. B. R. 22.

2. Bankruptcy Act (1898), §24a.; First Nat. Bank *v.* Klug, 186 U. S. 202, 22 Sup. Ct. 899, 46 L. ed. 1127, 8 Am. B. R. 12.

These include "all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the property be in his possession or theirs." Morehouse *v.* Pacific Hdw. & Steel Co., 24 Am. B. R. 176, 181.

"The distinction between cases which are 'proceedings in bankruptcy' under section 24-b, and those which are 'controversies arising in bankruptcy proceedings' and appealable under the general appellate jurisdiction of the court as confirmed by section 24a, is not always clear nor easily stated. Between Hewitt *v.* Berlin Machine Works and First National Bank of Chicago *v.* Chicago Title & Trust Co., there is this distinction: In the first case the stranger voluntarily came in and set up a claim against property in possession of the bankrupt's trustee. Very clearly that made one of those independent controversies which may arise in a bankruptcy proceeding or in any other where the *res* is *in custodia legis*, and was appealable under section 24a. In the later case the same kind of issue arose, but it arose upon the application of the trustee for an order of sale and as incident to that the determination of a claim against the property held by one not a party to the proceeding. The latter is plainly held to be a 'proceeding in bankruptcy' not appealable, but reviewable in matters of law only upon an appeal to the supervisory powers of the court of appeals, under section 24b. The distinction we recognize and apply in this case by holding that the proper and only mode of correcting error in the case was through the supervisory powers of this court, and that the petitioner resorted to the right remedy, though he had no wrong to redress." *In re* McMahon, 17 Am. B. R. 530, 537.

Controversy "in Bankruptcy Proceedings."—"Nothing . . . can be regarded as a controversy 'arising in bankruptcy proceedings' within the purview of subd. a, §24, where the subject-matter and object of the proceedings are within the power to make a summary order. Certainly this is true, where plenary action is not

and proceedings in bankruptcy that are reviewable by petition to superintend and revise.[3]

"Section 23 of the bankruptcy act establishes a clear distinction between 'proceedings in bankruptcy' and 'controversies at law and in equity arising in the course of bankruptcy proceedings;' the former, broadly speaking, covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, allowances, and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate; and the latter, broadly speaking, involving questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, concerning property in the possession of the trustee or of the claimants to be litigated in appropriate plenary suits, and not affecting directly the administrative orders and judgments, but only the question of the extent of the estate. The same distinction is maintained in section 24a, on the one hand, and section 24b and 25a on the other. Section 24a gives to the circuit court of appeals, if the grant be necessary in view of section 6 of the act of March 3, 1891, c. 517, appellate jurisdiction of controversies at law and in equity be-

sought." *In re* Farrell, 176 Fed. 505, 100 C. C. A. 63, 23 Am. B. R. 826.

A judgment of the circuit court of appeals affirming a judgment of the district court in bankruptcy sustaining title in the trustee to property claimed by a third person, is a "controversy arising in bankruptcy proceedings," and appealable. Hewitt *v.* Berlin Mach. Wks., 194 U. S. 296, 24 Sup. Ct. 690, 48 L. ed. 986, 11 Am. B. R. 709.

"There is a clear distinction between 'controversies arising in bankruptcy proceedings,' as mentioned in section 24a, and the 'proceedings in bankruptcy,' which, by section 24b, the circuit courts of appeal are given jurisdiction to superintend and revise 'in matters of law;' the former being generally held to embrace questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, and not directly affecting those administrative orders and judgments ordinarily known as 'proceedings in bankruptcy,' and the latter being confined to those questions arising between the bankrupt and his creditors, which are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, and including the intermediate administrative steps, and such controversies as arise between parties to the bankruptcy proceedings as are involved in the allowance of claims, fixing their priorities, sales, allowances, and other matters to be disposed of summarily. This distinction is emphasized by the provisions of section 23a, prescribing limitations of the circuit courts of the United States in controversies at law and in equity between trustees in bankruptcy, as such, and adverse claimants, concerning the property acquired or claimed by such trustees." Thompson *v.* Mauzy, 174 Fed. 611, 98 C. C. A. 457, 23 Am. B. R. 489.

"By 'controversies arising in bankruptcy proceedings' is meant those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors." *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

3. Bankruptcy Act (1898), §24b; Denver First Nat. Bank *v.* Klug, 186 U. S. 202, 22 Sup. Ct. 899, 46 L. ed. 1127, 8 Am. B. R. 12.

tween trustees and adverse claimants, to be invoked by writ of error or by appeal, as may be appropriate. Section 24b confers upon that court 'jurisdiction in equity' to revise in matter of law 'proceedings in bankruptcy,' to be invoked by original petition. Section 25a confers upon that court jurisdiction in equity to review in matter of law and fact three specific 'proceedings in bankruptcy,' to be invoked by appeal within ten days. If, in any 'proceeding in bankruptcy,' a trial by jury be had under section 19, a review in the circuit court of appeals cannot be entertained under section 24b or section 25a, because those sections confer only jurisdiction in equity, and not jurisdiction at law. A review cannot be held under section 24a, because that section relates exclusively to 'controversies,' as distinguished from 'proceedings'; and if a review lies, it must come by writ of error under the act of March 3, 1891. . . . In this way all 'controversies' and all 'proceedings' are reviewable under one or another provision that is specifically applicable.'"[4] In the earlier cases but little attention was paid to this distinction;[5] but the later cases clearly point out a distinction between the two remedies.[6]

4. *Per* Baker, C. J., in *In re* Friend, 134 Fed. 778, 67 C. C. A. 500, 13 Am. B. R. 595. See also Coder *v.* Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. ed. 772, 22 Am. B. R. 1; *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

These include "all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming the composition. These are questions which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision." Morehouse *v.* Pacific Hdw. & Steel Co., 24 Am. B. R. 176, 181.

5. *In re* McMahon, 147 Fed. 685, 77 C. C. A. 668, 17 Am. B. R. 530.

6. *In re* McMahon, 147 Fed. 684, 77 C. C. A. 668, 17 Am. B. R. 530; Davidson *v.* Friedman, 140 Fed. 853, 72 C. C. A. 553, 15 Am. B. R. 489; Dickas *v.* Barnes, 140 Fed. 849, 72 C. C. A. 261, 15 Am. B. R. 566; *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256; *In re* First Nat. Bank of Canton, 135 Fed. 62, 67 C. C. A. 536, 14 Am. B. R. 180; Dolle *v.* Cassell, 135 Fed. 52, 67 C. C. A. 526, 14 Am. B. R. 52.

Appeal.—By §25 it is provided with reference to proof of debts exceeding $500, all questions are open to the appellate tribunal, and by §24b it is provided that for all matters of administration which concern the relations to each other of the different interests in the estate, the action of the court of bankruptcy shall be revised only in matters of law. The courts are not at liberty to disregard the distinction so created, and when an order allowing the proving of a claim also determines its priority, the former part of the order is appealable but the latter part can only be reviewed on a petition for revision. *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637. See, however, Thomas *v.* Woods, 173 Fed. 585, 97 C. C. A. 535, 23 Am. B. R. 132, in which the court said: "At the outset we are confronted with the question which has become a part of nearly every bankruptcy cause in an appellate court, namely: Should the review have been sought by appeal or petition? The confusion existing on this subject has been frequently confessed by the courts. *In re* McMahon, 147 Fed. 684, 77 C. C. A. 668; Coder *v.* Arts, 213 U. S. 223, 232, 29 Sup. Ct. 436, 53 L. ed. 772. The classification of matters in bankruptcy as 'proceedings in bankruptcy' and 'controversies

Section 24b[7] and the provision regarding appeals were framed and must be construed in view of the distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts.[8]

In determining the question of remedy as between review or appeal, the court will be governed by the object and character of the proceeding.[9] If the proceedings sought to be reviewed are but a step in the bankruptcy proceedings and not a controversy arising out of the settlement of the estate, the relief is by revision.[10]

arising in bankruptcy proceedings' is vague and in actual application has bewildered the courts and the legal confession. It is quite manifest that, when the decision of a trial court in a 'bankruptcy proceeding' is brought under review in an appellate court, it presents a 'controversy,' and of necessity this is also a 'controversy arising in a bankruptcy proceeding.' The phrases, therefore, upon which the classification is based are tautological."

7. See next succeeding section herein.

8. First Nat. Bank of Chicago *v.* Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. ed. 1051, 14 Am. B. R. 102; Holden *v.* Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. ed. 116, 10 Am. B. R. 786; Elliott *v.* Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. ed. 200, 9 Am. B. R. 50; Denver First Nat. Bank *v.* Klug, 186 U. S. 202, 22 Sup. Ct. 899, 46 L. ed. 1127, 8 Am. B. R. 12.

"This distinction existed under the prior bankruptcy law, and the then decisions in respect to a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted. Smith *v.* Mason, 14 Wall. 419; Marshall *v.* Knox, 16 Wall. 551; *In re* Bonesteel, 7 Blatchf. 175, Mr. Justice Nelson; Knight *v.* Cheney, 14 Fed. Cases, 760, Mr. Justice Clifford; *In re* Ballou, 4 Ben. 135, Mr. Justice Blatchford, then district judge; *In re* Marter 16 Fed. Cases 857, Mr. Justice Brown, then district judge." First Nat. Bank of Chicago *v.* Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. ed. 1051, 14 Am. B. R. 102.

The power to revise by original petition the ruling of the bankruptcy court "extends only to some order made in the bankruptcy proceedings proper, and does not embrace proceedings in suits brought by the trustee in bankruptcy against third parties. *In re* Jacobs, 99 Fed. 539, 39 C. C. A. 647, 3 Am. B. R. 671." *In re* Busch, 116 Fed. 270, 53 C. C. A. 631, 8 Am. B. R. 518.

"The statute contemplates two different proceedings, and for two different purposes. The one is a review of an adjudication touching the merits of a claim, which may rest upon a question of fact or a question of law. Such an adjudication can only be reviewed by appeal within ten days from the adjudication, and will only lie when the claim adjudicated amounts to $500 or over. The appellate court reviews the facts as well as the law. In the other case the appellate court acts, not upon appeal, but by original petition of a complaining party, and is given authority to review and to revise in matter of law only the proceeding of the bankrupt court that is complained of." *In re* Rouse, Hazard & Co., 91 Fed. 96, 33 Fed. 356, 1 Am. B. R. 234.

There is no reason for supposing "that an order or judgment may be appealed when questions of fact are to be considered and reviewed upon petition if only a question of law is involved. The distinction between cases appealable and cases reviewable lies deeper and turns upon the character of case or question." *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

9. Coder *v.* Arts, 213 U. S. 223, 53 Sup. Ct. 77, 53 L. ed. 772, 22 Am. B. R. 1; *In re* Farrell, 176 Fed. 505, 100 C. C. A. 63, 23 Am. B. R. 826.

10. *In re* Mertens, 142 Fed. 445, 73 C. C. A. 561, 15 Am. B. R. 701, *follow-*

G. Supervisory Power in Circuit Court of Appeals. — **1. Generally.** — The several circuit courts of appeals have jurisdiction in equity either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.[11]

2. Questions of Law Alone Considered. — The court under this provision can consider only questions of law that are fairly presented by the petition and the record: it does not contemplate a review of the facts.[12]

ing First Nat. Bank of Chicago *v.* Chicago Title & Trust Co., 198 U. S. 288, 25 Sup. Ct. 693, 49 L. ed. 1051, 14 Am. B. R. 102.

"It is only some action taken or order made in the proceeding itself which can be reviewed by an original petition addressed to this court, under subdivision 'b' of section 24 of the bankrupt act, and that the power thereby conferred 'to superintend and revise' the action of the district court does not extend to suits brought in that court by the trustee in bankruptcy against third parties, to collect the assets of the estate, or to suits brought by third parties against the trustee, whether such suits are rightfully or wrongfully brought in that court, as to which point we express no opinion at this time. Such suits as those last referred to, whether at law or in equity, are not proceedings in bankruptcy, or 'controversies arising in bankruptcy proceedings,' within the meaning and intent of the law authorizing petitions for review, but they are suits which must be reviewed in the ordinary way, by appeal or writ of error, when they have reached a final determination in the court of first instance." *In re* Jacobs, 99 Fed. 539, 39 C. C. A. 647, 3 Am. B. R. 671.

A matter involving "an expense incurred by the trustee in the course of his administration," is not reviewable on appeal, but by petition to superintend and revise. Davidson *v.* Friedman, 140 Fed. 853, 72 C. C. A. 553, 15 Am. B. R. 489.

This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under §24a. *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256, *citing* Hewitt *v.* Berlin Mach. Wks., 194 U. S. 296, 24 Sup. Ct. 690, 48 L. ed. 986, 11 Am. B. R. 709; Holden *v.* Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. ed. 116, 10 Am. B. R. 786; Hutchinson *v.* Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. ed. 1179, 10 Am. B. R. 135.

11. Bankruptcy Act (1898), §24b; Cook Inlet Coal Fields Co. *v.* Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. B. R. 135; *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 178; Morehouse *v.* Pacific Hdw. & Steel Co., 24 Am. B. R. 178.

In connection with this section see the next preceding section.

"The proceeding under this section is designed to enable the circuit court of appeals to review questions of law arising in bankruptcy proceedings, and is not intended as a substitute for the right of appeal upon controverted questions of fact under the right of appeal given in controversies arising in bankruptcy proceedings (§24), or the special appeal given in certain cases under §25." Coder *v.* Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. ed. 772, 22 Am. B. R. 1.

12. Elliott *v.* Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. ed. 200, 9 Am. B. R. 50; Mueller *v.* Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. ed. 405, 7 Am. B. R. 224; *In re* Leech, 171 Fed. 622, 96 C. C. A. 424, 22 Am. B. R. 599; Ryan *v.* Hendricks, 166 Fed. 94, 92 C. C. A. 78, 21 Am. B. R. 570; Lesaius *v.* Goodman, 165 Fed. 889, 91 C. C. A. 567, 21 Am. B. R. 446; Ross *v.* Stroh, 165 Fed. 628, 91 C. C. A. 616, 21 Am. B. R. 644; Mulford *v.* Fourth St. Nat. Bank, 157 Fed. 897, 85 C. C. A. 225, 19 Am. B. R. 742; Samel *v.* Dodd, 142 Fed. 68, 73 C. C. A. 254, 16 Am. B. R. 163; Courier-Journal Job Prtg. Co. *v.* Schaefer-Meyer Brew. Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. B. R. 183; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. B. R. 145; *In re* Purvine, 96 Fed. 192, 37 C. C. A. 446, 2 Am. B. R. 787.

3. **Petition and Notice Required.** — This revisory power is to be exercised on due notice and petition by any party aggrieved.[13]

By Whom Granted. — The petition may be granted by the court whose proceedings are sought to be reviewed.[14]

4. **Time for Filing.** — No time limit for filing the petition for review has been fixed,[15] and unless there has been an unreasonable

"No error of law appearing there is nothing to revise." *In re* Donnelly, 187 Fed. 121.

"The opinion of the trial court may be looked to for the purpose of determining in a general way the propositions on which the case has been disposed of, and especially the questions of law which were passed on." Samel *v.* Dodd, 142 Fed. 68, 73 C. C. A. 254, 16 Am. B. R. 163; *In re* Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338, 14 Am. B. R. 757.

This is intended as a summary mode of reviewing any supposed erroneous holding upon a question of law, and does not contemplate a review of the facts. *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. B. R. 145.

13. Bankruptcy Act (1898), §24b; *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. B. R. 358; *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. B. R. 266, 291; *In re* Whitener, 105 Fed. 180, 5 Am. B. R. 198.

The proceedings for review are not subject to the regulation affecting appeals generally. *In re* Jemison Merc. Co., 112 Fed. 966, 50 C. C. A. 641, 7 Am. B. R. 588.

The petitioner must appear to be a party having a substantial interest, and when it appears that he no longer has such interest the petition will be dismissed. *In re* Baker, 104 Fed. 287, 43 C. C. A. 536, 4 Am. B. R. 778.

Due Notice.—"The words 'due notice' do not prescribe the time or manner of giving the notice, or the parties to whom it is to be given." *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. B. R. 266, 291.

"It was not without purpose . . . that the exercise of the superintending jurisdiction of this court is not placed by the act under specific regulations and restrictions, like the proceeding by appeal or writ of error. It seems clear to us, from a consideration of the various provisions of the act, and particularly of the clause conferring superintending and revising jurisdiction on this court, that it was the intent of Congress that the exercise of such jurisdiction could be easily invoked by any party aggrieved, and should be freely exerted by the circuit courts of appeals, without the hindrance of technical trammels." *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. B. R. 266.

14. *In re* Orman, 107 Fed. 101, 5 Am. B. R. 698.

15. *In re* New York Economical Prtg. Co., 106 Fed. 839, 45 C. C. A. 665, 5 Am. B. R. 697; *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. B. R. 358; *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. B. R. 496; *In re* Good, 3 Am. B. R. 605.

The circuit court of appeals, fifth circuit, quotes the language of Chief Justice Chase in *In re* Alexander, 1 Fed. Cas. No. 160, 3 N. B. R. 6, as to the time for filing a petition for review. "'In the case before us, its exercise must depend upon the sound discretion of this tribunal. Unreasonable delay in invoking the superintending jurisdiction should certainly not be allowed; nor, on the other hand, should such excessive rigor be exercised that the ends of justice will probably be defeated.' In the exercise of this discretion, we must, of course, keep in view the terms of the statute. It declares that the jurisdiction is in equity; that it is neither interlocutory or final, and to be exercised only in matter of law." *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. B. R. 266, 291.

Ten Days' Limitation Not Applicable.—There is nothing in the statute requiring the filing of a petition for review within ten days. Crim *v.* Woodford, 136 Fed. 34, 68 C. C. A. 584, 14 Am. B. R. 302.

In the second circuit under rule 38, petitions for review "must be filed and served within ten days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the bankruptcy

delay, the application will not be dismissed.[16] But it has been said that an application to revise or superintend an appealable order or judgment cannot be maintained after the time for appeal has expired.[17]

5. Place of Filing. — The petition on an application for revision, must be filed in the appellate court, and not in the lower court.[18]

6. Form of Petition. — The petition must clearly set forth all the

court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the bankruptcy court may, for good cause shown, enlarge the time for filing the petition or record, the order of enlargement to be made and filed with the clerk of this court before the expiration of the times hereby limited for filing the petition and record respectively." *In re* Brown, 174 Fed. 339, 98 C. C. A. 211, 23 Am. B. R. 93.

Six Months' Time.—"An order can be challenged by original petition in this court only when filed six months after it is filed." *In re* Tomlinson Co., 154 Fed. 834, 83 C. C. A. 550, 18 Am. B. R. 691.

In the first circuit on the filing of the petition the clerk issues an order to show cause returnable two weeks from its date, a copy of which is to be served on each of the parties named in the petition as a person against whom relief is demanded, or on his solicitor at least one week before the return of the order. Service is to be made by the marshal or his deputy in the district where the party or solicitor resides. 94 Fed. iii, 79 C. C. A. xlvii.

In the fourth circuit on the filing of the petition the clerk shall docket the cause and forthwith serve a certified copy of the petition on the respondent or his solicitor by mail or otherwise with a notice to answer, demur, or move to dismiss within fifteen days from the date of the notice. 97 Fed. iii, 79 C. C. A. lxii.

16. *In re* Foss, 147 Fed. 790, 17 Am. B. R. 439; Meyer Drug Co. *v.* Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240, 14 Am. B. R. 477 (a delay of three months from the entry of judgment held not unreasonable); Crim *v.* Woodford, 136 Fed. 34, 68 C. C. A. 584, 14 Am. B. R. 302; *In re* New York Economical Prtg. Co., 106 Fed. 839, 45 C. C. A. 665, 5 Am. B. R. 697.

17. *In re* Holmes, 142 Fed. 392, 73 C. C. A. 491, 15 Am. B. R. 689.

Appeal — Petition for Review.—Time for Filing.—The statute fixing no time within which the petition for review for matters appearing on the face of the record must be filed, unless some time is fixed by rule or by following some analogous provision of statute, such petitions can be filed with reference to any proceeding in bankruptcy so long as the decree is executory or the case has not been closed, the court determined that such an appeal must be taken within six months, which is the time within which an appeal might be taken from the decree sought to be reviewed. *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. B. R. 496. The learned editor of the American Bankruptcy Reports intimates (4 Am. B. R. 497), that this ruling was made under a misconception, and points out that, under the circumstances, it was not necessary to the decision.

Compare, however, *In re* Groetzinger, 127 Fed. 124, 62 C. C. A. 124, 11 Am. B. R. 467, where the court said: "The ground upon which the motion to dismiss the petition for review rests is that the petition was not filed within six months after the entry of the decree which the petitioners seek to have reviewed. But, as was said by the circuit court of appeals of the second circuit, in overruling a similar motion (*In re* New York Economical Printing Co., 106 Fed. 893), neither the bankrupt act nor any rule of court limits the time within which a petition for review in bankruptcy may be filed. We think that ordinarily by analogy such petition ought to be filed within the period of six months allowed by the act of March 3, 1891 (ch. 517, sec. 11, 26 Stat. 829, [U. S. Comp. St. 1901, p. 552]), for an appeal in other cases. In the absence, however, of an express statutory limitation or rule of court, we are not willing to hold that there is any absolute rule on the subject."

18. *In re* Williams, 105 Fed. 906, 5 Am. B. R. 198, note, *citing* Courier Journal *v.* Schaefer, 101 Fed. 69, 4 Am. B. R. 183.

facts necessary to a decision,[19] and set out the facts or findings of fact on which the matters of law sought to be reviewed arise,[20] and state specifically the question of law involved and ruled on by the court below, and should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose and its determination.[21] In the absence of findings or specification of error the court may dismiss the petition.[22]

19. Devries *v.* Shanahan, 122 Fed. 629, 58 C. C. A. 482, 10 Am. B. R. 518, the court may remand the case to the district court with instructions to set out the facts. See Meyer Bros. Drug Co. *v.* Pipkin Drug Co., 136 Fed 396, 14 Am. B. R. 477, holding though the record failed to show the pleadings upon which the issues were tried, nor show who were proper parties, and did not contain the evidence, the petition would not be dismissed in the absence of rules providing for these requisites.

The petition must state sufficient facts to enable the court to understand the form the notice should take and the persons against whom it should issue. *In re* Baker, 104 Fed. 287, 43 C. C. A. 536, 4 Am. B. R. 778.

Lack of Necessary Parties.—A petition will not be dismissed for lack of necessary parties where none of those referred to were parties to the proceedings below. *In re* Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. B. R. 383.

20. Steiner *v.* Marshall, 140 Fed. 710, 72 C. C. A. 103, 15 Am. B. R. 486; *In re* Taft, 133 Fed. 511, 66 C. C. A. 385, 13 Am. B. R. 417; *In re* O'Connell, 14 Am. B. R. 237.

Failure To Set Out Evidence.—If the record does not contain the evidence taken by the referee and which was before the district court, it will be presumed that the facts disclosed by the evidence were sufficient to sustain the finding and the order of the court. *In re* Baum, 169 Fed. 410, 94 C. C. A. 632, 22 Am. B. R. 295.

Court's Opinion Not Findings.—The opinion of the judge, not specially made a part of the record, does not take the place of a finding of facts. *In re* Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338, 14 Am. B. R. 757. See also *In re* Boston Dry Goods Co., 125 Fed. 226, 60 C. C. A. 118, 11 Am. B. R. 97.

If the petition fail to set out a finding of facts, petition may be dismissed. Steiner *v.* Marshall, 140 Fed. 710, 72 C. C. A. 103, 15 Am. B. R. 486; *In re* Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338, 14 Am. B. R. 757.

21. *In re* O'Connell, 137 Fed. 838, 70 C. C. A. 336, 14 Am. B. R. 237; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. B. R. 145. See, however, Meyer Drug Co. *v.* Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240, 14 Am. B. R. 477, that in the absence of a rule requiring certification a petition would not be dismissed.

In the second circuit the petitioner must file a certified transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed which must be filed in the office of the clerk of the circuit court of appeals within thirty days from the date of filing the petition. Upon the transcript being filed with the clerk of the circuit court of appeals he shall cause the record to be printed as provided by rule 23 of that court, and furnish counsel on both sides with three copies each. 97 Fed. iii, 79 C. C. A. xlvii.

"While neither the bankruptcy act nor the general orders in bankruptcy prescribe the practice to be adopted in proceedings on revisory petitions, the matters of law of which revision is sought should in some manner be clearly presented." Ross *v.* Stroh, 165 Fed. 628, 91 C. C. A. 616, 21 Am. B. R. 644. See also *In re* Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338, 14 Am. B. R. 757; *In re* O'Connell, 137 Fed. 838, 70 C. C. A. 336, 14 Am. B. R. 237; *In re* Boston Dry Goods Co., 125 Fed. 226, 60 C. C. A. 118, 11 Am. B. R. 97.

22. Ross *v.* Stroh, 165 Fed. 628, 91 C. C. A. 616, 21 Am. B. R. 644; *In re* Boston Dry Goods Co., 125 Fed. 226, 60 C. C. A. 118, 11 Am. B. R. 97.

Amendment of Petition. — In a proper case the court may grant leave to amend.[23]

7. Effect of Filing Petition. — When a petition is properly filed, no other or further relief is necessary to preserve the rights of the petitioner,[24] the petition bringing up the whole record of the action of the court conducting the bankruptcy proceedings, bearing upon the judgment sought to be reviewed.[25]

Stay Pending Decision. — The district court may if necessary grant a stay of proceedings pending the determination of the petition to review.[26]

8. Rules Regulating Answer and Hearing. — No rules have been prescribed by the supreme court, nor is there any statute regulating the practice on applications to review by petition.[27] In the first circuit it is provided by rule that within one calendar month after the return day either party may demur, plead or answer, the determination thereon shall be final, no order to plead over will be permitted,[28] and that the advantages of a demurrer or plea may be obtained by any party by inserting the proper allegations.[29] No demurrer shall be general and no cause of demurrer shall be allowed unless specifically set forth.[30] No pleadings in reply are necessary; any new matter properly in reply is available without being pleaded.[31]

It is furthermore provided within the time allowed for filing a demurrer, plea or answer, a motion to dismiss may be filed, or the subject-matter thereof, if it relates to the substance of the proceeding or to the jurisdiction of the court, may be availed of on demurrer, plea or answer by proper allegations.[32] Whenever a motion to dismiss is seasonably filed, the time for filing demurrer, plea or answer will run from the day on which an order may be entered overruling the motion.[33] The motion to dismiss must be in print, accompanied with a printed brief.[34] Each of the opposing parties is required to be served by the clerk through the mail or otherwise, with a copy of the motion and the brief, and a printed brief in reply may be filed within two weeks.[35] The motion is disposed of on the briefs unless at the court's suggestion or for good cause shown the court order oral argument.[36]

In the fourth circuit the cause is heard in regular order; but either side may on ten days' notice to his opponent have the cause heard either at term time or in vacation, or in chambers, upon the briefs, unless at the suggestion of the court or for good cause shown oral

23. *In re* Sutherland, 2 Biss. 405, 23 Fed. Cas. No. 13,636.
24. Matter of Saratoga Gas & Electric L. & P. Co., 21 Am. B. R. 592.
25. *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. B. R. 358.
26. *In re* Orman, 107 Fed. 101, 5 Am. B. R. 698; *In re* Schlesinger, 102 Fed. 118, 4 Am. B. R. 361.
27. *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. B. R. 358; *In re* Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. B. R. 198; *In re* Russell, 101 Fed. 248, 41 C. C. A. 323; *In re* Abraham, 93 Fed. 767, 35 C. C. A. 529, 2 Am. B. R. 266.
28. 94 Fed. iii, 79 C. C. A. xlvii.
29. 94 Fed. iii, 79 C. C. A. xlvii.
30. 94 Fed. iii, 79 C. C. A. xlvii.
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34. 94 Fed. iii, 79 C. C. A. xlvii.
35. 94 Fed. iii, 79 C. C. A. xlvii.
36. 94 Fed. iii, 79 C. C. A. xlvii.

argument be ordered.[37] The court may for special cause diminish or enlarge the time or make other orders suitable to expedite the proceedings or prevent injustice.[38]

H. Appeal and Supervision Being Cumulative Remedies. — **1. As to Either Being Invoked.** — The right of appeal and the right of superintendence and revision of matters of law are in some circuits held to be cumulative remedies, both rights being given freely and without limitation. The two grants are not inconsistent and in a proper case either may be invoked.[39]

2. Uniting Both. — It is also held that they do not neutralize each other; and the two remedies may be united, the proper adjudication being made by the court in the appropriate proceeding.[40]

37. 94 Fed. iii, 79 C. C. A. lxii.

38. Rule first circuit. 94 Fed. iii, 79 C. C. A. xlvii. Rule fourth circuit. 97 Fed. iii, 79 C. C. A. lxii.

39. Thomas *v.* Woods, 173 Fed. 585, 97 C. C. A. 535, 23 Am. B. R. 132; Ross *v.* Stroh, 165 Fed. 628, 91 C. C. A. 616, 21 Am. B. R. 644; Stevens *v.* Nave-McCord Co., 150 Fed. 71, 80 C. C. A. 25, 17 Am. B. R. 609; *In re* Holmes, 142 Fed. 392, 73 C. C. A. 491, 15 Am. B. R. 689; *In re* McKenzie, 142 Fed. 383, 73 C. C. A. 483, 15 Am. B. R. 679; C. C. Taft Co. *v.* Century Sav. Bank, 141 Fed. 369, 72 C. C. A. 671, 15 Am. B. R. 594; Dodge *v.* Norlin, 133 Fed. 366, 66 C. C. A. 425, 13 Am. B. R. 176.

This course of practice is recognized in the eighth circuit. *In re* Hecox, 164 Fed. 823, 90 C. C. A. 627, 21 Am. B. R. 314.

"The circuit court of appeals for the eighth circuit determined (*In re* Good, 99 Fed. 389, 3 Am. B. R. 605) that what is matter of appeal under section 25 is not matter for revision under section 24. This is undoubtedly correct; yet it appears that Derby, being doubtful whether his remedy was under section 24 or section 25, undertook to avail himself of both until the question of procedure was determined. The county urges on us that the two proceedings neutralize each other, or that one of them, at least, operates to annul the other. We see no necessity for a conclusion of this nature. It has never been held by the supreme court in any of the several cases where parties have been doubtful whether their remedy was by error or appeal, and have therefore taken both, that one of them nullified the other; but instances are reported where the court has heard both the writ of error and the appeal, acting on each by the dismissal of one, and giving a judgment on the merits of the other, according as the law requires." *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. B. R. 496.

Appeal.— Optional Remedies.—When a party is in doubt as to whether his remedy is by error or appeal from an order in bankruptcy, he may in addition to taking an appeal file a petition for review under §24b of the bankruptcy act; and the circuit court of appeals may determine the matters complained of in either or both proceedings as it may deem appropriate. *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637.

An order of dismissal of a petition in bankruptcy, on the ground that it does not state facts to constitute an act of bankruptcy is a "judgment refusing to adjudge the defendant a bankrupt," and is appealable under §25a of the bankruptcy act, although it is also reviewable by petition to revise under §24b. Stevens *v.* Nave-McCord Merc. Co., 150 Fed. 71, 80 C. C. A. 25, 17 Am. B. R. 609.

40. *In re* Moore & Bridgman, 166 Fed. 689, 92 C. C. A. 285, 21 Am. B. R. 651; Ingram *v.* Wilson, 125 Fed. 913, 60 C. C. A. 618, 11 Am. B. R. 192; Hutchinson *v.* Leroy, 113 Fed. 202, 51 C. C. A. 159, 8 Am. B. R. 20; Fisher *v.* Cushman, 103 Fed. 860, 43 C. C. A. 381, 4 Am. B. R. 646; *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. B. R. 496. See also *In re* Williams' Estate, 156 Fed. 934, 84 C. C. A. 434, 19 Am. B. R. 389; Duncan *v.* Ferguson-McKinney Co., 150 Fed. 269, 80 C. C. A. 157, 18 Am. B. R. 155; *In re* Jourdan, 7 Am. B. R. 186.

3. Treating One as the Other. — It is furthermore held that where an appeal is taken and the court determines that no right of appeal exists, the application may be treated as a petition for review, provided no consideration of the facts be necessary,[41] or, in the exercise of its discretion, the court may permit the filing of a petition for revision.[42]

4. As to Remedies Being Exclusive. — In other circuits it is held that there is no election of remedies,[43] and that where an appeal may be taken that remedy must be invoked to the exclusion of the right to apply for revision.[44] Likewise if an appeal be taken in a "proceeding in bankruptcy," it will be dismissed.[45]

I. ILLUSTRATION OF WHAT REVIEWABLE BY PETITION.— The following illustrations will serve to show what matters are reviewable by petition: orders confirming referee's disallowance of a creditor's claim for attorney's fee incurred in contesting claims of others claiming to be creditors;[46] orders or decrees of the bankruptcy court for the sale and disposition of the bankrupt's property;[47] orders for distribution of proceeds of sale of real estate made by trustee;[48] orders sus-

41. *In re* Blanchard Shingle Co., 164 Fed. 311, 90 C. C. A. 243, 21 Am. B. R. 142; *In re* Williams' Estate, 156 Fed. 934, 84 C. C. A. 434, 19 Am. B. R. 389; Chesapeake Shoe Co. *v.* Seldener, 122 Fed. 593, 58 C. C. A. 261, 10 Am. B. R. 466; *In re* Rouse, Hazard Co., 91 Fed. 96, 33 C. C. A. 356, 1 Am. B. R. 234. See also Francis *v.* McNeal, 170 Fed. 445, 95 C. C. A. 168, 22 Am. B. R. 337; *In re* Whitener, 5 Am. B. R. 198

42. *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. B. R. 266.

43. *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256. See also Morehouse *v.* Pacific Hdw. & Steel Co., 24 Am. B. R. 176.

"The consensus of opinion and reason seems to be that this advisory jurisdiction does not include any order or decrees which are appealable. The provisions for appeal and for petitions of review being mutually exclusive." *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

44. Brady *v.* Bernard & Kittinger, 170 Fed. 576, 95 C. C. A. 656, 22 Am. B. R. 342; O'Dell *v.* Boyden, 150 Fed. 731, 80 C. C. A. 397, 17 Am. B. R. 751; Mason *v.* Walkowich, 150 Fed. 699, 80 C. C. A. 435, 17 Am. B. R. 709, 717; Union Nat. Bank *v.* Neill, 149 Fed. 711, 79 C. C. A. 417, 17 Am. B. R. 853; *In re* Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. B. R. 256; *In re* Friend, 134 Fed. 778, 67 C. C. A. 500, 13 Am. B. R. 595; *In re* Kuffler, 127 Fed. 125, 61 C. C. A. 259, 11 Am. B. R. 469; *In re* Rusch, 116 Fed. 270, 53 C. C. A. 631, 8 Am. B. R. 518; Walter Scott & Co. *v.* Wilson, 115 Fed. 284, 53 C. C. A. 76, 8 Am. B. R. 349; *In re* Good, 99 Fed. 389, 39 C. C. A. 581, 3 Am. B. R. 605; Morehouse *v.* Pacific Hdw. & Steel Co., 24 Am. B. R. 176, 181. See also First Nat. Bank of Chicago *v.* Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. ed. 1051, 14 Am. B. R. 102; Hewit *v.* Berlin Mach. Wks., 194 U. S. 296, 24 Sup. Ct. 690, 48 L. ed. 986, 11 Am. B. R. 709; Dickas *v.* Barnes, 140 Fed. 849, 72 C. C. A. 261, 15 Am. B. R. 566.

45. Bank of Clinton *v.* Kondert, 159 Fed. 703, 86 C. C. A. 571, 20 Am. B. R. 178.

46. Davidson *v.* Friedman, 140 Fed. 853, 72 C. C. A. 553, 15 Am. B. R. 489. See also Ohio Val. Bank *v.* Switzer, 153 Fed. 632, 82 C. C. A. 438, 18 Am. B. R. 682. But see *In re* Curtis, 100 Fed. 784, 36 C. C. A. 430, 4 Am. B. R. 17, that if the amount allowed is five hundred or over the review is by appeal.

An order allowing for services of the bankrupt's attorney in the proceedings is reviewable on appeal. Pratt *v.* Bothe, 130 Fed. 670, 65 C. C. A. 48, 12 Am. B. R. 529.

47. Schuler *v.* Hassinger, 24 Am. B. R. 184.

48. *In re* Groetzinger & Sons, 127 Fed. 124, 62 C. C. A. 124, 11 Am. B. R. 467.

taining a demurrer to a petition to vacate an adjudication;[49] a determination on the right of exemption involving only a question of law;[50] order of referee allowing or disallowing the claim of a creditor;[51] order awarding[52] or refusing an injunction;[53] order confirming order of referee denying a claim for exemption of property by the wife of the bankrupt;[54] order confirming action of referee denying the right of partnership creditors to participate in a dividend arising from the bankrupt estate, until the individual creditors have been fully paid;[55] all orders of a summary nature;[56] an order determining the ownership of a fund in the hands of the court as between a creditor or trustee;[57] a question of law arising upon the determination of the validity of a trust deed executed within the four months period;[58] a decision involving a widow's right of dower in the estate, provided there is no disputed fact in issue.[59] An order refusing to vacate an adjudication is reviewable upon petition as an administrative order.[60]

The circuit courts of appeal in various circuits have entertained petitions for review to determine the right to a fund in its possession, but the question whether the order was one in bankruptcy proceedings

49. *In re* Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. B. R. 692.

50. Duncan *v.* Ferguson-McKinney etc. Co., 150 Fed. 562, 80 C. C. A. 157, 18 Am. B. R. 155; Ingram *v.* Wilson, 125 Fed. 913, 60 C. C. A. 618, 11 Am. B. R. 192.

51. Courier-Journal Prtg. Co. *v.* Schaefer-Meyer Brew. Co., 101 Fed. 699, 4 Am. B. R. 183. In this circuit it is held that the right of appeal and the right of review by original petition are cumulative.

52. Davis *v.* Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. B. R. 412; *In re* Kenney, 97 Fed. 554, 3 Am. B. R. 353. See, however, Doroshow *v.* Ott, 134 Fed. 740, 67 C. C. A. 644, 14 Am. B. R. 34, holding that interlocutory restraining order can only be reversed on appeal.

53. Clark *v.* Pidcock, 129 Fed. 745, 64 C. C. A. 273, 12 Am. B. R. 309.

54. *In re* Youngstrom, 153 Fed. 98, 82 C. C. A. 232, 18 Am. B. R. 572.

55. Euclid Nat. Bank *v.* Union Trust Co., 149 Fed. 975, 79 C. C. A. 485, 17 Am. B. R. 834.

56. *In re* Farrell, 176 Fed. 505, 100 C. C. A. 63, 23 Am. B. R. 826; *In re* Rose Shoe Co., 168 Fed. 39, 93 C. C. A. 461, 21 Am. B. R. 725 (an order directing a third person to pay over money to the trustee); *In re* Moore & Bridgeman, 166 Fed. 689, 92 C. C. A. 285, 21 Am. B. R. 651 (ruling on objection to trustee's account); Samel *v.* Dodd, 142 Fed. 68, 73 C. C. A. 254, 16 Am. B. R. 163 (where the court ordered the surrender of assets in the custody of the court); *In re* Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. B. R. 358; Fisher *v.* Cushman, 103 Fed. 860, 43 C. C. A. 381, 4 Am. B. R. 646 (where the court disposed of proceeds arising out of a sale of personal property of the bankrupt); *In re* Purvine, 96 Fed. 192, 37 C. C. A. 446, 2 Am. B. R. 787; *In re* Francis-Valentine Co., 94 Fed. 793, 36 C. C. A. 499, 2 Am. B. R. 522; *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. B. R. 266 (where the possession of property claimed to be part of the estate was disposed of).

57. *In re* Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248, 10 Am. B. R. 359.

58. *In re* McMahon, 147 Fed. 684, 77 C. C. A. 668, 17 Am. B. R. 530; Moore *v.* Green, 145 Fed. 480, 76 C. C. A. 250, 16 Am. B. R. 648; Morgan *v.* First Nat. Bank, 145 Fed. 466, 76 C. C. A. 236, 16 Am. B. R. 639.

59. *In re* McKenzie, 142 Fed. 383, 73 C. C. A. 483, 15 Am. B. R. 679. This was in the eighth circuit where the remedies are held to be cumulative and in which it is held: "In many cases parties aggrieved have the option to present questions of law by petition for revision, or question of law and fact by an appeal."

60. Brady *v.* Bernard & Kittinger 170 Fed. 576, 95 C. C. A. 656, 22 Am. B. R. 342.

proper, or one in a plenary suit or proceeding to determine the right of property, was either not presented or not determined.[61]

Proceedings Not Reviewable By Petition. — It is held, however, that the power to review by original petition does not embrace proceedings in suits by the trustee in bankruptcy.[62]

J. Review of Discretionary Order. — A petition for review is not usually granted where it is sought to review a discretionary order.[63] But where a valuable legal right is involved a petition will be allowed.[64]

K. No Review From Territorial Supreme Courts. — No authority exists under this section permitting a review by original petition in the territorial supreme courts.[65]

L. No Appeal to Supreme Court From Petition To Review. — No appeal lies to the supreme court of the United States from the decisions of the circuit court of appeals on petitions to superintend and revise.[66]

61. Hutchinson *v.* Otis, 115 Fed. 937, 51 C. C. A. 419, 8 Am. B. R. 382; Mueller *v.* Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. ed. 405, 7 Am. B. R. 224, *reversing* 105 Fed. 581, 44 C. C. A. 620, 5 Am. B. R. 176; *In re* Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. B. R. 266; *In re* Hutchinson, 113 Fed. 202, 8 Am. B. R. 382. *Compare* Bardes *v.* Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. ed. 1175, 4 Am. B. R. 163 (which was a suit by the trustee against a third party claiming adversely); Cunningham *v.* Bank, 103 Fed. 932, 43 C. C. A. 377, 4 Am. B. R. 192 (holding that the rank or lien of a claim was an incident to the allowance or rejection of the debt for which the lien was allowed or denied and could be reviewed on appeal). See Metcalf *v.* Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. ed. 122, 9 Am. B. R. 36.

Second Circuit.—*In re* Garcewich, 115 Fed. 87, 53 C. C. A. 510, 8 Am. B. R. 149; *In re* New York Economical Prtg. Co., 110 Fed. 514, 49 C. C. A. 133, 6 Am. B. R. 615; *In re* Neely, 113 Fed. 210, 7 Am. B. R. 312.

Fourth Circuit.—McNair *v.* McIntyre, 113 Fed. 113, 51 C. C. A. 89, 7 Am. B. R. 638.

Fifth Circuit.—Phillips *v.* Turner, 114 Fed. 726, 52 C. C. A. 358, 8 Am. B. R. 171; Carling *v.* Seymour Lumb. Co., 113 Fed. 483, 51 C. C. A. 1, 8 Am. B. R. 29; *In re* Oconee Milling Co., 109 Fed. 866, 48 C. C. A. 703, 6 Am. B. R. 475; *In re* Georgia Handle Co., 109 Fed. 632, 48 C. C. A. 571, 6 Am. B. R. 472.

Sixth Circuit.—*In re* Shirley, 112 Fed. 301, 50 C. C. A. 252, 7 Am. B. R. 299; *In re* Lemmon & Gale Co., 112 Fed. 296, 50 C. C. A. 247, 7 Am. B. R. 291.

Seventh Circuit.—*In re* Eggert, 102 Fed. 735, 43 C. C. A. 1, 4 Am. B. R. 449; *In re* Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. B. R. 145.

Eighth Circuit.—*In re* Pekin Plow Co., 112 Fed. 308, 50 C. C. A. 257, 7 Am. B. R. 369.

Ninth Circuit.—*In re* Beaver Coal Co., 113 Fed. 889, 51 C. C. A. 519, 7 Am. B. R. 542.

62. *In re* Busch, 116 Fed. 270, 53 C. C. A. 631, 8 Am. B. R. 518; *In re* Jacobs, 99 Fed. 539, 39 C. C. A. 647, 3 Am. B. R. 671. See also Coder *v.* Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. ed. 772, 22 Am. B. R. 1; Hewit *v.* Berlin Mach. Wks., 194 U. S. 296, 24 Sup. Ct. 690, 48 L. ed. 986, 11 Am. B. R. 709.

63. Mulford *v.* Fourth St. Nat. Bank, 157 Fed. 897, 85 C. C. A. 225, 19 Am. B. R. 742; *In re* Brown, 112 Fed. 49, 50 C. C. A. 118, 7 Am. B. R. 252; *In re* Lesser, 99 Fed. 913, 40 C. C. A. 177, 3 Am. B. R. 758.

This power does not give the circuit court of appeals authority to control the court of bankruptcy in appointing or removing a referee, which rests within the discretion of that court. Birch *v.* Steele, 165 Fed. 577, 91 C. C. A. 415, 21 Am. B. R. 539.

64. *In re* Carley, 117 Fed. 130, 55 C. C. A. 146, 8 Am. B. R. 720.

65. *In re* Stumpf, 4 Am. B. R. 267. And see *In re* Blair, 106 Fed. 662, 45 C. C. A. 530, 5 Am. B. R. 793.

66. Holden *v.* Stratton, 191 U. S.

Review by Certiorari. — The matter may, however, be brought up by certiorari.[67]

M. ALLOWANCE OF COSTS. — Though the petition for review has not the effect of removing a case to the appellate court, if while the matter is pending the respondent below dismisses the case he should pay the costs of the review.[68]

XX. APPEAL TO SUPREME COURT FROM APPELLATE COURT. —A. GENERALLY. — An appeal may be taken from any final decision of a court of appeals, allowing or rejecting a claim under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other: Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States;[69] or where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.[70]

B. TIME FOR TAKING. — Appeals to the Supreme Court of the United States from a circuit court of appeals or from the supreme court of a territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy shall be taken within thirty days after the judgment or decree.[71]

C. ALLOWANCE OF APPEAL. — The allowance may be made by a judge of the court appealed from or by a justice of the supreme court.[72]

115, 24 Sup. Ct. 45, 48 L. ed. 116, 10 Am. B. R. 786; *citing* as authority under former act Conro *v.* Crane, 94 U. S. 441, 24 L. ed. 145; Morgan *v.* Thornhill, 11 Wall, (U. S.) 65, 20 L. ed. 60.

67. Holden *v.* Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. ed. 116, 10 Am. B. R. 786; Denver First Nat. Bank *v.* Klug, 186 U. S. 202, 22 Sup. Ct. 899, 46 L. ed. 1127, 8 Am. B. R. 12; Louisville Trust Co. *v.* Comingor, 181 U. S. 624, 22 Sup. Ct. 946, 45 L. ed. 1031, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. ed. 413, 7 Am. B. R. 421; Mueller *v.* Nugent, 180 U. S. 640, 21 Sup. Ct. 927, 45 L. ed. 711, 7 Am. B. R. 224; 184 U. S. 1, 22 Sup. Ct. 269, 46 L. ed. 405, 7 Am. B. R. 224; Bryan *v.* Bernheimer, 175 U. S. 724, 20 Sup. Ct. 1031, 44 L. ed. 338, 5 Am. B. R. 623; 181 U. S. 188, 21 Sup. Ct. 557, 45 L. ed. 814, 5 Am. B. R. 623.

68. *In re* Orman, 107 Fed. 101, 46 C. C. A. 165, 5 Am. B. R. 698.

69. Bankruptcy Act (1898), §25b; Hutchinson *v.* Otis, 123 Fed. 14, 59 C. C. A. 94, 10 Am. B. R. 275.

70. Bankruptcy Act (1898), §25b; Coder *v.* Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. ed. 772, 22 Am. B. R. 1; Western Tie & Timber Co. *v.* Brown, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. ed. 571, 13 Am. B. R. 447; Lucius *v.* Cawthon-Coleman Co., 196 U. S. 149, 25 Sup. Ct. 214, 49 L. ed. 425, 13 Am. B. R. 696; Hutchinson *v.* Otis, 123 Fed. 14, 59 C. C. A. 94, 10 Am. B. R. 275. And see as to instances of what is not within the meaning of this section, Smalley *v.* Langenour, 196 U. S. 93, 25 Sup. Ct. 216, 49 L. ed. 400, 13 Am. B. R. 692; Holden *v.* Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. ed. 116, 10 Am. B. R. 736.

71. General Order XXXVI, (2), 172 U. S. 665, 89 Fed. xiv.

This limitation of time within which an appeal can be taken has the same effect as if written in the statute. Conboy *v.* First Nat. Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. ed. 128, 16 Am. B. R. 773.

72. General Order XXXVI, (2), 172 U. S. 665, 89 Fed. xiv.

D. Findings. — In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies, at or before the time of entering the judgment or decree, must make and file a finding of the facts and its conclusions of law thereon, stated separately; and the record transmitted to the supreme court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the findings of fact and the conclusions of law.[73] If the record fail to contain the findings of fact or conclusions of law, or none are made, the appeal will be dismissed.[74]

E. Questions Not Presented Below. — Questions not presented to the trial court cannot be raised for the first time on presentation of the appeal to the supreme court.[75]

F. Appeal to Supreme Court From State Court of Last Resort. An appeal will lie to the Supreme Court of the United States from a state court of last resort, where the judgment involved a "right" or "title" claimed under the bankruptcy statute.[76] The question must have been presented to the state court.[77] Only questions of law will be reviewed.[78]

G. Certiorari. — Controversies may be certified to the Supreme Court of the United States from other courts, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to

73. General Order XXXVI, (3), 172 U. S. 665, 89 Fed. xiv.

When an appeal is taken within the required time, the findings of fact and conclusions of law if not filed before judgment is entered may be filed *nunc pro tunc*. Coder *v.* Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. ed. 772, 22 Am. B. R. 1, *affirming* 18 Am. B. R. 513.

Entering Findings and Conclusions Nunc Pro Tunc.—The court may by order direct the filing of findings of fact and conclusions of law *nunc pro tunc* as of the date of the entry of the judgment, where they were made within the thirty days' time allowed for the appeal. Coder *v.* Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. ed. 772, 22 Am. B. R. 1.

74. Chapman *v.* Bowen, 207 U. S. 89, 28 Sup. Ct. 32, 52 L. ed. 116, 18 Am. B. R. 844. "The omission cannot be supplied by reference to the opinion."

75. Frank *v.* Volkommer, 205 U. S. 521, 27 Sup. Ct. 596, 51 L. ed. 911, 17 Am. B. R. 806.

Objections to Findings.—Armstrong *v.* Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. ed. 514, 19 Am. B. R. 746.

76. Miller *v.* New Orleans Acid & F. Co., 211 U. S. 496, 29 Sup. Ct. 176, 53 L. ed. 300, 21 Am. B. R. 416, *affirming* 117 La. 821, 42 So. 329; Eau Claire Nat. Bank *v.* Jackson, 204 U. S. 522, 27 Sup. Ct. 391, 51 L. ed. 596, 17 Am. B. R. 675; Rector *v.* City Deposit Bank Co., 200 U. S. 405, 26 Sup. Ct. 289, 50 L. ed. 527, 15 Am. B. R. 336; Nutt *v.* Knut, 200 U. S. 12, 26 Sup. Ct. 216, 50 L. ed. 348; Forsyth *v.* Vehmeyer, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. ed. 723, 3 Am. B. R. 807; Williams *v.* Heard, 140 U. S. 529, 11 Sup. Ct. 885, 35 L. ed. 550; Strang *v.* Bradner, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. ed. 248; Hennequin *v.* Clews, 111 U. S. 677, 4 Sup. Ct. 576, 28 L. ed. 565; Hill *v.* Harding, 107 U. S. 631, 2 Sup. Ct. 404, 27 L. ed. 493.

If the only question involved is the determination of an exemption under the state statute, there can be no appeal. Smalley *v.* Langenour, 196 U. S. 93, 25 Sup. Ct. 216, 49 L. ed. 400, 13 Am. B. R. 692.

77. Columbia Water Power Co. *v.* Elec. Street R., L. & P. Co., 172 U. S. 475, 19 Sup. Ct. 247, 43 L. ed. 521; Pim *v.* St. Louis, 165 U. S. 273, 17 Sup. Ct. 322, 41 L. ed. 714.

78. Egan *v.* Hart, 165 U. S. 188, 17 Sup. Ct. 300, 41 L. ed. 680; Dower *v.* Richards, 151 U. S. 658, 14 Sup. Ct. 452, 38 L. ed. 305.

the provisions of the United States laws now in force, or such as may be hereafter enacted.[79] Appeals or writs of error in cases in which the jurisdiction of the lower court is in issue can only be taken directly to the supreme court after final judgment.[80] The court is limited to the consideration of the jurisdiction of the lower courts,[81] but the circuit court of appeals may certify any question of law as to which it desires instruction.[82]

Petition. — The form of petition for certiorari in bankruptcy cases is the general form.[83]

Mandamus. — When on certiorari the cause is remanded back with instructions, the court may enforce its mandate by peremptory mandamus, though a writ of alternative mandamus should first issue.[84]

Cannot Be Substituted for Writ of Error. — But a mandamus will not issue for the purpose of reviewing the action of the bankruptcy court, on an adjudication, this writ not being a proper substitute for a writ of error.[85]

XXI. RELIEF WHEN BANKRUPTCY PROCEEDINGS INSTITUTED MALICIOUSLY. — When a proceeding in bankruptcy is instituted without probable cause and maliciously, the remedy is a suit in the nature of an action for malicious prosecution.[86]

79. Bankruptcy Act (1898), §25d; Bardes *v.* First Nat. Bank of Hawarden, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. ed. 261, 3 Am. B. R. 680.

"By the 5th section of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517), it was provided that appeals or writs of error might be taken from the district courts or from the circuit courts direct to this court, among other cases, in any case in which the jurisdiction of the court was in issue, but that in such cases the question of jurisdiction alone should be certified from the court below for decision; by the 6th section, that in cases made final in the circuit courts of appeals, those courts might at any time certify to this court any questions or propositions of law concerning which they desired instruction for the proper decision of the cases, and this court might answer the questions, or might require the whole record and cause to be sent up for consideration; and also that in respect of cases so made final, it should be competent for this court to require by certiorari or otherwise any such case to be certified to this court for review and determination with the same power and authority as if it had been brought here by appeal or writ of error." Bardes *v.* First Nat. Bank of Hawarden, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. ed. 261, 3 Am. B. R. 680.

80. Bardes *v.* First Nat. Bank of Hawarden, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. ed. 261, 3 Am. B. R. 680, *citing* McLish *v.* Roff, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. ed. 893.

81. First Nat. Bank of Denver *v.* Klug, 186 U. S. 203, 22 Sup. Ct. 899, 46 L. ed. 1127, 8 Am. B. R. 12; Bardes *v.* First Nat. Bank of Hawarden, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. ed. 261, 3 Am. B. R. 680.

82. Bardes *v.* First Nat. Bank of Hawarden, *supra.*

83. First Nat. Bank of Chicago *v.* Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. ed. 1051, 14 Am. B. R. 103. And see the title "Certiorari."

84. *Ex parte* Chicago Title & Trust Co., 146 Fed. 742, 77 C. C. A. 408, 16 Am. B. R. 848.

See the title "Mandamus."

85. Matter of Riggs, 214 U. S. 9, 29 Sup. Ct. 598, 53 L. ed. 887, 22 Am. B. R. 720.

86. Matter of Moehs & Rochester, 174 Fed. 165, 22 Am. B. R. 286; Wilkinson *v.* Goodfellow-Brooks Shoe Co., 15 Am. B. R. 554 (even though there is no seizure of the debtor's property).

See the title "Malicious Prosecution."