A TREATISE

ON THE

LAW OF REPLEVIN,

AS ADMINISTERED IN THE COURTS

OF

THE UNITED STATES AND ENGLAND.

BY H. W. WELLS,
COUNSELLOR AT LAW.

SECOND EDITION WITH NOTES PREPARED BY HON. E. T. WELLS, LATE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE TERRITORY OF COLORADO, FROM CASES SELECTED BY THE AUTHOR.

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PREFACE TO THE FIRST EDITION.

One of the first books treating on a single action at law was Gilbert on Replevin, published in 1756. This was followed by Wilkinson on Replevin, in 1825, and by Morris, the last edition of which is still fresh from the press. The two former works, though valuable and exhaustive treatises in their time, have become antiquated. The following pages contain an attempt to state the law of replevin as generally applicable in this country; a task attended with difficulty, in view of the differences in local laws.

The author has forborne to insert copies of cases in the notes, which, while it would have swelled the number of pages, would not, as is believed, have been attended with any corresponding advantage.

The work contains over five thousand references, and cites over three thousand authorities. H. W. W.

Peoria, October 29, 1879.

PREFACE TO THE SECOND EDITION.

This edition of Wells on Replevin is prepared from cases selected by the author. I have read with such attention as I could command every one of the cases cited, and personally verified the citations. I hope that few errors will be found either in doctrine or place. E. T. Wells.

Denver, Colorado, Sept. 1906.

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THE

LAW OF REPLEVIN.

CHAPTER I.

HISTORICAL INTRODUCTION.

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§ 1. **Origin of replevin unknown.** Replevin was among the earliest remedies given by the common law. Its origin antedates its written history an unknown period, and, like the origin of

the common law, of which it forms part, it can only be said to come from an age in which all our laws existed simply in tradition. Glanvil, the earliest writer on the laws of England, gives the writ as it was in his time, and as it must have existed before. Blackstone speaks of the action as "an institution which the Mirror ascribes to Glanvil."[1] The passage referred to by the learned author does not wholly justify the statement.[2] It would seem probable that Glanvil was the author of some regulation which afterward took form in the statute of Marlbridge; but the statute was not enacted until nearly eighty years after his death. Judges of that period were arbitrary in the exercise of their power, but Glanvil makes no claim to having originated this action; he simply wrote of the laws as they then existed.[3] The writ was certainly one of the earliest, and may have been in existence before the chancery was known.[4]

§ 2. **Its first appearance as part of the lex scripta.** It makes its first appearance as a part of the *lex scripta* in the statute of Marlbridge, 52 Henry III., A. D. 1267. The twenty-first chapter of this statute is on the subject of replevin, while other chap-

[1] 3 Blackstone, 146.

[2] The full text of the Mirror referred to by Blackstone is as follows: "If any be wrongfully distrained, ye are to distinguish whether it be by those who have the power to distrain, or by others; and if by others, then lieth an appeal of robbery, whereof Hailif gave a notable judgment; and if by those who may distrain, then they ought to deliver the distress by gage and pledges: And if the distrainer and the plaintiff of the distress lead it away, then the connisance thereof doth belong to the King's Court, and so there is a remedy by a writ of *replegari facias*. Nevertheless, for the releasing of such distress, and for the hastening of the right, Rudolph de Glanvil ordained that sheriffs and hundredors should take securities to pursue the plaints, and should deliver the distresses, and should hear and determine the plaints of tortious distresses, saving to the king the suit as to leading," etc. Mirror of the Justices, Ch. 2, § 26.

[3] He says, in his preface: "The laws of England, though not written, may, without impropriety, be termed laws. * * * There are some well established rules which, as they more frequently arise in court, it appears to me not to be presumptuous to put into writing."

[4] See preface to 8th Vol. Coke's Reports, p. 17. Herteford, a learned sergeant in the time of Edward I., mentions several writs which he thinks were invented before the chancery was known. Year Book, 30, 31, Edward I., 276. The chancery was an office for issuing writs long before it acquired jurisdiction as a court. Lives of the Chancellors, Vol. 1, p. 2, *et seq.*; Story's Eq. Jurisp., Vol. 1, Ch. 2.

ters relate to the subject of distress, which, as will appear, was closely allied to replevin in the ancient law.[5]

§ 3. **Its prior existence apparent.** From this statute it clearly appears that prior to its enactment the action was in general and frequent use; that it had grown into a well defined proceeding, with established forms, rules and precedents too strongly fixed to be disregarded or avoided. It may also be inferred from the statute that the defects and inadequacies in prior laws were of such magnitude, and the inconveniences resulting therefrom were so general as to demand an act of Parliament for their correction at a time when acts of Parliament, especially such as might operate in favor of the tenant and against the lord, were of rare occurrence.[6]

§ 4. **The origin of the statute of Marlbridge.** The contests which arose between the king and the nobles, called the wars of the barons, and which came to a close in the reign of Henry III., rendered England a scene of the greatest turbulence. In this conflict the people, alternately courted by both parties, became more and more sensible of their rights and their importance, and out of these influences the statute of Marlbridge, among others, came to be enacted.[7]

§ 5. **Originally it was an action to recover chattels wrongfully taken or wrongfully detained.** By the ancient law replevin was an action to recover chattels wrongfully taken or wrongfully detained. "The substance of this plea," say Britton, "consists of two things, to-wit: the taking and the detaining, * * * and because he who wrongfully detains does a greater injury than he who wrongfully takes, the principal burden of the

[5] Replevin was treated of under the title of distress, by all the old authors. Britton, Vol. 1, Ch. 28; Fleta Mirror, Ch. 2, § 26; Gilbert, in his work on Replevin, and many other writers.

[6] *Post*, § 9, note.

[7] DeLolme, on the Constitution of England, p. 155. This statute, (so called from Marlborough, in Wiltshire, where King Henry III. held a Parliament in November, 1267,) has ever been regarded as one of the charters of English liberties. Chapter 5 contains a re-affirmance of the first great charter of Henry III.; and the name *Magna Charta*, which it has ever since retained, was first given to it in this chapter. Thompson's Essay on Magna Charta, p. 381. No official record of this statute is known to exist. It is one of the ancient statutes. See preface to Statutes at Large.

answer shall fall on the detainers." [8] There is nothing in the writ, even in its earliest form, which would necessarily confine it to the recovery of distresses;[9] but by the common law the action was, without doubt, practically limited to the recovery of distresses wrongfully taken and detained.[10]

§ 6. **Distresses.** Distress was the taking of a personal chattel out of the possession of an alleged wrong-doer, by the person claiming to be injured, into his own custody to compel satisfaction for the wrong complained of.[11] This taking doubtless originated in the rough exercise of pure force, for which the will of the taker was the sole warrant. The written history of the law is not explicit on this subject, but enough remains to justify the belief that before the law had attained vigor enough to enforce its mandates, or compel that respect which is yielded to superior power, rude men employed their own individual force, and indemnified themselves for any real or supposed injury or default of another, by seizing from their adversary enough of his movables to satisfy or compensate them for their supposed loss.[12] The possession of sufficient force being the only pre-requisite to the seizure, of course such a taking would be stoutly resisted by any person who deemed himself able to make his resistance successful, or a recaption, or ample reprisals would be made at the earliest moment the party was prepared to do so.[13] Serious contests, long and bitter feuds and bloodshed were the common results. In process of time, as society began to grow stronger,

[8] Britton, translated by Nichols, Vol. 1, Chap. XXVIII.; F. N. B. 68, and following.

[9] The writ given by Glanvil is almost identical with the later writ. See § 11, note. Wilks. on Rep. 2. Two things fall in these plaints of taking and detaining, whereof there are four degrees: 1st. When the taking is justifiable for lawful, etc., and the detaining also, as for a debt due, or a debt recovered. 2d. Where both are wrongful, such as are disavowable both in taking an detaining. 3d. Where the taking is lawful, as in damage feasant and the taking tortious as against sufficient gages and pledges tendered. Mirror of Justices, Ch. 2, § 26.

[10] See *post* Chap. 2.

[11] 3 Blackstone, 6; Gilbert on Distresses, 4; Anon Dyer, 280; Bradby on Distresses, p. 1, and following.

[12] Distresses are called Revenges in Stat. Marlbridge, 52; H. III. Chap. 1 and 3, A. D. 1267.

[13] This afterwards came to be called *brevia manu*, "writs of hand." Historical Law Tracts published by Miller, (London, 1745,) 289.

and the public safety to forbid such contests, custom and law began to have force; the taking, though still permitted, was hedged in by certain rules; resistance or recaption was forbidden unless, as was grimly said, the taking was wrongful; the thing taken came to be regarded in the light of a pledge or security, to be returned when satisfaction was made; and replevin grew and became a legal proceeding by which a person might recover his property wrongfully taken or wrongfully detained from him by distress.[14]

§ 7. **Usually for rent.** The injury for which distress was most usually permitted was the non-payment of rent or dues by a tenant to his lord. If the tenant failed in the payment of his rent, or refused to perform the service which his feudal contract bound him to do, the lord would seize his goods, (usually cattle,) and detain them as a pledge or security to compel payment or performance.[15] The thing taken, as well as the process by which it was taken, was called a distress.[16]

§ 8. **Could not be sold.** Prior to the statute, 2 W. & M. Ch. 5, a distress, unless for dues to the King, could not be sold, and so

[14] Mathews *v.* Carey, 3 Mod. 137; Anon Dyer, 280; 3 Blackstone, 6, *et seq.* 145, *et seq:* Year Books *Passim.*

[15] 3 Blackstone, 145, *et seq.:* F. N. B. 68; Evans *v.* Brander, 2 H. Bla. 547. [If the defendant retain the goods and this appear by the pleadings judgment must inevitably go against him; or if there be a verdict in his favor judgment will go *non obstante.* Cassidy *v.* Elias, 90 Pa. St., 434.

Distress of a house of the tenant on the demised premises, no possession being taken, but the tenant left with his family in the occupancy of the house, amounts to nothing. Johnson *v.* Prussing, 4 Ills. Ap., 575.

Animals distrained for rent may be left by the landlord with the tenant for a reasonable time without loss of the lien. La Motte *v.* Wisner, 51 Md. 513.

But if the landlord leave them an unreasonable time, and they are sold to a purchaser *bona fide*, the landlord's right is lost. Id.

From January 26 to May 1 following, was held an unreasonable time. Id.

There may be a constructive taking sufficient to hold the distress. Robelen *v.* National Bank, 1 Marv., 346, 41 Atl., 80.

An execution or attachment levied, or deed of assignment recorded, in advance of the actual levy of a distress warrant, takes precedence thereof. Rowland *v.* Hewitt, 19 Ills. Ap., 450.]

[16] 3 Blackstone, 6. Distresses were usually the cattle of the debtor The term cattle included horses, down to quite a late period—Macaulay's Hist. Vol. 1, p. 294—and originally was synonymous with chattel.

was no payment or satisfaction to the distrainor; it could be held as a pledge or security only. The distrainor might impound the cattle in pound overt to be fed by the owner, and at the owner's risk in case they died,[17] and so pain or distress him until he should perform the service, or discharge his cattle by payment of the sum for which they were distrained.

§ 9. **Abuses of the right of distress.** Gross abuses grew out of the exercise of this right of distress. In the wars of the barons each was anxious to appear at the head of the largest body of vassals. Distresses were frequently made to compel the tenant to perform military service not due, or to perform service which he was not bound to perform under his tenure. When neighboring lords were seeking to enlarge their domains, the tenants were frequently distrained upon by both. The husbandry of the realm, then its only support, was greatly injured, and the public peace disturbed. In the latter part of the reign of Henry III. laws were enacted regulating distress and enlarging and simplifying the remedies for illegal distresses,[18] and it was from one of these acts, that is the twenty-first chapter of the Statute of Marlbridge, that the action of replevin received its principal impetus.

§ 10. **Replevin defined.** To replevy, as its name (*replegiare* —to take back the pledge,) indicates, is when the person distrained upon applies to the proper officer, and has his distress returned to him upon giving security to try the right of taking or distraining in an action at law.[19] The writ did not contain a summons to the defendant, and was not returnable to any superior court, but commanded the sheriff to see justice done between the parties. The sheriff, by the writ, was authorized to act as the judge. In this the writ differed from ordinary writs, in which the sheriff acted in his ministerial capacity.[20]

[17] Gilbert on Distresses, 4; Anon Dyer, 280 *b*; 3 Blackstone, 14–145, *et seq.*; Woglam *v.* Cowperthwaite, 2 Dall. 68; King *v.* Blackmore, 72 Pa. St. 347. In this country it is the duty of the party impounding cattle to feed them. Adams *v.* Adams, 13 Pick. 385.

[18] Statute de Districtione Scaccarii, 51 Henry III. 1266; Statute Marl. 52, Henry III. C. 1, A. D. 1267; Reeves' Hist. Vol. 2, p. 66; Gilbert on Distresses, 3; 3 Blackstone, 14–146.

[19] 3 Blackstone Com. 13; Co. Litt. 145 *b*. *Vetitum namium* (forbidden pledge,) as it was anciently called, was when the bailiff of the lord distrained and the lord forbiddeth the sheriff to deliver the distress when the sheriff cometh to deliver it. 2 Inst. 140; Gilbert on R. 79. Spelm. Law Gloss.

[20] Fitz N. B. 86; 3 Blackstone, 146, 147; Weaver *v.* Lawrence, 1 Dall. 156.

§ 11. **The writ was not returnable, but gave the sheriff power to try the case.** Prior to the enactment of the Statute of Marlbridge the proceeding was commenced by writ issuing out of chancery.[21] It was a judicial writ; so called because it gave the sheriff power to hear and determine the matter complained of.[22]

§ 12. **If the defendant claimed to own the property, the sheriff could not proceed.** If the defendant claimed to own the property, the sheriff could proceed no further with the replevin. The writ was framed to try the question of caption or detention only, and not the title to the property; but the plaintiff might sue in an appeal of felony, and if he was successful he got his goods, and the taker was regarded as a robber, and was hanged.[23] Subsequently, when the property was so claimed by the defendant, the writ *de proprietate probanda* was sued out to settle the question of ownership, and that was first determined. For the defendant to claim that he owned the goods, on the trial of the suit, was unheard of in early cases.[24]

[21] The form of the writ was as follows:

"THE KING, etc., *to the Sheriff, etc.:*

"We command you, that justly, and without delay, you cause to be replevied the cattle of B., which D. took and unjustly detains, as it is said, and afterwards thereupon cause him justly to be removed, that we may hear no more clamour thereupon for want of justice," etc.

"Pledges—"

Fitz N. B., 68 D. The writ given by Glanvil is substantially the same. Glanvil, Beam's Trans. 294.

[22] Gilbert, Blackstone, and other writers, speak of such writs as *vicontiel*—not being returnable, but commanding the sheriff *vice comite*, to see justice done. Such writs were common in the early history of the law. Gilbert on Replevin, 59; 3 Blackstone, 238. The *Natura Brevium* contains many such writs. Fitz N. B. *passim*; Glanvil, Book 12, Ch. 12; Crabb's Hist. Eng. Law, 116.

[23] Britton, Vol. 1, Ch. 28; Mirror, Ch. 2, § 26, cited *ante*, § 1, note 1; *Ex parte* Chamberlain, 1 Scho. & Lef. 320, note. This appeal was made as follows: John, who is here, appeals Peter, who is there, that, whereas, the same John, on such a day, and had a horse which he kept in his stable. The same Peter there came, and the same horse feloniously, as a felon, stole from him, and took and led away, against the peace, and that this he wickedly did the same John offers to prove by his body, as the court shall award that he ought to do it. Britton, Vol. 1, p. 115.

[24] Gilbert on Replevin, 98; 3 Blackstone Com. 148; Shannon v. Shannon, 1 Scho. & Lef. 327; Leonard v. Stacy, 6 Mod. 140. If the sheriff

§ 13. **Alias and pluries writs, and the practice. Pluries always returnable. The reason therefor.** If the sheriff failed to serve the first writ, the plaintiff was entitled to an *alias*, and then to a *pluries*. In practice, however, it became usual for the plaintiff to take all three, the writ, the *alias* and the *pluries* at one time.[25] And he might deliver all these writs to the sheriff;[26] or he might deliver the *alias* or *pluries* only, as he saw fit.[27] The original, as has been said, and the *alias* were not returnable, but the *pluries* always contained the clause *vel causam nobis certifices*, etc., or certify to us the reason why, etc. This writ was always returnable, the sheriff being therein commanded to certify the reason why he could not, or would not, execute the command of the former writs. The reason, as stated by Gilbert, being, the sheriff, having twice failed in his duty, (in not returning the original and *alias*,) was not further to be trusted with judicial power, and as he is answerable to the court how he has obeyed the command of the writ, the court must have it, to see whether he has done his duty or not. If he had failed, he was fined for disobedience.[28] If, however, the sheriff had had no other writ than the *pluries* delivered to him, he might make return of that fact, and so excuse himself, for supposed neglect of duty.[29]

§ 14. **Cattle driven within a liberty—the writ non omittas.** If the sheriff's return to the writ showed that the cattle were driven within some liberty, and that the bailiff of the liberty made no answer to his demand for them, the plaintiff might have an *alias* or *pluries non omittas*. This authorized the sheriff to enter the liberty or franchise and deliver the plaintiff's beasts.[30]

took the property after a claim of ownership by the defendant, he was a trespasser *ab initio*. "In replevin, the defendant said he had property in the beasts *absque hoc;* that the property was in the plaintiff, and prayed judgment, and it was found for the plaintiff. Sergeant Harvey moved in arrest of judgment, for in no book was found such a traverse as this; HUTTON, Justice, said this was never seen by him, and they all agreed that judgment shall be for the plaintiff." Anon Winch, 26; Weaver *v.* Lawrence, 1 Dall. 156.

[25] F. N. B. 68 E.; Gilbert on Replevin, 75.

[26] F. N. B. 68 E.

[27] Gilbert on Replevin, 75; Anon Dyer, 189*a;* F. N. B. 68; Thomas, of Matyshale, *v.* The Abbot of Cirencester, Year Book, 30 E. 1, 18. See this case *post*. § 25, note.

[28] Gilbert on Replevin, 77; F. N. B. 68; Freeman *v.* Bluet, 12 Mod. 395.

[29] Gilbert on Replevin, 76, *et seq.*

[30] Gilbert on Replevin, 69 *et seq.* See *post*. § 23, note. F. N. B. 68.

The clause which sometimes appears in our writs of the present day, "and this you are not to omit, under the penalty of the law," though now nothing more than a rather sonorous form, was once a special and highly essential part of the writ,[31] without which it would have been useless.[32]

§ 15. **The writ issued only at Westminster.** The writ of replevin, like all other original writs, could only issue out of chancery at Westminster, the King's chancellor being the only officer in the kingdom who could issue such writs, and Westminster was the only chancery office or place whence they could issue.[33]

§ 16. **Delay in the issuing of the writ occasioned thereby.** Westminster was several days' journey from the extremities of the kingdom. A journey from London to New Castle by land probably occupied as much time then as a journey from New York to San Francisco would now. Something like it occurred in the early history of Illinois, when a court at Kaskaskia sent its writs to Milwaukee. The delay which this occasioned was a serious hardship to the tenant, who was compelled to feed his beasts until a writ could be obtained without having the use of them. It was, moreover, a great detriment to the husbandry of the realm, and in those days agriculture was the sole support of the nation.[34]

§ 17. **Replevin by "plaint," sheriff authorized to proceed without writ.** To remedy this the Statute of Marlbridge was enacted. This statute, as before remarked, was one of the most important in English history, and without doubt the Chapter on Replevin had as marked, lasting and beneficial effect on the

[31] Gilbert's History and Practice of the Court of Common Pleas, 26 *et seq.* See *post*, § 23 Note.

[32] Reeve's Hist. Ch. 10, p. 93, (Finlason's Ed.)

[33] 3 Blackstone, 50 lb. 273; History and Practice of the Court of Common pleas, 15 *et seq.* The mode of commencing a civil suit in the reign of Henry III., as well as in earlier and subsequent times, was by the purchase of a writ. Writs, when issued, were sent by the hands of messengers who traveled through the kingdom and delivered them to the sheriffs of the counties to be served on defendants. Horwood in his preface to the Year Book, 30, 31, E. I. p. 26. Macaulay's History of England, Vol. 1, p. 347, contains a description of the roads and difficulties of travel four hundred years later. In 1700 York was a week distant from London. Lives of the Engineers, p. 23.

[34] History of England; Potter v. Hall, 3 Pick. 368.

laws of Great Britain as any other chapter ever enacted. This chapter (Ch. 21,) gave the sheriff power, upon complaint made to him, without any writ or process from any superior, to deliver to the plaintiff his cattle; or if they were taken within any liberty, the sheriff might at once enter the liberty to make replevin. In other words, this chapter operated like a general continuing writ of replevin available for all persons in all cases, or it saved the necessity for any writ, and by virtue of its provisions the sheriff, upon complaint made to him, might, upon his own authority, either by word, (for frequently the sheriff of those days could not write,) or by precept to his bailiff, replevy the plaintiff's goods.[35] After the adoption of this statute the writ gradually fell into disuse, and has long since become obsolete in England. Its use was continued in Ireland some years later.

§ 18. **Proceeding in case of resistance.** Proceedings under this statute were called "Proceedings by Plaint." The sheriff, upon plaint, (*i. e.* complaint,) made to him[36] went in person, or sent one of his bailiffs, to the place where the cattle were detained and demanded sight of them.[37] If this were denied he might

[35] Ch. 21, Statute Marl. 52 Henry III. A. D. 1267, is as follows: "It is provided, also, that if the beasts of any man be taken and wrongfully withholden the sheriff, after complaint made to him thereof, may deliver them without let or gainsaying of him that took the beasts, if they were taken out of liberties; and if the beasts were taken within any liberties, and the bailiff of the liberty will not deliver them, then the sheriff, for default of those bailiffs, shall cause them to be delivered."

These liberties were estates, baronys, towns or monasteries, etc., in which the lord claimed jurisdiction to the exclusion of the King's ordinary writ, the right proceeding frequently from a grant from the King, or immemorial custom. Gilbert's Hist. Com. Pleas, p. 25; Macaulay's Hist. Eng. (Library Ed.) Vol. 1, p. 338. See, also, Ch. 16 and 22 to 25 Fortunes of Nigel, for Scott's highly dramatic account of the immunities of Whitefriars, the most famous of the many liberties of the kingdom.

[36] The affidavit of modern practice is the "plaint" of ancient practice. Anderson *v.* Hapler, 34 Ill. 436.

[37] Reeve's Hist. Vol. 2, p. 48. It is probable that the sheriff never served such process in person, but that he always sent one of his deputies. Ackworth *v.* Kempe Douglass, 40; Blackwell *v.* Hunt, Noy, 107. Perhaps the sheriff executed the writ in person, and sent his bailiff when the suit was begun by plaint. Gilbert on Replevin, 67. The statute, 1 and 2 P. & M. Ch. 12, § 3, required the sheriffs to have at least four bailiffs in each county for the sole purpose of making replevin.

raise the hue and cry; or in case of resistance apprehend the offender and put him in jail.[38] If the distress had been driven into a castle or other stronghold the sheriff, after demand, might break it open to enable him to deliver them.[39] The common law privilege which was accorded to a man's house or cattle would protect himself or family from arrest, or his goods from seizure on a civil process, but could not protect or privilege him to keep the goods of another person unjustly taken so as to prevent service of the replevin.[40] The practice of driving distresses into strongholds was so frequent in the wars of the barons, and the poorer men suffered so much, that the Statute of West. 1. Ch. 17 was enacted expressly giving the sheriff power, after demand made, to break into a house, castle, or other stronghold, to make replevin of goods. This statute further to deter lords from refusing to deliver distresses to the sheriff on replevin, provided that the house or castle so used should be razed and destroyed. This, however, could not be done without the King's writ after a fair trial.

§ 19. **In case of no resistance.** If no opposition was made to the sheriff he would immediately, on sight of the beasts, deliver them to the plaintiff and then give the parties a day in which to appear in the county court and try the matter.[41]

§ 20. **Ancient method of trial.** The manner of trying the case anciently was for the plaintiff to have his suitors, *i. e.* witnesses, ready to prove he had offered the lord a pledge, or security, under the impression that that was sufficient, and that the lord had no right to seize or distrain pledges when sufficient pledges had been tendered him.[42] The form of the writ and dec-

[38] Reeve's Hist. Vol. 2, p. 48; Britton, Vol. 1, p. 137.

[39] This is the statute law in several of the States to-day.

[40] Gilbert on Replevin, p. 70.

[41] Reeve's Hist. Vol. 2, p. 48.

[42] Reeve's Hist. Vol. 2, p. 46; Gilbert on Replevin, pp. 40, 59, 69. When both parties appear in court the plaintiff shall set forth his plaint that, whereas, he had his beasts, to-wit: two oxen, two horses or two cows, or such chattels, according to the nature of the distress, on such a day, in such a year of our reign, in such a certain place, there came such an one, (the detainer,) and took the same beasts there found, or caused them to be taken by such an one, and drove them away from the same place to another place; and then came the plaintiff and demanded to have his cattle quietly and could not have them, and afterwards tendered security for the sake of peace, and offered pledges to

laration in many States to this day contains the words, "Wherefore, he took," etc., and unjustly detains the same "*against the sureties and pledges*," etc. This is a fragment of the old common law practice which still clings to this action, though the reason for it is sometimes forgotten. It tells us of the law of replevin as it was practiced more than six hundred years ago.[43]

§ 21. **Both parties actors or plaintiffs.** Both parties were called "actors," a term borrowed from the civil law, signifying plaintiff.[44] The defendant became an actor by avowing the taking and seeking a return of the goods. The plaintiff, or complainant, might show the taking and detention to be wrongful, and the defendant, or avowant, while he could not deny the taking or detention against the sheriff's return, might show that it was rightful, and demand a return of the goods. Replevin was one of the favorites of the law. In ordinary action the defendant might have *essoin*, that is, he might send his servant with an excuse and have delay; but an unjust taking and detention of the defendant's goods against gage and pledge was regarded in an unfavorable light. It was against the peace, and but little removed from robbery. The taker must, therefore, state his reason at the day appointed by the sheriff.[45]

§ 22. **Avowry and cognizance.** When the defendant avowed the taking in his own right, as for rent in arrear, setting up the right in his defense, it was called an avowry, and he was called an avowant. When the defendant admitted the taking, but set up the right of another under whose authority he acted, it was called making cognizance, and he was called the cognizor.[46]

appear in his court, or elsewhere, to stand to justice if he had any demand to make against him, and yet he wrongfully, against gage and pledge, detained them until the same beasts were delivered by the sheriff. Britton, Vol. 1, p. 139.

[43] Evans *v.* Brander, 2 H. Bla. 547.

[44] Statute Westm. 2, Ch. 2, § 2; Coan *v.* Bowles, Carth. 122; Anon, 2 Mod. 199, case 118; Yates *v.* Fassett, 5 Denio, 21; Persse *v.* Watrous, 30 Conn. 146. Each party may recover judgment against the other for different parts of the property and for damages and costs. Clark *v.* Keith, 9 Ohio, 73; Seymour *v.* Billings, 12 Wend. 286.

[45] Reeve's Hist. Vol. 2, pp. 48, 49; Gilbert on Replevin, 77, 78; Britton, Vol. 1, p. 137. This, perhaps, simply means that the defendant might have a continuance upon showing cause in ordinary cases, but not in replevin. Glanvil devotes some space to the law of essoins. Glanvil, B. 1, Ch. 22, *et seq.*; Beam's Trans.

[46] Statute 21, Henry VIII. Ch. 19.

§ 23. **Justified the taking.** The different claims which the avowant might set up as his excuse or justification for taking the goods were numerous. He might avow for rent in arrear, or for damage feasant, or justify the taking under judgment of the lord's court. These and other excuses or justifications the plaintiff could deny, and the question so presented was tried. If the plaintiff was successful in his suit, he was entitled to retain the goods replevied, and to have damages for the wrongful taking and the loss which it occasioned him. If however, the plaintiff failed to sustain his suit, he was in mercy, and might be, and anciently was, fined for his false clamor, and the defendant avowant was entitled to a return of the distress, and by the statute, (21 Henry VIII., Chap 19), to damages.[47]

§ 24. **Removal to the court of King's bench.** Either party might remove the case from before the county court (Sheriff's court) to the court of common pleas, or King's bench; the plaintiff, without showing cause, as the suit was his own; the defendant, upon reasonable cause.[48] But the removal was allowed for slight cause, and the truth of the cause alleged was not inquired into.[49] Or, if in the course of the proceeding, it appeared that the right of freehold came in question, it must of necessity be removed, as the sheriff could not try it in his county court.[50] So it became usual to carry up all cases from the sheriff to the courts of Westminster Hall, in the first instance. The usual mode to oust the sheriff of jurisdiction was for the plaintiff to take the *alias* and *pluries*, with the original writ, and deliver only the *pluries* to the sheriff to be served, which, as we have

[47] Anon, Dyer, 141*a*; Riccards *v.* Cornforth, 5 Mod. 366; Wooderoft *v.* Kynaston, 9 Mod. 305; Gilbert on Replevin, 62; Britton, Vol. 1, p. 140.

[48] Gilbert on Replevin, 102; 3 Blackstone's Com. 149; Statute Westm. 2, 13, Edward I., Ch. 2, A. D. 1285; Wooderoft *v.* Kynaston, 9 Mod. 305; Anon Loftus, 520; F. N. B. 69, 70.

[49] Gilbert on Replevin, 105. Originally the law seems to have been otherwise. F. N. B. 119, K.

[50] This does not imply that a freehold was or could be the subject of replevin; but the tenant or plaintiff in replevin would sometimes deny that he held his lands of the avowant, and so require him to prove it, and in this way the title of the lord came in question. Statute Westm 2, Ch. 2, § 1. Coke's Reports contain many cases in replevin which present this question in some form. Fordham *v.* Akers, 33 L. J. Q. B. 67, holds that county courts may proceed even when title to land is involved, if the defendant does not remove the case.

seen, was always returnable.[51] The sheriff thereupon returned the writ at once to the superior court. If the proceeding were commenced by writ, the removal was effected by the writ of *pone*, as it was called, from the words of the writ *pone ad petitionem, etc., coram justiciaris nostris.* "Put on the petition, etc., before our justices," etc. If the proceeding had been begun by plaint, the removal was effected by a writ of *recordari*, which was a writ to the sheriff commanding him to make a record of the proceeding before him, and return the record so made before the King's justices at Westminster.[52] This record gave the justices authority to act, while, in case the proceeding was by writ, the King's writ put before them gave them sufficient authority to proceed.

§ 25. **The writ of withernam.** If the defendant had eloigned the distress, driven it out of the county, or had concealed it, then, upon the sheriff's return showing that fact, the plaintiff was entitled to a *capias* in *withernam*, a writ deriving its name from two Saxon words, *weder*, other, *naaum*, distress,[53] upon which he might have a second or indemnifying distress, the writ being a command to the sheriff to take *other* cattle or *other* goods of the distrainor and deliver them to the plaintiff, in lieu of his own, wrongfully withholden from him. So, when the defendant had judgment for a return of a distress which had been replevied from him, and the plaintiff had eloigned or concealed the goods, the defendant was entitled to the writ of *withernam*. This was a kind of reprisal or punishment for wrongfully withholding the distress. It was a relic of the *lex talionis* which prevailed at a much earlier period. Goods taken by this process were not repleviable until the original distress was forthcoming.[54]

[51] *Ante*, § 12; Moore *v.* Watts, 1 Ld. Raym. 613; Woodcroft *v.* Kynaston, 9 Mod. 305.

[52] F. N. B. 69, 70; Statute Westm. 2, 13, Edward I., Ch. 2, A. D. 1285. The writ is usually called the *re. fa. lo.*, an abbreviation of the words *recordari facias loquelam.* Daggett *v.* Robins, 2 Blackf. 417.

[53] F. N. B. 73 F.; Moor *v.* Watts, 2 Salk, 581; Gilbert on Replevin, 79; Anon Dyer, 188*b*. The last case found in which this writ is recognized in this country is Bennett *v.* Berry, 8 Blackf. 1. See, also, Woglam *v.* Cowperthwaite, 2 Dall. (Pa.) 68; Weaver *v.* Lawrence, 1 Dall. 167; Swann *v.* Shemwell, 2 Har. & G. (Md.) 283; M'Colgan *v.* Houston, 2 Nott & M. (S. C.) 444. A proceeding similar in its effect, though not in form, has found a place in Michigan. Rathbun *v.* Ranney, 14 Mich. 387.

[54] "Let the judgment be this: That he loose the like member as he has destroyed of the plaintiff." Britton, Vol. 1, p. 122. Substantially

§ 26. **Defects in the statute of Marlbridge.** The Statute of Marlbridge and proceeding by plaint was a vast improvement on the earlier proceeding by writ. Yet certain imperfections in the practical operation of the law remained, occasioning great inconveniences and sometimes injustice. In this, as in other actions at law, and as is the law to this day, a non-suit suffered by the plaintiff did not debar him from again bringing suit on the same cause of action, or prevent the plaintiff in replevin from suing out another replevin for the same property. Advantage of this rule of law was sometimes taken by lawyers of the olden time, who, not unlike their professional brethren of to-day, thought more of a substantial victory for their clients than of abstract questions touching the dignity of the law, and who rather prided

the same as Exodus, Ch. 21, ver. 24. The writ of withernam was not a part of the proceeding in the replevin, but was a kind of punishment. If the defendant came in and pleaded *non cepit*, it would stay the withernam, as he is not concluded by the return elongavit. Swann *v.* Shemwell, 2 Har. & G. (Md.) 283.

[55] I venture to transcribe into this note a case from the Year Book, 30, 31, Edward I., p. 18, not only as a specimen of the ancient style of law reporting, but as illustrating many points in the text. This is one of the first cases, reports of which are accessible. There are a number of cases, some eight or ten years earlier, but none which so vividly illumine the points under discussion. This report also possesses value as showing the highly advanced state of pleading at that early day, and the technical exactness with which the law was administered. It may be remarked, *en passant*, that the amount of litigation in those days, as shown in these early reports, is a matter of astonishment. In one volume, containing about the same number of pages as an ordinary volume of law reports of to-day, may be found twenty-six cases of replevin alone.

Reports of the case of The Abbot of Cirencester v. Thomas, of Matyshale. Year Book, 30, 31, *Edward I., p.* 18, *A. D.* 1302.

[The names of the Judges are in small capitals, and counsel in italics.]

The Abbot of Cirencester distrained on one Thomas, of Matyshale, in the town of Cirencester. Thomas came into court and [a line in the MS. here has been entirely erased,] commenced suing the Abbott. The bailiff of the sheriff came, and wished to liberate Thomas' beasts, and could not, because Cirencester is of the King's ancient demesne, and not guildable to the county court, etc. Wherefore, the county court awarded a distress on the Abbot. Afterwards Thomas brought replevin, etc., and sought delivery. * * * Wherefore, he sued out the replevin "*sicut alias vel causam nobis significetis*," and to this writ the sheriff

themselves on an observance of the technical rules of the law, and especially where these rules were found highly advantageous to the case in which they were engaged. It, therefore, frequently happened that when the case was called for trial and the plaintiff saw his opponent with his witnesses ready to proceed, he would suffer himself to be non-suited and a return of the property adjudged against him, and would then at once replevy the same goods again, and again suffer a non-suit, and again replevy, and so on *in infinitum*, to the intolerable vexation of the lord. It was also a common occurrence for the tenant, pending the suit in replevin, to sell the cattle and become insolvent. The pledges or securities which the plaintiff gave, and which originally were required to be substantial securities, were only to answer his

returned that he had commanded the bailiffs of the liberty of the Abbot of Cirencester [and] that they should [would] do nothing. Wherefore, the "omit not by reason of the franchise" was sued out, etc., and the sheriff, by virtue of this writ, entered the franchise and made deliverance and attached the Abbot, etc., and then the Abbot caused the proceedings to be removed into *banc* by *pone*, and the case ran thus: "That the said Abbot asserts that he took the said beasts in a portion of the appurtenances of his manor of Cirencester, which is of the ancient demesne of the crown of England, for customary, etc., to him due. Thomas and the Abbot came into court. *Asseby*—Counted, etc. *Herle*—Cirencester, where the seizure was made, is of the ancient demesne, etc., where no writ runs, etc., except, etc., and this Thomas is tenant in ancient demesne, etc., and we do not understand that in this court, or elsewhere, at common law, he ought to be answered. *Asseby*—The proceedings were removed here at his own suit, etc., and the plea is attached to this court, etc., and we pray judgment, etc. *Warr*—The place where the seizure was made is holden of the Abbott, etc., and is of the ancient demesnes, etc., and he is tenant in ancient demesne, etc., and this he cannot deny, etc.; and we pray judgment, etc. Bereford—He tells you that out of the ancient demesnes you ought not to be answered on this writ, nor any other, except where you are distrained for services which you do not owe. As for that, there is a certain writ in regular form, etc. *Asseby*—You formerly sued for a return of the chattels, in this court, on the plea, etc., and so this court is seized, etc., and we pray judgment, etc. *Warr*—That was by your nonsuit, etc.; for at first you did not come into court; wherefore, we were able to challenge this proceeding, etc. Bereford's reply to his statement—That you are of the King's ancient demesnes within which, etc., the seizure was made, etc. *Asseby*—We cannot deny that Cirencester where the seizure was made, is of the ancient demesnes, etc.; but we tell you that we hold the tenements where the seizure was made, of the Abbott, by the services of XXVIII d; by the year, in lieu of all

amercement to the King *pro falso clamor*, and these soon degenerated into bare form; John Doe and Richard Roe, imaginary persons, being the only security required, so that the lord took nothing by his judgment.[56]

§ 27. **The statute of Westminster and the writ of second deliverance.** To remedy these evils the Statute of Westminster, 2, Ch. 2, was enacted in the thirteenth year of Edward I., A. D. 1285.[57] The statute also provided that the sheriff should not

services. *Warr*—How do you prove it? *Asseby*—Ready—— *Warr*—Since you have admitted that Cirencester is of the ancient demesnes, etc., and that you are tenant etc., and do not show that these tenements have been enfranchised, etc., we pray judgment, etc. BEREFORD, (to Asseby,)—Have you any deed to evidence what you have alleged, etc.? *Asseby*—Ready, etc., BEREFORD—Since, etc., (as above, in the reply,) the court adjudges that the Abbot goes quit, without day, and that you, etc., by your writ, but are in mercy, etc. *Warr*—We pray the return. BEREFORD—You shall not have it from us; but when you get to the inn do to your arch villian what you please, etc.

[56] 3 Inst. p. 9; 3 Blackstone, 274, 287; Baker *v.* Philips, 4 Johns. 190. "Pledgii" in the old books signified securities. Evans *v.* Brander, 2 H. Bla. 547.

[57] By the recent publication of old manuscript reports of a case in the time of Edward I., it appears that HENGHAM was the author of this statute. Horwood's preface to his translation of Year Book, 30, 31, E. 1. p. 31. The chapter cited it as follows:

I. Forasmuch as lords of fees distraining their tenants for services and customs due unto them, are many times grieved because their tenants do replevy the distress by writ, or without writ, and when the lords at the complaint of their tenant do come by attachment into the county, or unto another court having power to hold pleas of replevin, and do avow the taking good and lawful by reason that the tenants disavow to hold aught, nor do claim to hold anything of him (which took the distress and avowed it,) he that distrained is amerced and the tenants go quit, to whom punishment cannot be assigned for such disavowing by record of the county, or of other courts having no record.

II. It is provided and ordained from henceforth, that where such lords cannot obtain justice in counties, and such manner of courts against their tenants, as soon as they shall be attached at the suit of their tenants, a writ shall be granted to them to remove the plea before the justices, before whom, and none other, where justice may be ministered unto such lords, and the cause shall be put in the writ, because such a man distrained in his fee for services and customs to him due. Neither is this act prejudicial to the law commonly used, which did not permit that any pleas should be moved before justices at the suit of the defendant. For though it appear at the first show

only take security for the suit, but also "for the beasts or cattle to be returned, or the price of them, if return be awarded." Here is the first appearance among our laws of the bond or security for the return of the goods to the defendant in replevin, and is substantially the same as we have it at the distance of nearly six hundred years. The Statute of 11 George II., Ch. 19, §§ 22, 23, being only explanatory, and in aid of the provisions of the Statute of Westminster and the Statute Westminster also provided against replevins in *in infinitum* by awarding the avowant a return of the cattle after a non-suit of the plaintiff, to hold irreplevible except by a writ issuing upon the records of the justices before whom the suit in replevin was tried. The writ of *retorno*, in such cases, after the order for return, contained a clause as follows: "And that you do not again deliver them upon complaint of ——— (the plaintiff,) without our writ, which should expressly mention the aforesaid judgment," The goods returned by virtue of this

that the tenant is plaintiff and the lord defendant, nevertheless, having respect to that, that the lord hath distrained, and sueth for services and customs being behind, he appeareth indeed to be rather actor or plaintiff than defendant. And to the intent the justices may know upon what fresh seizin the lords may avow the distress reasonable upon their tenants. From henceforth it is agreed and enacted, that a reasonable distress may be avowed upon the seizin of any ancestor or predecessor since the time that a writ of novel disseizure hath run. And because it chanceth sometimes that the tenant, after he hath replevied his beasts, doth sell or alien them, whereby return cannot be made unto the lord that distrained if it be adjudged.

III. It is provided that sheriffs or bailiffs from henceforth shall not only receive of the plaintiffs pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts if return be awarded. And if any take pledges otherwise he shall answer for the price of the beasts, and the lord that distrained shall have his recovery by wit; that he shall restore unto him so many beasts or cattle. And if the bailiff be not able to restore, his superior shall restore. And forasmuch as it happeneth sometimes that after the return of the beasts is awarded unto the distrainor, and the party so distrained, after the beasts be returned, doth replevy them again, and when he seeth the distrainor appearing in the court ready to answer him does make default, whereby a return of the beasts ought to be awarded again unto the distrainor, and so the beasts be replevied twice or thrice, and infinitely, and the judgments given in the King's courts take no effect in this case, whereupon no remedy hath been yet provided; in this case, such process shall be awarded, that as soon as the return of the beasts shall be awarded to the distrainor the sheriff

writ were not again subject to replevin at the suit of the same party, except upon a writ of second deliverance which recited the former judgment, and this writ only issued upon cause shown, and not as a matter of course.[58]

§ 28. **Statute Charles II.** The Statute of Charles II., Ch. 7. A. D. 1665, provided that when the plaintiff in replevin was non-suited, or judgment be given against him, a writ of inquiry should issue to ascertain how much rent was in arrear to the distrainor and also the value of the distress, and he was entitled to judgment for the sum due as rent, or to so much as the value of the distress, with execution therefor, with a right to distrain again for the amount unpaid and in arrear.

§ 29. **Statute George II.** The Statute 11 George II., Ch. 19, § 23, provided that all officers granting replevins should, in any replevy of a distress, take a bond from the plaintiff with two responsible securities, and in double the value of the goods, conditioned for the prosecution of the suit and return of the goods in case return be awarded, and provided that the sheriff might endorse the bond to the avowant, or person making cognizance, who might sue on it in his own name, and that the court by rule should give such relief as was agreeable to justice.

shall be commanded by a judicial writ to make return of the beasts unto the distrainor, in which writ it shall be expressed that the sheriff shall not deliver them without writ making mention of the judgment given by the justices, which cannot be without a writ issuing out of the rolls of the said justices before whom the matter was moved. Therefore, when he cometh unto the justice and desireth replevin of the beasts, he shall have a judicial writ that the sheriff taking surety for the suit, and also of the beasts, or cattle, to be returned, or the price of them (if return be awarded,) shall deliver unto him the beasts or cattle before returned, and the distrainor shall be attached to come a certain day before the justices afore whom the plea was moved in the presence of the parties. And if he that replevied make default again, or for another cause, return of the distress be awarded; being now twice replevied, the distress shall remain irrepleviable. But if a distress be taken of new, and for a new cause, the process aforesaid shall be observed in the same new distress to the avowant, and were irrepleviable, except by a writ mentioning the former judgment, which was called a writ of second deliverance.

This statute is local to Great Britain and does not apply in this country. Daggett v. Robins, 2 Blackf. 417.

[58] The writ of replevin was a writ of right, and issued of course. The writ of second delivery was a writ of grace, or favor. Anon, 2 Atk. 237.

§ 30. **Conclusion.** This brings the history of the action down to a comparatively modern time. In this sketch of the history of the law of replevin, as it was formerly practiced, the author has been compelled to omit all details, as well as many matters of general import; he has endeavored to state only sufficient to give an idea of the origin of the action, and to indicate some of the principal steps by which it has grown from a half civilized contest, in which outrage was a prominent ingredient, in cases when the sole question was the right to a distress, into a ready instrument for the settlement of almost all disputes concerning the ownership and possession of property.

CHAPTER II.

GENERAL PRINCIPLES.

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§ 31. **Definition.** Replevin is an action at law for the recovery of specific personal chattels[1] wrongfully taken and detained,

[1] Rogers *v.* Arnold, 12 Wend. 34; Hickey *v.* Hinsdale, 12 Mich. 100; Mendelsohn *v.* Smith, 27 Mich. 2; Travers *v.* Inslee, 19 Mich. 101; Bacon *v.* Davis, 30 Mich. 157; Badger *v.* Phinney, 15 Mass. 362; Phillips *v.* Harriss, 3 J. J. Marsh. (Ky.) 123; Buckley *v.* Buckley, 9 Nev. 379; McFerrin *v.* Perry, 1 Sneed, (Tenn.) 314; Scott *v.* Elliott, 63 N. C. 215; Barksdale *v.* Appleberry, 23 Mo. 390. "The only effective remedy for the recovery of personal chattels." Kingsbury's Exrs. *v.* Lane's Exrs., 21 Mo. 115. "The object of the writ is to re-deliver or restore goods to the possession of the person who has the general or special

or wrongfully detained, with damages which the wrongful taking or detention has occasioned.[2]

property." Lathrop *v.* Cook, 14 Me. 415. To same effect, Yates *v.* Fassett, 5 Denio, 21; Pangburn *v.* Patridge, 7 John. 140; Harwood *v.* Smethurst, 5 Dutch. (29 N. J. L.) 197. "The appropriate remedy, in all cases where the plaintiff seeks to try title to personal property and recover possession." McKinzie *v.* Balt. & Ohio R. R., 28 Md. 161. "The proper remedy in all cases where the plaintiff has a right to the immediate and exclusive possession of chattels which he wishes to recover." Cullum *v.* Bevans, 6 Har. & J. (Md.) 469; Brooke *v.* Berry, 1 Gill. (Md.) 153; Pattison *v.* Adams, 7 Hill, 126; Johnson *v.* Carnley, 6 Seld. (N. Y.) 570; Ilsley *v.* Stubbs, 5 Mass. 280; Badger *v.* Phinny, 15 Mass. 362; Baker *v.* Fales, 16 Mass. 147; Shannon *v.* Shannon, 1 Sch. & Lef. (Irish,) 318; Peirce *v.* Hill, 9 Port. (Ala.) 151; Shaddon *v.* Knott, 2 Swan, (Tenn.) 358; Robinson *v.* Richards, 45 Ala. 354; Town *v.* Evans, 1 English, (6 Ark.) 260; Paul *v.* Luttrell, 1 Colorado, 317. "The action has been liberally extended, and now embraces every case of personal property which is in the possession of one person and is claimed by another." Snyder *v.* Vaux, 2 Rawle, 423. See, also, Keite *v.* Boyd, 16 S. & R. (Pa.) 300; Sprague *v.* Clark, 41 Vt. 6; Stoughton *v.* Rappalo, 3 S. & R. (Pa.) 559; York *v.* Davis, 11 N. H. 241; Harlan *v.* Harlan, 15 Pa. St. 513; Mackinley *v.* McGregor, 3 Whart. (Pa.) 369; Woods *v.* Nixon, Addis, (Pa.) 134. "Lies at the instance of a party where property has been improperly seized by an officer on legal process." Gimble *v.* Ackley, 12 Iowa, 27; Wilson *v.* Stripe, 4 G. Greene, 551; Cooley *v.* Davis, 34 Iowa, 129; Smith *v.* Montgomery, 5 Iowa, 370; Chinn *v.* Russell, 2 Blackf. (Ind.) 176; Marchman *v.* Todd, 15 Ga. 25; Miller *v.* Bryan, 3 Iowa, 58; Shearick *v.* Huber, 6 Binn. (Pa.) 3.

[2] Herdic *v.* Young, 55 Pa. St. 176; Mitchell *v.* Burch, 36 Ind. 535; Newell *v.* Newell, 34 Miss. 385; Hotchkiss *v.* Jones, 4 Porter, (Ind.) 260; Hart *v.* Fitzgerald, 2 Mass. 510; Scott *v.* Elliott, 63 N. C. 215; Kendal *v.* Fitts, 2 Foster, (N. H.) 1; Cumberland Coal & Iron Co. *v.* Tilghman, 13 Md. 74; Messer *v.* Baily, 11 Foster, (31 N. H.) 9; McKean *v.* Cutler, 48 N. H. 371; Bell *v.* Bartlett, 7 N. H. 178; Peyton *v.* Robertson, 9 Wheat. 527; Morgan *v.* Reynolds, 1 Blake, (Montana,) 164. The action is not for the recovery of damages or value, except as an incident to the action for the specific thing; but it is not strictly confined to the recovery of the thing, nor is judgment for the property essential. Damages may sometimes be given in lieu of the property; otherwise, upon the death or destruction of the property, pending the suit, the action would fail. Barksdale *v.* Appleberry, 23 Mo. 390; Mackinley *v.* McGregor, 3 Whart. 370. And, again, if one hire a horse for a year, and pending the time the horse be taken by one without right, the lessee may bring replevin; but if the property be not delivered on the writ, and after the year expires, and before judgment, the taker surrenders it to the owner, the lessee may recover damages for the detention, but not necessarily judgment for the property or its value. Cole *v.* Conolly, 16 Ala. 271.

§ 32. **Replevin lies for chattels wrongfully detained.** It lies for all goods and chattels wrongfully taken or detained, and may be brought whenever one person claims chattel property in the possession of another, whether his property in the goods be absolute or qualified, provided he has the right of possession at the time the suit is begun.[3]

[3] Harlan *v.* Harlan, 15 Pa. St. 507; Lazard *v.* Wheeler, 22 Cal. 140; Weaver *v.* Lawrence, 1 Dall. (Pa.) 156; Clark *v.* Skinner, 20 Johns. 467; Shearick *v.* Huber, 6 Binn. 3; Stoughton *v.* Rappallo, 3 S. & R. (Pa.) 562; Williams *v.* West, 2 Ohio St. 83. The action was formerly limited to cases of wrongful distress, but has long since outgrown its original limits, and now lies in all cases of unlawful taking and detention of goods. Osgood *v.* Green, 10 Fost. (N. H.) 210; Daggett *v.* Robins, 2 Blackf. (Ind.) 415; Sprague *v.* Clark, 41 Vt. 6; Chinn *v.* Russell, 2 Blackf. (Ind.) 172; Meany *v.* Head, 1 Mason C. C. 319. See Bofil *v.* Russ, 3 Strobh. (S. C.) 98. "It lies for goods unlawfully detained, though there may have been no tortious taking." Marston *v.* Baldwin, 17 Mass. 609; Pierce *v.* Hill, 9 Port. (Ala.) 151; Paul *v.* Luttrell, 1 Colorado, 317. *Contra*, Cummings *v.* MacGill, 2 Murphy, (N. C.) 359; Dickson *v.* Mathers, Hempst. C. C. 65; Duffy *v.* Murrill, 9 Ired. (N. C.) 46. "The gist of the action is the wrongful detention." Benje *v.* Creagh's Admrs. 21 Ala. 151. When goods are wrongfully detained upon a warrant which has been quashed or set aside by the court, replevin lies by the owner. Slayton *v.* Russell, 30 Ga. 127.

NOTE I. *For what the action lies; documents.*—Title deeds for lands may be recovered in replevin. Wilson *v.* Rybolt, 17 Ind. 391. Not where the question is whether the deed has ever been delivered. Flannigan *v.* Goggins, 71 Wis. 28, 36 N. W. 846. Hooker *v.* Latham, 118 N. C. 179, 23 S. E. 1004. *Contra* Simmonsen *v.* Curtis, 43 Minn. 539, 45 N. W. 1135. Replevin will not lie by the maker of a promissory note before payment thereof, even though he show duress; Olson *v.* Thompson, 6 Okla. 74, 48 Pac. 184, 6 Okla. 575, 52 Pac. 388. The court on rehearing approve the case of Sigler *v.* Hildy, 56 Ia. 504, 9 N. W. 374, where it was held that in an action upon a promissory note the defendant might, by counterclaim, averring that the note was obtained by fraud, and had been altered in a material part, demand possession of it. Replevin lies for the promissory note of a third person, the property of plaintiff, of which the defendant has wrongfully obtained possession, More *v.* Finger, 128 Calif. 313, 60 Pac. 933;—by administrator of the deceased payee, though there are no debts, Pritchard v. Norwood, 155 Mass. 539, 30 N. E. 80; or by a minor suing by his next friend, his guardian having been discharged, Bush v. Groomes, 125 Ind. 14, 24 N. E. 81. And replevin lies where the defendant has gotten possession of promissory notes "to see them," pending a bargain for lands never consummated, Brown *v.* Pollard, 89 Va. 696, 17 S. E. 6. And wherever under the facts, equity would decree cancellation, Shipley *v.* Reasoner, 80 Ia. 548, 50 N. W. 1077; *e. g.* where

§ 33. Recovery of specific goods the primary object, and of value or damages, the secondary. The primary object of

the note has been paid, Savery *v.* Hayes, 20 Ia. 25, 89 Am. Dec. 511;—or where there was no consideration; or the note was obtained by fraud, or has been altered, Sigler *v.* Hidy, 56 Ia. 504, 9 N. W. 374;—or the consideration has totally failed, or the transaction in which it was given has been lawfully rescinded, *id.* And see Hefner *v.* Fidler (W. Va.), 51 S. E. 513.

But not if it was part of a scheme to defraud, to which the maker was privy. Sigler *v.* Hidy, *supra.*

And see Todd *v.* Cruikshanks, W. Va., 52 S. E. 515, where it was held that a promissory note alleged to have been executed by plaintiff to defendant for purchase money of chattels bought on the faith of representations of the plaintiff which were false, cannot be recovered in replevin. The reasoning of the court is that the judgment must by the statute be in the alternative, for the thing or its value; that if the note was obtained by fraud it has no value; so that the requirements of the statute cannot be performed.

Replevin lies for a draft altered in a material part, Smith *v.* Eals, 81 Ia. 235, 46 N. W. 1110; for a promissory note executed by plaintiff for negotiation for the accommodation of a third person, which, he being unable to negotiate it, the defendant has wrongfully taken into possession, Decker *v.* Matthews, 12 N. Y. 313; and see Lincoln Bank *v.* Allen, 82 Fed. 148, 27 C. C. A. 87; for a promissory note of plaintiff obtained by duress, Kennedy v. Roberts, 105 Ia. 521, 75 N. W. 363. But not to recover a promissory note of the plaintiff upon allegation of payment by a new note, unless the second note is commercial paper, or an express agreement to accept it in satisfaction is averred, Combs *v.* Bays, 19 Ind. Ap. 263, 49 N. E. 398. Not for a check which has been paid, cancelled and returned to the drawer who is plaintiff in the replevin, Barnett *v.* Selling, 3 Abb. N. C. 83. It lies for negotiable bonds, Gibson *v.* Lenhart, 111 Pa. St. 624, 5 Atl. 52; for coin and bills identified by numbers and denominations, and "all contained in the aforesaid convas belt," Eddings *v.* Boner, 1 Ind. T. 173, 38 S. W. 1110; for money sealed in a sack and marked with the plaintiff's name, Sharon *v.* Nunan, 63 Calif. 234. But whether coin or paper, it is not repleviable after it has passed from the hands of the wrong-doer and become mingled with the general mass of the circulating medium, Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511. Replevin lies for bank bills if they can be identified, *e. g.* by the name of the bank, the denomination, the date, letter, or any other means showing what are the particular bills in question, Graves *v.* Dudley, 20 N. Y. 77; Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499; for bonds of a railway company, by legatee against executrix, Govin *v.* De Miranda, 140 N. Y. 662, 35 N. E. 628. For a verified claim against a decedent's estate. Willis *v.* Marks, 29 Ore. 493, 45 Pac. 293; for vouchers or statements of expenditure, Drake *v.* Auerbach, 37 Minn. 506, 35 N. W. 367. A license to sell liquors is a

the action is to recover the specific chattels which have been

mere chose in action, Anchor Co. *v.* Burns, 52 N. Y. Sup. 1005; but in Quinnipiac Co. *v.* Hachbarth, 74 Conn. 392, 50 Atl. 1023, replevin was allowed for such a document; for a certificate of deposit held by defendant as trustee for the plaintiff though endorsed to defendant, Robinson *v.* Stewart, 97 Mich. 454, 56 N. W. 853. A promissory note is paid to one of two executors named as payees therein. Trover will not lie by the maker against the other payee detaining it. The court say that the note was completely discharged, was of no value, and did not belong to the plaintiff, and it might be useful to the defendant to show that he had not received the money, that "Such an action as this was never brought before," Todd *v.* Crookshanks, 3 Johns. 432. But where defendant had obtained the note of plaintiff for the special purpose of receiving money upon it for their joint accommodation, and immediately passed it to another to pay his individual debt, and the plaintiff paid the note at maturity, it was held he was entitled to maintain trover, Murray *v.* Burling, 10 Johns. 172. A check was drawn by a third person payable to the defendant, but for the plaintiff; defendant endorsed it to plaintiff, but afterwards struck out the endorsement and converted it. It was held that plaintiff might have replevin, Haas *v.* Altieri, 2 Misc. 252, 21 N. Y. Sup. 950. Plaintiff took a promissory note in the name of her son for moneys actually advanced by her and belonging to her; she always retained possession of the note. After its maturity the son surreptitiously obtained the note and endorsed it to the defendant, who paid value. Held that defendant took no title and plaintiff might recover the note in replevin. Merrell *v.* Springer, 123 Ind. 485, 24 N. E. 258.

Replevin lies for non-assignable land script. Bradley *v.* Gammelle, 7 Min. 331; for an insurance policy, Saling *v.* Bolander, 60 C. C. A. 469, 125 Fed. 701; for a banker's pass-book. Wegner *v.* Second Ward Bank, 76 Wis. 242, 44 N. W. 1096. Trover will not lie for a share of stock in a corporation; the declaration should describe it as a certificate evidencing shares, Neiler *v.* Kelley, 69 Pa. St. 403; but see Payne *v.* Elliott, 54 Calif. 339. Trover lies for bank notes sealed in a letter. Moody *v.* Keener, 7 Port. 218; for negotiable instruments, Comparet *v.* Burr, 5 Blf. 419; for a newspaper which the postmaster refuses to deliver. Teall *v.* Felton, 1 N. Y. 537; for a judgment, Hudspeth *v.* Wilson, 2 Dev. 372; for a promissory note which has been paid. Pierce *v.* Gilson, 9 Vt. 216; not if payment is disputed, *Id.* For copies of a creditor's account, Fullam *v.* Cummings, 16 Vt. 697; for a writ of execution. Keeler *v.* Fassett, 21 Vt. 539; for certificates of corporate stock, Anderson *v.* Nicholas, 28 N. Y. 600; Atkins *v.* Gambol, 42 Calif. 86, Van Schmidt *v.* Bourn, 50 Id. 616; Garvin *v.* Wiswel, 83 Ills. 215; Alexander *v.* Rundle, 75 Id. 85; for a policy of insurance, Hayes *v.* Massachusetts Co., 125 Ills. 626. Replevin lies for a locomotive, Hills *v.* Parker, 111 Mass. 508, for wild geese which have been domesticated Amory *v.* Flyn, 10 Johns. 102—not for an undivided interest. Hoeffer

wrongfully taken or detained.[4] Though judgment for damages

v. Agee, 9 Colo. Ap. 189, 47 Pac. 973; Sharp *v.* Johnson, 38 Ore. 246, 63 Pac. 485. Execution sale of a portion of a mass of unpressed hay or the like, without separation, or delivery of any part will not sustain replevin. Lawry *v.* Ellis, 85 Me. 500, 27 Atl. 518.

But replevin lies for an undivided share in a quantity or mass of the same character and value so that the plaintiff's part can be ascertained by measurement. Fines *v.* Bolin, 36 Neb. 621, 54 N. W. 990. *Properties pertaining to a public office:* The title to an office cannot be tried in this action. Replevin will not lie by a claimant against the incumbent, for the properties pertaining to the office. Halgren *v.* Campbell, 82 Mich. 255, 46 N. W. 381. *Body of a deceased person:* Replevin will not lie by the widow or next of kin of deceased, to recover the corpse. Keyes *v.* Konkel, 119 Mich. 550, 78 N. W. 649, Buchanan *v.* Buchanan, 28 Misc. 261, 59 N. Y. Sup. 810: the next of kin and not the executor has the right of burial. Renihan *v.* Wright, 125 Ind. 536, 24 N. E. 822; *contra*, in the absence of a statute, Enos *v.* Snyder, 131 Calif. 68, 63 Pac. 170. The right of the surviving husband or wife, residing with the consort at time of death, is paramount to that of the next of kin, Larson *v.* Chase, 47 Min. 307, 50 N. W. 238; and see Hackett *v.* Hackett, 18 R. I. 155, 26 Atl. 42, where the question is learnedly discussed and many decisions cited; and see also articles 10 Cent. L. J. 303, 32 Am. L. Rev. 278, O'Donnell *v.* Slack, 123 Calif. 285, 55 Pac. 906. A grandmother with whom an orphan grandchild resides at the time of death, has the legal right of burial and she may unite with her in an action for an unwarranted interference with the right, a minor brother of the decedent, Wright *v.* Hollywood Association, 112 Ga. 884, 38 S. E. 94.

Buildings, fixtures. Generally. Replevin lies for a building which has been detached from the land. Weed *v.* Hall, 101 Pa. St. 592. If the owner of a house sells it separate from the land, neither he nor those claiming under him can afterwards assert title to it. Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268;—even though the building is not removed. If the building be not actually severed, the purchaser's remedy is not replevin. Eddy *v.* Hall, 5 Colo. 576, Dorr *v.* Dudderar, 88 Ills. 107; —but in Gill *v.* De Armant, 90 Mich. 425, 51 N. W. 527, the vendee of lands having unlawfully removed machinery from a mill situate thereon and set it up in his own mill, bolting it to the floor and using it there as a part of the mill, the vendor was permitted to recover it in replevin. An organ set up in a church without right is not part of the church, and replevin lies by the owner. Farrand Company *v.* Board of Church Extension, etc., 17 Utah, 469, 54 Pac. 818. Railroad iron unlawfully attached by wrong-doer to defendant's lands for a temporary purpose, may, after its severance by defendant, be replevied by the owner, Shoemaker *v.* Simpson, 16 Kans. 43. And machinery affixed to the freehold by a stranger, without authority of the owner, and

[4] Herdic *v.* Young, 55 Pa. St. 176.

usually follows a judgment for the property as a matter of

in such manner that if affixed by the owner it would pass by his deed, but so that it may be detached and removed without material injury to the freehold, does not become part of the freehold. Cochran *v.* Flint, 57 N. H. 514. In Byrnes *v.* Palmer, 113 Mich. 17, 71 N. W. 331, the plaintiff was permitted to recover a house which the defendant had unlawfully removed from plaintiff's premises and had erected upon his own premises; plaintiff was also allowed to recover as damages the cost of replacement. The relations of the parties have much to do with the effect of the attachment to realty of things before that chattels. The rule that everything attached to realty becomes parcel thereof is relaxed between landlord and tenant, in favor of the tenant; and in favor of one placing machinery for the purpose of manufacture; and between tenant for life, and the remainderman; but does apply in all strictness as between landowner and trespasser, and as between vendor and vendee, in favor of the latter. Union Bank *v.* Wolf Company, 114 Tenn. 255, 86 S. W. 310. Mere physical annexation is no longer the test, but the intention of the party, Vail *v.* Weaver, 132 Pa. St. 363, 19 Atl. 138. Docking *v.* Frazell, 38 Kans. 420, 17 Pac. 160. The intention of the owner of the chattel and the uses to which the chattel is put, must concur, to transform it into realty, Atchison Company *v.* Morgan, 42 Kans. 23, 21 Pac. 809. In McDaniel *v.* Lipp, 41 Neb. 713, 60 N. W. 81, it was held that a house erected by one party upon the lands of another, and partly in a public alley, by mistake of the boundaries, not permanently attached, and which the party making the erection regards and treats as personalty, remains such, though the owner of the lot upon which it is partly situate moves it so as to place it wholly upon his premises, erects brick piers under it and makes an addition to it; and the owner may maintain replevin. And if a building wrongfully severed from lands and erected upon other lands, is again severed, its character as a chattel is restored, and the owner of the lands from which it was removed, or the mortgagee of those lands, may have replevin. Dorr *v.* Dudderar, 88 Ills. 107. And see Oskamp *v.* Krites, 37 Neb. 837, 56 N. W. 394. Many things may, although not affixed to the freehold, come within the category of fixtures; *e. g.* the rolls of a mill, the machinery of a manufactory, fast or loose, necessary to constitute a factory; but mere loose movables about such an establishment will no more pass with it, in the absence of a usage or general understanding, than would the tools of a mechanic by the sale of his shop. Carey *v.* Bright, 58 Pa. St. 70. A building erected by the tenant upon the demised premises, belongs to the landlord, Dougherty *v.* Spencer, 23 Ills. Ap. 357.

A building erected upon another's land by his consent, and under an agreement that it shall belong to the builder, is a chattel. Chicago Co *v.* Goodwin, 111 Ills. 273. Curtis *v.* Riddle, 7 Allen 185; otherwise if erected by a trespasser. *Id.* Nichols *v.* Potts, 71 N. Y. Sup 765; 35

course, the contest is about the specific thing; the recovery of

Misc. 273. A writing from the landowner is not necessary. Taft *v.* Stetson, 117 Mass. 471. So an inclined plane connecting a railway with mines of the defendant, located partly on the land of defendant, under an agreement with plaintiff that he shall have the use of it, for a specified compensation during a fixed period, Charlotte Co. *v.* Stouffer, 127 Pa. St. 336, 17 Atl. 994. A dwelling erected with the consent of the owner of the lands that the one erecting it may do as he pleases with it, is a chattel. Adams *v.* Tully, 164 Ind. 292, 73 N. E. 595. The purchaser of the lands with notice of all the facts acquires no title to the house, even though it be not excepted or reserved in the deed. Adams *v.* Tully, *supra*. The owner of the house is in such case entitled to remove it within a reasonable time after the sale of the lands, Adams *v.* Tully, *supra*. But it has been held that a thing which cannot be removed without its destruction, *e. g.* a brick house; or without serious injury to what remains, *e. g.* the separate materials of a building, and things fixed in the wall, and essential to its support, may not by agreement be transformed from realty to personalty, Ford *v.* Cobb, 20 N. Y. 344. In order that things affixed to the soil shall remain personalty by agreement of the party making the improvement, he must have the right to determine and appoint; a purchaser of land cannot as against the vendor who retains the title, make a house erected upon the premises personalty, nor remove it, nor confer upon another who has notice of the facts, such right; the vendor of the lands may replevy. Ogden *v.* Stock, 34 Ill. 522, 85 Am. Dec. 332. A dwelling which is occupied by a tenant cannot be replevied, even although the tenant is holding over his term. The statutory remedy by the action of wrongful detainer is, it seems, exclusive, McCormick Co. *v.* Riewe, 14 Neb. 509, 16 N. W. 832.

Fixtures unlawfully severed from the land, the owner may replevy, Kirch *v.* Davies, 55 Wis. 287. Starting a building from its place, is a severance, and the owner may replevy it. Luce *v.* Ames, 84 Me. 133, 24 Atl. 720. It is not admissible in replevin for a house to litigate the legality of a tax title, under which the premises from which the house was removed, were at the time, in adverse possession. Rees *v.* Higgins, 9 Kans. Ap. 832, 61 Pac. 500. Brick built into the wall of a courthouse by a contractor, become part of the freehold and the property of the county, and remain so though the county authorities terminate the contract, and by other contractors, tear the wall down for reconstruction. Moore *v.* Cunningham, 23 Ill. 328. Mortgagee of lands not in possession, though default has been made, cannot maintain replevin for the thing severed. Kircher *v.* Schalk, 39 N. J. L. 335. Rails affixed to the roadbed of the railway are a part of the railroad unless there be an agreement to the contrary; and, in spite of such agreement, as to a mortgagee of the railway, who takes without notice. Hunt *v.* Bay State Company, 97 Mass. 279, Meagher *v.* Hayes, 152 Mass. 228, 25 N. E. 105.

the thing, and not the damages, is the primary object.[5] The

But this principle has no application in the case of a street railway laid in the public street. The railway company in such case gains neither freehold nor easement in the soil, nor exclusive control of the highway, nor any other interest in the land of which the rails can form a part; and like gas and water pipes, poles and wires for conveying electricity, they remain personalty. Lorain Company *v.* Norfolk Company, 187 Mass. 500, 73 N. E. 646. See however, Tudor Iron Works *v.* Hitt, 49 Mo. Ap. 472. A cotton screw wrongfully detached from the property of another is personalty, Wood *v.* McCall, 67 Ga. 506;—so a lathe which is a necessary part of the machinery of a factory. Green *v.* Chicago Co., 8 Kans. Ap. 611, 56 Pac. 136. The machinery and fixtures of an electric lighting plant, placed in a building temporarily, are personalty. The purchaser thereof, upon execution sale, may maintain replevin against the purchaser at a foreclosure sale of the lands. Vail *v.* Weaver, 132 Pa. St. 363, 19 Atl. 138. Replevin lies for window curtains, screens, screen-doors, gaslight pictures, gas and electric globes; such articles do not pass by a mortgage of the lands. Hall *v.* Law Guarantee Co., 22 Wash. 305, 60 Pac. 643. Materials collected for a new building are movables until actually used. Beard *v.* Duralde, 23 La. An. 284. A ferry boat and the chain by which it is attached to an island, and the buoys supporting the chain are no part of the realty. Cowart *v.* Cowart, 3 Lea. 57. A boiler resting upon blocks and not yet lowered to the foundation prepared for it is a chattel. Hacker *v.* Monroe, 56 Ill. Ap. 533; the filing of a claim of lien for the price will not affect the question, no suit to enforce the lien being prosecuted. *Id.* Replevin will not lie for hay, grown and harvested by defendant on land in his possession, under claim of title. Page *v.* Fowler, 28 Calif. 605, Renick *v.* Boyd, 99 Pa. St. 555. Wheat raised under an invalid lease of land may be recovered from the officer who has taken it on execution against the lessor. Burchett *v.* Hamil, 5 Okla. 300, 47 Pac. 1053. *Fixtures, between vendor and vendee.* Vendee of lands in possession may lawfully sell or dispose of a house which he has erected upon the premises, although he is in default in the purchase money, and the contract of purchase provides that in such case, vendor shall be entitled to "the immediate possession of the premises . . . . . and with all improvements." The vendor of the land cannot in such case recover the house from the purchaser thereof, Ellsworth *v.* McDowell, 44 Neb. 708, 62 N. W. 1082, Northrop *v.* Trask, 39 Wis. 515;—but see Cutter *v.* Wait, 131 Mich. 508, 91 N. W. 753, where it was held that a house erected by the vendee and removed before payment of the purchase price, may be replevied by the vendor; though otherwise if the purchaser has been induced to make the purchase of the house by fraudulent misrepresentations of the owner of the lands. A house erected

[5] Hunt *v.* Robinson, 11 Cal. 262; Nickerson *v.* Chatterton, 7 Cal. 568; Buckley *v.* Buckley, 12 Nevada, 423.

secondary object is to recover a sum of money which shall be

upon the premises of another under an agreement of purchase with the agent of the owner, which the owner has refused to ratify, may be replevied, Waters *v.* Reuber, 16 Neb. 99, 19 N. W. 687; and a frame building set upon a stone foundation by the authorities of a county, under a verbal agreement of purchase which the owner of the lands refuses to consummate, Board of Commissioners of Rush Co. *v.* Stubbs, 25 Kans. 322. But upon conditional sale of a grain elevator and a warehouse, with certain machinery, all situate upon premises leased of a third person, there being no express reservation of the title, but the sale being defeasible for the non-payment of any installment of the purchase money at the day stipulated, it was held that the vendor could not, for default in the conditions of the sale, maintain replevin for the things so sold, even although admitted to be chattel property; because (1), the writ would operate in effect as a writ of restitution of lands; and because (2) the equities of the parties could not be adjusted in such action. The vendor had not returned or tendered the part payment received and the last remark of the court has reference to this. Oskamp *v.* Crites, 37 Neb. 837, 56 N. W. 394. Parties holding an option to purchase mining premises, erected a whim, railway track and other improvements, in order to assist in the development of the mine, and to determine whether they would avail themselves of the option; these improvements were removable without injury to the estate. The option required that the mine should be kept free of any lien; there was no provision that the owner should retain improvements. Held that the things in question were chattels, and a license to remove them was implied. Alberson *v.* Elk Creek Co., 39 Ore. 552, 65 Pac. 978.

Buildings and Fixtures, as between Vendor of Chattel and Land-Owner. Mantel-pieces sold conditionally by writing recorded in compliance with the statute, remain personalty, though set up in the building of the purchaser. Nichols *v.* Potts, 35 Misc. 273, 71 N. Y. Sup. 765, citing Duffus *v.* Furnace Co., 8 App. Div. 567, 40 N. Y. Sup. 925. In Jermyn *v.* Hunter, 93 Ap. Div. 175, 87 N. Y. Sup. 546, it was held that a boiler sold to a contractor for the erection of a building then in course of construction, and which was by him erected and placed in such building on a permanent foundation, was parcel of the land, even though in the sale of the boiler the vendor expressly reserved the title until full payment of the price, and payment had not been made, the owner of the building having no notice of this reservation. Held further that the owner of the building could not be charged with the value of the boiler, citing Potter *v.* Cromwell, 40 N. Y. 287, McRea *v.* Central Bank, 66 N. Y. 489, Andrews *v.* Powers, 66 Ap Div. 216, 72 N. Y. Sup. 597, and distinguishing Ford *v.* Cobb, 20 N. Y. 344, Tift *v.* Horton, 53 Id. 377. In Hobson *v.* Gorringe, 1 Ch. 182, 75 L. T. R. 610, it was held that a gas engine sold conditionally, and for which payment had not been made, but which had been affixed

equivalent to the value of the property sued for, in case the

to the freehold of the purchaser by bolts, was a fixture and passed under the mortgage, as between the vendor of the title and a subsequent mortgagee of the land, without notice of the conditional character of the sale of the machine. And see Reynolds *v.* Ashby, 91 L. T. R. 607, cited 39 Am. L. Rev. 611. Union Bank *v.* Wolf Co., 114 Tenn. 255, 86 S. W. 310. *Between Mortgagor and Mortgagee.* A boiler, engine and printing presses erected upon mortgaged lands by the mortgagor, and intended as part of the establishment, the presses connected with the boiler by bolts, and resting by their own weight upon foundations especially prepared for them, are part of the realty as between mortgagor and mortgagee, Otis *v.* May, 30 Ills. Ap. 581; and see Jones *v.* Bull, 85 Tex. 136, 19 S. W. 1031;—so of anything placed by the mortgagee upon the mortgaged premises to carry out the purposes for which the same are occupied, and permanently increase their value for use, even though the thing may be removed without injury to itself or to the building; as platform scales, set in the floor of a manufactory, or outside of the building; or hydraulic presses; or printing machines, each standing upon a foundation constructed for it; an indigo mill or dyeing machine similarly attached, Southbridge Bank *v.* Mason, 147 Mass, 500, 18 N. E. 406, Butler *v.* Page, 7 Mete. 40, Wright v. Gray, 73 Me. 297. If the mortgagee in possession fells trees or sells buildings standing upon the mortgaged premises, the administrator of the mortgagor cannot maintain trover, Place *v.* Sawtel, 142 Mass. 477, 8 N. E. 343;—a building, resting by its own weight on flat stones laid upon the surface of the ground, is not a fixture, but personalty, Carlin *v.* Ritter, 68 Md. 478. Mortgage of a boiler and engine, stipulating that they shall remain chattels, takes precedence of a prior mortgage of lands where they are afterwards erected. Tift *v.* Horton, 53 N. Y. 377. A and B form a copartnership in distilling, A to furnish a certain mill with machinery to grind the grain, B to furnish the mash tub and fermenting tanks; the mash tub rested upon the joists of the third story floor, the mash therein was stirred by a rake fastened to the roof; the fermenting tanks were placed on trestles and extended through apertures cut in the floor above; all were parts of the apparatus, connected with it by pipes and troughs, and necessary to the conduct of the business; they were removable only by being taken in pieces; there was a parol agreement that the mash tub and fermenting tanks should remain the property of B; held, that this agreement affected a mortgagee and a purchaser of the mill who took with notice. Walker *v.* Schindel, 58 Md. 360. Trees standing upon the mortgaged lands are part of the mortgagee's security; he may have his action, if, without his assent, the mortgagor severs them, Sanders *v.* Reed, 12 N. H. 558, Page *v.* Robinson, 10 Cush. 99, Waterman *v.* Matteson, 4 R. I. 539; and junior mortgagee may recover full damages, if, since the trespass, the senior mortgage has been satisfied, *Id.* The mortgagee is entitled

property itself is not delivered to the plaintiff upon the writ;

to take and hold logs cut from the mortgaged premises without his permission, and his assignee has the same right and remedy; neither the wrong-doer nor his vendee can recover. Mosher *v.* Vehue, 77 Me. 169. In Connecticut the mortgagor in possession may sever fixtures and confer a good title by the sale thereof, even after default made. McKelvey *v.* Creevey, 72 Conn. 464, 45 Atl. 4; otherwise in Maine, Mosher *v.* Vehue, *supra;* in Vermont, Langdon *v.* Paul, 22 Vt. 205; in New Hampshire, Sanders *v.* Reid, 12 N. H. 558; in Rhode Island, Waterman *v.* Matteson, 4 R. I. 539; Massachusetts, South Bridge Bank *v.* Mason, 147 Mass. 500, 18 N. E. 406; in New Jersey, Kircher *v.* Schalk, 39 N. J. L. 335. A purchaser of growing trees from one in possession of lands, vested with the record title, and who severs them pursuant to his purchase, is preferred to a prior unrecorded mortgage; it is immaterial in such case that the purchase was by simple contract, Banton *v.* Shorey, 77 Me. 48. *Between landlord and tenant.* A tenant must remove his fixtures during the term;—if he accept a new lease without reserving therein the right to remove, the right of removal is lost. Carlin *v.* Ritter, 68 Md. 478;—otherwise if he holds over under circumstances creating an implied renewal, Darrah *v.* Baird, 101 Pa. St. 265; and the fixtures remain part of the freehold, until and unless severed by the tenant, or by those who hold under him, *Id.* If the tenant becomes bankrupt, and the assignee surrender, the right of removal is lost, *Id.* A tenant erects a building upon the demised premises and surrenders possession, reserving the building, and the landlord agrees that the tenant may remove it at his pleasure; the landlord afterwards lets the building to another tenant, and when the first tenant demands it, refuses the demand;—held the house is personalty, the landlord's agreement to its removal, though verbal is valid, and the landlord is liable for the value of the building on the day of the demand, with interest, Neiswanger *v.* Squier, 73 Mo. 192. A steam engine erected by the tenant upon the leasehold, not intended as a permanent attachment, and which can be removed without injury to the soil, is a chattel and may be replevied by the mortgagee of the tenant, from the landlord. Hewitt *v.* Watertown Co. 65 Ill. App. 153. Sale of the leasehold on execution against the tenant passes title with the fixtures situated thereon. If the tenant sever them the purchaser may have replevin. McNally *v.* Connolly, 70 Calif. 3, 11 Pac. 320. If a tenant surrender his term, his right in trade fixtures is gone; a subsequent mortgage by the tenant, though for the purchase money of the fixtures, and in pursuance of a precedent verbal promise, is without effect as against the landlord. Fuller *v.* Brownell, 48 Neb. 145, 67 N. W. 6. Where there are several estates in land, he who has the first estate of inheritance becomes the general owner of whatever is wrongfully severed; if there be a tenant for life without impeachment of waste, and the thing is such as he might have rightfully severed, he becomes the owner and may maintain replevin,

compensation for the injury which the plaintiff has sustained by

Kircher *v.* Schalk, 39 N. J. L. 335; or he who has the actual or constructive possession accompanied by an interest in the land at the time of the severance. *Id.* Machinery so attached to the premises as to become parcel of it, if so placed by the owner in fee, is mere fixtures when so placed by the life tenant. Overman *v.* Sasser, 107 N. C. 432, 12 S. E. 64, 10 L. R. A. 722. *Fences.* By statute, adjoining landowners may agree to build and maintain certain portions of a division fence; where a fence is so constructed the materials remain the property of him who performs the work of construction, and if severed he may maintain replevin, Moore *v* Combs, 24 Ind. Ap. 464, 56 N. E. 35. A fence located by mistake upon the lands of an adjoining proprietor; doubted if the party loses his title until after the lapse of a sufficient time, succeeding the discovery of the mistake, in which to remove it. Hobbs *v.* Clark, 53 Ark. 411, 14 S. W. 652, and see Atcheson Co. *v.* Morgan, 42 Kans. 23, 21 Pac. 809. *Trees, ores, etc.* A tree is, it seems, wholly the property of one upon whose land the trunk stands, though the roots extend to the lands of another proprieter, Dubois *v.* Beaver, 25 N. Y. 123;—logs cut from land, are the property of him who owns the land at the date of the severance. Stahl *v.* Lynn, 81 Wis. 668, 51 N. W. 879. Replevin lies for lumber manufactured from logs cut by a wrong-doer—though under color of a license. Mine Lamotte Co. *v.* White, 106 Mo. Ap. 222, 80 S. W. 356. Bona fide possession under an adverse claim will not preclude an investigation of the title. McKinnon *v.* Meston, 104 Mich. 642, 62 N. W. 1014. The defendant made forcible entry upon enclosed and improved premises in occupation of the plaintiff, broke down his fences and assumed forcible possession; he afterwards entered the lands under the preemption laws of the United States; held that notwithstanding his adverse claim plaintiff might maintain replevin for the hay cut by him upon the land. Laurendeau *v.* Fugelli, 1 Wash. 559, 21 Pac. 29, 5 Wash. 94, 632, 31 Pac. 421. But in Rees *v.* Higgins, 9 Kans. Ap. 832, 61 Pac. 500, it was held that in replevin for a house which the defendant had severed, under claim of title, his right could not be adjudicated. Replevin lies for ores extracted by a trespasser from a mine situate in another state, Hoy *v.* Smith, 49 Barb. 360; and if sand be removed by a trespasser from the premises where it is found, it becomes at once personalty, and trover lies, or replevin, in any jurisdiction to which it may be carried. McGonigle *v.* Atchison, 33 Kans. 726, 7 Pac. 550. But in American Co. *v.* Middleton, 80 N. Y. 408, it was held that the only action maintainable was trespass, q. c. f., and that no matter where the conversion of the thing severed occurs, the action will lie only in the jurisdiction in which the land is situate. In Forsythe *v.* Wells, 41 Pa. St. 291, trover was entertained for coal tortiously mined upon plaintiff's land. Growing trees being part of the realty any attempted sale of the tree or the right to fell it must observe the requirements of the statute of frauds, Mine Lamotte Co.

the wrongful detention of his goods is also recoverable, as in

v. White, *supra.* The writing need not be sealed. Warren *v.* Leland, 2 Barb. 613; but in Andrews *v.* Costican, 30 Mo. Ap. 29, it was held that an unsealed writing of sale, not accompanied by possession or severance, does not pass the title to standing trees; and the holder of such writing may not obtain replevin, for logs afterwards severed from the land. A writing agreeing to bargain and sell the standing timber on certain lands passes a present interest; so of an assignment by one of "his right to the pine timber" on certain lots. Warren *v.* Leland, *supra.* Forthwith upon the execution of such a writing by the owner of lands, the trees become in law personalty. *Id.* A license to cut the timber from lands vests no title until actual severance; but if the trees are felled by a trespasser, the license being unrevoked, the licensee may at once bring replevin, Keystone Co. *v.* Kolman, 94 Wis. 465, 69 N. W. 165. A mere license to dig for ore confers no title until severance; and if the owner of the land himself severs, the title is in him, and not in the licensee. Gillett *v.* Treganza, 6 Wis. 344. A landowner consented to donate the right of way for a public road, on condition that the road commissioners would pay the value of the timber cut, and that opportunity should be afforded him to estimate the amount before the trees should be felled; held, the title to the trees did not, by this consent pass, until compliance with the conditions prescribed. Keweenaw Association *v.* O'Neil, 120 Mich. 270, 79 N. W. 183. The purchaser from a trespasser cannot recover logs, cut from public lands, as against a purchaser from the state, even though the proceedings attending the sale by the state appear to be irregular, Raber *v.* Hyde, Mich. 101 N. W. 61. The bare possession of land under claim of title, is sufficient to entitle possessor to maintain replevin for logs cut by one who enters forcibly upon such possession, though under claim of title. Loveman *v.* Clark, 114 Tenn. 117, 85 S. W. 258. Deeds may be examined to ascertain the extent of the possession of lands from which logs, the subject matter of the action, were cut. *Id.* Replevin cannot be made the metans of litigating the title to lands; but the title may come in question incidentally to be examined, so far as necessary to ascertain in whom was the possession, and by consequence, title to the things severed. *Id.*

Growing crops. At the common law the fruit of trees or perennial bushes or grasses growing from perennial roots, are, while unsevered from the soil, considered as pertaining to the realty; *e. g.* blackberries; but such things as grains, garden vegetables, and the like, raised by annual manurance and labor, are, even while still annexed to the soil treated as chattels, Sparrow *v.* Pound, 49 Minn. 412, 52 N. W. 36. Growing crops are a chattel. Davis *v.* McFarlane, 37 Calif. 654, Stall. *v.* Wilbur, 77 N. Y. 158. But they pass by the conveyance of the lands, Stall *v.* Wilbur, *supra.* One who recovers land in ejectment may have replevin for the crop grown and harvested thereon pending the action, by a tenant who had notice of it, Rowell *v.* Klein, 44 Ind.

cases when the goods themselves are recovered.[6] It may be said to be the proper form of action, in all cases where the plaintiff, having a general or special property, with the right to the immediate possession of chattels personal which are wrongfully detained by another, desires to recover the specific goods, and this without reference to whether they were wrongfully taken or not.

290. Crops planted by an intruder upon lands, are the property of the landowner, Baker *v.* McInturff, 49 Mo. Ap. 505. But in Missouri it seems the conveyance of lands does not pass title to the crops growing thereon. Edwards *v.* Eveler, 84 Mo. Ap. 405; and in McAllister *v.* Lawler, 32 Mo. Ap. 91, it was held that one in actual possession of lands, no matter in what capacity, cannot by the landowner be deprived of the crop which he has planted, matured and severed. And the product of lands grown and harvested by one in adverse possession, though without color of title, cannot be replevied by the true owner of the lands, Martin *v.* Thompson, 62 Calif. 618, 45 Am. Rep. 663. But mortgagee of lands is entitled to the crop planted after foreclosure sale, and standing ungathered when the deed passes. Foss *v.* Marr, 40 Neb. 559, 59 N. W. 122, Rankin *v.* Kinsey, 7 Ill. Ap. 215. And see Hall *v.* Durham, 117 Ind. 430, 20 N. E. 282. And whether planted before or after the execution of the mortgage, until severance, the mortgage binds both the land and the crop, not only as against the mortgagor but as against all claiming under him subsequent to the record of the mortgage. Yates *v.* Smith, 11 Ill. Ap. 459. See Sieffert *v.* Campbell, 24 Ky. L. Rep. 1050, 70 S. W. 630, Tittle *v.* Kennedy, 71 S. C. 1, 50 S. E. 544. But the sheriff's deed on foreclosure does not pass the crop of mortgagor's tenant then matured and ready for the harvest. Hecht *v.* Bettman, 56 Ia. 679, 7 N. W. 495, 10 N. W. 241, Porche *v.* Bodin, 28 La. An. 761. And purchaser at foreclosure sale is not entitled to the crop grown by a tenant, even though his lease were granted after the record of the mortgage, and the crop was not harvested until the mortgagor's right of redemption had expired. Aultman *v.* O'Dowd, 73 Minn. 58, 75 N. W. 756. Corn ungathered in the field, belonging partly to the tenant and partly to the landlord, but undivided, the assignee of the tenant cannot maintain replevin. The reason assigned by the court is that no division is practicable in its then condition. Jones *v.* Dodge, 61 Mo. 368; but in Garth *v.* Caldwell, 72 Mo. 622, it was held that corn in the stalk may be replevied

[6] Ellis, Admr. of Pritchard, *v.* Culver, 2 Harr. (Del.) 129; Hart *v.* Fitzgerald, 2 Mass. 509; Bruen *v.* Ogden, 6 Halst. (N. J.) 371; Buckley *v.* Buckley, 12 Nevada, 426; Yates *v.* Fassett, 5 Denio, 21; Burr *v.* Daugherty, 21 Ark. 559; Gray *v.* Nations, 1 Ark. 559; Whitfield *v.* Whitfield, 40 Miss. 352; Broadwater *v.* Darne, 10 Mo. 278; Loomis *v.* Tyler, 4 Day, (Conn.) 141; Frazier *v.* Fredericks, 4 Zab. (N. J.) 163; Smith *v.* Houston, 25 Ark. 184; Parham *v.* Riley, 4 Coldw. (Tenn.) 5; Stevens *v.* Tufte, 104 Mass. 332.

The wrongful detention of another's goods will generally, under the statutes and decisions in this country, render the defendant liable in this action.[7]

§ 34. **It is a mixed action, partly in rem and partly in personam.** It is a mixed action, being not only for specific articles but for damages which the taking and detention has occasioned.[8] It is a proceeding partly *in rem* and partly *in personam*. Insomuch as it seeks the return of specific chattels it is a proceeding *in rem*, resembling a libel in a court of admiralty, both parties being claimants;[9] and so far as the object is to obtain a judgment against the defendant for damages is a proceeding *in personam*,[10] and can be brought only against the person having possession or control of the goods at the time the suit is begun. The writ in addition to the order for delivery, contains a summons to the defendant, and if the plaintiff does not obtain delivery of the goods upon the writ, he may have judgment for the value against the defendant personally.[11]

§ 35. **The writ is a writ of right.** By the common law the writ was a writ of right, not of grace or favor,[12] and in most of the states the common law is recognized as the foundation of the action, the statutes only adapting the remedy to the wants of modern society.[13]

[7] Peirce *v.* Hill, 9 Port. (Ala.) 151; Brooke *v.* Berry, 1 Gill. (Md.) 153; Marston *v.* Baldwin, 17 Mass. 609; Paul *v.* Luttrell, 1 Colorado, 317; Brownell *v.* Manchester, 1 Pick. 233.

[8] Fisher *v.* Whoollery, 25 Pa. St. 197; Herdic *v.* Young, 55 Pa. St. 176.

[9] Brown *v.* Smith, 1 N. H. 38; Wheeler *v.* Train, 4 Pick. 168; Fletcher *v.* Wilkins, 6 East. 283; Sharp *v.* Whittenhall, 3 Hill, (N. Y.) 576; Eaton *v.* Southby, Willes, 131; Baldwin *v.* Cash, 7 Watts & S. 425; Lowry *v.* Hall, 2 W. & S. (Pa.) 132.

[10] Ramsdell *v.* Buswell, 54 Me. 547; Burr *v.* Daugherty, 21 Ark. 559; Daggett *v.* Robins, 2 Blackf. (Ind.) 416; Stevens *v.* Tuite, 104 Mass. 332.

[11] Bower *v.* Tallman, 5 W. & S. (Pa.) 561. In some of the states the plaintiff may file a count in trover for such goods as the officer returns he cannot find, but in most of the states the value of the chattels is given in the form of damages in the replevin suit. See Greenwade *v.* Fisher, 5 B. Mon. (Ky.) 167. In Minnesota it was held so far a proceeding *in rem* before a justice of the peace that delivery of the goods was necessary to give jurisdiction, and that upon a return of "no property found" the justice could not proceed. St. Martin *v.* Desnoyer, 1 Minn. 41.

[12] Anon. 2 Atk. 237.

[13] Chadwick *v.* Miller, 6 Iowa, 34.

§ 36. **Form of proceeding in different states substantially the same.** So far as its name is concerned this action has been abolished in most, if not all, of the states which have adopted a code.[14] It was never recognized in Alabama.[15] It obtained a foothold in Mississippi only after a struggle.[16] In Connecticut and Vermont it was formerly allowed only in cases of distress and attachment.[17] In South Carolina the writ would only lie for a distress.[18] In Virginia it was abolished by statute, except in cases of distress.[19] In Louisiana, where the civil law prevails, the writ is unknown; and the same may be said of Texas. But in states adopting a code, provisions are made by which substantially the same results are reached. This is done by what is claimed to be a more simple and equitable proceeding, and one in which the same principles apply.[20] In Alabama the action of detinue has been modified and made to serve the same purpose as replevin, and is, in fact governed by the same general principles.[21] In Georgia the writ is called "possessory warrant," and differs somewhat in form from the common law writ,[22] while Louisiana and Texas recognize the principles which

[14] "The form of the action was abolished by the code, but the principles which governed it remain, and now, as much as formerly, control in determining the rights of parties." Eldridge *v.* Adams, 54 Barb. 417. To the same effect, Collins *v.* Hough, 26 Mo. 152; Chadwick *v.* Miller, 6 Iowa, 34.

[15] Smith *v.* Crockett, Minor, (Ala.) 277, (1824); Peirce *v.* Hill, 9 Porter, (Ala.) 155.

[16] In Wheelock *v.* Cozzens, 6 How. (Miss.) 281, one of the counsel says he would as soon expect to see the court recognize the obsolete remedy of wager of battle, or wager of law, as replevin. See, also, a similar remark by counsel in Virginia. Nicolson *v.* Hancock, 4 Hen. & M. (Va.) 491.

[17] Watson *v.* Watson, 9 Conn. 140; Watson *v.* Watson, 10 Conn. 75. Against the attachment creditors, and not against the officer. Bowen *v.* Hutchings, 18 Conn. 550; Glover *v.* Chase, 27 Vt. 533.

[18] Hewitson *v.* Hunt, 8 Rich. (S. C.) 106. See Charleston *v.* Price, 1 McCord, 299; Byrd *v.* O'Hanlin, 1 Mill. (S. C.) 401.

[19] Valden *v.* Bell, 3 Rand. (Va.) 448.

[20] "The name replevin is much more convenient and suggestive to the profession than that adopted by the code." Ames *v.* Miss. Boom Co., 8 Minn. 467. See Belkin *v.* Hill, 53 Mo. 493; Pulls *v.* Dearing, 7 Wis. 221; Porter *v.* Willet, 14 Abb. Pr. Rep. 319; Collins *v.* Hough, 26 Mo. 149; Chadwick *v.* Miller, 6 Iowa, 34.

[21] Peirce *v.* Hill, 9 Porter, (Ala.) 151; Lawson, Admrs *v.* Lay, Exrs., 24 Ala. 188.

[22] Mills *v.* Glover, 22 Geo. 322; Stat. Geo. Title, Poss. War.

govern actions of replevin in a proceeding by sequestration.[23] In Vermont and Connecticut, as a suit to try the title to property, it has only been allowed within a comparatively recent period.[24] In Pennsylvania, it is said, the action rests solely upon the local statutes, there being no right to proceed under the common law or the Statute of Marlbridge,[25] though the common law principles apply. But, whether they be of ancient or modern origin, all laws governing actions for the recovery of specific personal chattels can best be discussed under the title of replevin.

§ 37. **Peculiarities of the action; privileges to the plaintiff.** There are some peculiar privileges to the plaintiff in this action. Upon affidavit being filed that he is the owner of the property in controversy, and entitled to its immediate possession, he can demand that it be delivered to him under the first process issued in the case, leaving the title or right of possession to be investigated afterwards. In no other form of action has the plaintiff this right.[26] The bond which the plaintiff is required to give is regarded as a sufficient indemnity to the defendant in case the result of the trial shall show the title of the latter to be superior; and for the purpose of asserting his title, the defendant is permitted to set it up by his pleading, and to claim its return, and to require the plaintiff to prove affirmatively his title or right to possession when the suit was begun.[27]

§ 38. **Importance of the action.** The remedy has been called a violent one.[28] The transfer of the subject of the dispute from the defendant to the plaintiff, upon the first process, leaving the question of title to be determined afterward, is, without doubt, a proceeding liable to abuse, and has probably been made use of to deprive the real owner of his property; yet it has frequently been found to be the only remedy of any real value to the owner

[23] Fowler *v.* Stonum, 6 Texas, 61; Porter *v.* Miller, 7 Texas, 473.

[24] Compare Collamer *v.* Page, 35 Vt. 387; Bennett *v.* Allen, 30 Vt. 686; Glover *v.* Chase, 27 Vt. 533; Sprague *v.* Clark, 41 Vt. 6.

[25] Weaver *v.* Lawrence, 1 Dall. 156; English *v.* Dalbrow, 1 Miles, (Pa.) 160.

[26] Hunt *v.* Chambers, 1 Zab. (N. J.) 624; Yates *v.* Fassett, 5 Denio, 31; Kingsbury's Exrs. *v.* Lane's Exrs., 21 Mo. 117; Creamer *v.* Ford, 1 Heisk. (Tenn.) 308; Lowry *v.* Hall. 2 W. & S. (Pa.) 129.

[27] Mennie *v.* Blake, 6 E. & B. (88 E. C. L.) 843.

[28] Hutchinson *v.* McClellen, 2 Wis. 17. See, also, Mennie *v.* Blake, 6 E. & B. (88 E. C. L.) 846; Tifft *v.* Verden, 11 S. & M. (Miss.) 160. Imprisonment is sometimes allowed. Tomlin *v.* Fisher, 27 Mich. 525.

of property which has been wrongfully taken or detained from him. In cases where the defendant is irresponsible, or where the identical property must be put to some special immediate use, or where the property is an heirloom, or has some peculiar value to the plaintiff, the necessity of this action has long been apparent. Through a series of legislative acts, and the liberal construction of the courts, it has become a common remedy; indeed, almost the only effective one in cases wherein the plaintiff is entitled to specific chattels, and prefers a recovery in specie, or where, for any cause, he prefers the property to the risks to which the insolvency or knavery of the defendant might expose him, should he have judgment for damages only.[29] It is sometimes the only adequate remedy of any kind available when property is withheld. When one owns goods which are in the possession of another, he cannot sue in assumpsit for them, or for their value, but must sue for them in replevin, or for their value in trover. In the latter case, if the defendant is insolvent, the judgment is of no value, and the plaintiff is subject not only to the loss of his goods, but to the burden of a suit.[30]

§ 39. **The right to present possession the chief question at issue.** Though conflicting titles may well be settled in this form of proceeding, it is chiefly a possessory action, the right to present possession of the property being the principal question in controversy.[31] And where the title is investigated, it is frequently with a view to determine the right of possession, which

[29] Badger *v.* Phinney, 15 Mass. 362; Town *v.* Evans, 1 Eng. (Ark.) 263; Ames *v.* Miss. Boom Co., 8 Minn. 467; Kingsbury's Exrs. *v.* Lane's Exrs. 21 Mo. 117; Hunt *v.* Chambers, 21 N. J. 624; Clark *v.* Skinner, 20 Johns. 467; Travers *v.* Inslee, 19 Mich. 101; Weaver *v.* Lawrence, 1 Dall. 156. Replevin is the only effective remedy when the goods are in the hands of a worthless defendant. Tibbal *v.* Cahoon, 10 Watts, 232; Pettygrove *v.* Hoyt, 11 Me. 66; Mennie *v.* Blake, 6 Ell. & Bla. (88 E. C. L.) 849.

[30] Creel *v.* Kirkham, 47 Ill. 345; Johnston *v.* Sallsbury, 61 Ill. 317; Bethlehem, etc., *v.* Perseverance Fire Co., 81 Pa. St. 446; Gray *v.* Griffith, 10 Watts, (Pa.) 431; Mendelsohn *v.* Smith, 27 Mich. 2. See the old case of Lindon *v.* Hooper, Cowp. 415, where it was held that if a party pays money for the release of his cattle, wrongfully distrained, he cannot recover it.

[31] Heeron *v.* Beckwith, 1 Wis. 20; Rose *v.* Cash, 58 Ind. 278; Hunt *v.* Chambers, 1 Zab. (21 N. J.) 624; McCoy *v.* Cadle, 4 Clark, (Iowa,) 557; Johnson *v.* Carnley, 6 Seld. (N. Y.) 578; Corbitt *v.* Helsey, 15 Iowa, 296; Seldner *v.* Smith, 40 Md. 603; Hickey *v.* Hindale, 12 Mich. 100.

is in dispute in all cases of replevin. Ownership of chattels usually draws to it the right of possession. Proof of ownership would warrant the inference that the owner was entitled to possession; but a right of possession may be shown independent of or superior to the owner's rights. Thus, if one hire a horse for a stated time, and the owner should retake possession while the contract of hiring was in force, the hirer might sustain replevin.

§ 40. **Statutory provisions allowing the defendant to retain possession.** In many of the states statutory provisions exist, whereby the defendant is allowed a reasonable time within which to give bond to secure the plaintiff and retain the property in his own possession until the questions at issue are determined. This eminently just provision is but a return to the principles of the common law which were in force in the earliest times.[32]

§ 41. **Formerly, would lie only for a distress.** Blackstone says the action would lie only for the recovery of a wrongful distress.[33] This statement has been criticised in a number of modern cases.[34] While there is nothing in the form of the writ which necessarily confines it to cases of distress,[35] there are many excellent reasons for accepting the statement of Justice Blackstone in preference to his critics. All the early writers speak of replevin simply as the remedy for a wrongful distress,[36] and it does not seem to be referred to in any other connection until after Blackstone wrote, "A *replegari* lyeth, as Littleton here teacheth us, when goods are distrained and impounded," etc.[37] Britton,

Smith *v.* Williamson, 1 Har. & J. (Md.) 147; Childs *v.* Childs, 13 Wis. 17; Jackson *v.* Sparks, 36 Geo. 445.

[32] Lisher *v.* Pierson, 11 Wend. 58; Mitchell *v.* Hinman, 8 Wend. 667. If the defendant claimed the property, the sheriff could proceed no further. The writ *de proprietate probando* was then sued out to determine the ownership. See *ante*, § 12.

[33] 3 Black. Com. 146.

[34] Herdic *v.* Young, 55 Pa. St. 177; Daggett *v.* Robins, 2 Blackf. (Ind.) 416; Chinn *v.* Russell, 2 Blackf. (Ind.) 173, note 3; Shannon *v.* Shannon, 1 Sch. & Lef. 327; Pangburn *v.* Patridge, 7 Johns. 140; Bruen *v.* *Ogden*, 6 Halst. (N. J.) 373; Caldwell *v.* West, 1 Zab. 420; Reist *v.* Heilbrenner, 11 S. & R. (Pa.) 132. The old authorities are, that replevin lies only for goods taken tortiously. Harwood *v.* Smethurst, 29 N. J. L. 195; Cullum *v.* Bevans, 6 Har. & J. (Md.) 469.

[35] See *ante*, § 11, note.

[36] Britton, Vol. 1, 136, *et seq.;* F. N. B. 156; Gilbert on Replevin; Cowell Interp. Title Replevin.

[37] Co. Litt. 145*b*.

one of the earliest authorities, lays down the law as follows: "But to the intent that beasts and other *distresses* may not be long detained, we have granted that the sheriff, by the simple plaints and by pledges, may deliver such distresses.[38] In twenty-six sections, which Britton devotes to this subject, there is no intimation that the writ would lie for any other purpose than the recovery of a distress.[39] Gilbert treats of the action simply as the remedy for the recovery of a distress. The title of the work usually cited as Gilbert on Replevin, is, "The Law and Practice of Distress and Replevin." The second chapter of this work begins as follows: "Having, in the foregoing chapter, shown in what cases a distress or pledge may be taken, and how it is to be disposed of, the next thing in order to be treated of is the remedy given the party to controvert the legality of such caption, in order to bring back the pledge to the proprietor in case the distress were unlawfully taken, and without just cause.[40]

§ 42. **The same.** Of something like a hundred cases reported in the time of Edward I., not one is believed to exist that was for any other cause than the recovery of a distress.[41] The name replevin, from *replegari*, to "take back the pledge," renders it almost certain that the action was originally used to recover goods wrongfully seized as a pledge or security; such seizures, in the ancient law, were always called distresses. Considering these authorities, together with the fact that the ancient common law gave an appeal of felony in cases where goods were seized otherwise than as a distress, as well as for goods which the distrainor claimed to own;[42] also, that the action of detinue was for goods bailed to, and wrongfully detained by, the defendant, and that the action of trover enabled the plaintiff to recover the value of goods wrongfully converted, replevin seems, by the harmony of the ancient law, confined solely to cases of distress.[43]

[38] Britton, Nichols' Trans. Vol. 1, p. 136.

[39] This agrees with Bracton, 105*b*, and Fleta, 94*a*.

[40] See, also, Mennie *v.* Blake, 6 Ell. & Bla. (88 E. C. L.) 842. Replevin is a personal action, to try the legality of a distress. Eaton *v.* Southby, Willes, 134. See, also, Ilsley *v.* Stubbs, 5 Mass. 280; Bro. Abr. & Roll. Abr.; Cowell's Interp.; Jacobs' Law Dic., this title.

[41] Year Books, Edward I., *passim*.

[42] See *ante*, § 1, notes.

[43] The Statute 11 Geo. II., Ch. 19, providing for bond, applies only in cases of replevin of distress for rent. Knapp *v.* Colburn, 4 Wend. 618; Statute 11 Geo. II., Ch. 19.

§ 43. **The same.** Viewed in the light of these authorities, it would seem that replevin by the common law was an action to test the legality of a distress; that it would lie in no other case; and it admits of no doubt that under the statutes and decisions of the courts in modern times, the settled and prevailing doctrine is that the action lies for any wrongful taking or unlawful detention of the goods of another.[44]

§ 44. **Similarity of this action to trespass, trover and detinue.** A clearer understanding of the law of replevin will be gained by considering it as belonging to the same class of cases as trespass, trover and detinue; that while the form of proceeding is different, and the results are not the same, these actions are strictly analogous in all their governing principles.[45] "Replevin at common law is distinguished from trespass," says COLERIDGE, J., "in this, among other things, that while the latter is intended to procure compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former action is to procure the restitution of the goods themselves, and it effects this by a preliminary *ex parte* interference by the officers of the law with the possession. * * * As a general rule, it is just that a party in the peaceable possession of goods should remain undisturbed, either by parties claiming adversely, or by the officers of the law, until the right be determined and the possession shown to be unlawful; but where, either by distress or by merely a strong hand, the peaceable possession has been disturbed, an exceptional case arises, and it is thought just that even before any determination of the right the law should interfere to place the parties in the condition in which they were before the act was done, security being taken that the right shall be tried and the goods forthcoming to abide the decision."[46]

[44] In addition to cases before cited, see Pangburn *v.* Partridge, 7 Johns. 140; Hopkins *v.* Hopkins, 10 Johns. 369; Gardner *v.* Campbell, 15 Johns. 401; Cullum *v.* Bevans, 6 H. & J. (Md.) 469; Clark *v.* Skinner, 20 Johns. 467; Rogers *v.* Arnold, 12 Wend. 30; Wheeler *v.* McFarland, 10 Wend. 318; Ilsley *v.* Stubbs, 5 Mass. 283; Benje *v.* Creagh's Admr. 21 Ala. 151; Trapnall *v.* Hattier, 1 Eng. (Ark.) 21; Dudley *v.* Ross, 27 Wis. 680.

[45] Holbrook *v.* Wight, 24 Wend. 169; Marshall *v.* Davis, 1 Wend. 109; Wickliffe *v.* Sanders, 6 T. B. Mon. (Ky.) 296; Chapman *v.* Andrews, 3 Wend. 242; Heard *v.* James, 49 Miss. 236; Rogers *v.* Arnold, 12 Wend. 30; Briggs *v.* Gleason, 29 Vt. 78; Rector *v.* Chevalier, 1 Mo. 345.

[46] Mennie *v.* Blake, 6 Ellis & B. (88 E. C. L.) 842. "It bears a strong

§ 45. **Characteristics of this action compared with those of trover and trespass.** Trover, by the common law, supposed a casual loss by the plaintiff, and a finding and conversion by the

resemblance to trover." Hisler *v.* Carr, 34 Cal. 641. The rule in trespass and trover which allows a return to be shown in mitigation of damages is applicable to replevin; exceptions stated. Cary *v.* Hewitt, 26 Mich. 228. "The same principles govern in trover and replevin." Parmalee *v.* Loomis, 24 Mich. 243. "When the taking was illegal the action was by replevin; when detention only was complained of the remedy was by detinue." Dame *v.* Dame, 43 N. H. 37. "The action is like trover in principle." Sanford Manf'g Co. *v.* Wiggin, 14 N. H. 441. "Where trespass or trover lies for the conversion, replevin will lie for the goods." Sawtelle *v.* Rollins, 23 Me. 196. See, also, Shannon *v.* Shannon, 1 Sch. & Lef. 324; Clark *v.* Skinner, 20 Johns. 467; Rowell *v.* Klein, 44 Ind. 294; Vanderburgh *v.* Bassett, 4 Minn. 243. "Same proof required as in trover." Ingalls *v.* Bulkley, 13 Ill. 317. "Replevin and trover concurrent; different in judgment only." Allen *v.* Crary, 10 Wend. 349; Beebe *v.* De Baun, 3 Eng. (Ark.) 510. "Analogous to trespass." Daggett *v.* Robins, 2 Blackf. (Ind.) 416. "The measure of damages is found by processes analagous to those in actions for trespass." Phillips *v.* Harris, 3 J. J. Marsh, 123, Warner *v.* Matthews, 18 Ill. 83. "For any unlawful taking of chattels out of the possession, actual or constructive, of another, the injured party may have trespass *de bonis*, or replevin, at his election." Ely *v.* Ehle, 3 Comst. (N. Y.) 507. "Ordinarily where replevin will lie trover will lie." Pace *v.* Pierce, 49 Mo. 393. "Replevin in the *cepit lies* only where trespass might have been brought." Rich *v.* Baker, 3 Denio, 80. "The same general principles regulate trespass, trover and replevin." Whitfield *v.* Whitfield, 40 Miss. 367. "Judgment in trespass is a bar to replevin for same goods." Coffin *v.* Knott, 2 Greene, (Iowa,) 582; Karr *v.* Barstow, 24 Ill. 580. "Trespass and replevin are concurrent." Gallagher v. Bishop, 15 Wis. 276. "The action is ranked with trespass and trover." Crocker *v.* Mann, 3 Mo. 473; Walpole *v.* Smith, 4 Blackf. (Ind.) 304. Same principles apply as in trover. Gerber *v.* Monie, 56 Barb. 652. The action of detinue, or of replevin, asserts a continuing property in the plaintiff, while trover proceeds on the assumption that by a wrongful conversion the defendant has become the owner, and seeks damages which the conversion has occasioned. McGavock *v.* Chamberlain, 20 Ill. 220. Replevin is by statute made a substitute for detinue and trover. Wright *v.* Bennett, 3 Barb. 451. Consult, in this connection, Porter *v.* Miller, 7 Texas, 473; Seaver *v.* Dingley, 4 Gr. (Me.) 306; Grace *v.* Mitchell, 31 Wis. 533; Childs *v.* Childs, 13 Wis. 17; Sharp *v.* Wittenhull, 3 Hill, (N. Y.) 576; Brockway *v.* Burnap, 12 Barb. 351; Rich *v.* Baker, 3 Denio, 79; Maxham *v.* Day, 16 Gray, (Mass.) 213; Newman *v.* Jenne, 47 Me. 520; Mitchell *v.* Roberts, 50 N. H. 490; Angell *v.* Keith, 24 Vt. 373; Overfield *v.* Burlitt, 1 Mo. 749; Gray *v.* Nations, 1 Ark. 558; Jocelyn *v.* Barrett, 18 Ind. 128; Burr *v.* Daugherty, 21 Ark. 559; Heard

defendant.[47] The distinction between trover and replevin consists mainly in the fact that replevin is a possessory action, while trover is based on a right of property, and requires ownership, either general or special, to support it. The right of possession figures in the action of trover only as it forms an incident to the title.[48] Trespass lies for any unauthorized interference with the goods of another. In trover there must be a conversion.[49] In other respects the actions are very similar. Detinue was for the detention, and at common law supposed a bailment of goods by the plaintiff to the defendant, and a refusal to deliver them after proper request.[50] In trespass the defendant was liable if he took the goods even for an instant; and an offer to return, accompanied by a tender of the goods, was no defense. In trover the defendant was not liable unless there was an actual conversion. If the defendant surrender the goods on request, he is not liable in trover.

§ 46. **The same.** Replevin was formerly based upon a supposed wrongful taking of the plaintiff's goods. Authorities in recent times have held that it would not lie at common law, except in cases where there has been a wrongful taking.[51] The

v. James, 49 Miss. 246; Chinn *v.* Russell, 2 Blackf. (Ind.) 174; Bethea *v.* M'Lennon, 1 Ired. (N. C.) 523; Stockwell *v.* Phelps, 34 N. Y. Ct. Appeals, 363; Wheeler *v.* McFarland, 10 Wend. 318. Trespass, replevin and trover are concurrent remedies if an owner has the immediate right of possession. Stanley *v.* Gaylord, 1 Cush. 536. Trespass lies for any unlawful interference with, or dominion over, the goods of another —Hardy *v.* Clendening, 25 Ark. 440; Ralston *v.* Black, 15 Iowa, 47; Reynolds *v.* Shuler, 5 Cow. 325; Hurd *v.* West, 7 Cow. 753; Gibbs *v.* Chase, 10 Mass. 125; Phillips *v.* Hall, 8 Wend. 610; Coffin *v.* Field, 7 Cush. 355; Phillips *v.* Harris, 3 J. J. Marsh, (Ky.) 122—and if the trespasser take possession of goods, replevin was always a concurrent remedy. Cummings *v.* Vorce, 3 Hill, 282; Dunham *v.* Wyckoff, 3 Wend. 280; Brockway *v.* Burnap, 12 Barb, 347; Marshall *v.* Davis, 1 Wend. 110; Allen *v.* Crary, 10 Wend. 349.

[47] 3 Black. Com. 151.

[48] Burdick *v.* McVanner, 2 Denio, 171; Heyland *v.* Badger, 35 Cal. 404; Ward *v.* Macauley, 4 Term Rep. 260, 488. Compare Waterman *v.* Robinson, 5 Mass. 304. So, in trespass, the plaintiff must aver and prove title. Carlisle *v.* Weston, 1 Met. (Mass.) 26.

[49] Price *v.* Helyer, 4 Bing. 597.

[50] 3 Black. Com. 155; Selw. N. P. 657; Fitz N. B. 323; Y. B. 6 H. 7, 9; Lawson *v.* Lay, 24 Ala. 188; Schulenberg *v.* Campbell, 14 Mo. 491.

[51] Pirani *v.* Barden, Pike, (5 Ark.) 84; Wallace *v.* Brown, 17 Ark. 452; Neff *v.* Thompson, 8 Barb. 215; Marshall *v.* Davis, 1 Wend. 113;

whole theory of the action is based upon the assumption that the plaintiff has a general or special property in the goods in dispute, as well as a right to their immediate possession, and that the defendant wrongfully took or wrongfully detained them from him;[52] and upon this assumption the law steps in and restores the property to the original possessor, upon his giving bond to make good his claim to the property.[53]

§ 47. **Distinction between this action and trespass and trover.** While replevin has a strong resemblance to detinue, trespass and trover, as has been shown in the preceding sections, yet there are certain points of distinction which it is important to observe. One of the principal differences is, that in replevin the property in dispute may be delivered to the plaintiff upon the first process in the case, while in the common law action of detinue, the property is not delivered until after judgment.[54] In trespass and trover the property was never delivered to plaintiff. In each of these actions he seeks only to recover the value of his goods, and damages for the injury to or conversion of them, These distinctions, however, only apply to the effect of the remedy; not to the principles which govern in determining the question of right.

§ 48. **The same.** Replevin may frequently be sustained in cases where trespass will not lie. Thus, it is essential, to sustain trespass, that there should be some proof that the defendant has in some way interfered with the plaintiff's goods, or done some act in some way wrongfully interfering with the plaintiff's possession.[55] Simple omission or refusal to deliver goods rightfully in the defendant's possession would not be an act of trespass, but such refusal might furnish ample grounds to sustain an action of replevin for the detention, or trover for their value.[56] Again,

Woodward *v.* Railway Co., 46 N. H. 525; Smith *v.* Huntington, 3 N. H. 76; Wheelock *v.* Cozzens, 6 How. (Miss.) 280; Miller *v.* Sleeper, 4 Cush. 370; Ramsdell *v.* Buswell, 54 Me. 548; Chinn *v.* Russell, 2 Blackf. 176, note 3; Vaiden *v.* Bell, 3 Randolph, 448; Watson *v.* Watson, 9 Conn. 140; Drummond *v.* Hopper, 4 Harr. (Del.) 327.

[52] Hunt *v.* Chambers, 1 Zab. (21 N. J.) 624.

[53] Mennie *v.* Blake, 6 Ell. & B. (88 E. C. L.) 850.

[54] Cox *v.* Morrow, 14 Ark. 608; Badger *v.* Phinney, 15 Mass 362; Robinson *v.* Richards, 45 Ala. 358; 3 Black. Com. 152.

[55] Grace *v.* Mitchell, 31 Wis. 536.

[56] See Isaac *v.* Clark, 2 Bulst. 310. Sometimes cited as Thimblethorp's Case.

trespass will not lie against one who comes rightfully into the possession of the goods of another, even though it should turn out that the party who delivered them to him was a wrong-doer.[57] So, when a bailee of goods sells and delivers them without authority, such sale and delivery conveys no title to the purchaser; and though replevin would lie at the suit of the rightful owner, trespass would not lie. If, however no delivery of the goods accompany such sale, and the purchaser takes possession by his own wrong, trespass or replevin for the wrongful taking would lie, at the election of the injured party.[58]

§ 49. **The same.** If an infant sell his goods and deliver them with his own hand, though the act be voidable and replevin lies, yet he could not recover in trespass. If, however, the vendee should take them by force, trespass would lie, notwithstanding the sale.[59] In a case where the action was in the *cepit* for barrels of flour sold by a carrier without authority, and the defendant pleaded *non cepit*, with notice that he should claim: 1st, that the property was his; 2d, that it was the property of the carriers, and 3d, that the carrier had the right of possession. On the trial the defendant proved that he purchased the flour in good faith, for a fair price, from H., the captain of a canal boat, but it was held that under the plea of *non cepit* the title was not put in issue; that proof of purchase from H. was immaterial unless defendant showed that H. was authorized to sell; that there was no proof of delivery, but only of sale by the carrier, the flour being found in the defendant's possession, the action for taking was properly brought, and the plaintiff recovered.[60] Again, in replevin the plaintiff is bound to take the goods he sues for when delivered to him by the officer, even though they be in a damaged condition.[61] But in trespass the plaintiff is not bound to take the goods, but may insist on judgment for value.[62]

§ 50. **The same.** Another important distinction is, that in

[57] Barrett *v.* Warren, 3 Hill, (N. Y.) 348; Wilson *v.* Barker, 4 Barn. & Adol. (24 E. C. L.) 614.

[58] Marshall *v.* Davis, 1 Wend. 109; Nash *v.* Mosher, 19 Wend. 431; Barrett *v.* Warren, 3 Hill, 348.

[59] Fonda *v.* Van Horn, 15 Wend. 613; Roof *v.* Stafford, 7 Cow. (N. Y.) 179, and note, citing many cases on the law of infancy.

[60] Ely *v.* Ehle, 3 Comst. (N. Y.) 506.

[61] Allen *v.* Fox, 51 N. Y. 564.

[62] Robinson *v.* Mansfield, 13 Pick. 144.

order to sustain replevin, the defendant must have the actual or constructive possession of the goods at the time suit is commenced; in other words, he must be in a condition to deliver the property when called on by the officer, in obedience to the command of the writ.[63] Thus, when a creditor in an execution directs the sheriff to levy on certain property, and the sheriff does so and takes possession of it, the sheriff and the creditor in execution may both be liable in trespass; but the sheriff having possession of the property would alone be liable in replevin.[64]

§ 51. **Where one takes forcible possession of his own property, he may be liable in trespass, but not in replevin.** Where a person takes forcible possession of his own goods, he may be liable, in certain cases, as a trespasser, but not in replevin; having the right of possession at the time of the seizure, his trespass does not debar him from the right of possession, nor vest the other party with the right to retake the goods.[65]

[63] Lathrop *v.* Cook, 2 Shep. (14 Me.) 415; Richardson *v.* Reed, 4 Grey, 443; Hickey *v.* Hinsdale, 12 Mich. 100; Ramsdell *v.* Buswell, 54 Me. 546. To this rule some exceptions have been stated, as where the defendant had possession of the goods at one time, but had purposely put them out of his hands to defeat the plaintiff. Ellis *v.* Lersner, 48 Barb. 539; Brockway *v.* Burnap, 16 Barb. 309. See *post*, § 145. While in trespass the defendant may never have had possession. Trover may be sustained where the defendant once possessed the goods, but has disposed of, or has destroyed or made way with them before suit brought. Richardson *v.* Reed, 4 Gray, 442; Taylor *v.* Trask, 7 Cow. 249; Woolbridge *v.* Conner, 49 Me. 353; McNeeley *v.* Hunton, 30 Mo. 332; Wickliffe *v.* Sanders, 6 T. B. Mon. (Ky.) 296; Kreger *v.* Osborn, 7 Blackf. (Ind.) 74.

[64] Grace *v.* Mitchell, 31 Wis. 533; Coply *v.* Rose, 2 Comst. 115; Mitchell *v.* Roberts, 50. N. H. 486. *Contra*, see Allen *v.* Crary, 10 Wend. 349. The point was made in a case in New York that the plaintiff in execution who had done nothing except to direct the sheriff to levy, had never had possession of the goods, and therefore could not be a defendant in replevin, but the court followed Allen *v.* Crary, 10 Wend. 349, and held that this was a sufficient proof of taking to enable the owner to bring replevin. Knapp *v.* Smith, 27 N. Y. 280.

[65] Taylor *v.* Welbey, 36 Wis. 42; Carroll *v.* Pathkiller, 3 Porter (Ala.) 279; Neely *v.* Lyon, (18 Tenn.) 10 Yerg. 473; Bogard *v.* Jones, 9 Humph. (Tenn.) 739; Hodgeden *v.* Hubbard, 18 Vt. 504; Owen *v.* Boyle, 22 Me. 67; Hurd *v.* West, 7 Cow. 753; Spencer *v.* McGowen, 13 Wend. 256; Coverlee *v.* Warner, 19 Ohio, 29; Marsh *v.* White, 3 Barb. 518; Collomb *v.* Taylor, 9 Humph. (Tenn.) 689.

§ 52. **Actual detention of the goods necessary to sustain replevin.** While proof of a wrongful or forcible taking from the plaintiff's possession, may be sufficient to sustain trespass, it would not always be sufficient to sustain replevin, without proof of an actual detention of the goods by the defendant at the time the suit was brought. For instance, if the defendant should show that before the suit was brought he returned the goods to the plaintiff, proof of the fact that he had taken them by force would not justify a finding against him in replevin.[66] So, a levy by an officer not authorized by law is a trespass, and an action may be sustained without proof of a removal of the goods.[67] But replevin would not lie unless the officer should remove the property, or should have the possession of the goods at the time the suit was brought.[68]

§ 53. **Replevin in cepit, detinet and detinuet.** The action is frequently spoken of as replevin in the *cepit* and in the *detinet*. There was formerly a distinction between these, amounting to more than a form of pleading. The old style of declaration, in case the goods were not delivered on the writ, was * * * "Wherefore, he took, and until now unjustly detains," etc. When the goods were delivered on the writ the form was, "Wherefore, he took and unjustly detained," etc.[69] Replevin the *cepit* is simply for the wrongful taking, from *capio* in Latin, "to take;" and replevin in the *detinet* is for the detention of goods only, detinet being from *de* and *teneo*, "to hold." This distinction, though not of as much importance as formerly, should still be kept in mind.[70] There is another technical distinction between the action in the *detinet* and in the *detinuet*, the former signifying "he detains," and the latter "he detained." The latter form in the declaration imports that the goods have been delivered to the plaintiff upon his writ; he, therefore, can only recover damages for the taking and detention up to the time of delivery, and not the value of the goods, which by legal intendment are in his possession. When

[66] Paul *v.* Luttrell, 1 Colorado, 318. See *post*, § 134, and following.

[67] Allen *v.* Crary, 10 Wend. 349; Wheeler *v.* McFarland, 10 Wend. 322; Neff *v.* Thompson, 8 Barb. 215.

[68] English *v.* Dalbrow, 1 Miles, (Pa.) 160.

[69] Harwood *v.* Smethurst, 5 Dutch. (29 N. J.) 203.

[70] Pierce *v.* Van Dyke, 6 Hill, 613; Oleson *v.* Merrill, 20 Wis. 462; Cummings *v.* Vorce, 3 Hill, 282.

he charges that the defendant *detains*, that is in the detinet, and he may have the value as damages.[71]

§ 54. **Wrongful taking.** Proof of any unlawful taking or control of the goods of another is sufficient to sustain an allegation of taking, without proof of an actual forcible dispossession of the plaintiff.[72] Wrongful taking, as used in this connection, does not imply any forcible or malicious act; it simply means that the taking is against right.[73] Cases frequently arise, however, where the defendant has become possessed of the plaintiff's goods in a lawful manner, and refuses to deliver them on request. In such cases the action is for the detention, and is called replevin in the *detinet*. With this form of action trover is always concurrent; or the plaintiff may, at his election, employ it where the goods were taken by force.[74] As every unlawful taking is *prima facie* an unlawful detention, proof of a wrongful taking is permitted so far as to excuse the plaintiff from the necessity of proof of a demand, even where the form of action is for detaining. The right to prove a wrongful taking in cases where the charge is for detention only will not, however, be permitted to affect the question of damages.[75]

§ 55. **The scope of the investigation in this action.** The parties to this action are not confined to an investigation of the naked question of title or right of possession, but may go into all the incidents that go to make up these, as being necessary to arrive at a correct decision. Thus, where replevin was brought to recover property seized under a chattel mortgage, the plaintiff

[71] Petre *v.* Duke, Lutw. 360; Potter *v.* North, 1 Saund. 347*b*, note 2; Truitt *v.* Revill, 4 Harr. (Del.) 71; Fox *v.* Prickett, 5 Vroom, (N. J.) 13. See Boswell *v.* Green, 25 N. J. L. 390.

[72] Haythorn *v.* Rushforth, 19 N. J. L. 160; Cox *v.* Morrow, 14 Ark. 608; Stewart *v.* Wells, 6 Barb. 80; Neff *v.* Thompson, 8 Barb. 215; Wheeler *v.* McFarland, 10 Wend. 322; Barrett *v.* Warren, 3 Hill (N. Y.) 349; Murphy *v.* Tyndall, Hempst. C. C. 10.

[73] Moore *v.* Moore, 4 Mo. 421.

[74] Ronge *v.* Dawson, 9 Wis. 246; Cummings *v.* Vorce, 3 Hill, (N. Y.) 282.

[75] Eldred *v.* The Oconto Co., 33 Wis. 133; Newell *v.* Newell, 31 Miss. 490; Smith *v.* McLean, 24 Iowa, 322. Replevin in the *detinet* was seldom used until it was made applicable by statute to a large majority of cases—Yates *v.* Fassett, 5 Denio, 26; Potter *v.* North, 1 Saund. 347*b*—and it is now the most common form of the action. Daggett *v.* Robins, 2 Blackf. 416.

claimed that the note described in the mortgage under which the seizure was made was given for machinery that was warranted; that there was a breach of the warranty, and consequently a failure of consideration to the amount of that note; and the matter was held proper.[76] Where the action was for a distress for rent the defendant was permitted to show that he purchased the premises with the consent of his landlord;[77] and where the action was for wheat stored with the defendant, and he justified on the ground that he was a warehouseman, the plaintiff replied that some forty bushels were lost or destroyed, and that this equaled in value the storage.[78]

§ 56. **The same.** Where the holder of a prior mortgage replevied from the sheriff, the latter was permitted to set up as a defense under the statute that the mortgage was to secure a loan on usurious interest.[79] In another case, where the defendant claimed that the property belonged to his minor son, and that he, as natural guardian, was bound to keep the custody of it, the plaintiff offered proof that he bought of the defendant and his son; thereupon the defendant introduced evidence to show that the sale was fraudulent.[80]

§ 57. **The same.** When the action is for the recovery of goods wrongfully attached by an officer on process against another, the plaintiff must recover on the strength of his own title, which is subject to encounter whatever would tend to show that the property was liable to the levy.[81]

NOTE II. *Nature of the action, in general.*—The primary object of the action under the code, is to recover the goods in specie; the gist of the action is wrongful detention, Dow *v.* Dempsey, 21 Wash. 86, 57 Pac. 355. The owner may sue either in replevin or trover for the value, *Id.* Dawson *v.* Baum, 3 Wash. T. 464, 19 Pac. 46, Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260. The judgment in one form of action bars recovery in the other, Dow *v.* Dempsey, *supra.* It is a statutory remedy to enable the owner to recover personal property wongfully

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[76] Hutt *v.* Bruchman, 55 Ill. 441; Bruce *v.* Westervelt, 2 E. D. Smith, 440.

[77] Hill *v.* Miller, 5 S. & R. (Pa.) 355.

[78] Babb *v.* Talcott, 47 Mo. 343; Gillham *v.* Kerone, 45 Mo. 490.

[79] Dix *v.* Van Wyck, 2 Hill, (N. Y.) 522.

[80] Bliss *v.* Badger, 36 Vt. 338.

[81] Hotchkiss *v.* Ashley, 44 Vt. 198.

detained with an alternative remedy, if possession cannot be had, Riciotto *v.* Clement, 94 Calif. 105, 29 Pac. 414. The action lies for either wrongful taking or wrongful detention, Wise *v.* Jefferis, 2 C. C. A. 432, 51 Fed. 641. It is merely a possessory action, and where the record fails to show what claim was asserted by the defendant, a judgment of *retorno* is not conclusive upon the title, Pearl *v.* Garlock, 61 Mich. 419, 28 N. W. 155. Unless the title is distinctly put in issue the judgment determines only the right of possession, Consolidated Co. *v.* Bronson, 2 Ind. Ap. 1, 28 N. E. 155. The action originates in wrong and can be maintained only by proof of the wrong; the right of possession is always in issue, the title may or may not be, Dodd *v.* Williams, etc. Co., 27 Wash. 89, 67 Pac. 352. It is never founded upon contract but always upon tort, Wheeler Co. *v.* Jacobs, 2 Misc. 236, 21 N. Y. Sup. 1006. The action has lost its common law character and depends for its efficacy almost entirely upon statute, Corbett *v.* Pond, 10 Ap. D. C. 17. The single question is whether at the date of the writ, the plaintiff was entitled to possession, Dreyfus *v.* Cage, 62 Miss. 733. The action cannot be used to settle partnership accounts, nor can an insolvent by replevin investigate the conduct of his assignee in insolvency, Rodman *v.* Nathan, 45 Mich. 607, 8 N. W. 562; nor ascertain the balance after administration of the trust, Id. Replevin under the code lies wherever trespass *de bonis* could have been maintained at common law, Rowell *v.* Klein, 44 Ind. 290. Both parties are actors, Corbett *v.* Pond, 10 Ap. D. C. 17. If the plaintiff discontinue the defendant should nevertheless be permitted to prove his right and have judgment for the return of the goods and his damages, Strauss *v.* Smith, 8 N. M. 391, 45 Pac. 930. The statute is not controlled by differing provisions relating to actions for money demands, Kelly *v.* Kennemore, 47 S. C. 256, 25 S. E. 134. The cause may be instituted and proceed without delivery of the goods; the jurisdiction of the court does not depend upon the regularity or the sufficiency of the affidavit or bond, Hudelson *v.* First National Bank, 56 Neb. 247, 76 N. W. 570. And though an order for arrest made at the institution of the action, is vacated, the action may still proceed, Eddings *v.* Boner, 1 Ind. T. 173, 38 S. W. 1110. Where the goods are not seized on the writ, the action is governed by the same principles as the action of trover, McArthur *v.* Oliver, 60 Mich. 605, 27 N. W. 689. The office of the writ is to deal with the title, Welborn *v.* Shirly, 65 Ga. 695. The proceeding known under the code as claim and delivery is substantially the common law action of replevin; it lies where there is either wrongful taking or a wrongful detention, Moser *v.* Jenkins, 5 Ore. 447. It is simply a possessory action, the title to the goods is not necessarily involved, Wilhelm *v.* Scott, 14 Ind. Ap. 275, 40 N. E. 537.

Malicious Replevin.—An action lies for the malicious prosecution of an action of replevin without any probable cause and with intent to extort money from the defendant therein. Harris *v.* Thomas, Mich. 103 N. W. 863.

In the Different States.—The writ is demandable as of right on complaint of the party injured, Watson *v.* Watson, 9 Conn. 141.

In Alabama, the statutory action combines the qualities of both detinue and replevin; but one form of action is prescribed, whether the taking or the detention merely, be unlawful. To this procedure is adapted the machinery of the replevin and the seizure of the goods and the custody under bond to abide the judgment, Rich *v.* Lowenthal, 99 Ala. 488, 13 So. 220. No writ issues but an endorsement is made upon the summons requiring the sheriff to take the goods, *Id.*

In Arkansas, the action may proceed, though no writ of replevin is issued, Eaton *v.* Langley, 65 Ark. 448, 47 S. W. 123.

In California, the distinction between the action of claim and delivery under the code, and an action for the wrongful conversion of goods, is said to be as broad as that between detinue and trover at common law. One lies for the recovery of goods with damages for the detention, and the other for damages for the wrongful conversion of goods, Kelly *v.* McKibben, 54 Calif. 192.

In Connecticut, the action formerly lay only for a wrongful detention; replevin in the *cepit* was not allowed, Watson *v.* Watson, 9 Conn. 141 (1832.) The history of the action is set forth in Bellknap Bank *v.* Robinson, 66 Conn. 542, 34 Atl. 495. The action is governed solely by the statute. The owner may recover his goods with damages for the detention; and if a portion be not found, damages for the conversion of these, *Id.* The action lies, although the conversion occurred in another state and the goods not found never were in the state, *Id.*

In Georgia, the possessory warrant claims and restores possession to one from whom the possession was fraudulently obtained; this writ does not lie where the title is obtained by fraud and the possession accompanies it by the owner's consent, Amos *v.* Dougherty, 65 Ga. 612. The plaintiff must have had possession; but the prior possession of an agent is an actual and not a constructive possession, and satisfies the statute, Hillyer *v.* Brogden, 67 Ga. 24. The plaintiff must give bond in double the value, with surety, to have the goods forthcoming to answer any suit brought by defendant in relation to any claim or lien upon them, within four years thereafter, *Id.* The question in the trial of possessory warrant is in whom was the last lawfully acquired quiet and peaceable possession, Ivey *v.* Hammock, 68 Ga. 428. There is no question as to the title or the right of possession, King *v.* Ford, 70 Ga. 628. Section 3390 of the Code of Georgia was intended to combine, so far as possible, the common law actions of detinue and trover. The plaintiff may elect upon the trial, either to take the specific article, as in detinue, or its value and hire, as in trover. The plaintiff may elect in advance to have restitution of the specific article, and this is done when he sues out a bail process in aid of his action by which the sheriff is commanded to exact of the defendant a bond with surety in double the value, as sworn by plaintiff, conditioned to answer the judgment, etc., and pay the eventual condemnation money, or, on his

default to pay for the property and deliver it to the plaintiff on his giving like bond; or, if the property is not found, to arrest and commit the defendant until the goods be produced, or he shall enter into bond with surety for the eventual condemnation money, McElhannon *v.* Farmers Alliance Co., 95 Ga. 670, 22 S. E. 686.

In Iowa, the action may proceed, although the plaintiff fails to give bond; and prevailing, the plaintiff may take judgment for the goods or the value, at his election. In either case he recovers damages for the detention, Cook v. Hamilton, 67 Ia. 394, 25 N. W. 676.

In Indiana, the statutory action covers the entire ground of detinue and replevin at the common law, Wilson *v.* Rybolt, 17 Ind. 391.

In Kansas, if the goods are not replevied the action may still be prosecuted as one for damages, Lamont *v.* Williams, 43 Kans. 558, 23 Pac. 592, Goodwin *v.* Sutheimer, 8 Kans. Ap. 212, 55 Pac. 486.

In Maryland, the action lies for any unlawful detention. It extends to all cases in which the plaintiff seeks to try the title to personal property, and recover its possession, McKinzie *v.* Baltimore Co. 28 Md. 161; La Motte *v.* Wismer, 51 Md. 543.

In Michigan, the action is founded upon an unlawful detention whether there has been an unlawful taking or not, Sexton *v.* McDowd, 38 Mich. 148.

In Minnesota, it is optional with the plaintiff to claim immediate delivery, or he may defer his claim and demand possession at any time before answer; or, he may waive it and obtain it only after judgment. The election to waive the delivery does not convert the action into trover, Benjamin v. Smith, 43 Minn. 146, 44 N. W. 1083.

In Nebraska, where the plaintiff fails to give bond, the goods remain with the defendant and the action proceeds as for damages only and it is said, becomes in effect an action for trover, Philleo *v.* McDonald, 27 Neb. 142, 42 N. W. 904. The distinction between replevin in the *cepit* and in the *detinet* does not exist, Hale *v.* Wigton, 20 Neb. 83, 29 N. W. 177.

In Pennsylvania, the action so far as regards goods distrained for rent, is only the common law form of the action modified by statute and usage, Cassidy v. Elias, 90 Pa. St. 434. The goods are a mere pledge and the question tried is not the right of property but of possession merely, and during the trial the possession is in the plaintiff, *Id.* The action lies for the goods of one person in the possession of another, whether the claimant ever had possession or not and whether his property in the goods be absolute or qualified, provided he has the right of possession, Miller *v.* Warden, 111 Pa. St. 300.

In Rhode Island, the action depends upon the actual seizure of the goods by the officer; if he returns not found there is nothing to try, there being no provision of the statute allowing judgment for the value, Warren *v.* Lelter, 24 R. I. 36, 52 Atl. 76.

In South Dakota, the writ of replevin is merely ancillary, and the plaintiff may resort to it or not, in his pleasure; he is not required

to claim immediate delivery, Simpson Co. *v.* Marshal, 5 S. Dak. 528, 59 N. W. 728.

Statutory Prohibition or Interference with the Action.—A statute providing that the sheriff, defendant in an action of replevin, shall be entitled to substitute as defendant therein, the plaintiff in the process under which he seized the goods, and himself be discharged, is unconstitutional; the aggrieved party is entitled to look to the one who did the wrong and cannot be required to look to another, Sunberg v. Babcock, 61 Ia. 601, 16 N. W. 716. A statute prohibiting an action against a warehouseman, by an owner for his goods in the warehouseman's hands, is an unconstitutional interference with the right of property, Milligan *v.* Brooklyn Co., 34 Misc. 55, 68 N. Y. Sup. 744.

The statute of Indiana provides that whenever any person other than defendant in an attachment, shall claim the attached property, the right of property may be tried as in case of property taken on execution and that "the claimant having notice of the attachment shall be bound to prosecute his claim as in such cases, or be barred of his right." Held, that this statute must be construed to refer to a notice required by other sections to be given in writing by the officer making the levy, stating by what process the goods are taken and requiring all persons to assert their right within twenty days, requiring persons so notified to institute proceedings to try the right of property, and that the claimant having notice otherwise of the attachment, is not under any duty to institute such proceedings, but may bring his action of replevin, Patterson *v.* Snow, 24 Ind. Ap. 572, 57 N. E. 286.

A statute providing for the enforcement of an agricultural lien, declared that all persons having knowledge of the proceeding shall "intervene in such proceeding," and that if they fail to do so they shall be barred by such proceeding, takes away the right of replevin. Dogan *v.* Bloodworth, 56 Miss. 419, and see McCarthy *v.* Ockerman, 154 N. Y. 565, 49 N. E. 153.

In Iowa a statute provided that the claimant of any property for the seizure or sale of which an indemnifying bond has been taken and returned, shall be barred of his action against the officer if the surety in the bond was responsible when the bond was accepted. It was held unconstitutional as compelling the owner of property to surrender it without his consent for the private benefit of another. Foule *v.* Mann, 53 Ia. 42, S. C., *sub nom.* Towle *v.* Mann, 3 N. W. 814; Craig *v.* Fowler, 59 Ia. 200, 13 N. W. 116.

Of the Title Generally. Plaintiff must recover on the strength of his own title. Easter *v.* Fleming, 76 Ind. 116; Gallick *v.* Bordeaux, Mont. 78 Pac. 583; Hall *v.* So. Pacific Co., Ariz. 57 Pac. 617; Bardwell *v.* Stubbert, 17 Neb. 485, 23 N. W. 344. Failure of the defendant's justification does not warrant a verdict for the plaintiff, not shown to be entitled to the goods. Gallick *v.* Bordeaux, *supra.* Plaintiff not showing actual possession must prove a legal title, Russell *v.* Walk ".

73 Ala. 315. Under a plea of property in a stranger with a traverse of the property of the plaintiff the only issuable fact is the right of property in plaintiff; it is sufficient if he has a special interest entitling him to possession, Blakely Co. *v.* Pease, 95 Ills. Ap. 341. No writing is required to pass the title to chattels. Beimuller *v.* Schneider, 62 Md. 548.

That plaintiff's title is liable to forfeiture does not impair his right of action; until judgment for forfeiture, the goods are his. Tracy *v.* Corse, 58 N. Y. 144. But a mere lien is not sufficient. Perry Co. Bank *v.* Rankin, 73 Ark. 589, 84 S. W. 725. Plaintiff became surety for T. in a forthcoming bond; the goods attached were delivered to T. The effect of this was to discharge the attachment. T. agreed with plaintiff that, in consideration of plaintiff's becoming his surety, he would, in case judgment should be rendered against him, surrender the goods to discharge the judgment; and in case of his default the plaintiff might seize them so as to return them. Held that this agreement conferred upon plaintiff no title which he could assert as against T.'s vendee, nor did it constitute plaintiff receiptor of the goods. Schultz v. Greenwood, R. I. 60 Atl. 1065. In Alabama by statute the landowner has the legal title to the crop, and even though by agreement, the crop is to be equally divided between the landowner and the cropper, one claiming under the latter has no right at law against one claiming under the landowner. Farrow *v.* Wooley, 138 Ala. 267, 36 So. 384.

Plaintiff only required to show Title as against Defendant.—Plaintiff is not required to show title as against all the world; it is enough if he is entitled as against the defendant. Lewis *v.* Birdsey, 19 Ore. 164, 26 Pac. 623. One entitled to the goods may in general maintain replevin against any one in possession who has no right to detain them as against him. Read *v.* Brayton, 143 N. Y. 342, 38 N. E. 261. One with whom negotiable bonds have been deposited as collateral security for a loan by plaintiff, cannot refuse to surrender them on suggestion that the depositor had previously pledged them to another. Gibson v. Lenhart, 111 Pa. St. 624, 5 Atl. 52.

Prior Possession Unnecessary. It is not required, to maintain replevin, that plaintiff should ever have had possession of the goods. Miller *v.* Warden, 111 Pa. St. 300, 2 Atl. 90; Garcia *v.* Gunn, 119 Calif. 315, 51 Pac. 684; Ferguson *v.* Lautersteln, 160 Pa. St. 427, 28 Atl. 852; Lazard *v.* Wheeler, 22 Calif. 139. Plaintiff was lessee under the Mexican Republic of an island where many wild goats were running; defendants were in possession of four thousand skins taken from goats killed upon this island; the lease provided that plaintiff might utilize the wild goats, and conferred the right of killing, under control of the lessor; it was held that plaintiff was prima facie entitled to recover the skins. Garcia *v.* Gunn, *supra*.

Prior Possession Sufficient Title. A mere naked possession without any general or special property is not sufficient to maintain replevin. Poe *v.* Stockton, 39 Mo. Ap. 550. But it seems that the mere possession is in itself a property which the possessor must be entitled to

defend, *e. g.*, a mere bailee whose possession is wrongfully interfered with. Cox *v.* Fay, 54 Vt. 446. Under a statute allowing replevin whereever goods are wrongfully taken or detained, nothing but the present right of possession is necessary. Waterman *v.* Matteson, 4 R. I. 539. One in possession may recover goods from those who, without a better right, disturb his possession. Odd Fellows Association *v.* McAllister, 153 Mass. 292, 26 N. E. 862; Meyer *v.* First National Bank, 63 Neb. 679, 88 N. W. 867; Lamotte *v.* Wisner, 51 Md. 543; Gafford *v.* Stearns, 51 Ala. 434; Steere *v.* Vanderberg, 90 Mich. 187, 51 N. W. 205; Wambold *v.* Vick, 50 Wis. 456, 7 N. W. 438; Krewson *v.* Purdom, 13 Ore. 568, 11 Pac. 281; Pallen *v.* Bogy, 78 Mo. Ap. 88; Van Baalen *v.* Dean, 27 Mich. 104; Knox *v.* Hellums, 38 Ark. 413; Downey *v.* Arnold, 97 Ills. Ap. 91. Even though the plaintiff in fact has no title, Moorman *v.* Quick, 20 Ind. 67; Dederick *v.* Brandt, 16 Ind. Ap. 264, 44 N. E. 1010; Barkley *v.* Lieter, 49 Neb. 123, 68 N. W. 381.

And even though the possession was obtained by wrong, it is sufficient as against one who has no title nor right of possession. Anderson *v.* Gouldburg, 51 Minn. 294, 53 N. W. 636. It is only necessary that the possession should have been lawful as against the one interfering with it, *Id.* Actual, peaceable possession obtained in good faith, even from one without right, *e. g.*, a thief, suffices as against one who shows no right, Bartleson *v.* Mason, 53 Ills. Ap. 644. In detinue for a mule defendant showed title by purchase from one of the distributees of the estate of a deceased former owner; under this claim of right, and never having had any possession, he forcibly took the animal from the plaintiff who had taken it up as an estray, and been in peaceable possession for several months; it was held plaintiff was entitled to recover, Huddleston *v.* Huey, 73 Ala. 215. Actual possession, accompanied by an equitable interest, is sufficient, Appleby *v.* Hollands, 8 Ap. Div. 375, 40 N. Y. Sup. 808; so, possession under claim of title, as against an officer who levies execution against a third person, *Id.*; or possession with any special property, Gafford *v.* Stearns, *supra*. Actual possession is evidence of title, Springfield Co. *v.* Shackelford, 56 Mo. Ap. 642; Barkley *v.* Leiter, *supra*. Possession raises a presumption of title, Stevens *v.* Gordon, 87 Me. 564, 33 Atl. 27; but only as against one showing no better title, Stone *v.* McNealy, 59 Mo. Ap. 396. Possession, the contrary not appearing, is presumed to be rightful, Stockwell *v.* Robinson, 9 Houst. 314, 32 Atl. 528. One showing no right cannot object to defects in title of the plaintiff, Conely *v.* Dudley, 111 Mich. 122, 69 N. W. 151. The fact that some other person has an interest in the goods is not material if the plaintiff has the right of possession, Lillie *v.* Shaw, 22 Wash. 234, 60 Pac. 406. The title and right of possession may be separated; and the mere right of possession may prevail against the title, Pacey *v.* Powell, 97 Ind. 371. The possession of land is sufficient evidence of title to warrant the one in possession in recovering the fruits and products thereof, Russell *v.* Willette, 80 Hun, 497, 30 N. Y. Sup. 490. The habitual enjoyment and cultivation of land is sufficient evidence of title to sustain an action for the

product of the land, even although included within the limits of a public highway, Stevens *v.* Gordon, *supra*. One whose sole right is derived under a void execution levy, not followed by actual possession of the goods, has neither possession nor right of possession. Upham *v.* Caldwell, 100 Mich. 264, 58 N. W. 1001. Plaintiff purchased a sleigh under condition that the vendor should retain possession for six months, but plaintiff to have the use of it whenever he desired during that time. Plaintiff was held entitled to maintain replevin as against an officer who seized it under process against a stranger, Tandler *v.* Saunders, 56 Mich. 142, 22 N. W. 271.

What Facts Constitute Possession.—Animals are presumptively in possession of the owner of the homestead where those reside who keep and use them, Burt *v.* Burt, 41 Mich. 82, 1 N. W. 936. One in possession of a house is presumed to be in possession of the goods in the house, Stockwell *v.* Robinson, *supra*. Delivery of the key of an office and the combination of the safe therein, confers possession of the office furniture, Gamble *v.* Wilson, 33 Neb. 270, 50 N. W. 3. Residence of the son with the father does not confer upon the father possession of properties belonging to the son, and which he controls; the father cannot replevy, if the goods are unlawfully taken, Woolston *v.* Smead, 42 Mich. 51, 3 N. W. 251. An infant daughter may replevy a piano which is her property and in her possession though in the father's house, with whom she is residing, Wambold *v.* Vick, 50 Wis. 456, 7 N. W. 438. If the infant alone uses the instrument, the fact that it is kept in the parent's house where she resides, that it was a gift from the parent, that she pays no taxes upon it, nor the expenses of removal when the household removes, does not impeach her possession. Kellogg *v.* Adams, 51 Wis. 138, 8 N. E. 115. The husband made a gift to his wife of a driving horse, calling the stableman who had charge of it and informed him of the gift; after that the wife alone drove the animal; the husband, who had previously driven it ceased to do so. It was recognized as the wife's property and no one used it without her consent. Held, that though the animal for nearly four years was kept in the husband's stable, and fed, shod and trained at his expense, there was sufficient delivery, and that the wife might recover the animal in replevin. Armitage *v.* Mace, 96 N. Y. 538. Plucking and delivering a handful of grass partially grown, is not a good symbolical delivery of a whole field, accompanying a sale of the whole with an agreement of the vendor to cut it at his own expense. The vendor being a mere tenant, and the landlord having put him out before the grass matured, and cut and cured the grass at his own expense, was held to have a better right, Lamson *v.* Patch, 5 Allen, 586. A quantity of timber in rafts moored at the premises of a corporation was sold by the agent of the corporation, to defendant, who put one Ames in possession of it, for defendant. The same agent was employed by the seller and purchaser to measure the raft. It was held there was such a delivery as the case admitted of, and the sale consummated, though no measurement was yet effected, Adams Co. *v.* Senter, 26 Mich. 73. The sheriff

after levying upon the goods and taking a delivery bond still remains, in law, in possession, Pugh *v.* Calloway, 10 O. St. 488. The entry upon lands and commencing to harvest the hay growing thereon, and partially harvesting and delivering the hay growing on the north half of the field, pursuant to contract with the landowner, by which the party is to have the hay growing on the south half for his services, does not confer possession either of the lands or the hay; and if, the party so employed having temporarily quitted the work by consent of the landowner, the landowner employs others to cut and cure the grass growing on the south half of the field, the one first employed cannot maintain replevin, Bryant *v.* Dyer, 96 Mo. Ap. 455, 70 S. W. 516.

Lumber at the yard of the manufacturer's mill, bought, paid for, separated, measured and marked with the buyer's name, is the property of the buyer, even as against creditors of the manufacturer, Russe *v.* Hendricks, 75 Mo. Ap. 386.

Brick unburned in the kiln. The seller putting his hand upon the southerly end of a certain ten arches, which were the subject of the transaction, declared, "These are your brick." It was understood that the vendor was to complete them, and that they were to be left upon the yard until the following spring. This was held sufficient delivery, and the purchaser was permitted to recover them as against the subsequent mortgagee of the vendor, Whittle *v.* Phelps, 181 Mass. 317, 63 N. E. 907.

By the terms of the lease tenant was required to harvest and thresh the crop and deliver to the landlord a per centage thereof. When the wheat was all harvested the landlord requested that it might be stacked in his barnyard, and this was done. Held, that the possession still remained in the tenant, and that if the landlord afterward attempted to assert an exclusive right and refused to permit the tenant to thresh it, the latter might maintain replevin, Cunningham *v.* Baker, 84 Ind. 597.

Plaintiff must be entitled to Immediate Possession.—Plaintiff must have the right of possession at the institution of his suit, Easter *v.* Fleming, 78 Ind. 116; Carpenter *v.* Glass, 67 Ark. 135, 53 S. W. 678. But in Guy *v.* Doak, 47 Kans. 366, 27 Pac. 968, it was held that one who had instituted replevin without any right, but had acquired title pending the suit might proceed. Where plaintiff is entitled to possession on payment only of the purchase price or charges or disbursements made by the defendant, he cannot recover without showing payment or tender of these sums, Robison *v.* Hardy, 22 Ills. Ap. 512; and he must show a legal title; a mere equity will not suffice, Haas *v.* Altieri, 2 Misc. 252, 21 N. Y. Sup. 950. Plaintiff must show either actual possession or a right to immediate possession, Massachusetts Co. *v.* Hayes, 16 Ills. Ap. 233.

A tenant who by his lease is entitled to the increase of livestock, but is required to maintain and care for it until the end of the lease, does not by a sale entitle the purchaser to possession, Spooner *v.* Ross, 24 Mo. Ap. 599.

Goods were sent to a store for comparison with other goods, the merchant to purchase if they corresponded. He was to have possession until demanded. Held, that a levy having been made before demand the owner could not replevy, Klee *v.* Grant, 2 Misc. 412, 21 N. Y. Sup. 1010.

In Wise *v.* Grant, 140 N. Y. 593, 35 N. E. 1078, it was held that where the statute gives the action of replevin only to one who at the time of the levy under an attachment, has the "right to reduce the goods into his possession," one who had been induced to dispose of his goods, by fraudulent representations of the purchaser, but had done nothing to disaffirm the sale until after the attachment levy, could not maintain replevin; this, upon the ground that until the sale is rescinded the buyer has both the title and possession, and therefore a leviable interest, and that the seller has the right of possession only after rescission, which had not taken place at the date of the levy of the attachment. The reasoning of the court seems to be exceedingly refined and of questionable soundness. Elsewhere it is held that the institution of the suit in replevin is, of itself, a rescission of the sale, Soper Co. *v.* Halsted Co., 73 Conn. 547, 48 Atl. 425, Bradley Co. *v.* Fuller, 58 Vt. 315, 2 Atl. 162; and in Desbecker *v.* McFarline, 42 Ap. Div. 455, 59 N. Y. Sup. 439, S. C., 166 N. Y. 625, 60 N. E. 1110, the plaintiffs were permitted to recover from the sheriff, goods of which they had been defrauded and upon which the sheriff had levied under execution against the fraudulent purchaser, though there was no rescission until after the levy.

Promissory notes of one S. deposited in a bank payable to the plaintiff but to be delivered only on the order of S., cannot be replevied by payee until S. directs their delivery, Nicholls Co. *v.* First National Bank, 6 N. D. 404, 71 N. W. 135.

Prior Possession Originating in Wrong.—Plaintiff who must bring forward his own unlawful act to sustain his claim, fails, Bayless *v.* Lefaivre, 37 Mo. 119. But an actual possession, though wrongful, is sufficient as against one who, having no better right, forcibly assumes possession, Reynolds *v.* Horton, 2 Wash. 185, 26 Pac. 221; *e. g.*, where goods are obtained by tenant by waste of the demised lands, Id; where one quarries stone unlawfully upon the lands of another, and a trespasser assumes possession of the stone, Id; where one cuts and cures the grass upon unenclosed land of another, and a third person having no right in the lands seeks to recover it, Johannsen *v.* Miller, 15 Neb. 53, 63 N. W. 141. And where corn is raised upon Indian lands under a lease which is void, because prohibited by statute, the party cultivating and maturing the crop is entitled thereto; and the illegality of the lease and possession thereunder is no defense to an action of replevin against an officer who levies upon it as the property of the lessor, Buckhalter *v.* Nuzum, 9 Kans. Ap. 885, 61 Pac. 310. The levy of an attachment upon goods of which the defendant therein has obtained possession wrongfully, is no defense to an action of replevin by

the owner who has been so dispossessed, Post *v.* Berwind Co., 176 Pa. St. 297, 35 Atl. 111.

Certainty of Interest Required.—One who is entitled to an indeterminate and uncertain amount of a larger quantity, example, lumber enough to manufacture two hay presses, cannot maintain replevin, Stanley *v.* Robinson, 14 Ills. Ap. 480.

Purchaser at Private Sale.—Goods sold by a completed sale, may be replevied by the purchaser though there has been no delivery, Wilkins *v.* Wilson, 1 Marv. 404, 41 Atl. 76; Cheney *v.* Eastern Line, 59 Md. 557; though the goods are taken in satisfaction of a debt, De St. Aubin *v.* Field, 27 Colo. 414, 62 Pac. 199.

In Hodges *v.* Nall, 66 Ark. 135, 49 S. W. 352, where the property in controversy were cattle upon the range, it was said that a sale of the personalty is not complete so as to entitle the vendee to maintain replevin as against the vendor, without a delivery. But it seems certain that title of goods may pass without manual delivery; *e. g.*, where they are in the hands of vendor's bailee and the vendor authorizes the vendee to call for them, Bemis *v.* DeLand, 177 Mass. 182, 58 N. E. 681. Certain hogs were selected out of a larger number and the price agreed upon, and plaintiff paid earnest money; it was agreed that the hogs should remain at defendant's corral until the following Saturday. Held, the title passed, that being the intention of the parties; and the omission of the buyer to call for the hogs on the day appointed did not authorize the seller to recede, O'Farrell *v.* McClure, 5 Kans. Ap. 880, 47 Pac. 160.

Goods shipped by the seller to be paid for upon delivery, and which are never paid for, nor accepted by the buyer, may be replevied by the seller from the carrier, or from an assignee for creditors. The title never passed out of the seller, and the assignee took nothing, Lentz *v.* Flint & Pierre Co., 53 Mich. 444, 19 N. W. 138. Goods shipped to a merchant and which he refuses to accept, remain the property of the consignor, even as against creditors of the consignee, and even though the goods remain in the possession of the assignee and are exposed for sale by him with his other stock, Gilbert *v.* Forrest City Co., 72 Ills. Ap. 186. A merchant ordered goods from the plaintiff; they failed to arrive promptly, and the merchant, going to another state, left directions with the one in charge of his store that if the goods should arrive they were not to be accepted. The goods arrived while the merchant was still absent, and a clerk, ignorant of the instructions of the principal, paid the freight and placed them in stock. The merchant not knowing of this, immediately afterwards sold his stock without inventory, to the defendant. Held, that never having been accepted by the buyer the title remained in plaintiff, and plaintiff might re-claim them in replevin, Graves *v.* Morse, 45 Neb. 604, 63 N. W. 841. Title to personal property does not pass by a sale until the sale is completed, and this is a question of intention. One making an unconditional offer of a stock of merchandise and the fixtures of the business, but express-

ing readiness to deliver only at a later day, retains the title; his sale to a third person in the meantime is effectual to pass title, Kerr *v.* Henderson, 62 N. J. L. 724, 42 Atl. 1073. But the goods must be, in some manner ascertained and identified. The purchase of a specified quality of corn to be delivered on a certain day at a specified place and for a certain price per bushel, earnest money being paid, passes no title, no corn being selected, identified or set apart. The transaction is a mere agreement to sell and will not support replevin. Augustine *v.* McDowell, 120 Ia. 401, 94 N. W. 918. Plaintiff, a merchant in Arkansas, bargained with merchants in Missouri for a quantity of flour; it was shipped with other flour of the same brand and description to defendant; no particular boxes or barrels were marked for plaintiff; defendant was directed not to deliver without payment in cash. Held, that although by the terms of plaintiff's bargain, plaintiff was entitled to thirty days' time, the title never vested, and plaintiff could not maintain replevin, Carpenter *v.* Glass, 67 Ark. 135, 53 S. W. 678. Braudy wrote to Joseph Brothers, accepting an offer made by one of the firm for a certain quantity of wrought iron, mixed steel, horseshoes, and car-rails. The prices were set down opposite the articles; the contract expressly provided for delivery on the cars and for payment in cash, as delivered. As to the car-load of rails, neither the number nor amount was stated; they had never been seen by the plaintiff or his agents. The court, on the ground that the contract was an entirety and that, in part, the goods had not been sufficiently identified, held that title did not pass, Joseph *v.* Braudy, 112 Mich. 579, 70 N. W. 1101.

Where the plaintiff had bargained for a quantity of lumber sufficient to make two hay presses, but the amount was not ascertained or agreed upon, and there was no delivery, it was held the title did not pass, Stanley *v.* Robinson, 14 Ills. Ap. 480. The intention of the parties may sometimes prevail, even against the express terms of the agreement. In June, 1854, Frink & Company sold all their stage coaches, horses, and other like property in Illinois, to Walker, one of the firm; without the knowledge of the firm an agent had before that transferred certain coaches and horses, for a temporary purpose, from the Illinois line to the line in Iowa, and at the date of this transaction they were actually being used there. It was held that although the bill of sale was in terms limited "to the stage stock now used or owned by Frink & Company in Illinois," yet as both parties understood that the stock in question was in Illinois, and intended it should be included in the sale, the title passed to Walker as against a subsequent purchaser, with notice, of the stock in Iowa, Western Stage Co. *v.* Walker, 2 Ia. 504. Where a sale is attempted of part of a greater quantity or number there must be some identification, in order to pass the title. Martin *v.* LeSan, Iowa, 105 N. W. 996.

A sale of 150,000 shingles at a mill, in no manner identified, distinguished or set apart, does not pass the title, Steinbli *v.* Blaine Bank, 11 Wash. 426, 39 Pac. 814; nor a promise to deliver sixteen bushels of

wheat, out of the promisor's crop, Mattison *v.* Hooberry, 104 Mo. Ap. 287, 78 S. W. 642. But upon sale of a specific quantity of a particular kind and quality of paper, there being on hand a larger quantity of uniform value and quality, it was held that trover would lie with the same effect as if the whole mass were sold, Riebling *v.* Tracy, 17 Ills. Ap. 158. Where the parties so intend, the title passes, though the quantity of the commodity sold is not ascertained and something remains to be done by the vendor; *e. g.*, the harvesting and cribbing of growing corn, Vaughn *v.* Owens, 21 Ills. Ap. 249. As to the effect of a sale of a specific portion, not separated or identified, out of a mass, and that the title passes, where this is the intention of the parties, see a learned article in 60 Cent. L. J. 4.

Where plaintiff purchased a quantity of flour in store in a certain ware-house without any segregation of the particular flour from the other barrels of like flour in the same ware-house, but by subsequent sales and removals the quantity in the ware-house was reduced to a less number of barrels than the number for which plaintiff had bargained, it was held he might maintain replevin for what remained, Horr *v.* Barker, 6 Calif. 489. The title may pass if this be the intention of the parties, and there is a delivery, although the goods are yet to be weighed in order to ascertain the quantity, Pinckney *v.* Darling, 3 Ap. Div. 553, 38 N. Y. Supp. 411, Wren *v.* Kuhler, 68 Mo. Ap. 680

Plaintiff bought fifty barrels of flour from Clap & Company; it was in defendant's ware-house; the sellers gave plaintiff an order on the defendant for the flour; plaintiff delivered this order to a teamster, who carried it to defendant's clerk, and obtained a "flour check." The receipt stated that the flour was for the plaintiffs. The flour check directed a delivery of fifty barrels of flour "brand of Clap & Company." The teamster, according to the usage, carried the check to another employee of defendant and received on different occasions twenty-two barrels of the flour; the other twenty-eight barrels were delivered to some third person without authority. Held, that the facts showed a selection and separation of the twenty-eight barrels as the flour of plaintiffs, and vested in plaintiffs the title to the twenty-eight barrels, which had been so erroneously delivered, Hall *v.* Boston Co., 14 Allen, 439.

A symbolical delivery will prevail against an attachment intervening before a delivery; *e. g.*, the delivery of a bill of lading, a warehouse receipt, a railway company's receipt, Russell *v.* O'Brien, 127 Mass. 349. The endorsement and delivery of a bill of lading is in law the delivery of the goods, even although the bill of lading contains no words of negotiability; the leaving of them in the possession of the carrier in no way impairs the title, Forbes *v.* The Boston Co., 133 Mass. 154.

But if there is a general custom among carriers to deliver the goods to the assignee when known, without requiring production of the bill of lading, and the carrier having no notice of the assignment, makes delivery to the assignee, such delivery is not wrongful, nor is the carrier chargeable, Id.

W. and E. obtained from a custom-house inspector a certificate that the duties had been paid upon certain goods, permitting their delivery. They also obtained from the agent of the Steamship Company by which the goods had been transported, a certificate that the freight had been paid, and that the consignees, W. and E., were entitled to delivery. These, with a written order from W. and E. to deliver to the plaintiffs, addressed to the Steamship Company, were, by W. and E. delivered to a teamster employed by them and by other firms who had general orders from the plaintiffs to receive and deliver them all merchandise which should arrive for them. At that port Steamship Companies were accustomed to deliver goods on receipt of such certificates, permits and orders. The teamster went with the papers to the steamer's wharf, where she was discharging, and delivering them to the delivery clerk, demanded the goods; the goods were identified in the conversation, by their marks, but were not delivered because not yet raised from the hold. During this conversation the teamster held the papers in his hand, the clerk saw them, but did not examine them. The clerk told him that the goods would be out in a day or two. If the goods had been then upon the wharf the teamster would have been permitted to remove them. It was held that the jury were warranted in inferring a symbolical delivery and the passing of the title, and that such delivery took precedence of a subsequent attachment, Russell *v.* O'Brien, *supra.*

Where a warehouseman's receipt is negotiable by statute, such receipt for goods purchased of the warehouseman carries the title, even as against creditors of the warehouseman. The delivery of the receipt is delivery of the goods, Broadwell *v.* Howard, 77 Ills. 305, citing Cool *v.* Phillips, 66 Ills. 217; Gibson *v.* Stevens, 8 How. 384; Horr *v.* Barker, 8 Calif. 614; Second National Bank *v.* Walbridge, 19 Of. St. 494; S. P., Spangler *v.* Butterfield, 6 Colo. 356.

But it is held that where, by the agreement, the vendor is to do anything with the goods to put them in deliverable condition, the performance of this, in the absence of a contrary intention manifested in the circumstances, is a condition precedent to the vesting of the property in the buyer, Smith Co. v. Holden, 73 Vt. 396, 51 Atl. 2. A distinction must be drawn between a sale and an agreement to manufacture. The title to the goods does not vest by the mere force of an agreement to manufacture, Stanley *v.* Robinson, 14 Ills. Ap. 480. Until things manufactured are completed and ready for delivery and notice given to take them away, or some such act done, they remain the property of the manufacturer, Schnelder *v.* Westerman, 25 Ills. 514; and according to some authorities, until delivery is actually made, Goodman *v.* Kennedy, 10 Neb. 270, 4 N. W. 987; and if the manufacturer sell and deliver them to a third person in violation of his agreement, the party with whom the agreement to manufacture, is made, cannot maintain replevin against such purchaser, *Id.* Wick contracted to manufacture lumber for the plaintiff, the contract was by letter, in which it was declared that a former contract between

plaintiffs and Connor, should be the contract between Wicks and the plaintiffs. The contract with Connor provided that the title to the logs to be purchased pursuant thereto by Connor, should be in the plaintiffs. In Wicks' case the logs were already purchased and the greater portion of them at his mill, the lumber in controversy was yet to be manufactured by Wicks. It was to be piled at the saw-mill, distant a mile and a half from the place of delivery, and was to be delivered upon railway cars, graded, scaled and accepted, and credit given to Wicks at the end of each month upon the basis of an inspection made after the lumber was loaded. Plaintiffs should have security upon the lumber for their advances. The lumber was to be of a specified grade. Held, the title remained in Wicks, and there having been no delivery, and plaintiffs having failed to comply with the contract in several respects, an assumption of possession by them in Wicks' absence, was a mere trespass, Smith *v.* Wisconsin Company, 114 Wis. 151, 89 N. W. 829.

Every sale of chattels is presumed to be for cash, unless the contrary is expressed; and delivery of the goods does not waive the right of the seller to demand immediate payment and reclaim the goods, in case of refusal, Goldsmith *v.* Bryant, 26 Wis. 34; Hopkins *v.* Davis, 23 Ap. Div. 235. 48 N. Y. Sup. 745. Upon sale for cash the title does not vest until full payment of the agreed price, Haines *v.* Cochran, 26 W. Va. 719; McManus *v.* Walters, 62 Kans. 128, 61 Pac. 686. The seller must exercise his right within a reasonable time, Goldsmith *v.* Bryant, *supra.*

Plaintiff agreed to cut, fit and lay carpets, hang curtains, and set and arrange the cornice of defendant's house, and defendant was then to pay the bill. The servant who completed the job was instructed to demand payment, and did so. Defendant promised to come to the store on the same afternoon and make payment, but defaulted. Held, that notwithstanding the delivery, the plaintiff might reclaim the goods, Goldsmith *v.* Bryant, *supra.* A delay of two weeks, during which repeated demands of payment were made, of the defendant's wife and daughter, he not being found, was not unreasonable, Goldsmith *v.* Bryant, *supra.* But where the goods were permitted to remain in the hands of the buyer for six or seven months it was held that the seller could not reclaim them from an innocent purchaser, Robbins *v.* Phillips, 68 Mo. 100. And an unconditional delivery is a waiver of the right to demand payment, Powell *v.* Bradlee, 9 G. & J. 220; Martin v. Wirts, 11 Ills. Ap. 567; Hopkins *v.* Davis, 23 Ap. Div. 235, 48 N. Y. Sup. 745; Kingsley v. McGrew, 48 Neb. 812, 67 N. W. 787. But not so if the thing sold was delivered merely for trial and the purchaser was to take it only on a particular condition, presently to be performed, Hopkins *v.* Davis, *supra.* And so if there was a general usage in the market to deliver the goods sold without demanding payment, and the seller dealt with reference to this usage; the delivery in such case does not waive the condition of payment nor vest title in the purchaser, Powell *v.* Bradlee, *supra.* Where goods are sold for

"cash on delivery," and a conditional delivery is made, the seller may recover them as against all but a bona fide purchaser. An offer to return the goods because unable to pay for them requires no acceptance. The seller may maintain replevin against the sheriff who has levied under an attachment against the buyer. Daugherty *v.* Fowler, 44 Kans. 628, 25 Pac. 40, 10 L. R. A. 314.

A reservation of the title as one of the terms of a sale may be implied from circumstances, McManus *v.* Walters, *supra*. There is no occasion to rescind the sale in order to maintain the action, nor need the seller return what he has received, Thomson *v.* McLean, 59 Hun, 627, 14 N. Y. Sup. 55.

A contract that Johnson "has sold" unto Meeker "the entire crop of hops of the growth of the year 1890," 10,000 pounds, to be delivered at a certain railway station between specified dates; Johnson to complete the cultivation of the hops, pick, cure and bale the same and deliver the same, of strictly choice quality, even color, well and equally picked and thoroughly cured, etc.; Meeker to pay a specified price "no delivery and acceptance." Held, no title passed, even though actual delivery and acceptance was had, the price not then being paid; and though they had been placed in Meeker's care for shipment; Johnson, having for default of payment removed them, it was held that Meeker could not maintain replevin, Meeker *v.* Johnson, 3 Wash. 247, 28 Pac. 542. N agreed to sell to S all his cattle of a certain brand, at a price named per head, delivery to be made between specified dates; before the time of delivery arrived S assigned his contract to H. A new contract was then made between S and H, by which the cattle were to be counted as 1600 head, and the title was to remain in N until full payment. Later N gave an order upon H for the balance due him, which H. accepted, with the added words, "when advanced money paid by H settled." H obtained possession of the cattle without payment of the balance mentioned in this order. When replevied by N it was held that the last contract between N and S was admissible in connection with evidence that H was informed of it, and the cattle was delivered under it, and N was entitled to maintain his action, Nebeker *v.* Harvey, 21 Utah, 363, 60 Pac. 1029. In trustee process, it appeared that the trustee purchased of Reed one hog, some sugar and other things, amounting to the value of $30. The sale was for cash. The hog was changed to another pen upon the same premises; the sugar was mixed with sugar of the trustee; there was no other delivery of any of the articles. While the trustee had his wallet in his hand, intending to pay the price, he was served with trustee process, and refused to make payment. Reed then demanded his goods. Held, there was no acomplished sale, and the trustee was discharged, Paul *v.* Reed, 52 N. H. 136. And if, the purchase being for cash, the purchaser obtains the goods by giving a check upon the bank where he has no funds, and of which he has no reasonable ground to expect payment, the seller may reclaim them, Powell *v.* Bradlee, *supra*. Canadian Bank *v.* McCrea, 106 Ills. 281, Cohen *v.* Adams,

13 Tex. Civ. Ap. 118, 35 S. W. 303. So if he obtain the goods by promise of giving a good endorser for balance due, in which promise he fails, Jennings *v.* Gage, 13 Ills. 610.

Where goods are sold with the privilege of exchange, and the vendee retains them in the exercise of this privilege, any loss is upon him; the title remains in him until the goods reach the vendor, Cook *v.* Gross, 60 Ap. Div. 416, 96 N. Y. Sup. 924.

Gift.—If donor wrongfully obtain possession after a perfected gift, donee may maintain replevin, Schenck *v.* Sithoff, 75 Ind. 485. To give effect to a gift there must be a delivery, actual, so far as the thing is susceptible of delivery, either to the donee or someone for him, with the donee's consent. The delivery may be symbolical if the goods are so situated that dominion thereof may be completely parted with, Miller *v.* Le Piere, 136 Mass. 20. The gift is effected only by words of present donation; words signifying a purpose to be carried into effect only in the future accomplish nothing, Spencer *v.* Vance, 57 Mo. 427. A father who conveys slaves to his son to defraud creditors cannot repudiate the gift on the score of his own fraud, Newell *v.* Newell, 34 Miss. 385. There may be an effectual gift where possession is assumed by the donee, though he leaves it in the house of the donor who resides as a tenant upon donee's premises, Downey *v.* Arnold, 97 Ills. Ap. 91. Shortly before marriage a piano was brought to the apartments of the future husband; his intended wife being present he told her it was a present. Ever afterwards it was treated by both as the property of the wife. Creditors of the husband having taken it in execution it was held the wife might replevy, Williams *v.* Hoehle, 95 Wis. 510, 70 N. W. 556. A piano purchased by the father expressly as a gift to the child and donated to her, and which, although kept in the father's house, was used only by the daughter, and was known as hers; the gift was held to be irrevocable. The daughter was allowed replevin as against a mortgagee of the father, Kellogg *v.* Adams, 51 Wis. 138, 8 N. W. 115; and see to the same effect Colby *v.* Portman, 115 Mich. 95, 72 N. W. 1098. Gift by a father to daughter of a piano; it was delivered into the daughter's possession while she resided with her parents. She exercised acts of control, excluding others from the use of it and thus continued during all her minority. In replevin by one claiming under bill of sale from the father, judgment for the defendant was affirmed, Harris *v.* McCasland, 29 Ills. Ap. 430. Plaintiff offered his cow at a lottery. Defendant and one Joubar each claimed to have won it; defendant, in plaintiff's absence, took the cow away; plaintiff thereupon executed a writing, transferring to him all his right and declaring "I hereby deliver, etc." With this document plaintiff and Joubar demanded the cow of defendant. Held, the transaction with Joubar must be regarded as a gift and not consummate until actual delivery, and the plaintiff might sustain replevin, Miller *v.* Le Piere, *supra.* But see Bruce *v.* Squires, 68 Kans. 199, 74 Pac. 1102. A gift *causa mortis* to be effectual must be made in view of death impending; the donor must die from the disorder

or peril which prompts the donation, and there must be an actual delivery, Bruce *v.* Squires, *supra*. The donor must part with all present and future dominion, Carleton *v.* Lovejoy, 54 Me. 445. Assurances by a father to a child who for a long time has had control of a stock of merchandise and a store conducted in the father's name, that she shall have the store when he dies, she managing for him so long as he lives, is not a good gift, *causa mortis*. The possession of the child is the possession of the father, and there is lacking the necessary change of possession, Bruce *v.* Squires, *supra*. An agreement that a third person in possession of the goods shall hold them for the purchaser, is a delivery, High *v.* Emerson, 23 Wash. 103, 62 Pac. 455. Possession by a carrier or a warehouseman for the vendor, becomes, after notice of sale given by either vendor or vendee, the possession of the vendee, Taylor *v.* Richardson, 4 Houst. 300. The immediate delivery of bulky articles situate in another place than that of the sale is not required; possession must be assumed in a reasonable time in view of the situation of the persons, the goods, and the attending circumstances, Taylor *v.* Richardson, *supra*. In September the plaintiff arranged with his tenant of a certain farm under lease expiring in the March following, that the tenant should vacate at the expiration of the lease, and plaintiff then bought of the tenant his livestock, farming utensils, hay and grain upon hand; the stock remained upon the farm, but plaintiff's employee sent to reside there, fed and cared for it and had exclusive control of it for some considerable time; after that, plaintiff had charge of it, visiting the farm frequently, counting and salting the cattle which were running at large. During all this time the tenant remained on the farm. Held, there was sufficient change of possession even as against the creditors of the tenant, Haberer *v.* Walzer, 109 Ills. Ap. 371. Delivery according to the nature of the thing is all that is required; the removal of the mass of corn in a crib or other cumbrous thing, is not necessary to constitute delivery, Hart *v.* Wing, 44 Ills. 141; May *v.* Tallman, 20 Ills. 443; or a stack of hay, or standing corn, Ticknor *v.* McClelland, 84 Ills. 471; Lufkin *v.* Preston, 52 Ia. 236, 3 N. W. 58. Plaintiff called for corn which he had purchased, the defendant pointed to a crib, saying "there is your corn;" the plaintiff, after debating with another as to the quantity, accepted it and removed part. Held, that delivery was sufficient as between the parties to pass title, May *v.* Tallman, *supra*. A delivery of one slave in the name of several is sufficient to give effect to a gift of all the slaves mentioned in the deed of gift, Newell *v.* Newell, 34 Miss. 385. The pledge of a warehouse receipt is in effect the sale of the goods described therein, Hanchett *v.* Buckley, 27 Ills. Ap. 159. Goods were shipped in the name of the seller; he endorsed the bill of lading to the buyer and deposited it, addressed to him, in the postoffice. Held a constructive delivery of the goods, McCormick *v.* Joseph, 77 Ala. 236, and see National Bank *v.* Dearborn, 115 Mass. 219; Bank of Rochester *v.* Jones, 4 Comst. 497.

How far Transfer by Plaintiff impairs his Right.—The fact that the goods are subject to a prior lien against the plaintiff does not impair his right to recover them, *e. g.*, goods subject to a landlord's lien, Stockwell *v.* Robinson, 9 Houst. 314, 32 Atl. 528. Goods subject to a prior levy, Schenck *v.* Sithoff, 75 Ind. 485. One who has put up his goods at lottery, may nevertheless recover them from a trespasser, and the circumstance that his purpose is to deliver them to the winner in the lottery does not impair his right of action, Martin *v.* Hodge, 47 Ark. 378, 1 S. W. 694. One who has agreed to exchange with another his goods for lands, but declines to deliver the goods, for the failure of the purchaser to furnish and turn over insurance policies, and returns the goods to his own premises, may replevy the same from an officer who levies thereon under an execution against the proposed purchaser; the seller is not concluded by an admission that he had sold the goods, or that they belonged to the other party, Lewis *v.* Birdsey, 19 Ore. 164, 26 Pac. 623. A married woman, fearing that her property might be taken by her husband's creditors, included it in a bill of sale to the defendant to protect it, but not intending to pass the title. Held, she might nevertheless maintain replevin, Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836. A father who has made a gift of livestock to one of his children without any intention that it shall be separated from the herd, may maintain replevin against the wrong-doer, Filley *v.* Norton, 17 Neb. 472, 23 N. W. 347. A deed of trust executed as security and binding the donor to deliver the articles, does not defeat his action for the value against one who has converted the goods, Haines *v.* Cochrans, 26 W. Va. 719. Where a marriage contract recites the desire of the intended wife to secure her property "for her sole and separate use and free from the control of her intended husband," appoints a trustee for the intended wife and "for all and singular her property, real and personal, to keep, preserve and assure the same forever unto the said Camilla," the title remains in the intended wife, and her executor may sue in trover for the value if the goods are converted, Liptrot *v.* Holmes, 1 Kelly, 381. But where the owner of goods has leased them to another for a term not yet expired, and delivered possession, he cannot maintain replevin against an officer who levies upon them under execution against the tenant, Gazelle v. Doty, 73 Ills. App. 406.

A mortgagee who has assigned his mortgage as collateral security for a debt, cannot maintain replevin for the mortgaged chattels, Kavanaugh *v.* Brodball, 40 Neb. 875, 59 N. W. 517. One who sells goods which are in adverse possession, but with the condition that he shall recover them, may maintain replevin therefor, Bemis *v.* De Land, 177 Mass. 182, 58 N. E. 684.

Purchaser at Execution Sale.—Purchaser at execution sale acquires no right if the goods belong to a stranger to the writ, Jacob *v.* Watkins, 3 App. Div. 422, 38 N. Y. Sup. 763. Irregularities in the sale cannot be relied upon as a defense; *e. g.*, that the goods were levied upon in bulk and that the levy did not afford a sufficiently particular descrip-

tion, Boyce *v.* Canon, 5 Houst. 409; nor the fact that the goods were left in the hands of the execution debtor. The statute against the sale of goods without actual delivery has no application to a public sale under execution, Id.; nor the fact that the goods were not present at the sale, Hazzard *v.* Burton, 4 Har. Del. 62. And the plaintiff, producing title under execution sale, is under no duty to show that the officer was an officer *de jure*, Lufkin *v.* Preston, 52 Ia. 236, 3 N. W. 58. Defendant in execution who attends the sale and objects thereto, on the sole ground of the statutory exemption, cannot in replevin against the officer, the creditor, and the purchaser, assert that the sale was at an improper place; having given one reason for his objection he cannot afterwards assert an additional reason, Redinger *v.* Jones, 68 Kans. 627, 75 Pac. 997. One who purchased goods belonging to a partnership, on execution against one of the firm, acquires no right to the possession of the chattels, Reinheimer *v.* Hemingway, 35 Pa. St. 432.

Execution sale of goods which are a quarter of a mile distant from the place of sale confers no title, Lawry *v.* Ellis, 85 Me. 500, 27 Atl. 518; so if the sale is of only part of a larger quantity and there is no separation or delivery, Id. But a party to a proceeding, must object to irregularities promptly; if he delay until third persons acquire rights in such proceeding he will not be heard to complain, Riggs *v.* Coker, 69 Miss. 266, 13 So. 814.

Equitable Title.—Plaintiff cannot recover upon a mere equitable right; as where the husband purchased bonds in his own name with the wife's money, Leete *v.* Bank of St. Louis, 141 Mo. 584, 42 S. W. 927. Plaintiff must rest on a legal and not an equitable right. One claiming a motor cycle for which he contested in a voting contest but which was determined by the committee in charge in favor of the defendant, cannot prevail, Fisher *v.* Alsten, 186 Mass. 549, 72 N. E. 78. A mere equity will not sustain the statutory action of detinue, Jones *v.* Anderson, 76 Ala. 427. A mere equity without the right to reduce the goods to possession will not sustain replevin, National Bank of Deposit *v.* Rogers, 1 Ap. Div. 623, 37 N. Y. Sup. 365.

Mortgagee.—Mortgagee entitled by the terms of the mortgage to assume possession upon default of interest, may, upon such default, maintain replevin, Flinn *v.* Ferry, 127 Calif. 648, 60 Pac. 434; Fuller *v.* Brownell, 48 Neb. 145; 67 N. W. 6. If the goods are attached under invalid process, the mortgagee may maintain replevin against the officer, Allen *v.* Wright, 134 Mass. 347. The assignment of a mortgage passes to the assignee a legal title, Russell *v.* Walker, 73 Ala. 315. The mortgagee who has assigned the mortgage, even as collateral security, cannot maintain replevin, Kavanaugh *v.* Brodball, 40 Neb. 875, 59 N. W. 517. A mortgage executed at a former date and a sale under it to the plaintiff without any evidence of title, right or possession in the mortgagor, is not sufficient to maintain replevin, Peterson *v.* Lodwick, 44 Neb. 771, 62 N. W. 1100.

Pledgor and Pledgee.—By a pledge a special title passes to the

pledgee, which depends on the actual continued possession of the pledge. In the absence of statute no record, or even written evidence of a pledge is required, Mitchell *v.* McLeod, Iowa, 104 N. W. 349. Pledgor may sell subject to the pledge, Ottumwa Bank *v.* Totten, Mo. 89 S. W. 65; Harding *v.* Eldredge, 186 Mass. 39, 71 N. E. 115. Pledgee who leaves the goods with the pledgor until his death cannot by retaking them defeat the right of the pledgor's administrator, afterwards appointed, Thompson *v.* Dolliver, 132 Mass. 103; Vinal *v.* Spofford, 139 Mass. 126, 29 N. E. 288. But the pledgee may permit the pledgor to take and use the pledge for any special limited purpose, Id. The right of the pledgee depends upon that of the pledgor, and one who advances money upon the pledge of goods to which the pledgor has no title, nor muniment of title, nor even possession, acquires no right, Chicago Co. *v.* Lowell, 60 Calif. 454. A factor has no authority to pledge the goods of his principal, Ludden *v.* Buffalo Co., 22 Ills Ap. 415. And the pledgee is chargeable with notice of the owner's rights, Leet *v.* Wadsworth, 5 Calif. 404. And the pledge must be for a lawful debt; where by statute a pledge to secure a loan at usury is void, any person may raise the question, and one whose agent in the possession of negotiable paper of the principal has converted it and pledged it for a loan which bears usury, may avail himself of this infirmity in the transaction to avoid the pledge, and may recover the paper though he had clothed his agent with an apparent title, and the defendant made the loan without any knowledge of the plaintiff's rights, Keim *v.* Vette, 167 Mo. 389, 67 S. W. 223. And where the indebtedness is paid or tendered and the pledgee refuses to surrender the pledge, the pledgor may have replevin, Latta *v.* Tutton, 122 Calif. 279, 54 Pac. 844. If no objection is made to the amount of the tender its sufficiency is admitted, Id. And the pledgee cannot refuse to return the pledge because another is claiming it; even although the adverse claimant has brought his action and made the pledgee party thereto, Cass *v.* Higenbotam, 100 N. Y. 248, 3 N. E. 189. And where the pledgee has converted the pledge the pledgor may sue without making demand, Cox *v.* Albert, 78 Ind. 241. But the pledgee may recoup the amount of the debt, Maryland Co. *v.* Dalrymple, 25 Md. 242. So if the pledgor repossesses himself wrongfully of the goods and disposes of them to a stranger who has notice of the pledge, the pledgee may have replevin, Harkey *v.* Tillman, 40 Ark. 551; Where the delivery is symbolical, *e. g.*, a warehouse receipt, the pledgor has no right, independent of statute, to substitute other goods. He must retain the identical goods. In re St. Paul Co. Min. 94 N. W. 218.

Partnerships.—A purchase by two persons of an article of personal property does not constitute them a partnership, Ingals *v.* Ferguson, 59 Mo. Ap. 299. A partner cannot maintain replevin against his co-partner for partnership goods, Jenkins *v.* Mitchell, 40 Neb. 664, 59 N. W. 90; and if the action is defeated, the defendant partner is entitled to return of the goods, and, in the alternative, the full value. The rights of the partners in the fund are to be determined in some

other proper proceeding, Id. The defeated partner is estopped to assert, in the action on the bond, a partnership which his action of replevin ignored, or to assert equitable considerations against the judgment in the action of replevin, Clapham *v.* Crabtree, 72 Me. 473. But if the articles of co-partnership provide that upon dissolution one of the firm named shall "be entitled to the assets and property of the firm," he becomes vested with the absolute title upon dissolution, and may maintain replevin against the other, Depew *v.* Leal, 2 Abb. Pr. 131. A sale by one partner of the partnership goods, made otherwise than in the ordinary course of business, against the expressed objections of the other partner, to one who has notice of all the facts, does not impair the title of the firm, or of one who is afterwards appointed receiver of its effects, Yeager *v.* Wallace, 57 Pa. St. 365. But a majority of the firm may, although the firm is about to expire, effectually dispose of the partnership goods in spite of the objections of a minority, Western Stage Co. *v.* Walker, 2 Ia. 504. But if the majority are acting in bad faith towards the minority, the sale will not pass the interest of the dissenting partner; and the purchasers become tenants in common with such dissenting partner, and cannot replevy from him, Id. The sheriff may on execution against one of a firm levy upon and take into possession the partnership goods, sell the debtor partner's interest and deliver the goods to the purchaser and the other partners, Ferguson *v.* Day, 6 Ind. Ap. 138, 33 N. E. 213. But in Daniels *v.* Owens, 70 Ala. 297, it was held that the purchaser does not acquire the right to possession of the property purchased, as against the other members of the firm. The sheriff cannot levy upon specific articles of partnership property; his levy must be upon the interest of the partner in the whole partnership property, Ferguson *v.* Day, *supra;* and if he levies on specific articles of partnership property, taking them into possession for sale as the property of the individual debtor, in disregard of the rights of the other members of the firm, he becomes a trespasser *ab initio*, and all the partners may unite in an action of replevin, Id. But the sheriff may in his return enumerate the property taken, without invalidating his levy, if in fact he takes the whole partnership property, Weber *v.* Hertz, 188 Ills. 68, 58 N. E. 676. And the sheriff cannot sell specific articles, but only the indebted partner's interest in the whole partnership assets, Daniel *v.* Owens, *supra*. The purchaser acquires only the interest of the debtor partner, that is his share in what remains after all liabilities of the firm, including those to the other partners, are satisfied, Hannon *v.* O'Dell, 71 Conn. 698, 43 Atl. 147. If the partnership is insolvent at the date of the officer's levy the purchaser takes nothing and can recover nothing in an action on the bond, when the goods are replevied, Id. The levy of an attachment against an individual partner, upon the partnership goods, does not dissolve the partnership; and if the partners replevy the goods they may deal therewith precisely as if there had never been a levy; and the fact that the debts existing at the time of the levy are discharged, and new debts created,

in no manner enlarges the liability of the sureties in the replevin bond, Hannon *v.* O'Dell, *supra*. The officer attaching partnership goods upon a writ against one of the firm, takes only the interest of the partner subject to all partnership liabilities; but he may take actual possession of the goods and hold the entire property in his hands, subject to the paramount claim of partnership creditors, Hacker *v.* Johnson, 66 Me. 21. And if the partnership has in good faith transferred all the partnership property, no partner has any remaining interest which can be taken, even although no provision is made for the partnership debts, Densmore Co. *v.* Shong, 98 Wis. 380, 74 N. W. 114. A partner cannot replevy the partnership goods from an officer who, proceeding regularly, has taken them under process against the other partner, Weber *v.* Hertz, 87 Ills. Ap. 601, S. C. 188 Ills. 68, 58 N. E. 676.

Husband and Wife.—The wife carrying on business as a sole trader, may recover her goods from the sheriff who has taken them on execution against her husband, Gavigan *v.* Scott, 51 Mich. 373, 16 N. W. 769. A married woman may, in Missouri, maintain replevin against her husband, Beagles *v.* Beagles, 95 Mo. Ap. 338, 68 S. W. 758. The wife may replevy the product of her own lands where taken in execution for the husband's debt, Taylor *v.* Taylor, 12 Lea. 490. Where husband and wife are residing together, his possession of slaves, which are the separate property of the wife, is the possession of the wife, McNeill *v.* Arnold, 17 Ark. 179. The wife is entitled to the wheat grown by her upon her husband's homestead claim under a lease granted by the husband before patent issues, whether such lease be valid or void, and she may replevy it from an officer who takes it in execution against the husband, Burchett *v.* Hamil, 5 Okla. 300, 47 Pac. 1053. The husband cannot replevy from the wife exempted goods, where by statute she is authorized to sue for the same, as if her separate property, Smith *v.* Smith, 52 Mich. 539, 18 N. W. 347. The wife is the agent of the husband to have charge of her deceased mother's wearing apparel until an administrator is appointed; and to deliver it for safe keeping to another. The husband cannot maintain trover against such depositary, Lawrence *v.* Wright, 23 Pick. 128. The husband cannot create a valid crop lien upon a crop grown or to be grown on the wife's land; and where the common law disability of the wife obtains, a verbal assent to the husband's action will be without effect, Rawlings *v.* Neal, 126 N. C. 271, 35 S. E. 597. And where the husband in such case acts in his own name the conduct of the wife, after his death, will not ratify it. The contract is void as to her and incapable of ratification, Id.

Infant.—Where an infant has been emancipated by his father, his acquisitions are his own. One claiming under a transfer from the father has no right, Francisco *v.* Benepe, 6 Mont., 243, 11 Pac. 637. An infant who has sold goods need not formally renounce the sale; a mere demand for them is sufficient, George *v.* Hewlett, 70 Miss. 1, 12 So. 855.

Lien.—Actual possession and a lien for money advanced, or a prec-

edent debt, is a sufficient title, Gafford *v.* Stearns, 51 Ala. 434. A factor holding goods for advances made by him may, if his possession be disturbed, have replevin, Williams *v.* Bugg, 10 Mo. Ap. 585.

Officer in Possession under Process.—An officer who has taken goods under valid process has a special property which entitles him to retain the possession, and may maintain replevin if his possession is disturbed, Pugh *v.* Calloway, 10 O. St. 488; even though he leaves the goods in possession of the defendant in execution, taking bond for their delivery, Id.; or taking the receipt of the defendant's agent, Chicago Co. *v.* Reid, 74 Mich. 366, 41 N. W. 1083.

Plaintiff in replevin obtains by his writ and the execution of it, a mere temporary right of possession. If the defendant be an officer who holds under a levy, his right revives upon the death of the plaintiff, and the consequent abatement of the suit, and he may maintain replevin, Burkle *v.* Luce, 1 Comst. 163; even against a purchaser from the plaintiff, Lockwood v. Perry, 9 Metc. 440.

Bailor and Bailee.—Wool supplied by the plaintiff to the tenant of a factory, the woven product to be returned to him at a certain price per yard; plaintiff is in law the owner, and may recover the goods manufactured from the wool from the landlord who distrains them for rent, or takes them on execution for the debt of the tenant, Knowles *v.* Pierce, 5 Houst. 178. Grain brought by the proprietor of an elevator for another with money furnished by the other, is the property of the latter and not liable to execution for debts of such proprietor of the elevator, though stored with him, Cool *v.* Phillips, 66 Ills. 216. The fact that the ware-houseman discharges part of the purchase price of the grain by cancelling demands which he holds in his own right against those from whom he purchased does not affect the result, Id. An agent employed to purchase grain for the plaintiff with money furnished by the plaintiff, made the purchase in his own name; defendant, without any notice of the rights of the plaintiff, purchased the grain from the agent in satisfaction of moneys due defendant for like purchases made by the same agent on his account; he immediately took possession and retained the grain. It was held that he obtained a good title and was not accountable to the plaintiff, Koch *v.* Willi, 63 Ills. 144. Goods were shipped by express C. O. D.; by the fraud of consignee, the agent of the express company was induced to deliver them for a post-dated check which was dishonored. Held the express company might recover them from an officer who attached them in the hands of the assignee. American Co. *v.* Willsie, 79 Ills. 92. If one deliver his grain to a ware-houseman not to be returned to him, but to be shipped and sold by the ware-houseman, the depositor to be paid on demand the market price on the day of the sale, the title passes to the ware-houseman, Lonergan *v.* Stewart, 55 Ills. 44. If the thing deposited is to be returned, though in an altered form, then the transaction is a bailment, Id. Goods were shipped to the plaintiff to be delivered to defendant on payment of a draft for the price, the defendant obtained possession for the purpose of examination and

failed to pay the draft; plaintiff was entitled to replevy, West Michigan Bank *v.* Howard, 52 Mich. 423, 18 N. W. 199.

Title by Finding.—The servant who finds lost money upon the floor of the hotel where he is employed, is entitled to it as against the master, Hamaker *v.* Blanchard, 90 Pa. St. 377. But where one casually leaves his purse when making payment of a bill, the purse is not lost and the finder gains no title, Kincaid *v.* Eaton, 98 Mass. 139. The owner of hides left them in vats, not intending to abandon them; they were accidentally overlooked and forgotten for forty years. Held, that the finder still acquired no property, Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600.

An aerolite is the property of the owner of the land where it falls, and not of the first finder, Goddard *v.* Winchell, 86 Iowa, 71, 52 N. W. 1124.

Goods Acquired in another State.—The title to goods acquired in one state and carried into another, will, as between husband and wife, depend on the laws of the state of acquisition, Shumway *v.* Leakey, 67 Calif. 459, 8 Pac. 12. A pledge is to be construed, and its validity and effect determined by the laws of the state where the goods are at the time of the transaction, even though the note secured thereby is expressly payable in a different state. In re St. Paul Co. Min. 94 N. W. 218. If the goods are in different states, the law of each state controls as to what is in that state, Id.

Things Severed from Realty.—One who has purchased from the owner of lands the mere right to cut trees thereon, may maintain replevin against one who cuts trees upon the land, without right, Gamble v. Cook, 106 Mich. 561, 64 N. W. 482; Keystone Co. *v.* Kolman, 94 Wis. 465, 69 N. W. 165. The mortgagee of lands in California has, until foreclosure, a mere lien; he is not entitled to possession until the expiration of the period allowed for redemption; he therefor cannot maintain, previous to that date, replevin for a house removed by the mortgageor, after the mortgage sale and before the right of redemption is gone, Peoples Bank *v.* Jones, 114 Calif. 422, 46 Pac. 278. The bare possession of another's land does not authorize the possessor to fell trees, and one purchasing from such wrongdoer, though in good faith, gains no title, Reid *v.* King, 89 Ky. 388, 12 S. W. 772. But if in fact the one in possession being the owner, had conveyed the lands to the plaintiff upon secret trust to defeat his creditors, one purchasing from him, and not in any way connected with the fraudulent transfer, may show the facts and thus establish the authority of the vendor remaining in possession to cut and dispose of the timber as his own, Id. One seeking to recover logs as the owner of the lands upon which they were cut, must show either title, or possession of the lands, Webb *v.* Phillips, 26 C. C. A. 272, 80 Fed. 954. Doubtful evidence of brief possession more than twenty years before the trespass, will not suffice, Id.

Things Severed from Land in Adverse Possession.—The product of land in the actual adverse possession of the defendant cannot be

recovered in replevin, even by one who had an earlier actual possession and upon whose possession plaintiff had forcibly entered, Page *v.* Fowler, 28 Calif. 605; but this judgment was reversed in the Supreme Court of the United States, where it was held that the actual and peaceable possession of public lands is not to be invaded under claim of the right of pre-emption, and with intent to initiate a pre-emption under the Acts of Congress, and that one so entering is a mere trespasser, and he upon whose possession he enters may maintain replevin for hay cut by the trespasser, Atherton *v.* Fowler, 6 Otto, 513, 24 L. Ed. 732.

Grain sown and harvested by one in the actual adverse possession of the lands, though without color of title, cannot be recovered from him in replevin, by the adverse claimant. Replevin cannot be made the means of litigating the title to lands, Martin *v.* Thompson, 62 Calif. 618; even though the administrator's conveyance under which the defendant claims, has since been annulled and set aside, Emerson *v.* Whittaker, 83 Calif. 147, 23 Pac. 285. So of oil extracted from lands of which the party is in adverse possession—except as allowed by statute, Giffin *v.* Southwest Pipe Lines, 172 Pa. St. 580, 33 Atl. 578; so of timber, Street *v.* Nelson, 80 Ala. 230. The bare possession of land under claim of title is sufficient to entitle the possessor or his landlord to maintain replevin for logs cut by one who enters forcibly upon such possession, though asserting title, Loveman *v.* Clark, Tenn. 85 S. W. 258. One in actual possession of land, whether as a tenant, licensee or mere trespasser, cannot be dispossessed of the crop which he has planted, matured and severed, McAllister *v.* Lawler, 32 Mo. Ap. 91. The owner of the free-hold cannot recover things severed therefrom, if at the time of the severance another was in the adverse possession, Cooper *v.* Watson, 73 Ala. 252; Harrison *v.* Hoff, 102 N. C. 126, 9 S. E. 638. Settler upon the public domain, having merely the right of possession, is limited to such remedies as the local statutes afford; replevin does not lie by one claimant against another for logs cut upon land in dispute, if the remedy is not expressly allowed by statute; even though other remedies standing upon the same reason are given, Adkinson *v.* Hardwick, 12 Colo. 581, 21 Pac. 907. Plaintiff was a tenant of A, and sub-let a portion of the lands to B, upon shares; B, at the instance of the plaintiff, undertook to secure a renewal of the plaintiff's lease, but in violation of his duty took a new lease from A to himself; it was held that notwithstanding this, he remained the tenant of the plaintiff, and the plaintiff was permitted to recover his share of the crops in replevin, Zeisler *v.* Bingman, 9 Kans. App. 447, 60 Pac. 657. The reason why replevin is not allowed for the product of lands in adverse possession is that the occupant should not be harassed in separate actions for each bushel of wheat raised, or each stick of fire-wood severed when the matter may be settled once for all by a single action to recover the lands, Phillips *v.* Gastrell, 61 Miss. 413.

The doctrine is restricted within the narrowest limits, and the ne-

tion is denied only as against an actual occupant. Swamp lands to which defendant claimed title, were visited by him with loggers and rafters yearly for more than ten years, but merely for the purpose of cutting the timber, though while there they cultivated small gardens. It was held that the owner of the land might recover the timber cut, notwithstanding the adverse claim, Philips *v.* Gastrell, *supra*, and see Brewer *v.* Fleming, 51 Pa. St. 102. Replevin cannot be made the means of litigating and determining the title of lands, but the title may come in question incidentally, and conveyances may be examined to ascertain the question of possession and in whom in fact was the possession, and by consequence the title to the things severed, Loveman *v.* Clark, *supra*.

Note IV. *Defences to the action.—Property in Defendant.*—One in possession of a slave, not for himself, but for the estate of an ancestor, cannot set up a claim in his own right; nor can any one who succeeds to his possession, Miller *v.* Jones, 26 Ala. 247. Receiptor who has given to an officer a recipt for goods taken on execution against a third person, cannot assert title in an action upon his receipt, Bursley *v.* Hamilton, 15 Pick. 40. But he may after delivery of the goods, maintain replevin, Id. Defendant need only show his actual possession to entitle himself to a judgment for the value as against the plaintiff who shows no right, Steere *v.* Vanderberg, 90 Mich. 187, 51 N. W. 205.

Property in Another.—Property and the right of possession in another is a good defense, Fuller *v.* Brownell, 48 Neb. 145, 67 N. W. 6; Dobson *v.* Owens, 5 Wyo. 325, 40 Pac. 442; Gottschalk *v.* Klinger, 33 Mo. Ap. 410; Central Co. *v.* Mears, 89 Ap. Div. 452, 85 N. Y. Sup. 795. Part ownership in another is a good plea in bar, Reinheimer *v.* Hemingway, 35 Pa. St. 432;—but not if the right of possession is in the plaintiff, Lillie *v.* Shaw, 22 Wash. 234, 60 Pac. 406. But where the defendant has receipted for the goods to the plaintiff, and stipulated to account to him for them, he cannot plead this plea, Reed *v.* Reed, 13 Ia. 5. Where defendant holds under plaintiff he will not be heard to set up a mortgage executed by him to a third person, even though such mortgagee took without notice of plaintiff's right, and defendant at the date of the mortgage was in possession of the chattels, Puffer Co. *v.* May, 78 Md. 74, 26 Atl. 1020. Nor can mortgageor set up a title in a stranger by his own prior mortgage, Gottschalk *v.* Klinger, 33 Mo. Ap. 410. And bailee cannot as against his bailor, plead title in another as long as he retains the goods, Hentz *v.* The Idaho, 3 Otto (93 U. S.), 575, 23 L. Ed. 978. Defendant will not be heard to say that he holds for another who has no right of possession, Read *v.* Brayton, 143 N. Y. 340, 38 N. E. 261. Property in a stranger is no defense where defendant is a mere trespasser, Van Baalin *v.* Dean, 27 Mich. 104. Nor unless defendant connect himself with such title, Stevens *v.* Gordon, 87 Me. 564, 33 Atl. 27; Miller *v.* Jones, 26 Ala. 247; so in detinue, Gafford *v.* Stearns, 51 Ala. 434. Where the plaintiff grounds his action not upon a prior possession, but upon title, defendant, if not estopped, may show

title in a stranger without connecting himself with it, McIntosh *v.* Parker, 82 Ala. 238, 3 So. 19. He may show that he holds the goods as trustee for his wife, without power to mortgage, even though the plaintiff relies upon a mortgage executed by defendant, which recites that he is the absolute owner; the mortgage constitutes no estoppel, Id. Defendant will not be heard to assert a mere lien of a third person, where the plaintiff, as against the defendant, is entitled to possession, McGill *v.* Howard, 61 Miss. 411. Where in replevin for staves cut from lands claimed by each party the state also interpleaded, claiming the staves as cut from public lands, and plaintiff and defendant elected to try the issue as between themselves, in advance of the determination of the claim of the state; held, that neither party could invoke the title of the state to defeat the right of the other, Winchester *v.* Bryant, 65 Ark. 116, 44 S. W. 1124.

Defendant, showing no title, cannot question the regularity of a sale by the state, the original owner, to the plaintiff, Raber *v.* Hyde, Mich., (1904), 101 N. W. 61.

Lien.—If one of a firm is made sole defendant, he may assert a lien on the goods in favor of the partnership, Holderman *v.* Manier, 104 Ind. 118, 3 N. E. 811. *Expiration of Plaintiff's Right.*—That plaintiff's property in the goods has passed to another by foreclosure of a lien, is a good defense, Neeb *v.* McMillan, 98 Ia. 718, 68 N. W. 438. Or that after the property was taken plaintiff sold to defendant, Giroux *v.* Wheeler, 163 Mass. 48, 39 N. E. 470. Merely applying for and obtaining leave to interplead in an attachment and assert claim to the goods attached, does not preclude the party from his action of replevin, Wangler *v.* Franklin, 70 Mo. 659. Under a statute that "no action shall abate by * * * the transfer of any interest therein," an action of replevin pending in the circuit court by appeal from the county court, is not affected by the taking of the goods out of possession of plaintiff, by the levy of an execution thereon by an officer, or by the recovery of a judgment by the plaintiff against the officer for such taking. The appeal may nevertheless proceed, Culver *v.* Randle, 45 Ore. 491, 78 Pac. 394.

Infancy.—Infancy is no defense to an action of trover, Fish *v.* Ferris, 5 Duer, 49. *Usury.*—Plaintiff, resting his claim upon a chattel mortgage which is shown to be usurious, defendant recovers costs, Rodgers *v.* Graham, 36 Neb. 730, 55 N. W. 243.

Bankruptcy.—Defendants' discharge in insolvency is no defense, Wood *v.* McDonald, 66 Calif. 546, 6 Pac. 452. Nor his bankruptcy and composition with creditors, where plaintiff was not a creditor, Miller *v.* Warden, 111 Pa. St. 300, 2 Atl. 90; Robinson *v.* Soule, 56 Miss. 549. Bailee wrongfully converts negotiable securities, which were obtained without deceit or trick; his discharge in bankruptcy was held a defense, Hennequinn *v.* Clews, 77 N. Y. 427. Defendant in replevin denied all liability. Held, that his liability in an action of replevin was so contingent that plaintiff was not bound to prove against his estate in bankruptcy, and his right was not obliterated by defendant's discharge,

Clemmons *v.* Brinn, 36 Misc. 157, 72 N. Y. Sup. 1066. Seizure of goods under a writ of replevin is discharged by an adjudication in bankruptcy upon petition filed within four months, In Re Hymes Co., 130 Fed. 977. Where the sheriff, after a levy, surrenders to a trustee in bankruptcy, this amounts to an abandonment and invalidates the levy, the jurisdiction of the court issuing the writ is gone, Id.

Unlawful Combination.—A statute that in any action it shall be lawful to plead that plaintiff is a member or agent of any unlawful combination in restraint of trade, is not intended to deprive a person of property rights, not in any way connected with the unlawful combination; a plea of such statute affords no defense to an action to recover property to which plaintiff has a clear right, Barton *v.* Mulvane, 59 Kans. 313, 52 Pac. 883.

Indemnifying Bond, Unconstitutional Statute.—The statute that "the claimant" of any property for the seizure or sale of which an indemnifying bond has been taken and returned, shall be barred of an action against the officer, if the surety in the bond was good when it was taken. Held unconstitutional, as compelling one to surrender his property without his consent, for the private benefit of another, Foule *v.* Mann, 53 Ia. 42, S. C. sub. nom, Towle *v.* Mann, 3 N. W. 814; and such bond is no defense to an action for damages against the officer, Craig *v.* Fowler, 59 Ia. 200, 13 N. W. 116. *Equitable Defenses.* Replevin is strictly a legal action; equitable defenses cannot be interposed, Hennessey *v.* Barnett, 12 Colo. Ap. 254, 55 Pac. 197. But in Ames Iron Works *v.* Rea, 56 Ark. 450, 19 S. W. 1063, defendant had purchased a cotton gin of the plaintiff to be shipped by a day named, title to remain in the plaintiff until payment; defendant paid one hundred and ten dollars and agreed to pay in installments the further sum of six hundred and fifty dollars; the gin was not delivered until weeks after the day agreed upon, and was found imperfect; defendant at once notified plaintiff, and used diligence to procure and supply the necessary parts without success; he was deprived of the use of the gin and damaged by the plaintiff's default. Held, he might plead these facts as an equitable defense to an action of replevin by the plaintiff.

And in Hennessey *v.* Barnett, *supra*, a similar defense was entertained. So where plaintiff claimed under a conditional sale for nonpayment of the purchase money, it was held defendant might show that the machine did not correspond with the representations under which it was purchased; that its defects were secret, that the machine by reason of these defects was worth very much less than the agreed price, and that defendant had promptly notified plaintiff, McKean *v.* Matthews Co., 74 Miss. 119, 20 So. 869. So that defendant was induced to execute an agreement of purchase by fraudulent misrepresentations as to its contents, Woodbridge *v.* Dewitt, 51 Neb. 98, 70 N. W. 506. An equitable defense may be set up in an answer or supplemental answer, Sparks *v.* Green, 69 S. C. 198, 48 S. E. 61. In replevin for wood and railway ties cut upon vacant land, defendant was permitted

to set up by answer that plaintiff was claiming the land under an invalid tax sale, to pray a cancellation of the tax deed and transfer the cause to equity, Rogers *v.* Kerr, 42 Ark. 100; but defendant was required to pay plaintiff the amount of his outlays in the matter of the tax, *Id.* Sureties in the forthcoming bond are not permitted to intervene in the action of bail trover; they must stand or fall by the defense made by their principal; they are bound by any judgment against him, Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251. The sureties have no right to tender to the plaintiff the property sued for, pending the suit; especially except at the trial when the plaintiff had elected to take a verdict for damages in lieu of the goods, Id.

Destruction or Loss of the Goods.—Plaintiff cannot, when return is awarded, shield himself on the ground that the property has been destroyed by accident, Suppiger *v.* Gruaz, 137 Ills. 216, 27 N. E. 22. Where the goods are destroyed in plaintiff's possession and the circumstances are not shown, judgment should be for the value without any alternative, Epperson *v.* Van Pelt, 9 Baxt. 73. One who assumes possession of goods encumbered by a mortgage duly recorded, is liable for the value though he acted in good faith, and the goods are destroyed without his fault, Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545. Where defendant submits to a default he will not be allowed to prove upon the inquest of damages his readiness to deliver, and the subsequent unlawful destruction of the goods without his fault, Curry *v.* Wilson, 48 Ala. 638. The weight of authority is against excusing the party who has wrongfully possessed himself of the goods of another, from returning the same or paying the value, because they have been lost by the act of God. Such excuse rests on no sound principle, De Thomas *v.* Witherby, 61 Calif. 92. The destruction of the goods by fire while in possession of defendant on delivery bond, is no defense, George *v.* Hewlett, 70 Miss. 1, 12 So. 855. In Duffus *v.* Schwinger, 79 Hun, 541, 29 N. Y. Sup. 930, it was said that where the statute fixes the value at the date of the trial as the measure of the recovery, the destruction of the goods after the taking and before the trial seems to afford no exception to the rule. In Gillet *v.* Roberts, 57 N. Y. 28, it was held that one who in good faith purchased logs from a trespasser would not be liable for their value if they were carried away by a flood before demand upon him by the owner.

Delivery to a Stranger.—The sheriff who makes a wrongful levy cannot relieve himself from liability to the owner by delivery of the goods to a receiver appointed by the court in a suit in which plaintiff is not a party, Wise *v.* Jefferis, 2 C. C. A. 432, 51 Fed. 641. The sheriff who, having replevied the goods from defendant, surrenders them to a stranger, is liable, Adamson *v.* Sundby, 51 Minn. 160, 53 N. W. 761; and delivery to a stranger cannot be allowed even in mitigation of damages, Yallop, etc., Co. *v.* Minneapolis Co., 33 Minn. 482, 24 N. W. 185. Defendant cannot justify under one who had no right; and delivery of the goods by agent to his principal, without notice of the owner's right, is no defense to an action for the conversion.

Miller *v.* Wilson, 98 Ga. 567, 25 S. E. 578. One who takes goods in pledge, and who in good faith returns them to the pledgor, without notice that he is not the owner, and without any intention to injure or embarrass the owner, is not responsible in replevin, Carpenter *v.* Shave, 1 Mackey, 417.

Possession for a Third Person.—One in actual possession of the goods is liable in replevin though holding them for another, Flatner *v.* Good, 35 Minn. 395, 29 N. W. 56. If, in a building belonging to him, which he controls, they are in his possession, Id.

Non-Detention, General Rule.—One who neither has the actual or constructive control of the goods, and has not concealed, removed or disposed of them for the purpose of avoiding the writ, cannot be made liable in replevin, Depriest *v.* McKinstry, 38 Neb. 194, 56 N. W. 806. The matter is put in issue by a general denial, Id. The plaintiff has the burden of proof, Bardwell *v.* Stubbert, 17 Neb. 485, 23 N. W. 344. Plaintiff must prove either an unlawful taking or an unlawful detention.

One not in possession of the goods cannot be sued in replevin, although responsible to the plaintiff therefor, Myrick *v.* National Co., Miss. 25 So. 155. The goods must be in the actual or constructive possession of the defendant at the institution of the action, McCormick Co. *v.* Woulph, 11 S. D. 252, 76 N. W. 939; Penn *v.* Brashear, 65 Mo. Ap. 24; Eales *v.* Francis, 115 Mich. 636, 73 N. W. 894; Verein *v.* Wall, 58 N. Y. Supp. 1115; Myers *v.* Credle, 63 N. C. 504; Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564; Dow *v.* Dempsey, 21 Wash. 86, 57 Pac. 355; Coffin *v.* Gephart, 18 Ia. 257, *e. g.*, a father in whose house the goods are and who advises the son not to surrender them, but who himself makes no claim, and has never assumed possession nor control. The Matteawan Co. *v.* Bentley, 13 Barb. 641; Norman Co. *v.* Ford, 59 Atl. 499; an officer who has returned goods levied upon by him to the place where he took them; and notified the claimant, McHugh *v.* Robinson, 71 Wis. 565, 37 N. W. 426; the plaintiff in execution, where the officer assumes exclusive possession of the goods, House *v.* Turner, 106 Mich. 240, 64 N. W. 20; sureties in the official bond of an officer who have nothing to do with a levy made by him, Gallick *v.* Bordeaux, Mont. 78 Pac. 583, are none of them liable in replevin: even though one defendant has submitted to a default, the truth of the matter appearing by the defense made by the other, Feder *v.* Abrahams, 28 Mo. Ap. 454. B. mortgaged a crop of wheat to the plaintiff; upon harvesting the crop he carried it to an elevator and received tickets, not entitling him to any wheat in particular; he delivered these tickets to the defendant, who afterwards disposed of them, but had no other control of either the wheat or the tickets. Held, not liable, Best *v.* Muir, 8 N. D. 44, 77 N. W. 95. Property was replevied from a constable and delivered to plaintiff, the writ being defective, was discontinued without return of the goods; the constable who had levied an execution upon them in behalf of the defendants but was not made a party, consented to the service of a second writ without return of the goods.

Held, he had no such authority and defendants were entitled to judgment, Osborne *v.* Banks, 46 Conn. 444. But where goods were taken by the officer, and the original summons being irregular a second was issued and served upon the defendants, the objection that the goods were not in defendant's possession when the second writ was issued, was held more technical than meritorious, American Bank *v.* Strong, Mo. Ap. 85 S. W. 639. Damages cannot be recovered against the defendant for goods disposed of by him before the institution of the action, Burr *v.* McCallum, 59 Neb. 326, 80 N. W. 1040. The fact that the value may be recovered does not enlarge the remedy, Redinger *v.* Jones, 68 Kans. 627, 75 Pac. 997. A statute that if the officer shall return not found as to the goods, but defendant has been summoned, plaintiff may declare for the value and damages for the taking or detention as if he had thus commenced his action, does not authorize replevin in every case where trover, case or detinue is the proper remedy; it only enables plaintiff to proceed with his action if the goods were really in possession of defendant at the date of the affidavit, Krosmopolski *v.* Paxton, 58 Miss. 581.

Plaintiff is entitled to the benefit of the statute where the failure to seize the goods is partial only, *Id.* But if defendant is detaining the goods when the writ is served, he is liable, though they were not in his possession at the time of its issuance, Howard *v.* Bartlett, 70 Vt. 314, 40 Atl. 825. Plaintiff cannot maintain replevin upon mere threat of defendant to remove the goods, Johnson *v.* Prussing, 4 Ills. Ap. 575.

Pleading property in defendant waives the plea of *non detinet*, McGinley *v.* Wirthele, Neb., 101 N. W. 244. But it seems otherwise where the defendant is permitted to plead contradictory defenses. Where an officer levying, refuses the claim made by the plaintiff, and the evidences of title which he attempts to exhibit, he will not be heard to assert that plaintiff's goods were unlawfully confused with those of the execution debtor, and were not identified or pointed out to him. Greenberg *v.* Stevens, 212 Ill. 606, 72 N. E. 722.

Non-Detention, in whom is Possession.—An attorney, having the keys of a certain shop, merely to deliver them to the owner of the premises upon certain conditions, and neither having nor asserting control of the machinery in the shop, is not liable, even though on demand he refuses to deliver it, disclaiming authority, Barnes *v.* Gardner, 60 Mich. 132, 26 N. W. 858. Tenant of rented apartments, not the landlord, is in possession of the goods in such apartments, Young *v.* Evans, 118 Ia. 144, 92 N. W. 111. A tenant occupying a house by him wrongfully attached to the land of a third person, is not in possession thereof in such sense that replevin will lie against him, Richards *v.* Morey, 133 Calif. 437, 65 Pac. 886. A son residing with his mother, and using her horses in her affairs, is not in possession thereof; replevin, therefore, will not lie against him, Burt *v.* Burt, 41 Mich. 82, 1 N. W. 936, S. P., Saenz *v.* Mumme, Tex. Civ. Ap. 85 S. W. 59. Notwithstanding the Married Woman's Acts, the husband is liable for a wife's torts, and if she wrongfully detains goods of another upon his premises,

replevin lies against him though his conduct is merely passive, Choen *v.* Porter, 66 Ind. 194. And the husband's possession of slaves, the separate property of the wife, is in law, the wife's possession. McNeill *v.* Arnold, 17 Ark. 154.

Vendor in a conditional sale of printing presses, default having been made, entered the place where they were, and tagged them with his own name; the defendant claiming under a mortgage from the vendee removed the tags and sold the presses under the mortgage. Held that the tagging constituted possession, and the subsequent conduct of defendant an unlawful interference and detention, and that plaintiff was entitled to replevin without demand, Cottrell *v.* Carter, 173 Mass. 155, 53 N. E. 375.

Non-Detention. Goods in Plaintiff's Possession.—Plaintiff in possession at the issuance of the writ, cannot maintain his suit, Hickey *v.* Hinsdale, 12 Mich. 99; Degering *v.* Flick, 14 Neb. 448, 16 N. W. 824; Bruce *v.* Horn, 11 Colo. Ap. 316, 52 Pac. 1036; Austin *v.* Wauful, 59 Hun, 620, 13 N. Y. Sup. 184; Graham *v.* Myers, 74 Ala. 432;—even though plaintiff is in possession as receiptor to the defendant, an officer, who has levied upon them, Austin *v.* Wauful, *supra.* And even though the officer has actually advertised the goods for sale under his writ, and is proposing to make a sale, Morrison *v.* Lumbard, 48 Mich. 548, 12 N. W. 696; but see Williams *v.* Morgan, 50 Wis. 541, 7 N. W. 548. And if the complaint shows possession in the plaintiff, it is bad on demurrer, Carman *v.* Ross, 64 Calif. 249, 29 Pac. 510. An officer having levied upon goods under an attachment, the plaintiff brought replevin; this action was discontinued but without any judgment for return; plaintiff then returned the goods to the place from which they were taken, and notified the defendant that they were subject to his order; defendant refused to receive or intermeddle with them; held, they still remained in possession of the plaintiff in replevin and that he could not maintain a second replevin, Calnan *v.* Stern, 153 Mass. 413, 26 N. E. 994. The widow of a decedent cannot maintain replevin against the administrator for goods of which she is in the undisturbed possession and the administrator has merely caused to be appraised and advertised as property of the deceased, Reed *v.* Wiltbank, 2 Pen. Del. 243, 45 Atl. 400.

Estoppel to plead Non-Detention.—Defendant cannot at the trial deny possession when he admits it upon the demand, Harris *v.* Hayfield, 5 Wash. 230, 31 Pac. 601; nor can one who has given a delivery bond; he thereby conclusively admits possession, Jordan *v.* Johnson, 1 Kans. Ap. 656, 42 Pac. 415; Nye *v.* Weiss, 7 Kans. Ap. 627, 53 Pac. 152; Griswold *v.* Sundback, 4 S. D. 441, 57 N. W. 339; Martin *v.* Gilbert, 119 N. Y. 298, 23 N. E. 813, 24 N. E. 460; Diossy *v.* Morgan, 74 N. Y. 11; McMillan *v.* Dana, 18 Calif. 339; Lucas *v.* Beebe, 88 Ills. 427; Anthony *v.* Bartholomew, 69 Mo. 186; Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620; Benesch *v.* Waggner, 12 Colo. 534, 21 Pac. 706. But where the writ was for "329,760 feet of white pine logs, more or less, marked E on the end," and it appeared that the logs in con-

troversy were contained in a boom maintained for the convenience of all persons driving logs upon the stream, mixed with innumerable others, submerged and imbedded in the mud and heaped together, filling the stream for a mile or more, that no human power could reach them until flooded out, that an officer was appointed by law to ascertain, measure and scale the logs; held, that in view of the vague character of the writ and the impossibility of determining the number of logs in the boom, it could not be said that the sheriff by return of "replevied," or the defendant by giving bond and claiming the logs, could have intended any certain number of logs or number of feet, but that the return and the bond must be held to cover and secure only what in due course of the operation of the boom should be found in defendant's possession, Susquehannah Co. *v.* Finney, 58 Pa. St. 200. Held further, that evidence as to the number of logs as afterwards returned, and that a great part of what the plaintiff had claimed he had actually obtained, and that others had been rafted out and delivered to another claimant previous to the service of the writ, should have been admitted, Id. Defendant notified the purchaser not to remove the saw-mill in question, and that if he came upon the lands where it was he would be treated as a trespasser. Held, he was not at liberty to defend on the ground of non-detention, Savage *v.* Russell, 84 Ala. 103, 4 So. 235. So the officer who, on demand, refuses, generally, without assigning any reason, or excuse, cannot on replevin brought, assert that before the demand he has delivered the goods to another, Udell *v.* Slocum, 56 Ills. Ap. 217. Mortgagee cannot deny possession of the mortgaged goods on replevin brought by the mortgagee, Griffith *v.* Richmond, *supra*. Nor can an officer who justifies under his levy, even though the goods were left upon plaintiff's premises and plaintiff gave a receipt for them, Williams *v.* Morgan, 50 Wis. 541, 7 N. W. 548, but see Austin *v.* Wauful, 59 Hun, 620, 13 N. Y. Sup. 184; Morrison *v.* Lumbard, 48 Mich. 548, 12 N. W. 696, and see post, *Constructive Possession*. Replevin lies against an assignee for creditors, who has left the goods with the assignor, but who, on demand made, does not clearly disclose that he does not claim them under the assignment, Coomer *v.* Gale Co., 40 Mich. 691.

The defense of non-detention may be waived. Plea of a purchase of plaintiff's husband, and that plaintiff is estopped to deny his authority, is such waiver. McGinley *v.* Werthele, Neb. 101 N. W. 244.

Non-Detention, Possession at Demand.—Actual possession of defendant at the emanation of the writ is not essential if the goods were in his possession when he refused the demand, Harkey *v.* Tillman, 40 Ark. 551; and he cannot evade the writ by delivery to another after such demand, Gassner *v.* Marquardt, 76 Wis. 579, 45 N. W. 674.

Non-Detention, Presumption.—In Massachusetts the writ may issue provisionally, and be delivered to the officer with instructions not to serve it until after a certain time; and where the writ bore date prior to the accrual of the action and there was no proof as to when the writ was delivered to the officer, nor with what instructions, it

was presumed that it was not delivered until the cause of action accrued, *i. e.*, until the detention began, Federhen *v.* Smith, 3 Allen, 119.

Non-Detention, Constructive Possession.—In Jordan *v.* Flynn, 17 Neb. 518, 23 N. W. 519, it was said that constructive possession of a horse by defendant while in plaintiff's stable, was conceivable. The defendant, an officer, endorsed upon his writ a levy on the goods of the plaintiff and put another officer in charge of them but did not remove them. Held, notwithstanding, there was such a detention as would suffice to maintain replevin, O'Connor *v.* Gidday, 63 Mich. 630, 30 N. W. 313; S. P., Hursh *v.* Starr, 6 Kans. Ap. 8, 49 Pac. 618; Hadley *v.* Hadley, 82 Ind. 95. So, if the officer take a delivery bond even though the plaintiff himself gives the bond, Louthain *v.* Fitzer, 78 Ind. 449; but see Hove *v.* McHenry, 60 Ia. 227, 14 N. W. 301. So, if the officer merely claims to exercise control by his process, or makes an inventory, or threatens to remove the goods unless receipt is given, Hadley *v.* Hadley, *supra.*

Notwithstanding the Married Woman's Acts, the husband is liable for the wife's torts, and if she detains the goods of another upon his premises, replevin lies against him though his conduct is merely passive, Choen *v.* Porter, 66 Ind. 194.

An officer having levied upon the goods of the plaintiff under a writ against another, denies that he has taken any goods of the plaintiff and declares that plaintiff can take them if they belong to him. The officer's declaration imports that the attachment is not released, and that plaintiff will take the goods at his peril, Wheeler *v.* Eaton, 67 N. H. 368, 39 Atl. 901. So, where the officer levied upon the goods, placed a custodian in charge and forbade the plaintiff to remove them, Aman *v.* Mottweiler, 15 Ind. Ap. 405, 44 N. E. 63. And so where the officer endorsed upon his writ a levy upon a lot of lumber and took such possession as is customary with bulky articles and refused to surrender on demand, Hatch *v.* Fowler, 28 Mich. 205. And replevin will lie against the sheriff whose deputy is in possession under a levy, Crum *v.* Elliston, 33 Mo. Ap. 591. But an officer who merely read the attachment to the defendant named therein and told him he attached certain goods, but failed entirely to remove them or interfere with the possession and claimed no control of them, was held not liable in replevin, Libby *v.* Murray, 51 Wis. 371, 8 N. W. 238, Standard Oil Co. *v.* Bretts, 98 Ind. 231. Where an action in which the goods had been seized and delivered to the plaintiff, was dismissed, it was held that the goods were immediately in the constructive possession of the defendant and that plaintiff might sue out a second writ of replevin before actual manual delivery of the goods to defendant, Teeple *v.* Dickey, 94 Ind. 124. If defendant wrongfully place the goods of the plaintiff in possession of another, he is liable for the value, Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499. But goods taken in execution by the sheriff and placed in the hands of a keeper, cannot be replevied of the plaintiff in execution, House *v.* Turner, 106 Mich.

240, 64 N. W. 20. Replevin lies against one who has delivered the thing demanded to another "subject to his order," Bradley *v.* Gamelle, 7 Minn. 331.

Non-Detention, Unlawful Taking.—Replevin lies not against one who unlawfully took the goods unless he is detaining them at the commencement of the action, Willis *v.* DeWitt, 3 S. D. 282, 52 N. W. 1090, *contra*, Pranke *v.* Herman, 76 Wis. 428, 45 N. W. 312; McBrien *v.* Morrison, 55 Mich. 351, 21 N. W. 368;—but here the statute provided that "whenever any goods shall have been unlawfully taken . . . an action of replevin may be brought," etc. Where goods are unlawfully taken by A. without the knowledge or concurrence of B and are afterwards found in possession of A. and B., B. cannot be made a participant in the original tortious taking, and charged as a trespasser by relation, upon mere evidence that he received possession, knowing of the trespass, Harper *v.* Baker, 3 T. B. Monr. 421; otherwise, if trespass was committed for his use, and he assented to it after its commission, Id. Plaintiff shipped lumber to A. who declined to receive it, A. afterwards made an assignment for creditors; the assignee after demand made by the plaintiff, sold the lumber. Held he was liable in replevin in the *cepit*, Stark v. Paine, 85 Wis. 633, 55 N. W. 185.

Non-Detention, Transfer before Suit.—Replevin will not lie against one who before the institution of the action has sold and finally parted with the goods, Davis v. Van de Mark, 45 Kans. 130, 25 Pac. 589; Murray *v.* Lease, 86 N. Y. Sup. 581; McCormick *v.* McCormick, 40 Miss. 760; Brockway *v.* Burnap, 12 Barb. 347; Glass *v.* Basin Bay Co., 31 Mont. 21, 77 Pac. 302; Hodges *v.* Nall, 66 Ark. 135, 49 S. W. 352; Robb v. Dolrenski, 14 Okl. 563, 78 Pac. 101. As where the treasurer of a municipality sold them at public outcry, Hall *v.* Kalamazoo, 131 Mich. 404, 91 N. W. 615; or the sheriff has sold goods under his writ and delivered them to the purchaser, Moses *v.* Morris, 20 Kans. 208; or a pledgee has sold and parted with the goods before demand, Gildas *v.* Crosby, 61 Mich. 413, 28 N. W. 153; or the officer after a wrongful levy has delivered the goods to a receiver, Riciotto *v.* Clement, 94 Calif. 105, 29 Pac. 414; Dow *v.* Dempsey, 21 Wash. 86, 57 Pac. 355. Goods obtained upon credit by fraudulent representations of the defendant are taken from him upon legal process without his procurement; replevin will not lie upon a subsequent demand and refusal, Sinnott *v.* Felock, 165 N. Y. 444, 59 N. E. 265. But in Riciotto *v.* Clement, *supra*, it was held that the plaintiff might amend and claim damages for the wrongful taking or conversion. Defendant held the goods as trustee for creditors, receiving possession January 31, and proceeded selling them until all were disposed of; plaintiffs demanded them February 10th; on the 28th of February all were disposed of, but at what date the last were sold was not shown, nor whether it was before or after the institution of the suit. Held, plaintiff's action could not be maintained, West *v.* Graff, 23 Ind. Ap. 410, 55 N. E. 506.

Non-Detention, Wrongful or Collusive Transfer.—Defendant cannot

set up a sale made by him before the issuance of the writ, merely to defeat the action, Helman *v.* Withers, 3 Ind. Ap. 532, 30 N. E. 5; Gassner *v.* Marquardt, 76 Wis. 579, 45 N. W. 674. Defendant cannot protect himself by showing a simulated or constructive transfer, Hainer *v.* Lee, 12 Neb. 452, 11 N. W. 888; or a transfer "subject to his order," Bradley *v.* Gamelle, 7 Minn. 331; or a wrongful transfer, Nichols *v.* Michael, 23 N. Y. 264. Alternative judgment for the chattel or its value, may be had in such case, Holliday *v.* Poston, 60 S. C. 103, 38 S. E. 449. But in Alabama it was held that detinue but not replevin may be maintained, Lightfoot *v.* Jordan, 63 Ala. 224. In California it was held that the plaintiff might go for the value, Richards *v.* Morey, 133 Calif. 437, 65 Pac. 886.

CHAPTER III.

WHEN AND FOR WHAT IT LIES.

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§ 58. **Replevin lies only for chattels.** Replevin lies only for chattels personal, and not for real estate, or anything attached to or forming part of the realty.[1] The title to land cannot be tried in this action, though, as will be shown hereafter, where

[1] Roberts v. The Dauphin Bank, 19 Pa. St. 75; Ricketts v. Dorrell, 55 Ind. 470; Vausse v. Russell, 2 McCord, (S. C.) 329; Eaton v. Southby, Willes, 131; Bower v. Tallman, 5 Watts & Serg. 556.

the title to chattels depends on the ownership of the soil from which they may have been severed, the title of the land can be investigated, with the view of determining the ownership of chattels.[2] The term "goods" or "chattels," as used in this connection, has the same signification, and includes all species of animate and inanimate, movable, tangible property.[3]

§ 59. **Some illustrations of the rule.** The writ lies for domestic animals, but not for wild animals, until after they are reclaimed;[4] or for the increase of domestic animals, and the plaintiff may have judgment in his favor for the young of such animals born, or for wool shorn from them after the animals are replevied.[5] It lies for money in a box or bag, or so separated from other money that it can be distinguished;[6] or, bonds which can be identified;[7] or, the records of a parish or church;[8] or corporate company;[9] or, for a note or a check by the legal owner;[10] but not by the winner of a wager, against the stakeholder, for the winning.[11] It does not lie after the death or destruction of the chattel sued for.[12] Neither can it be employed to quiet title to property in the plaintiff's possession.[13] Nor will the action lie to remove public papers or documents from a public office. Such instruments are in the custody of the law, and the writ, if issued for their seizure, will be quashed, and the papers

[2] Snyder *v.* Vaux, 2 Rawle, (Pa.) 427; Nibblet *v.* Smith, 4 Durnf. & E. 504; Gullett *v.* Lamberton, 1 Eng. (Ark.) 109; F. N. B. 156; Brown *v.* Wallis, 115 Mass. 158; Bacon *v.* Davis, 30 Mich. 157; Cresson *v.* Stout, 17 Johns. 121; Chatterton *v.* Saul, 16 Ill. 150; Knowlton *v.* Culver, 1 Chand. (Wis.) 214; S. C., 2 Pin. (Wis.) 86.

[3] Eddy *v.* Davis, 35 Vt. 248; Graff *v.* Shannon, 7 Iowa, 508.

[4] Amory *v.* Flyn, 10 Johns. 103; Goff *v.* Kilts, 15 Wend. 550; Buster *v.* Newkirk, 20 Johns. 75.

[5] Arundel *v.* Trevil, 1 Sid. 81; Buckley *v.* Buckley, 12 Nev. 423.

[6] Bull, Nisi Prius, 32; Skidmore *v.* Taylor, 29 Cal. 619; Dows *v.* Bignall, (Lalor's Sup., Hill & Denio), 408; Core's Case, Dyer, 22*b*.

[7] Sager *v.* Blain, 44 Hand, (N. Y.) 448.

[8] Baker *v.* Fales, 16 Mass. 147; Sawyer *v.* Baldwin, 11 Pick. 492; Sudbury *v.* Stearns, 21 Pick. 148.

[9] Southern Plank Road Co. *v.* Hixon, 5 Ind. 166.

[10] Clapp *v.* Shepard, 2 Met. 127; Graff *v.* Shannon, 7 Iowa, 508; Chickering *v.* Raymond, 15 Ill. 363; Bissell *v.* Drake, 19 Johns. 66. But, see Barnett v. Selling, 70 N. Y. 492.

[11] Merchant's S. L. & T. Co. *v.* Goodrich, 75 Ill. 554.

[12] Lindsey *v.* Perry, 1 Ala. 204; Scott *v.* Elliott, 63 N. C. 215.

[13] Bacon *v.* Davis, 30 Mich. 157; Hickey *v.* Hinsdale, 12 Mich. 100.

returned.[14] Nor for an apprentice, at the suit of his master, the apprentice being a freeman,[15] though it would always lie for a slave. Nor will it lie for articles in actual use at the time of the service of the writ. Beasts of the plow or tools in actual use could not be distrained. Neither will it lie for articles of clothing or ornament actually worn upon the person, though it be with the design to prevent the service of the writ.[16] Neither will it lie by the appointee to an office, for his commission, after it has been made out and duly executed by the appointing power. The judgment is for the thing or its value, and the value of a public office cannot be ascertained or awarded as damages. Replevin, in such cases, is like replevying an office, which the law does not permit.[17] And without attempting to enter into specific details, the writ may be said to lie for all chattels personal which are *in esse*, and subject to manual delivery, not actually in use or exempted by law.[18]

§ 60. **Chattels severed from realty.** Chattels personal, however ponderous or bulky they may be, and notwithstanding the fact that they may have previously been part of the real estate, may be recovered in this action.[19] In Arkansas, the statute which made slaves real estate was designed only to change the mode of descent and conveyance, and not to deprive the owner of a right to replevin them in case they were wrongfully taken or detained.[20]

§ 61. **Buildings are prima facie real estate.** Buildings, such as dwelling houses and similar structures, are *prima facie* real estate.[21] They are not fixtures in the common intendment of

[14] Brent *v.* Hagner, 5 Cranch, C. C. 71; Marbury *v.* Madison, 1 Cranch, U. S. 49.

[15] Morris *v.* Cannon, 1 Harr. (Del.) 220.

[16] Maxham *v.* Day, 16 Gray, (Mass.) 213.

[17] Marbury *v.* Madison, 1 Cranch, U. S. 50.

[18] Brown *v.* Caldwell, 10 S. & R. (Pa.) 118. The old rule was that it would lie for anything that could be distrained. Bacon Abr., title Replevin.

[19] Gear *v.* Bullendick, 34 Ill. 74; Foy *v.* Reddick, 31 Ind. 414; Reese *v.* Jared, 15 Ind. 142; Ombony *v.* Jones, 21 Barb. 520; Dubois *v.* Kelley, 10 Barb. 496; Mills *v.* Redick, 1 Neb. 437; Pennybecker *v.* McDougal, 48 Cal. 162; Huebschman *v.* McHenry, 29 Wis. 659.

[20] Gullett *v.* Lamberton, 1 Eng. (Ark.) 118.

[21] Chatterton *v.* Saul, 16 Ill. 151; Madigan *v.* McCarthy, 108 Mass. 376; Smith *v.* Benson, 1 Hill, (N. Y.) 176; Meyers *v.* Schemp, 67 Ill. 469; Vausse *v.* Russel, 2 McCord, (S. C.) 329; Davis *v.* Taylor, 41 Ill. 405.

the law, but part of the land.[22] So, also, the engine and other machinery of a mill or factory which is attached to or forms part of the permanent structure, is presumptively part of the real estate,[23] and as such, not subject to be delivered on this writ; but a building may become personal property with the consent of the owner, or by circumstances which clearly indicate the intention of the owner so to regard it, and it will then be properly the subject of delivery upon the writ of replevin.[24]

§ 62. **Chattels may be attached to, and become part of the realty.** Articles of personal property may be permanently attached to, or become part of a building, and when so attached they are considered part of the real estate, as boards may be wrongfully taken and built into a house or other permanent structure, or machinery may be permanently built into a mill. In such case the owner cannot sustain replevin, but is driven to his action for the value.[25]

§ 63. **What is or is not real estate.** A discussion of what is or what is not real estate, would more properly belong to a treatise on some other subject than replevin, but as it is frequently the most important question to be determined before bringing this action, and as articles which are really chattels sometimes appear to be attached to the realty, and articles which are in fact part of the real estate sometimes appear to be chattels, a brief reference to a few of the authorities in which this question and its relation to the action of replevin are considered, may be in place.

§ 64. **How far the question as to what is or is not real estate may be investigated in replevin.** The action will lie for trade fixtures and other property not part of the realty, and the question as to whether the property in dispute is or is not part of the real estate can generally be investigated and determined in this action. While authorities on this point are not as numerous as might be wished, it is probable that the action would be permitted to investigate the title to property concerning

[22] Goff *v.* O'Connor, 16 Ill. 423.

[23] Harlan *v.* Harlan, 15 Pa. St. 513.

[24] Doty *v.* Gorham, 5 Pick, 487; Ashmun *v.* Williams, 8 Pick. 402; Wells *v.* Banister, 4 Mass. 514; Ricker *v.* Kelly, 1 Gr. (Me.) 117; Yale *v.* Seely, 15 Vermont, 221; Fahnestock *v.* Gilham, 77 Ill. 637; Beers *v.* St. John, 16 Conn. 322; Dooley *v.* Crist, 25 Ill. 551; Nalor *v.* Collinge, 1 Taunt. 19; Mansfield *v.* Blackburn, 6 Bing. 426.

[25] Fryatt *v.* The Sullivan Co., 5 Hill, (N. Y.) 117; Ricketts *v.* Dorrel, 55 Ind. 470.

the nature of which an honest, fair question might be made; and for this purpose the sheriff would be warranted, in obedience to the mandate of the writ, in severing and removing property which might appear to be a part of the real estate; but in so doing the sheriff should exercise a reasonable discretion, and if his right to sever the property be denied on the ground that it is in fact real estate, he ought to permit the defendant all the opportunity to restrain the proceeding which he can consistently with his duty, and ought not to execute the writ by making such severance unless it appears the party is acting in good faith, on reasonably probable grounds, and not then in an oppressive manner, or without ample security.

§ 65. **The same.** *Hamilton* v. *Stewart*, 59 Ill. 331, was an injunction to restrain a party from entering and removing from a basement room, certain fixtures which had been placed there for the convenience of parties occupying it as a saloon. The property consisted of a counter, ice box, shelves and gas fixtures. The court said that the party would have the undoubted right to employ replevin; and on the trial the nature of the fixtures could be investigated, whether they were permanently attached to the building and formed part of the realty, or whether they were mere temporary articles placed there for the convenience of the trade carried on in the building, and which could properly be removed by a tenant, or a purchaser from him; thus recognizing the right of a party to have the question as to whether the articles were part of the real estate determined in the replevin suit.

§ 66. **The same.** When the property was a frame dwelling, it was said that the action should not be dismissed until the court could first determine from the evidence whether it was real or personal property.[26] So it was no cause of demurrer to a declaration in replevin that it was brought for a barn, shingle mill and office. These things might be real estate; yet they might be personal property; and whether they are or not is a matter of evidence upon which the court must determine as the facts shall appear after a full consideration of the evidence.[27]

[26] Elliott *v.* Black, 45 Mo. 373.

[27] Brearly *v.* Cox, 4 Zab. (24 N. J.) 287. Consult, also, Guthrie *v.* Jones, 108 Mass. 193; Hanrahan *v.* O'Reilly, 102 Mass. 201; Fahnestock *v.* Gilham, 77 Ill. 637; Goodrich *v.* Jones, 2 Hill, 142; Reynolds *v.* Shuler, 5 Cow. 323. [The character of the thing is not determined by its name: a declaration in replevin for a mill, barn, office or the like,

67. **The same. Trade fixtures.** Ewell on Fixtures (p. 91) states the law to be well settled "that mere utensils or machines, or other articles of a similar nature, being themselves of a chattel nature, and capable of being detached without material injury to the freehold or themselves, and of being set up and used elsewhere, are removable by the tenant or his vendee during his term." All such articles would therefore be the proper subjects of a suit in replevin, and the officer having such a writ, properly describing them, would without question be authorized to sever and remove them. "On the other hand," continues the same authority (p. 93), "there may be annexations made by a tenant occupying premises for trade purposes of so intimate and permanent a character as to furnish satisfactory evidence that the annexations were intended to be permanent accessions to the realty." In such cases the action of replevin would of course fail; but this statement of the general rule leaves a wide field open to dispute as to whether, in any particular case, the property in question should be placed with the former or the latter class. Upon this question it can only be said that each case must necessarily present a mixed question, consisting mostly of fact, to which the general rules of the law must be applied.[28]

§ 68. **Buildings while fixed are part of the realty; while being moved are personalty.** In Illinois when a house was built on a foundation in such a manner as showed that it was intended for a permanent residence, and not for a temporary purpose, it was held part of the realty, and in such case if the house had been removed to another lot, and there again fixed upon a

is not bad on demurrer, Brearly *v.* Cox, *supra*. A "frame building" is not *ex vi termini* parcel of the realty; the question is to be settled by the evidence, Eliott *v.* Black, 45 Mo. 373. A deed of trust of the lands of a mining corporation included, among other things, "one steam engine and fixtures and two boilers;" they were erected by the corporation and attached to the soil. Held, that notwithstanding the designation of them in the manner indicated, they were part of the freehold and not personalty, Jenney *v.* Jackson, 6 Ills. Ap. 32. But in Bridges *v.* Thomas, 8 Okla. 620, 58 Pac. 955, the authority of Brearly *v.* Cox, *supra*, was rejected and it was held that describing a house as "goods and chattels" will not suffice, that the special facts which give it the character of personalty must be set forth.]

[28] Consult Brown *v.* Wallis, 115 Mass. 158; Guthrie *v.* Jones, 108 Mass. 191; Cresson *v.* Stout, 17 Johns. 116; Hanrahan *v.* O'Reilly, 102 Mass. 201; Bliss *v.* Whitney, 9 Allen, 114; Cong. Society of Dubuque *v.* Fleming, 11 Iowa, 533.

permanent foundation, such as would show it was intended to be permanent, though it might be regarded as personal property while in transit, yet when so fixed upon the second lot it would again become realty, and not subject to replevin.[29]

§ 69. **Fixtures, or other articles severed from the realty, become personalty.** Fixtures severed from the realty become personal property, and are subject to recovery in this action as though never attached to the soil.[30] Thus it lies for machinery of a mill severed from the real estate,[31] or trees cut down ;[32] or property which would otherwise be treated as real estate may, by the act of the parties, be regarded and treated as personal, even without actual severance, and so become the subject of recovery in this action.[33] Grass cut from the freehold is personal, and in an action for it the plaintiff need not show title to the land.[34]

§ 70. **The same.** Where a person purchased a mill at sheriff's sale, and the *real estate only* was sold, another party claimed the machinery and severed and took it, with the knowledge of the purchaser at the sheriff's sale, who afterward brought replevin, claiming it as part of the real estate. The purchaser was permitted to show that it was in fact part of the realty, and was sold by the sheriff with the realty and conveyed to him, and upon making such proof he could sustain replevin against the party who wrongfully severed it.[35] When one built a mill on the land of another, under an agreement that it was to be the property of the builder until a certain judgment should be paid, the judgment was not paid but the land, with the mill standing thereon, was sold on execution, the mill was held to be the personal property of the builder.[36]

§ 71. **The same.** Two persons leased land for a salt well on

[29] Salter *v.* Sample, 71 Ill. 431.

[30] Brown *v.* Caldwell, 10 S. & R. 118; Heaton *v.* Findlay, 12 Pa. St. 304; Mather *v.* Ministers of Trinity Church, 3 S. & R. 509. Compare Voorhis *v.* Freeman, 2 Watts & Serg. 116; Pyle *v.* Pennock, Ib. 390; Baker *v.* Howell, 6 S. & R. 476.

[31] Cresson *v.* Stout, 17 Johns. 116; Harlan *v.* Harlan, 15 Pa. St. 514.

[32] Richardson *v.* York, 2 Shep. (Me.) 216; Bower *v.* Higbee, 9 Mo. 260.

[33] Shell *v.* Haywood, 16 Pa. St. 527; Piper *v.* Martin, 8 Barr. (Pa.) 211.

[34] Johnson *v.* Barber, 5 Gilman, (Ill.) 426.

[35] Harlan *v.* Harlan, 15 Pa. St. 513. See, also, Heaton *v.* Findlay, 12 Pa. St. 304.

[36] Yater *v.* Mullen, 24 Ind. 277.

shares. Petroleum came up with the salt water and they collected and sold it, and the owner of the land brought trover. The court held that the salt only was granted, and that everything else was reserved, but that as the lessees could not run the salt water without the petroleum, that the severance of the oil from the real estate was inevitable and lawful, and that this possession by the defendants was lawful; that trover would not lie; that the proper remedy was in equity.[37] This case conforms in principle so far as the question of severance is concerned, to the current of authorities, but no good reason is perceived why, if the owner of the land was entitled to the oil, he could not, after demand, recover it in replevin.

§ 72. **The same.** A party bought a lot, paying only a small part of the purchase money, and built a house on it. After a number of installments of the purchase money were due and unpaid, he moved the house off. Thereupon the owner of the ground demanded it as personal property, and replevied it. It was held that the action was proper and could be sustained, so long as the house was not permanently attached to other realty.[38]

§ 73. **The severance of chattels does not change the title.** It is an unquestioned rule of the common law that standing trees belong to the realty, and as such they are not subject to replevin, but trees cut down by a tenant become personal property, and if the tenant had no right to cut them they belong to the owner of the land, and he can sustain replevin for them.[39] Timber cut on State lands belongs to the State, and may be followed as long as it can be identified.[40] When plaintiff bought land at sheriff's sale, and took deeds, and also took possession, with permission to defendants to remain in two houses on the land as tenants at sufferance, and while there they cut hay on the land, the purchaser was allowed to recover in replevin.[41] The reason for this rule is, that a severance of property from the realty does not change the ownership. It belongs to the owner of the land

[37] Kier *v.* Peterson, 41 Pa. St. 358.

[38] Ogden v. Stock, 34 Ill. 522. See, also, Salter *v.* Sample, 71 Ill. 432.

[39] Paget's Case, 5 Co. Rep. 76*b*; Richardson *v.* York, 2 Shep. (14 Me.) 216; Bower *v.* Higbee, 9 Mo. 260; Gillerson *v.* Mansur, 45 Me. 26; Snyder *v.* Vaux, 2 Rawle, (Pa.) 427.

[40] Schulenberg *v.* Harriman, 21 Wall. 44.

[41] Nichols *v.* Dewey, 4 Allen, (Mass.) 386.

as much after the severance as before, and he is entitled to all the remedies for its recovery which the law allows for any personal property wrongfully taken or detained from its owner.[42]

§ 74. **The same. Growing crops.** Crops growing on land pass with the title to the realty. So, when a tenant rents land from one against whom suit in ejectment is pending, of which the tenant has notice, and the suit is determined against his landlord, the growing crops pass with the soil, and the party recovering in ejectment may recover them in replevin, if the tenant harvests them and refuses to deliver.[43] Upon a sale of the land, and reservation in the deed of plants or crops growing thereon, they become personal property, and replevin will lie for their recovery.[44] So where crops of wheat or corn are wrongfully severed by a trespasser, the owner is not thereby divested of his property, but may sustain replevin.[45]

§ 75. **Actual severance not necessary to give property the character of personalty.** An actual severance or disconnection of property from the real estate is not essential to give it the character of personal property. Simple consent or agreement of the owner of the real estate will usually be sufficient, and such consent may be inferred from his acts or from his dealings, when they clearly indicate such intentions. Thus, the sale of an engine and boiler separate from the land, accompanied by possession and acts of ownership by the vendee, amounts to a severance of the property from the real estate.[46]

§ 76. **The same.** A building or other fixture, which is ordinarily a part of the real estate, when placed on the land of another, with his consent, with the intention of removal, is regarded as personal property, and may be the subject of replevin.[47]

[42] Halleck *v.* Mixer, 16 Cal. 578.

[43] Rowell *v.* Klein, 44 Ind. 290, citing many cases. Manure made on the farm is part of the realty, but not manure made at a livery stable. Daniels *v.* Pond, 21 Pick. 370; Middlebrook *v.* Corwin, 15 Wend. 169.

[44] Ring *v.* Billings, 51 Ill. 475; Gibbons *v.* Dillingham, 5 Eng. (Ark.) 9.

[45] Bull *v.* Griswold, 19 Ill. 632; Anderson *v.* Draper, 34 Ill. 439; Langdon *v.* Paul, 22 Vt. 205; Sands *v.* Pfeiffer, 10 Cal. 258; Sanders *v.* Reed, 12 N. H. 558.

[46] Hensley *v.* Brodie, 16 Ark. 511.

[47] Weathersby *v.* Sleeper, 42 Miss. 732; Hines *v.* Ament, 43 Mo. 300. Ashmun *v.* Williams, 8 Pick. 402; Russell *v.* Richards, 10 Me. 429; Foy *v.* Reddick, 31 Ind. 414.

In California, a building which was placed on blocks not in any way attached to the soil, was regarded as personal property.[48] A fence was built on the land of another by mistake, and remained there for fifteen years with the consent of the owner of the land; he then requested the plaintiff to remove it, and shortly after took it away himself. The owner of the fence brought, and was permitted to sustain replevin.[49]

§ 77. **Chattles fixed to the land of another without his consent.** Where the owner of chattel property fixes it to the real estate of another without his consent, it becomes real estate, and cannot be the subject of an action of replevin. So, if one acquire possession of his neighbor's chattels, and fix them to his own land, so that they form part of the real estate, though trespass or trover might lie, replevin would not furnish a remedy.[50] A building placed on the land of another by mistake, without the owner's knowledge or consent, would be personal property, and liable for the debts of the builder—the owner of the land not objecting.[51]

§ 78. **Same. Entry under adverse claim.** Where one enters on the land of another under an adverse claim, and erects a house, and after ejectment removes the house, the owner of the land can recover it in replevin; and the fact that it was a wooden building, and that the builder erected it intending to remove it at some future day, will make no difference;[52] but in such case, if the building had been removed before the suit in ejectment was determined, it might have presented another case.[53]

§ 79. **The title to real estate—when evidence in replevin.** While, as has been shown, replevin does not lie for real estate, and the title thereto cannot be directly tried in this action,[54] yet this rule only applies so far as the suit is for the purpose of investigating the title to real estate. When the title only comes in question as a means of determining the ownership of chattels, there is no reason why the courts having the proper jurisdiction

[48] Pennybecker *v.* McDougal, 48 Cal. 162. See, also, Mills *v.* Redick, 1 Neb. 437. But, see Huebschman *v.* McHenry, 29 Wis. 658.

[49] Hines *v.* Ament, 43 Mo. 300.

[50] Fryatt *v.* The Sullivan Co., 5 Hill. (N. Y.) 117.

[51] Fuller *v.* Tabor, 39 Me. 520.

[52] Huebschman *v.* McHenry, 29 Wis. 659.

[53] See § 85 and note, and § 88 and note.

[54] See *ante*, § 58.

may not resort to an inquiry into the title of real estate, as determining the ownership of chattels which have been severed therefrom; for in such case it is not a trial of the title to lands, but of chattels.[55]

§ 80. **The same.** The current of authorities fully sustains this doctrine. The title to land must sometimes be inquired into, as the only means of determining the ownership of chattels which have been severed therefrom, and in such case deeds and title papers may be read in evidence, in replevin. As a general rule governing such cases, it may be stated that the title to real estate may be incidentally called in question in this action, not for the purpose of determining disputed titles to real property, but to enable the court to pronounce intelligently on the title to chattels, where other evidence leaves a doubt.

§ 81. **Holder of colorable title cannot recover chattels severed.** In a suit for logs cut on land, the title to which was claimed by plaintiff, and of which the plaintiff was in actual possession, the action might be sustained without proof of title; but in such case the defendant could show an adverse title to the land of a higher character than the plaintiff's and defeat the action. The holder of colorable title, without other right, though in possession, cannot recover against the real owner by a resort to replevin, any more than in any other action;[56] but the holder of colorable title in good faith would doubtless be permitted to defend in this action.[57] Where the plaintiff cleared land and put in wheat, and was in possession when the defendant entered and cut it, the defendant offered to prove that the land was his, and that the plaintiff was a trespasser, in sowing the grain, and the court admitted the evidence.[58]

§ 82. **The same. Defendant holding under claim of title in good faith.** But when the defendant is in possession of the land, holding adversely under color of title in good faith, the plaintiff, even though he be the real owner of the soil, cannot recover chattels severed therefrom. Replevin cannot be the means of litigating and determining the title to real estate between ad-

[55] Clement *v.* Wright, 40 Pa. St. 251.

[56] Hungerford *v.* Redford, 29 Wis. 347. See, also, Schulenberg *v.* Campbell, 14 Mo. 493; Harlan *v.* Harlan, 15 Pa. St. 513; Hart *v.* Vinsant, 6 Helsk. (Tenn.) 616.

[57] See *post*, § 82.

[58] Elliott *v.* Powell, 10 Watts, (Pa.) 454

verse claimants.[59] The owner of land may bring replevin for chattels severed from the freehold, where there is no adverse possession, or where the adverse possessor is a trespasser; but the law does not permit adverse claimants to contest the title to land under pretense of a contest about chattels, as this would perhaps sometimes give a decided advantage to the plaintiff;[60] and the general rule may be stated that neither replevin nor trover lies against a party in the actual possession of land holding title, for timber, slate, or any other thing severed therefrom, even in case the title is in dispute, but it does lie by the owner in possession either actually or constructively, as against one who wrongfully severs and removes any part of the realty without color of right.[61]

§ 83. **The same. The action cannot be used to litigate title to land.** This rule, though clearly defined and well established, requires some care in its application. When the plaintiff bases his right to recover a chattel which has been severed from realty, on the fact that he owns and is entitled to immediate possession of the land from which the chattel was severed, he may give evidence of his title to the land, and that will establish his title to the chattel, and a mere intruder or trespasser on the land cannot object so as to defeat the action; but when the defendant in such cases is in possession, and claims a title adverse to the plaintiff, and has color of title in good faith, the plaintiff cannot recover against him in replevin.[62]

[59] Snyder *v.* Vaux, 2 Rawle, (Pa.) 427; Halleck *v.* Mixer, 16 Cal. 575; Harlan *v.* Harlan, 15 Pa. St. 513; DeMott *v.* Hagerman, 8 Cow. 219.

[60] Vausse *v.* Russell, 2 McCord, 329; Mather *v.* Trinity Church, 3 S. R. 509; Baker *v.* Howell, 6 S. & R. 476; Brown *v.* Caldwell, 10 S. & R. 114; Powell *v.* Smith, 2 Watts, 126; De Mott *v.* Hagerman, 8 Cow. 220; Davis *v.* Easley, 13 Ill. 192; Saunders *v.* Reed, 12 N. H. 558; Langdon *v.* Paul, 22 Vt. 205; Sands *v.* Pfeiffer, 10 Cal. 258; Anderson *v.* Hapler, 34 Ill. 436; Cresson *v.* Stout, 17 John. 116.

[61] Brewer *v.* Fleming, 51 Pa. St. 111; Wright *v.* Guier, 9 Watts, 172; Elliott *v.* Powell, 10 Watts, 454; Harlan *v.* Harlan, 3 Harris, (15 Pa. St.) 509; Brown *v.* Caldwell, 10 S. & R. (Pa.) 114. Where a disseizor enters and sows wheat, and the real owner afterward re-enters, he shall have the crop, whether cut and on the premises or growing, because he takes his former title, and the crops belong to him, and the disseizor can take nothing. Hooser *v.* Hays, 10 B. Mon. (Ky.) 72.

[62] Halleck *v.* Mixer, 16 Cal. 579; Page *v.* Fowler, 28 Cal. 608; Harlan *v.* Harlan, 15 Pa. St. 513; Anderson *v.* Hapler, 34 Ill. 439.

§ 84. **The same. Chattels severed through mistake in boundaries.** When O. built a cabin and stable, and cut timber on land, the boundaries of which were not exactly known, and some of the timber cut was on the land of another, it was held that the possession of the land where the timber was cut was not such as could be used as a defense in a suit in replevin. Nothing short of an actual adverse possession, under claim of ownership, will deprive the owner of the right to sue in this action for chattels severed from his land;[63] and the rule that a party in possession under paper title is restricted in his possession by the calls in his deed (unless he has actual possession of other lands), applies in replevin as in other actions.

§ 85. **The same. Chattels severed by a trespasser.** Plaintiff was in possession of about eight hundred acres of land, which had been inclosed for several years, but the fences had fallen down in places. Defendants entered and claimed to preempt, each one-quarter section. They built houses and lived on the claims. They were not successful in establishing their claim for pre-emption, and plaintiff recovered against them in ejectment. While they were in possession, they cut hay, which the plaintiff replevied. *Held*, that the replevin suit could not be sustained; that the owner of the land was out of the possession, and defendants in possession, claiming to own it. The owner of land, being *ousted*, may have his action for the rents and profits, but not for the crops grown on the land and harvested and removed by the disseizor. The law in all such cases gives the owner an action for the rents and profits, but not the crops, or their value. It would be oppressive to require one, after years of litigation, after finding he had a bad title, to pay the value of the crops grown; and it would be an inconvenience to the public if they were obliged to look at his title before buying his crops.[64]

§ 86. **The same.** When replevin was brought for wood cut on plaintiff's land by defendant, who was in possession as a trespasser without color of title, adverse possession of the land, unless for a period long enough for the statute of limitation to run, would not protect the defendant in an action for the timber severed from the realty; the court saying that when the defendant is in possession as a trespasser, his rights resting only on a naked assertion of title sufficient to put the statute of limitations

[63] Young *v.* Herdle, 55 Pa. St. 172.

[64] Page *v.* Fowler, 39 Cal. 415; Page *v.* Fowler, 28 Cal. 608.

in operation, the question of title cannot be said to be in issue until the statute has actually run.[65]

§ 87. **The same.** When a trespasser entered on land and sowed grain, and the land was afterward sold by the sheriff upon execution against the owner, the purchaser at such sale was entitled to the grain; and when the purchaser, by mistake, took the trespasser for a tenant of the former owner, and seized upon the grain by distress for rent, and it was replevied by the trespasser, who pleaded *non tenuit* to the avowry in replevin, the defendant in replevin (the purchaser) was entitled to take him at his word, and if not a tenant he was a trespasser, and the defendant in replevin was entitled to recover.[66] The doctrine stated has been carried even further in California, where it was said the owner of the land cannot sustain replevin for crops raised on the land by one who holds possession with adverse claim of right, even though *without color of title*.[67]

§ 88. **Where a party in possession of lands claiming to own them severs chattels.** Land was in the actual possession of W., claiming the premises as his own, and holding adversely to plaintiff, who had the title; while so in possession he cut a quantity of hay and sold it to defendant, and plaintiff brought replevin. *Held*, it could not be sustained, W. being in possession and claiming title must be regarded as the owner until after judicial decree.[68]

§ 89. **Summary.** From these cases it would seem, then, that the mere assertion of title by one in possession will not defeat the rights of the real owner of the fee. The law will not permit a mere trespasser to set up a claim of title and thus acquire rights, or protect himself in his wrong-doing. The title which will protect one in possession must be a colorable title, made in good faith. It is not adverse possession alone, nor adverse possession claiming title, unless for a sufficient length of time for the statute of limitations to run that constitutes the grounds of defense, but a colorable title made in good faith. The assertion of title by a trespasser confers no title.[69]

[65] Kimball *v.* Lohmas, 31 Cal. 155.

[66] Hellings *v.* Wright, 14 Pa. St. 375.

[67] Pennybecker *v.* McDougal, 46 Cal. 662.

[68] Stockwell *v.* Phelps, 34 N. Y. 363. See Mather *v.* Ministers, etc., Trinity Church, 3 S. & R. 509; Lehman *v.* Kellerman, 65 Pa. St. 489; Ralston *v.* Hughes, 13 Ill. 469.

[69] Halleck *v.* Mixer, 16 Cal. 574; Page *v.* Folwer, 39 Cal. 412; Kimball

§ 90. **How far a mortgage on real estate passes title to chattels severed therefrom.** The question as to how far a mortgage passes the title to land so as to convey chattels severed from the realty to the mortgagee is often of the greatest importance, and sometimes attended with considerable difficulty. Upon this question authorities are not uniform. The general rule may be stated, that in States where the mortgage is by law regarded as an absolute conveyance of the land with a condition of defeasance on payment of the mortgage debt, that chattels severed from the realty during the existence of the mortgage may be said to belong to the mortgagee, and he may recover them in an action of replevin. But when the mortgage is only regarded as a security for debt, and not a conveyance of the title to the land chattels severed from the land, do not necessarily belong to the mortgagee, at least not until after default and foreclosure. In many of the States a mortgage is considered a conveyance of the fee, and in such case a fixture severed without the consent of the holder of the mortgage so as to endanger the security may be recovered in replevin, as he is looked upon as the owner of the fee.[70]

§ 91. **The same.** In Minnesota it was held that the holder of a mortgage on real estate is not entitled to the timber cut from the mortgaged property, even after default, until he shall have foreclosed his mortgage. The reason for this decision seems to be based on the statute which substantially declares that a mortgage shall not be held a conveyance so as to entitle the holder to re-

v. Lohmas, 31 Cal. 158; Stockwell *v.* Phelps, 34 N. Y. 363; Brown *v.* Caldwell, 10 S. & R. 118. An execution debtor has no right to keep purchaser at sheriff's sale out of possession by sowing crops (wheat) which may not mature until after the purchaser is entitled to his deed. The debtor, after such sale, cannot maintain replevin for such crops as sown by himself. Parker *v.* Storts, 15 O. St. 352. It was said if the owner of a mill take out a mill stone to pick it, and devise the mill while it is out, the mill stone shall pass by the devise. Bull. N. P. 34.

[70] Smith *v.* Goodwin, 2 Me. 173; Hemenway *v.* Bassett, 13 Grey, 378; Gore *v.* Jenness, 19 Me. 53; Roberts *v.* Dauphin Bank, 19 Pa. St. 75; Cope *v.* Romeyne, 4 McLean, 384; Latham *v.* Blakely, 70 N. C. 368. Gray *v.* Holdship, 17 S. & R. 113; Goff *v.* O'Connor, 16 Ill. 421. Sanders *v.* Reed, 12 N. H. 561; Frothingham *v.* McKusick, 24 Me. 405; Bussey *v.* Page, 14 Me. 132; Smith *v.* Moore, 11 N. H. 55; Thomas *v.* Crofut, 14 N. Y. 474; Van Pelt *v.* McGraw, 4 N. Y. 111; Fernald *v.* Linscott, 6 Me. 234; Bratton *v.* Clawson, 2 Strobh. (S. C.) 478.

cover possession without foreclosure.[71] But in Rhode Island it was held that the mortgagee could sustain replevin against the mortgageor [72] in possession for timber cut on the mortgaged premises in substantial diminution of the security of the mortgage.[73] Substantially the same rule was declared to be the law in Maine and New York, where the court permitted the mortgagee before entry to recover in trespass for cutting timber in the mortgaged premises; the reason being that it might diminish the security.[74]

§ 92. **The same.** In Vermont the mortgagee, after condition broken and before foreclosure, was allowed to sustain trover against the mortgageor for the value of timber cut, and replevin would of course have been permitted had that been the form of the action.[75] But in Kansas the mortgageor removed a house from the mortgaged premises and the remedy was denied.[76]

§ 93. **The same.** "The question," said REDFIELD, J., "in *Langdon* v. *Paul*, 22 Vt. 210, is whether the mortgagee, after condition broken, can maintain an action in the nature of waste against the mortgageor in possession for cutting timber and selling it, or trover for the timber." There is no English case against the action. In the case of *Hitchman* v. *Walton*, 4 Mees. & W., 409, the court of exchequer upon a full argument decided the action maintainable on either count. The mortgageor, said the court, has no just grounds of complaint. He may at any time defeat the plaintiff's action by paying the mortgage debt and tending the costs. If he will not do that, but suffer the estate to

[71] Adams *v.* Corriston, 7 Minn. 456.

[72] It is with feelings of extreme diffidence that the author has ventured to depart from the examples of many eminent law writers in the orthography of this word. He has, however, followed the legal pronunciation and the spelling of the dictionaries, all of which it is believed will be found to agree therewith.

[73] Waterman and Wf. *v.* Matteson, 1 Ames, (4 R. I.) 540.

[74] Stowell *v.* Pike, 2 Greenleaf, (Me.) 387; Fernald v. Linscott, 6 Greenleaf, (Me.) 238; Gore *v.* Jenness, 19 Me. (1 App.) 54; Smith *v.* Goodwin, 2 Me. 173. See, also, Northampton Paper Mill *v.* Ames, 8 Met. 1; Yates *v.* Joyce, 11 Johns. 136; Jackson *v.* Bronson, 19 Johns. 326; Hatch *v.* Dwight, 17 Mass. 299; Van Pelt *v.* McGraw, 4 Comst. (N. Y.) 110; Gardner *v.* Heartt, 3 Denio, 233.

[75] Langdon *v.* Paul, 22 Vt. 210. See, also, Lull *v.* Matthews, 19 Vt. 322; Morey *v.* McGuire, 4 Vt. 327.

[76] Clark *v.* Reyburn, 1 Kan. 281.

go upon the mortgage, the mortgagee is entitled to his judgment.[77]

[77] Morey *v.* McGuire, 4 Vt. 327; Lull *v.* Matthews, 19 Vt. 322. See, also, Blaney *v.* Bearce, 2 Me. 132; Frothingham *v.* McKusick, 11 Shep. (24 Me.) 403; Gore *v.* Jenness, 19 Me. 53.

CHAPTER IV.

PLAINTIFF MUST HAVE THE RIGHT TO IMMEDIATE AND EXCLUSIVE POSSESSION.

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§ 94. **Plaintiff must have a right to immediate and exclusive possession.** One of the cardinal rules in this action is, that the plaintiff must in all cases have a general or special property in the goods which he seeks to recover, with the right to their immediate and exclusive possession at the time of the commencement of his suit. This has been the rule from the earliest times, and is sustained by an unbroken current of authorities to the present day.[1] It is also an established rule that the plaintiff, having such property and right of possession, may sustain the action without other title, even against the general owner.[2] In Iowa it is said the simple question to be determined is, "in whom was the right of possession at the time of the institution of the suit." And in this view it is sufficient for the plaintiff to allege his right of possession when his suit was begun.[3] So, where the

[1] Britton, Nichol's Trans., Vol. 1, p. 139; Gordon *v.* Harper, 7 Durnf & East. 9 and 6; Smith *v.* Plomer, 15 East, 607; Jimmerson *v.* Green, 7 Nebraska, 26; Meredith *v.* Knott, 34 Geo. 222; Crocker *v.* Mann, 3 Mo. 473; Russell *v.* Minor, 22 Wend. 659; McIsaacs *v.* Hobbs, 8 Dana, (Ky.) 268; Hubloun's Case, Skinner, 65; Reese *v.* Harris, 27 Ala. 306; Loveday *v.* Mitchell, Comyns, 247; Hilger *v.* Edwards, 5 Nev. 81; Muggridge *v.* Eveleth, 9 Met. 235; Kirby *v.* Miller, 4 Cold. (Tenn.) 3; Sager *v.* Blain, 5 Hand. (N. Y.) 449; Bassett *v.* Armstrong, 6 Mich. 397; Barrett *v.* Scrimshaw, Combe, 477; Lloyd *v.* Goodwin, 12 S. & M. (Miss.) 223; Packard *v.* Getman, 4 Wend. 613; Waterman *v.* Robinson, 5 Mass. 304; Hallinbake *v.* Fish, 8 Wend. 547; Fairbank *v.* Phelps, 22 Pick. 538; Forth *v.* Pursley, 82 Ill. 152; Ingersoll *v.* Emmerson, 1 Carter, (Ind.) 77; Bradley *v.* Michael, 1 Carter, (Ind.) 552; Johnson *v.* Neale, 6 Allen, 228; Barry *v.* O'Brien, 103 Mass. 521; Pattison *v.* Adams, 7 Hill, (N. Y.) 126; Wade *v.* Mason, 12 Gray, 335.

[2] Crocker *v.* Mann, 3 Mo. 473; Prater *v.* Frazier, 6 Eng. (Ark.) 249.

[3] Cassell *v.* Western Stage Co., 12 Iowa, 48. But, see, and compare Pattison *v.* Adams, 7 Hill, (N. Y.) 126. "The plaintiff must have a general or special property in the goods, with the right to immediate possession." Lowry *v.* Hall, 2 W. & S. (Pa.) 133; Stapleford *v.* White, 1 Houst. (Del.) 238; Lester *v.* McDowell, 18 Pa. St. 91; Pierce *v.* Stevens, 30 Me. 184; Haythorn *v.* Rushforth, 4 Har. (19 N. J.) 160; Selbert *v.* M'Henry, 6 Watts, (Pa.) 302. "The action cannot be sustained by one who has not at the time a general or special property in the goods, with the right to their immediate possession." Miller *v.* Adsit, 16 Wend. 335; Perley *v.* Foster, 9 Mass. 114; Thompson *v.* Button, 14 Johns. 84; Dunham *v.* Wyckoff, 3 Wend. 281; Redman *v.* Hendricks, 1 Sandf. (N. Y.) 32. "The plaintiff must have the exclusive right to the possession of the goods at the time the suit is begun." Hunt *v.* Chambers, 1 Zab. (21 N. J.) 623; Kingsbury *v.* Buchanan, 11 Iowa, 387; Noble *v.* Epperly, 6 Port. (Ind.) 416, Barrett *v.* Turner, 2 Neb.

action was for the grain in a warehouse, the defendants were permitted to show that there was grain in the warehouse belonging to other parties, as a defense.[4] Therefore, when the plaintiff's right to possession did not accrue until after his suit was begun, he had not at that time the right to possession, and could not sustain the action.[5]

§ 95. **Proof of wrongful taking not necessary.** An actual wrongful or forcible taking from the plaintiff's possession was formerly essential;[6] but as the law stands now, such proof is not requisite.[7]

§ 96. **The term "property," or "property in the plaintiff," does not mean absolute ownership.** The term "property," or "property in the plaintiff," used in this connection, and generally in this action, does not mean ownership by absolute title, but a right to the possession or dominion over the goods, which he seeks to recover, at the time he makes demand or brings suit.[8] So, in case of the defendants, a plea of property in defendant does

174; Dickson *v.* Mathers, Hempst. U. S. C. C. 65. Possession for the full period of the Statute of Limitations invests the party with title. He may make use of it against the former owner, if he assume to retake the property. Hicks *v.* Fluit, 21 Ark. 463. "Persons having a special property in the goods, with the right to immediate possession, may sustain the action," Wheeler *v.* McFarland, 10 Wend. 324; Branch *v.* Wiseman, 51 Ind. 1; Tuthill *v.* Wheeler, 6 Barb. 362; Mead *v.* Kilday, 2 Watts. 110; Hamilton *v.* Mitchell, 6 Blackf. 131; Burton *v.* Tannehill, 6 Blackf. 470. The plaintiff must have a right to delivery of the goods at the time the writ issues. Sharp *v.* Whittenhall, 3 Hill, 576.

[4] Nelson *v.* McIntyre, 1 Bradwell, (Ill.) 603. See, also, Gillett *v.* Treganza, 6 Wis. 343. Consult Rose *v.* Tolly, 15 Wis. 444; Walpole *v.* Smith, 4 Blackf. 306; Presley *v.* Powers, 82 Ill. 125; Chinn *v.* Russell, 2 Blackf. 174; Clark *v.* Heck, 17 Ind. (Harrison), 281; Wheeler *v.* Train, 3 Pick. 255; Beckwith *v.* Philleo, 15 Wis. 223; Appleton *v.* Barrett, 22 Wis. 569; Rogers *v.* Arnold, 12 Wend. 30.

[5] Campbell *v.* Williams, 39 Iowa, 646.

[6] Ely *v.* Ehle, 3 Comst. (N. Y.) 506; Dame *v.* Dame, 43 N. H. 37; Wright *v.* Armstrong, Breese, (Ill.) 130; Harwood *v.* Smethurst, 29 N. J. L. 195.

[7] Kerley *v.* Hume, and Hume *v.* Gillespie, 3 T. B. Mon. (Ky.) 181. Compare Cobb *v.* Megrath, 36 Geo. 625; McArthur *v.* Hogan, Hempst. 286; Skinner *v.* Stouse, 4 Mo. 93. See cases cited in notes to § 94.

[8] Johnson *v.* Carnley, 6 Selden, (N. Y.) 570; Sprague *v.* Clark, 41 Vt. 6.

not mean absolute ownership, but a right to present and exclusive possession.[9]

§ 97. **Right of possession ownership may be in different persons.** The right to the immediate possession may, sometimes, be in one person, while the title may be in another,[10] as frequently arises in cases of bailment for a special purpose. The bailee may have the right to the immediate possession by virtue of a lien for services bestowed, or a lease for an unexpired time, and in such case the action can be sustained by the owner of the special property even against the owner of the title, upon showing right to possession as against him at the time the suit was begun;[11] and the plaintiff's claim is sufficiently maintained if he shows himself entitled to possession as against the defendant at the time the suit was begun. He is not obliged to show title against the world.[12] The statutes giving the right to maintain replevin, which are substantially the same in all States, do not limit the action to the owner of absolute title, but any owner of special property with the right to possession is entitled to sustain the action the same as though he held absolute title.[13]

§ 98. **Property of bailee.** As a general rule, property in the hands of a borrower, trustee or bailee, for a limited time or purpose, without fraud or wrongful intent, is not liable to be taken upon process for the collection of his debts, and if so taken, the real owner, entitled to immediate possession, may sustain replevin;[14] but cases often arise where a bailee has an interest in the property bailed, which may be seized and sold on process against him. For example, if one hire a horse for a year, and acquire the right to exclusive possession for that time, his interest may be taken and sold on execution. In this case, only the interest of the bailee, not the general property, would pass by such a sale.[15] Where plaintiff leased oxen to

[9] Hunt *v.* Chambers, 1 Zab. (21 N. J.) 620; Cleaves *v.* Herbert, 61 Ill. 172.

[10] Childs *v.* Childs, 13 Wis. 20; McLaughlin *v.* Platt, 27 Cal. 452.

[11] Bowen *v.* Fenner, 40 Barb. 385; Roberts *v.* Wyatt, 2 Taunt. 268; Burton *v.* Hough, 6 Mod. 334; Pain *v.* Whittaker, Ry. & Moody, 99.

[12] Summons *v.* Austin, 36 Mo. 308; Ingersoll *v.* Emmerson, 1 Carter, (Ind.) 78.

[13] Williams *v.* West, 2 Ohio St. 83.

[14] Robinson *v.* Champlin, 9 Iowa, 91.

[15] Caldwell *v.* Cowan, 9 Yerg. (Tenn.) 262.

A. for three months, and they were levied upon by an attachment against A. before the three months had expired, the court was unanimous that, inasmuch as the plaintiff had no right to the immediate possession when the suit was begun, he could not recover in replevin, even though he was the general owner.[16]

§ 99. **Replevin lies at the suit of one entitled to the property for a special purpose.** Where a party bought five hundred head of cattle, and paid the full purchase price, the vendors agreeing that the purchaser might select that number from their herd and take immediate possession, the court intimated in argument, that he might, upon refusal of the vendors to permit him to make the selection, have replevied the whole herd, and selected his five hundred therefrom, and returned the remainder.[17] No matter what the plaintiff's title may be, he cannot sustain the action against a defendant who had the right of possession at the time the suit was begun.[18]

§ 100. **Illustrations of the rule.** A multitude of cases will doubtless suggest themselves to the reader, where the necessities of commerce and business require that a party entitled to present possession of a chattel should find a ready and effective remedy to enforce his rights to it, against all persons, even the general owner, who acts in disregard of them. The bailee of a horse or ship for a special purpose, or for a stated time, the carrier who transports goods for hire, the commission man who advances money upon goods consigned to him, or the warehouse man who stores them at the owner's request, or the mechanic who repairs a watch or carriage, each has a special property in the goods so placed in his possession, which is superior, until it is lawfully determined, to the rights of the owner. And it would be disastrous to commerce, as well as unjust to such bailee, if the owner were permitted to retake possession of his goods without first discharging

[16] Collins *v.* Evans, 15 Pick. 63. See, also, Wheeler *v.* Train, 3 Pick. 255; Gordon *v.* Harper, 7 Durnf. & East. 10 and 6; Dixon *v.* Thatcher, 14 Ark. 144; Hunt *v.* Strew, 33 Mich. 85; Smith *v.* Plomer, 15 East. 607; Bruce *v.* Westervelt, 2 E. D. Smith, (N. Y.) 240; Cox *v.* Hardin, 4 East. 211; Forth *v.* Pursley, 82 Ill. 152; Wyman *v.* Dorr, 3 Me. 183; Templeman's Case, 10 Mod. 25.

[17] McLaughlin *v.* Piatti, 27 Cal. 452. See, also, Wilson *v.* Royston, 2 Ark. 315.

[18] Rucker *v.* Donovan, 13 Kan. 251.

the special lien of the bailee, and in a lawful manner putting an end to his title. The law therefore recognizes and protects the right of possession the same as it does absolute title.[19]

§ 101. **The same.** When the plaintiff furnished cloth upon which to print calico, under an agreement that the calico was to be sold, and, after deducting advances, commissions, and cost of the cloth, the balance was to be paid to the printer, it was held that while the goods were in the hands of a factor for sale, the sheriff could not levy on them by virtue of an attachment or execution against the printer. The factor in such case having a special property in the goods, with possession and the right of possession, process against the printer was regarded the same as process against any stranger.[20] So, when a factor advances money on goods stored with him, and has a lien for his advances, the owner cannot sustain replevin until he tenders the advances and expenses.[21]

§ 102. **Ownership not necessarily determined in this action.** The general ownership of property is not necessarily determined in replevin, but the right of possession always is.[22] Where the plaintiff, who was the general owner, sued a railroad company for goods which it refused to deliver unless the plaintiff signed a receipt stating that they were in good order, the detention was held to be rightful; the company had a right to require such a receipt; that the plaintiff had a right to examine the goods at the time and place of delivery, and before he could insist on removal.[23]

§ 103. **Borrower cannot set up title.** A simple borrower of property cannot set up title in himself against his bailor; he must restore the property before he can assert ownership in himself. A person claiming to be the owner cannot be permitted to employ such means to obtain possession of goods and then hold under pretense of superior title. The act of borrowing is such a recognition of the lender's title as estops the borrower from asserting ownership until after he has surrendered the goods.[24] So,

[19] Williams *v.* West, 2 Ohio St. 85.

[20] Wood *v.* Orser, 25 N. Y. 348.

[21] Tyus *v.* Rust, 34 Geo. 382. See, also, McCoy *v.* Cadle, 4 Iowa, 558; Corbitt *v.* Helsey, 15 Iowa, 297.

[22] Warner *v.* Matthews, 18 Ill. 83; Rogers *v.* Arnold, 12 Wend. 30.

[23] Skinner *v.* C., R. I. & P. R. R., 12 Iowa, 191.

[24] Simpson *v.* Wrenn, 50 Ill. 224.

when property was seized and the owner gave the officer a receipt for it, and then refused to deliver it, he was not allowed to set up title in himself as against the officer when sued by the latter.[25]

§ 104. **Carrier cannot show title in third party as a defense to an action by the shipper or consignee.** Neither can a carrier who acquired possession from a shipper excuse himself for a non-delivery by showing title in a third party or in himself. Though a seizure of the property upon a writ of replevin, or other legal process against the shipper or consignee might be shown, and would constitute a good defense to the carrier in an action against him for the goods.[26]

§ 105. **The legal title will prevail over the equitable.** In this action, as in other actions at law, legal title will in all cases prevail over a mere equitable title,[27] but the fact that the plaintiff holds only as trustee for another, or as guardian or executor, will not debar him. So long as he holds the legal title, with the right to immediate possession, he may sustain replevin.[28]

§ 106. **An assignee in bankruptcy.** An assignee in bankruptcy takes the title of the bankrupt, and is entitled to the possession of the goods the same as the bankrupt was before the bankruptcy. Proceedings, however, by the assignee to recover the property of the bankrupt, do not usually take the form of a suit in replevin, though such a suit would doubtless be sustained. The shorter and more effective course is by application to the court in a summary proceeding for the possession of the goods. A bankrupt has title against all but his assignee.[29] When in replevin against a sheriff he answered that he seized the goods on an attachment against one W., and that afterwards proceedings in bankruptcy were taken against W., who was adjudged a bankrupt, and that the assignee appointed by the court had demanded

[25] Brusley *v.* Hamilton, 15 Pick. 40.

[26] G. W. Ry. Co. *v.* McComas, 33 Ill. 185.

[27] Heyland *v.* Badger, 35 Cal. 404; Reese *v.* Harris, 27 Ala. 306; Killian *v.* Carrol, 13 Ired. (N. C.) 431.

[28] Bergesch *v.* Keevil, 19 Mo. 128. A father who is the natural guardian for his minor children has sufficient right to the possession of their property to enable him to sustain replevin against one who wrongfully takes or detains it. Smith *v.* Williamson, 1 Har. & J. (Md.) 147.

[29] Sawtelle *v.* Rollins, 23 Me. 199; Fowler *v.* Down, 1 Bos. & Pull. 44; Hurst *v.* Gwennap, 2 Stark. 306; Webb. *v.* Fox, 7 Term. R. 392, 224.

and taken all the goods, the answer was regarded as a sufficient defense for the sheriff.[30]

§ 107. **Right to present possession, does not depend on former possession.** A legal right to the possession of the goods at the time the suit was begun has been frequently held to be all that is essential to sustain replevin. But what circumstances invest a party with this right remains a question unsolved by the statement, and perhaps no rule can be given which will apply in all cases. Where the plaintiff asserts the right to present possession, his right to recover does not depend on the question as to whether he had the possession at any former time, but as to whether he had the right at the time the suit was begun.[31] So, when the plaintiff is not entitled to bring suit for the goods without prior demand for the possession, and does begin suit without such demand, he is not entitled to possession at the time the suit was begun, and cannot succeed.[32] Any fact showing that the plaintiff in replevin had no right to the immediate possession when he began his suit is a complete bar to the action.[33]

[30] Bolander *v.* Gentry, 36 Cal. 109.

[31] Stoughton *v.* Rappalo, 3 S. & R. 562; Harlan *v.* Harlan, 15 Pa. St. 513; Shearick *v.* Huber, 6 Binn. 3; Hunt *v.* Strew, 33 Mich. 85; Herdic *v.* Young, 55 Pa. St. 177; Hatch *v.* Fowler, 28 Mich. 210; Morgner *v.* Biggs, 46 Mo. 65. *Contra*, see Cobb *v.* Megrath, 36 Geo. 625.

[32] Alden *v.* Carver, 13 Iowa, 254. See Campbell *v.* Williams, 39 Iowa, 646.

[33] Consult the following cases: Belden *v.* Laing, 8 Mich. 503; Clark *v.* West, 23 Mich. 242; Davidson *v.* Waldron, 31 Ill. 120; Hill *v.* Freeman, 3 Cush. 260; Dixon *v.* Hancock, 4 Cush. 96; Waterman *v.* Robinson, 5 Mass. 303; Fairbank *v.* Phelps, 22 Pick. 538; Walcott *v.* Pomeroy, 2 Pick. 121; Whitwell *v.* Wells, 24 Pick. 25; Perley *v.* Foster, 9 Mass. 112; Ludden *v.* Leavitt, 9 Mass. 104; Warren *v.* Leland, 9 Mass. 265; Mitchell *v.* Roberts, 50 N. H. 486; Wallace *v.* Brown, 17 Ark. 450; Hill *v.* Robinson, 16 Ark. 92; Britt *v.* Aylett, 6 Eng. (Ark.) 476; Wilson *v.* Royston, 2 Ark. 315; Dixon *v.* Thatcher, 14 Ark. 141; Parsons *v.* Boyd, 20 Ala. 117. Reese *v.* Harris, 27 Ala. 305; Bryan *v.* Smith, 22 Ala. 539; Beazley *v.* Mitchell, 9 Ala. 780; Parham *v.* Riley, 4 Cold. (Tenn.) 5. Ownership without right to possession is not sufficient. Williams *v.* West, 2 O. St. 83; Tison's Admr. *v.* Bowden, 8 Fla. 69; Neff *v.* Thompson, 8 Barb. 213; Johnson *v.* Neale, 6 Allen, 228; Brown *v.* Chickopee Falls Co., 16 Conn. 87; Tomlinson *v.* Collins, 20 Conn. 365; Smith *v.* Orser, 43 Barb. 187; Muggridge *v.* Eveleth, 9 Met. 233; Wade *v.* Mason, 12 Gray, 335; Bradley *v.* Michael, 1 Carter (Ind.) 552; Paugburn *v.* Partridge, 7 John. (N. Y.) 140; Hotchkiss *v.* McVickar, 12 Johns. 403; Clark *v.* Skinner, 20 John. (N. Y.) 465; Marshall *v.* Davis,

§ 108. **Rule similar to that in trespass.** The rule, as has been shown, s similar to that in trespass *de bonis asportatis*, and this latter action cannot be supported unless the plaintiff have the actual or constructive possession of the goods, or a general or special property in them, with a right to immediate possession when the injury was committed. It is not essential that the plaintiff should ever have had the actual possession, but he must have such a title as will authorize him to reduce the goods to his possession when he pleases.[34]

§ 109. **Prior rightful possession; when sufficient.** It has been stated that prior rightful possession of property, without any other title, is sufficient to sustain the action against a wrongdoer, such possession being a good title until a better one be shown. Prior rightful possession is of itself *prima facie* proof of title, and as against all, except the owner, is sufficient to entitle the plaintiff to recover.[35] Where the plaintiff is able to show that the defendant was taking away property of which he had just before been in possession, claiming to own it, it is sufficient, at least, to put the defendant upon proof of his title or right to possession, and in the absence of such proof the plaintiff will be entitled to recover.[36] Such recovery is permitted on the presumption of ownership, which, in the judgment of the law, accompanies actual possession, but which may be rebutted by proof.[37]

1 Wend. 109; Hall *v.* Tuttle, 2 Wend. 475; Dubois *v.* Harcourt, 20 Wend. 41; Rogers *v.* Arnold, 12 Wend. 30. *Prima facie* title better than possession. La Fontaine *v.* Greene, 17 Cal. 296; Emmons *v.* Dowe, 2 Wis. 322; Rose *v.* Tolly, 15 Wis. 443; Beckwith *v.* Philleo, 15 Wis. 224; Sager *v.* Blain, 5 Hand. (N. Y.) 449; Wyman *v.* Dorr, 3 Gr. (Me.) 186; Pierce *v.* Stevens, 30 Me. (17 Shep.) 184; Southwick *v.* Smith, 29 Me. 229; School Dist. No. 5 *v.* Lord, 44 Me. 384; Melton *v.* McDonald, 2 Mo. 45; Ramsay *v.* Bancroft, 2 Mo. 151; Bush *v.* Lyon, 9 Cow. 53; Warner *v.* Hunt, 30 Wis. 201; Harrison *v.* McIntosh, 1 Johns. 380; Eisendrath *v.* Knauer, 64 Ill. 402; Skinner *v.* Stouse, 4 Mo. 93.

[34] Putnam *v.* Wyley, 8 Johns. 432; Cannon *v.* Kinney, 3 Scam. 9; Hume *v.* Tufts, 6 Blackf. 136; Boise *v.* Knox, 10 Met. 40; Bell *v.* Monahan, Dudley, (S. C.) 38; Crenshaw *v.* Moore, 10 Geo. 384; Lunt *v.* Brown, 13 Maine, 236; Heath *v.* West, 8 Foster, (N. H.) 101; Muggridge *v.* Eveleth, 9 Met. 233. *Contra*, Cobb *v.* Megrath, 36 Geo. 625.

[35] Hunt *v.* Chambers, 1 Zab. (21 N. J.) 624.

[36] Morris *v.* Danielson, Hill, 168.

[37] Moorman *v.* Quick, 20 Ind. 68; Miller *v.* Jones' Admr., 26 Ala. 260; Shomo *v.* Caldwell, 21 Ala. 448; Bayless *v.* Lefaivre, 37 Mo. 119; Duncan *v.* Spear, 11 Wend. 54; Daniels *v.* Ball, 11 Wend. 58 note; Smith *v.*

§ 110. **The same.** If the right of the plaintiff is better than that of the defendant, whatever it may be with regard to the rest of the world, he can recover. Possession is sufficient evidence of right against every one who is not the true owner or rightfully entitled to possession by virtue of some superior right.[38]

§ 111. **Application of the rule.** The rule last stated requires some care in its application, as cases are found where the doctrine seems to be denied. Thus, where the plaintiff's title is denied in the pleadings, naked proof of possession would not suffice; the rule in such cases being that the plaintiff must make out his title by proof[39]—*i. e.*, he must recover on the strength of his own title, and not on the weakness of his adversary's, in support of which many cases may be cited.

§ 112. **The same.** Where the title is placed in issue, and proof of possession is made only as a circumstance tending to show title, the question of title, and not mere possession, must govern,[40] the burden of proof, in such cases, being on the plaintiff.[41] One of the reasons for this rule is found in the fact that the plain-

Lydick, 42 Mo. 209; Johnson *v.* Carnley, 10 N. Y. (Seld.) 579; Davis *v.* Loftin, 6 Tex. 495; Cook *v.* Howard, 13 Johns. 276; Demick *v.* Chapman, 11 Johns. 132; Pangburn *v.* Patridge, 7 Johns. 140; Cresson *v.* Stout, 17 Johns. 116; Wheeler *v.* McFarland, 10 Wend. 322; Schermerhorn *v.* Van Volkenburgh, 11 Johns. 529. "Possession is sufficient as against all persons not having a better title." Bogard *v.* Jones, 9 Humph. (Tenn.) 738; Sawtelle *v.* Rollins, 23 Me. 199; Morris *v.* Danielson, 3 Hill, 168; Ingersoll *v.* Emmerson, 1 Carter, 76. "Possession is a right of property against all the world but the owner." Armory *v.* Delamire, 1 Str. 505; Summons *v.* Austin, 36 Mo. 308.

[38] Van Namee *v.* Bradley, 69 Ill. 301; Freshwater *v.* Nichols, 7 Jones, (N. C.) 252. Possession, if recently before the taking, would raise a presumption of ownership which, unless contradicted, would be sufficient. Hunt *v.* Chambers, 1 Zab. (21 N. J.) 624; Morris *v.* Danielson, 3 Hill, 168; Smith *v.* Graves, 25 Ark. 461.

[39] Gartside *v.* Nixon, 43 Mo. 138; Gray *v.* Parker, 38 Mo. 160; Harrison *v.* M'Intosh, 1 Johns. 380.

[40] Hatch *v.* Fowler, 28 Mich. 206.

[41] Patterson *v.* Fowler, 22 Ark. 398; Simcoke *v.* Fredericks, 1 Ind. 54. In Broadwater *v.* Darne, 10 Mo. 285, the court says that bare possession, without other right, will not support the action. "When the defendant has become bankrupt, and cannot defend, it will not do away with the necessity of proof on the part of the plaintiff." Hallett *v.* Fowler, 8 Allen, 93. In this action, as in ejectment and trover, the plaintiff must maintain his title, or fail in his action. Davidson *v.* Waldron, 31 Ill. 120.

tiff's title or right of possession in this action is always in question. Unless admitted, it must be maintained by a preponderance of proof. The defendant's title is in no way impeached by the plaintiff's affidavit, or by the writ, if he fails to establish his title at the trial.[42]

§ 113. **Rightful possession evidence of title.** But, possession of goods under a claim of ownership is of itself one of the strongest evidences of title, and the plaintiff who has shown such possession has fully complied with the obligation to show title; and if such possession be shown to be long continued and open, under a claim of ownership, the law will presume title;[43] and naked claim of title, no matter how formally pleaded, ought not to be sufficient to overcome such title. If, therefore, the plaintiff is able to show an undisputed possession, under a claim of ownership for a length of time, such possession alone will be sufficient to entitle him to recover against a defendant who has wrongfully deprived him of such possession, unless the latter show something more than a mere assertion of title in his pleading.[44]

§ 114. **Conflicting claims to possession.** Where the plaintiff shows ownership of the property in himself, a short possession by the defendant, without plaintiff's knowledge or acquiescence, will not amount to title in the defendant;[45] and when possession alone is relied upon by plaintiff, a prior possession of as high a character by the defendant, in the absence of any proof of ownership, is a better proof of a right to present possession than subsequent possession of the plaintiff.[46]

§ 115. **The possession must be under a claim of right.** As before stated, actual possession of property, when accompanied by a claim of ownership, is *prima facie* evidence of such ownership. And the simple possession of chattels, without other title, is regarded a sufficient evidence of ownership to sustain an action against one who wrongfully usurps possession;[47] but

[42] Dows *v.* Green, 32 Barb. 490; Barnes *v.* Bartlett, 15 Pick. 75; Bogard *v.* Jones, 9 Humph. (Tenn.) 739; Fowler *v.* Down, 1 Bos. & Pull. 44.

[43] Shomo *v.* Caldwell, 21 Ala. 448; Robinson *v.* Calloway, 4 Ark. 100; Sprague *v.* Clark, 41 Vt. 6; Dixon *v.* Thatcher, 14 Ark. 141.

[44] Smith *v.* Graves, 25 Ark. 461; 2 Greenleaf on Ev. 637.

[45] Tompkins *v.* Haile, 3 Wend. 406.

[46] Summons *v.* Austin, 36 Mo. 308.

[47] Davis *v.* Loftin, 6 Tex. 497; Scott *v.* Elliott, Phil. (N. C. L.) 104.

this must be possession by the plaintiff in his own right, and under a claim of right, not as servant of another. A servant who has the goods of his master, and who must surrender them on demand, has no such possession as will enable him to sustain the action.[48] The possession must also be under a claim of right in the plaintiff himself.[49] It must also be a rightful possession, acquired without force or fraud.[50]

§ 116. **But need not be under a claim of title. Finder of property.** But the possession need not be accompanied by a claim of absolute ownership. The finder of property has an undoubted right to retain possession against all the world until the rightful owner appear to claim his property, or the authorities lawfully interfere to take charge of it, as they do in some cases; and if, while the finder is in possession, looking for the owner, another, by fraud or superior force, take the property from him,[51] trover or replevin will undoubtedly lie, at the suit of the finder. So money picked up on the floor of a shop,[52] or found in a railroad car,[53] belongs to the finder, rather than to the owner of the shop or car, and he may recover it or its value;[54] but money laid down by the owner in a shop or bank is regarded as left in the custody of the owner of the shop or bank, rather than in the care of a chance finder.[55] Where one had a simple authority to re-

[48] Mitchell *v.* Hinman, 8 Wend. 667; Brownell *v.* Manchester, 1 Pick. 232; Stanley *v.* Gaylord, 1 Cush. 536; Harris *v.* Smith, 3 S. & R. 23; Bond *v.* Padelford, 13 Mass. 395; Perley *v.* Foster, 9 Mass. 114; Summons *v.* Austin, 36 Mo. 308.

[49] Cases last cited. Holliday *v.* Lewis, 15 Mo. 406.

[50] Hatch *v.* Fowler, 28 Mich. 205; Bayless v. Lefaivre, 37 Mo. 120.

[51] Armory *v.* Delamire, 1 Stra. 505.

[52] Bridges *v.* Hawkesworth, 7 E. L. & Eq. Rep. 424.

[53] Tatum *v.* Sharpless, 6 Phila. 18.

[54] Consult Regina *v.* West, 1 Dearsley C. C. 402; People *v.* McGarren, 17 Wend. 260.

[55] State *v.* McCann, 19 Mo. 249; McAvoy *v.* Medina, 11 Allen, 548; Lawrence *v.* The State, 1 Humph. (Tenn.) 228; McLaughlin *v.* Waite, 9 Cow. 670; McLaughlin *v.* Waite, 5 Wend. 405. [Abandoned goods become the property of the finder, Burdick *v.* Cheseborough, 94 Ap. Div. 532, 88 N. Y. Supp. 13. Where logs are left in a rollway more than twenty years and have become imbedded in sand, and grass and bushes have grown over them, it is a reasonable inference that they are abandoned, Log Owners Co. *v.* Hubbell, 135 Mich. 65, 97 N. W 157;—but if the owners from time to time take logs from the same place, this is a circumstance to be considered in determining whether or not there was an intention to abandon; and if the logs were so

cover animals which had strayed, and of which he never had possession, and for which he was in no way responsible to the owner until he should have possession, he had no such title as would authorize him to bring replevin.[56]

§ 117. **The same.** The plaintiff bought an old safe, and left it for sale, with permission to the defendant to use it until sold. Defendant afterwards found a package of money in it. The plaintiff demanded the money, which was refused. He then demanded the safe and contents. The safe was at once delivered, and plaintiff sued for the money. Plaintiff did not claim any right to the money as against the real owner, but claimed that, as against the defendant, he had a better right. The plaintiff never had possession, except unwittingly, and it was held, as against him, the finder had the superior right. The place of finding did not change the rights of the parties.[57] Perhaps, however, if the question had been between the original owner of the safe and the finder, the result would have been different. Under the cases cited in the preceding section, the money would probably have been held to be left in the care of the owner of the safe.

§ 118. **The lien of a finder for reward offered.** The finder of property lost or stolen has a lien on it for the reward offered by the owner for its recovery. The owner, by public offer of reward, constitutes the finder his bailee, to take and care for the property;[58] but a finder who voluntarily incurs expense in keeping or caring for property he has found, unless necessary for its preservation, has no right to retain it for the purpose of enforcing his claim.

situated that there was no danger of injury or decay, the intention to abandon should not be inferred from great lapse of time, Id. A stranded raft is still the property of the owner until he abandons it, and one who converts the logs into firewood gains no title, Eastman *v.* Harris, 4 La. An. 193; and is not entitled to an allowance for his labor in making the conversion, Id. If goods are buried and the place forgotten and the owner cannot find them, they become part of the soil and pass with it, Burdick *v.* Cheseborough, *supra.* A boat, hollowed from the trunk of a tree, and supposed to be two thousand years old, was discovered by a tenant, buried in the soil;—held, though not a mineral and no part of the soil, it was the property of the lord, Elwes *v.* Briggs Gas. Co., L. R. 33 Ch. Div. 562.]

[56] Holliday *v.* Lewis, 15 Mo. 406.

[57] Durfee *v.* Jones, 11 R. I. 590.

[58] Cummings *v.* Gann, 52 Pa. St. 489.

§ 119. **Finder of a note has no right to collect it.** The finder of a note, bill or lottery ticket, while he may retain it as against all but the owner, has no such right to the money due or payable thereon as will authorize him to recover it from the person promising to pay.[59]

§ 120. **Where the title is the issue, good title must be shown.** A party rightfully in possession cannot, as against an intruder or wrongdoer, be required to show title beyond proof of his possession in the first instance; but when he undertakes to show title, and bases his right on title, rather than possession, he must show a sufficient title.[60]

§ 121. **The nature of the special property necessary to sustain replevin.** The exact nature of the special property which will sustain the action has not been very accurately defined. Greenleaf says: "Special property, in a strict sense, may be said to consist in the lawful custody of property with a right of detention against the general owner. But a lower degree of interest will sometimes suffice against a stranger or wrongdoer. For a wrongdoer is not permitted to question the title of one in actual possession of goods whose possession he has invaded." This doctrine was cited approvingly in an Illinois case.[62] A definition of this special property ample enough to embrace all cases would be too general to be of great value in any particular case. A statement of some of the principles which govern in particular cases will convey the best idea of the rule. When one has a temporary property, with right of possession of a chattel, and delivers it to the general owner for a special purpose, he may maintain replevin for it after that purpose has been accomplished.[63]

§ 122. **General owner usually entitled to possession; exceptions.** As a general rule it may be said that a right of property carries with it a right of possession.[64] But the right of the general owner to present possession of property may be suspended in a variety of ways; as when he deposits it as security for a loan,

[59] McLaughlin *v.* Waite, 5 Wend. 405; McLaughlin *v.* Waite, 9 Cow. 670; Killian *v.* Carrol, 13 Ired. (N. C.) 431.

[60] Hatch *v.* Fowler, 28 Mich. 205.

[61] Greenleaf on Evidence, 637.

[62] Elsendrath *v.* Knauer, 64 Ill. 402.

[63] Roberts *v.* Wyatt, 2 Taunt, 268; Elsendrath *v.* Knauer, 64 Ill. 402; Rich *v.* Ryder, 105 Mass. 310.

[64] Wilson *v.* Royston, 2 Ark. 315.

or where he delivers possession to a mechanic for repairs, the mechanic has a right to retain the property until reasonable or stipulated compensation is paid. In these and similar cases the rights of the general owner await the temporary, but superior right of the bailee, and until these latter are discharged the bailee, and not the general owner, will be the proper plaintiff in replevin.[65]

§ 123. **Liens.** In discussing the question as to what title or what special property in the plaintiff is sufficient to sustain the action of replevin, or what title in the defendant will defeat it, there is no question of more importance than the question of liens. The general principle may be stated that when one has possession of goods with a valid lien thereon against the owner, the owner's right to possession is suspended until the lien is legally discharged.[66]

§ 124. **The same.** Among the most familiar instances of liens are bailees for special purpose. The workman who repairs a carriage or watch for the owner has, unless some special contract exists, a lien on the article until paid for his services.[67] So warehousemen are entitled to a lien on property stored with them until their proper charges are paid.[68] The taker up of a stray animal, who properly conforms to the law relating to estrays, has a lien for his lawful charges.[69] An innkeeper who entertains the traveler has a lien for his charges on the chattels of his guest in the inn or its stables.[70] When a factor advances money on goods consigned to his care or for sale on commission, he has a lien, or qualified right to possession of the goods, and may retain them until his lien is satisfied.[71] In these and other kindred cases,

[65] Wallace *v.* Brown, 17 Ark. 450.

[66] Moore *v.* Hitchcock, 4 Wend. 293; Everett *v.* Coffin, 6 Wend. 603; Bush *v.* Lyon, 9 Cow. 52; Jones *v.* Sinclair, 2 N. H. 319; M'Combie *v.* Davis, 7 East. 5; Wilbraham *v.* Snow, 2 Saund. 47.

[67] Hollingsworth *v.* Dow, 19 Pick, 228; Morgan *v.* Congdon, 4 Comst. 552; McIntyre *v.* Carver, 2 Watts & Serg. 932; Curtis *v.* Jones, 3 Denio, 590.

[68] Platt *v.* Hibbard, Cow. 497; Tyus *v.* Rust, 34 Geo. 328.

[69] Phelan *v.* Bonham, 4 Eng. (Ark.) 389; Bayless *v.* Lefaivre, 37 Mo. 119.

[70] Thompson *v.* Lacy, 3 Barn. & Ald. 287; Turrill *v.* Crawley, 13 Ad. & El. 197; Sunbolf *v.* Alford, 3 Mees. & W. 248.

[71] Wood *v.* Orser, 25 N. Y. 349; Brownell *v.* Carnley, 3 Duer, (N. Y.) 9; Holbrook *v.* Wight, 24 Wend. 169.

when a lien exists the right of the general owner is subservient to the lien, and before he can be permitted to assert his title he must show that the lien has been discharged.

§ 125. **The same.** When one has a lien on property which is forcibly and clandestinely taken from him, he can sustain replevin for its recovery. Thus, a hotel keeper has a lien on his guest's horses; and in some States a livery stable keeper has a lien on horses boarded with him; and when he keeps several for the same owner the lien is not against each horse, but is against the owner and upon all the horses, and one may be detained for the keeping of all.[72]

§ 126. **The same. Taking up of an estray.** When a person has taken up an estray, and advertised it according to law, he has a lien upon and a right to retain it until the lien is satisfied, and may maintain replevin against the owner who takes it away without paying the lawful charges.[73] But this lien is given by statute. The owner cannot be deprived of his property, or the right to immediate possession, except by a proceeding in accordance with the statute. A party, therefore, who asserts title under a law respecting the taking up of estrays, must comply strictly with the provisions of the statute, or his lien will be lost.[74] The taker up of an estray, who duly complies with the law with reference thereto, has an unquestionable lien upon the property until his legal charges are paid. And, to the extent of his lien, he has a special property in the animal taken up, and may assert it, it would seem, against the owner who takes the property without complying with the law.[75]

[72] Young *v.* Kimball, 23 Pa. St. 195.

[73] Ford *v.* Ford, 3 Wis. 399; Bayless *v.* Lefaivre, 37 Mo. 119.

[74] Brown *v.* Smith, 1 N. H. 36; Morse *v.* Reed, 28 Me. 481.

[75] Ford *v.* Ford, 3 Wis. 399; Morse *v.* Reed, 28 Me. 481; Barnes *v.* Tannehill, 7 Blackf. 606; Bayless *v.* Lefaivre, 37 Mo. 119; Hendricks *v.* Decker, 35 Barb. 298.

NOTE V. *Lien, How Acquired.*—A lien exists only by virtue of a contract, express or implied, or by force of law; one to whom a chattel is pledged as security for a particular debt has no lien upon it to secure another demand, Jarvis Admr. *v.* Rogers, 15 Mass. 389. The law gives no lien for the purchase money of chattels without an express agreement, Kingsley *v.* McGrew, 48 Neb. 812, 67 N. W. 787; nor for mere manual labor in the cleansing or improving an article, one who has con-

tracted to clean carpets and re-lay them, cannot detain them after demand. Nettleton *v.* Jackson, 30 Mo. Ap. 135.

The purchaser of an animal jointly with another, and who pays the whole purchase price, has a lien upon the interest of his associate for reimbursement, and it seems may maintain replevin, Wooley *v.* Bell, Tex. Civ. Ap. 68 S. W. 71. And where one tenant in common of an animal becomes sole owner, by reason of the other's defaults, he is not permitted to recover it in replevin, without first satisfying his share of the other's disbursements for its necessary sustenance. Ellis *v.* Simpkins, 81 Mich. 1, 45 N. W. 646. Rendering voluntary service with success, to rescue goods from the perils of the seas, gives a lien for reasonable compensation; the party is entitled to possession until his claim is satisfied, Central Co. *v.* Mears, 89 Ap. Div. 452, 85 N. Y. Sup. 795. The unlawful detention of another's property will not found a lien. Busch *v.* Fisher, 89 Mich. 192, 50 N. W. 788. A trespasser, however innocent, acquires no property in logs cut upon the land of another, nor a lien for the expense of cutting, Id. An assignee in insolvency advanced freight on goods which the assignor had obtained by fraud; he acquired no lien for the freight, Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174. An agent without authority accepted goods for storage, agreeing that no charge should be made; it was held that the principal might disavow the act and require the owner to remove the goods, but, permitting them to remain without any disavowal of this agreement, he cannot assert a lien for storage, Knight *v.* Beckwith Co., 6 Wyo. 500, 46 Pac. 1094. A mechanic has no lien upon personalty for repairs done upon it when he has agreed to make such repairs in consideration of other employment for which he is paid, Stickney *v.* Allen, 10 Gray, 352. A real estate broker has no lien upon moneys deposited with him by a client, with which to purchase lands, Robinson *v.* Stuart, 97 Mich. 454, 56 N. W. 853. An agister's lien is a special property, Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085. It exists only by statute, Sharp *v.* Johnson, 38 Ore. 246, 63 Pac. 485. All the conditions of the statute are essential, and compliance therewith must be shown, Id. One who sells feed to the owner of livestock is not an agister and has no lien upon the stock, Howard Co. v. National Bank, 93 Ills. Ap. 473; and a statute that " any agister or herder of cattle to whom any horses shall be intrusted, and a contract for their keeping entered into between the parties, shall have a lien, etc.," does not give a lien to a mere herdsman or vaquero hired to drive cattle, no contract being made with him for their keeping. Underwood *v.* Birdsall, 6 Mont. 142, 9 Pac. 922. But under the same statute it was held that a sheriff assuming possession of mortgaged animals, at request of the mortgagee, may cause them to be stabled and fed, and so confer a lien in favor of the stable keeper. It appears that the sheriff was in the performance of an official duty and acting under a statutory power. Vose *v.* Whitney, 7 Mont. 385, 16 Pac. 846. A chattel mortgage of a horse authorized the mortgagee in case of default to take immediate possession, sell, and pay the amount due,

"with all reasonable costs of taking, keeping, advertising and selling;" The mortgagee directed Martin to take the animal and do all things necessary to foreclose the mortgage. Martin accordingly took it into his possession and fed and maintained it while advertising the sale. The mortgage debt was afterwards paid, but no adjustment was made of Martin's bill for the keep of the horse. Held that the horse while fed and maintained by Martin, was still in possession of the mortgagee, and that while *he* was entitled to retain it until the costs of the maintainance was discharged, *Martin* acquired no lien for his bill, though the statute provided that "when any person shall procure any other person to feed any kind of livestock it shall be unlawful for him to gain possession of the same by legal process until he is paid or tendered the contract price or reasonable compensation." Hale *v.* Wigton, 20 Neb. 83, 29 N. W. 177. A statute that one who "shall feed any horse, cattle, etc., or bestow any labor, care or attention on the same at the request of the owner," shall have a lien, does not give a lien for training a race horse, or for jockey fees, costs of shoeing, entrance money or the like, Sharp *v.* Johnson, *supra*. Nor has one of several tenants in common a lien for the sustenance of an animal which is the common property, Id. Auld *v.* Travis, 5 Colo. Ap. 535, 39 Pac. 357. The statute that "livery stable keepers and other persons keeping any horse at livery, or pasturing or boarding the same for hire under an agreement with the owner," shall have a lien, etc., has no application to the case where one takes charge of a race horse and conveys it about the country to different races, under an agreement that he is to have one-half the earnings, the owner paying all expenses, Armitage v. Mace, 96 N. Y. 538. And where the trainer agrees to furnish feed for the animals they are not subject to a lien for feed purchased by him, Anderson *v.* Heile, 23 Ky. L. Rep. 1115, 64 S. W. 849. A chattel mortgage is ordinarily superior to an agister's lien accrued subsequent to its record, Woodard *v.* Myers, 15 Ind. Ap. 42, 43 N. E. 573, Hanch *v.* Ripley, 127 Ind. 151, 26 N. E. 70.

But where the animal was too young to be worked, the mortgageor was insolvent, and the mortgagee, knowing that the animal was being fed and sustained, failed to demand it, the agister was allowed a lien superior to the mortgage. It was held that the mortgagee in effect waived his right in favor of the agister, Woodard *v.* Myers, *supra*. And one who stands by and permits another under claim of right to pay duties upon his goods, thereby concedes to the latter an equitable lien under which he may defend replevin, Fowler *v.* Parsons, 143 Mass. 401, 9 N. E. 799.

How Waived or Lost.—One who asserts title to goods, concealing his lien, thereby loses the lien thereon, Mexal *v.* Dearborn, 12 Gray, 336; Hudson *v.* Swan, 83 N. Y. 552; Guille *v.* Wong Fook, 13 Ore. 577, 11 Pac. 277; George *v.* Hewlett, 70 Miss. 1, 12 So. 855.

But otherwise, if in the same pleading the defendant asserts his lien, Summerville *v.* Stockton Co., 142 Calif. 529, 76 Pac. 243. A pledgee who surrenders the goods to the sheriff and purchases them under a

void sale, forfeits his lien, Latta *v.* Tutton, 122 Calif. 279, 54 Pac. 844. If a carrier negligently permits the goods in his hands to be damaged to an amount equalling the freight, his lien is gone, Miami Co. *v.* Port Royal Co., 47 S. C. 324, 25 S. E. 153. And demand of an excessive sum forfeits the lien, even for the amount justly due, Stephenson *v.* Lichtenstein, N. J. L., 59 Atl. 1033; Brown *v.* Dempsey, 95 Pa. St. 243; but see Hall *v.* Tittabawassee Co., 51 Mich. 377, 16 N. W. 770. And so an unqualified refusal where demand is made by the true owner; the lienor cannot afterwards assert his lien, Thompson *v.* Rose, 16 Conn. 71; Keep Co. *v.* Moore, 11 Lea 285; Judah *v.* Kemp, 2 J. Cas. 411; Holbrook *v.* Wight, 24 Wend. 169; George *v.* Hewlett, *supra*. *Contra*, Fowler *v.* Parsons, *supra*. And where all the facts were stated and the lien was known to the plaintiff and his agent at the time of the demand, it was held there was no waiver, even though the lien was not distinctly asserted, Everett *v.* Coffin, 6 Wend. 603; and see Fowler *v.* Parsons, *supra*. No tender of the sum due need be made where demand is refused on other grounds, Wall *v.* Demitkiewicz, 9 Ap. D. C. 109, *contra*, Fowler *v.* Parsons, *supra*.. But mere silence when the goods are demanded is not a waiver of the lien, Lytle *v.* Crum, 50 Ia. 37.

A lien is extinguished by a tender of the amount due, Jones *v.* Rahilly, 16 Minn. 320. And if the lien holder makes no objection to the amount tendered he is deemed to assent to it, and the lien is discharged, even though the amount is less than the sum due, Latta *v.* Tutton, *supra*. If the lienor permits the thing upon which he has a lien to pass to the possession and control of another, though occupying the same place of business with him, he loses his lien, Stickney *v.* Allen, 10 Gray, 352. A lien is preserved only while possession remains, Latta *v.* Tutton, *supra;* Pallen *v.* Bogy, 78 Mo. Ap. 88, Papineau *v.* Wentworth, 136 Mass. 543; Thompson *v.* Dolliver, 132 Mass. 103; and is not regained by resumption of possession, except in case of fraud or possibly mistake, Sensenbrenner *v.* Mathews, 48 Wis. 250, 3 N. W. 599. The landlord, who permits the tenant's produce to be removed from the demised premises loses the lien given by statute, Brownell *v.* Twyman, 68 Ills. Ap. 67. The affidavit that the defendant detains the goods will not be received as an admission of possession in the landlord, so as to support his lien, Id.

Deposit of a thing with another temporarily, is not a waiver of the lien, Pallen *v.* Bogy, *supra;* Ludden *v.* The Buffalo Co., 22 Ills. Ap. 415. As where stable man permits a horse to be taken to the track to be raced, Hartman *v.* Kerwin, 101 Pa. St. 338; or where a wheelwright delivers a wagon, on which he has been employed to make repairs, to a painter, in order that he may complete the work of renovation, Ruppert *v.* Zang, N. J. L. 62 Atl. 998. But if the lien holder pledge the goods as his own, or falsely represent to the pledgee the amount of his lien, his right in gone, Ludden *v.* Buffalo Co. *supra*. Surrender of a part of the goods does not destroy the lien upon the remainder; the lien for the whole of the agister's demand extends to all of the goods

remaining in his custody, George R. Barse Co. *v.* Adams, 2 Ind. T. 119, 48 S. W. 1023. An act done to preserve the property in order that it may remain subject to the lien, which is not in antagonism to the lien, and is equally beneficial to those having subordinate rights, is not a conversion, Summerville *v.* Stockton Co., 142 Calif. 529, 76 Pac. 243. One who manufacturers lumber from logs furnished by another has a lien upon all the lumber in his possession, at any time, for the balance due him; permitting the other party to pile the lumber for its better preservation on the mill lot, is not a loss of the possession nor of the lien, Holderman *v.* Manier, 104 Ind. 118, 3 N. E. 811. Waiver of a lien in favor of one party does not avail a different party, Farr *v.* Kilgour, 117 Mich. 227, 75 N. W. 457. The lien upon the crop given by statute to the landlord as security for the rent, does not prohibit the tenant from alienating his share of the crop; nor does his transfer displace the lien, Cunningham *v.* Baker, 84 Ind. 597. And one who is entitled by verbal agreement to a lien upon a growing crop, and to possession on default made in the payment of his demand, is not affected by notice of a subsequent mortgage or charge upon the same crop, Gafford *v.* Stearns, 51 Ala. 434. An assignee of promissory notes given for rent of a plantation, which by statute are a first lien upon the crop, cannot sustain replevin of the crop as against one, who at his instance, has advanced money or supplies to the tenant, in ignorance of the notes and their assignment, on the faith of a waiver of the lien by the landlord. Dreyfuss *v.* Gage, 84 Miss. 219, 36 So. 248. In Florida by statute the lien of a mechanic for repairs upon personal property confers a right to retain possession for three months and no longer. At the end of that period, the owner upon demand may replevy the article, even though, pursuant to a statute, a bill in equity is pending to enforce the lien. Ocala Company *v.* Lester, Fla. 38 So. 51.

Right to Possession.—One who detains goods in pursuance of a lien, is not liable in trover therefor, without discharge or tender of the amount of the lien, Gunning *v.* Quinn, 63 N. Y. St. 209, 30 N. Y. Sup. 1015; Brown *v.* Dempsey, 95 Pa. St. 243; Fowler *v.* Parsons, 143 Mass. 401, 9 N. E. 799. And where by statute the goods of the tenant are pledged to the landlord as security for his rent, the tenant cannot remove them without the landowner's consent. The opinion of the tenant that enough remains to make the rent secure is immaterial. The question is for the landowner, and not for the tenant to decide. Millot *v.* Conrad, 112 La. 928, 36 S. 807. Under the statute of Michigan, companies operating booms upon the natural streams of the state have a lien upon the logs which they drive, for their services in driving, sorting, and delivering the logs to the owners; their charges are required to be reasonable. A log owner, in order to maintain replevin, must tender what is reasonable. The boom company may properly refer to its established and uniform schedule of rates, and, acting fairly and in good faith is not deprived of its lien by detaining more logs than the amount necessary to secure it, Hall *v.* Tittabawassee Co., 51 Mich. 377, 16 N. W. 770. The landlord's lien on growing

crops does not invest him with the title, either general or special; he is not entitled to the possession and cannot maintain replevin, Travers *v.* Cook, 42 Ills. Ap. 580. A mere lien without possession, is no defense against the action of one holding the legal title, Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349. Where two are entitled to a lien and one of them is made sole defendant in an action of replevin for the goods, he may assert the lien, Holderman *v.* Manier, 104 Ind. 118, 3 N. E. 811. If one fortuitously come into possession of goods which are subject to a lien, *e. g.*, an executor, he is entitled to have the lien ascertained and discharge it, Pallen *v.* Bogy, 78 Mo. Ap. 88.

Enforcement of Lien.—One who claims under the sale of goods to enforce a lien pursuant to the statute, authorizing such sale, must show a sale in accordance with the statute, Greenawalt *v.* Wilson, 52 Kans. 109, 34 Pac. 403. A landlord's lien given by statute, cannot be enforced by forcible seizure of the crop, the landlord must resort to legal methods, Cunningham *v.* Baker, 84 Ind. 597. Whoever claims a lien under statute must conform to the statute, Eales *v.* Francis, 115 Mich. 636, 73 N. W. 894. If, in a conditional sale, the vendor reserves a lien on the goods, as well as the title, and a purchaser from the original vendee refuse to deliver them on demand, the vendor may recover full damages for the conversion and may attach the goods and hold them under his original lien, Hill *v.* Larro, 53 Vt. 629.

Several Liens.—In replevin against several they will not be permitted to assert separate and distinct liens upon the chattels. Underwood *v.* Birdsell, 6 Mont. 142, 9 Pac. 922.

Order and Priority.—An execution lien which, by the statute dates from the delivery of the writ to the officer, is superior to a lien acquired by a mechanic subsequent to the delivery of the writ and before its levy, McCrisaken *v.* Osweiler, 70 Ind. 131. The lien of a chattel mortgage duly recorded seems to take precedence of the lien of an agister, dependent upon subsequent contract with the mortgagor, Central Bank *v.* Brecheisen, 65 Kans. 807, 70 Pac. 895.

NOTE VI. *Distraint damage feasant.*—Where, as in some of the states, the landowner is permitted to take up or distrain, trespassing animals; the animal cannot be replevied without tender the damages committed by it, and compensation for its keep, Shroaf *v.* Allen, 12 Neb. 110, 10 N. W. 551. Animals trespassing upon uninclosed premises are not liable to distraint unless it affirmatively appears that they have done an actual and perceptible injury estimable in dollars and cents. Arla Company v. Burk, Neb. 102 N. W. 74. The party distraining must comply strictly with the provisions of the statue, Hanscom *v.* Burmood, 35 Neb. 504, 53 N. W. 371. If the owner accepts a verbal notice, where the statute requires notice in writing, it seems this will suffice, Id.; or if he has actual notice of the distraint, Schroaf *v.* Allen, *supra*. Every statute of this character is to be strictly construed and strictly pursued by those who claim the benefit of it, Haffner *v.* Barnard, 123 Ind. 429, 24 N. E. 152. Where the statute requires that the taker-up shall within twenty-four hours

cause the damages done to be appraised by two disinterested freeholders, and a certificate thereof made, and notice given to the owner of the fact of the trespass and of the damages assessed, a verdict that the taker-up gave notice to the owner, without showing its contents, entitles the owner to a judgment for possession, Id. If the distrainor demands damages where he has sustained no damage, he can assert no lien upon the animal, even for a lawful charge, Jones *v.* Clouser, 114 Ind. 387, 16 N. E. 797.

In Vermont the distrainor has no right to impound the animal on his own premises, if there is a public pound in the town, Rowe *v.* Hicks, 58 Vt. 18, 4 Atl. 563. The distrainor is allowed twenty-four hours to give notice to the owner, and this period is computed from the time the cattle are actually impounded; merely placing them in a pasture, without any intent to there impound them, is not an impounding, even though there be no public pound in the town, Howard *v.* Bartlett, 70 Vt. 314, 40 Atl. 825. The duty of the pound keeper to provide food and drink for animals distraint damage feasant, must be strictly performed; it is not excused by the pound keeper's absence from home, he must provide a servant to perform his duties during his absence, Farrar *v.* Bell, 73 Vt. 342, 50 Atl. 1107; and so as to the duty of advertisement, Id. The statute allowed the owner twenty-four hours after notice of the distress to move the animals and make payment of the damages, the amount of the damages was required to be stated in the notice; no provision was made for compensating the distrainor for sustaining the animals. Held no such allowance could be demanded, Allen *v.* Van Ostrand, 19 Neb. 578, 27 N. W. 642. The remedy given by the statute does not repeal the common law in like case, Randall *v.* Gross, 67 Neb. 255, 93 N. W. 223. And the distrainor has no right of distraint if he has no lawful fence, Syford *v.* Shriver, 61 Ia. 155, 16 N. W. 56. The owner may in such case replevy in the common form without resorting to the special remedy provided by statute in the case of a lawful distraint, Cox *v.* Chester, 77 Mich. 494, 43 N. W. 1028.

Plea of tender of amends admits that the cattle were lawfully distrained damaged feasant, Miller *v.* Gable, 30 Ills. Ap. 578. A plea justifying under a distraint damage feasant must show how and in what manner the animals were wrongfully upon the premises; "wrongfully" is a mere conclusion of law, and not traversable. Spahr *v.* Tartt, 23 Ills. Ap. 420.

Answer justifying under a distraint damage feasant and averring that before defendant had time to ascertain the name of the owner and serve notice upon him as required by statute, the plaintiff took out his writ of replevin without tender of the damages, states a good defense, Randall *v.* Gross, *supra*.. Where the statute authorizes the distraint of an animal that shall "break into the inclosure" of any person, distraint of an animal which invades an uninclosed grainfield, is unwarranted, Anderson *v.* Worley, 104 Ind. 166, 3 N. E. 817.

§ 127. **Goods lost at sea.** Where goods were found upon the ocean, and by the salvors brought into port, it was held that the ownership had been changed to the insurer by the abandonment; that the insurers of goods abandoned to them had acquired property in them, and that they, with the owners of the goods not insured, were the owners, subject to the lien of the salvors; that the salvors had simply a lien, and had no right to sell or pledge the goods, and a party purchasing from them could not sustain replevin.[76]

§ 128. **Goods in possession of one's servant.** When goods are taken from a carrier by process against him, the owner may sustain an action against the taker, the owner being regarded as in possession, and the carrier as his servant. Such a case presents a marked distinction from the case of one who hires goods for a stated period.[77]

§ 129. **Contract for purchase of property does not necessarily confer a right of possession.** When the plaintiff claims to have bought the property, of which he never had the possession or right to possession, replevin will not lie; the proper remedy being an action for a failure to complete the contract of sale.[78] Plaintiff bought a horse for one thousand dollars, and paid one hundred dollars, and was to have the horse on payment of nine hundred dollars more within thirty days. It was held to be an executory, not an executed contract. And the fact that, pending the contract, the defendant trotted the horse, would not enable the plaintiff to maintain trover until after the conditions were complied with.[79]

§ 130. **An officer levying process has a special property, and a right to possession.** An officer has a special property by the lien of an execution in his hands, and has sufficient property in goods that are levied on to sustain replevin against the owner who is defendant in the process, or any one who wrongfully takes them.[80] But an officer has no such lien until he has

[76] Whitwell *v.* Wells, 24 Pick. 31.

[77] G. W. R. R. Co. *v.* McComas, 33 Ill. 186.

[78] Haverstick *v.* Fergus, 71 Ill. 105.

[79] Whitcomb *v.* Hungerford, 42 Barb. 177. See, also, Stevens *v.* Eno. 10 Barb. 96; Lester *v.* East, 49 Ind. 588; Roper *v.* Lane, 9 Allen, (Mass.) 510; Updike *v.* Henry, 14 Ill. 378; Golder *v.* Ogden, 15 Pa. St. 528.

[80] Martin *v.* Watson, 8 Wis. 315; Rhoads *v.* Woods, 41 Barb. 471; Mulheisen *v.* Lane, 82 Ill. 117; Dayton *v.* Fry, 29 Ill. 529; Dezell *v.* Odell,

actually levied on the property;[81] and after the levy and execution was set aside, the officer could not recover.[82] When an officer claims title to property upon a process in his hands, he must not only show a process regular on its face, but a valid judgment.[83]

3 Hill, 215; Morris *v.* Van Voast, 19 Wend. 283; Clark *v.* Norton, 6 Minn. 412; Lockwood *v.* Bull, 1 Cow. 333; Dunkin *v.* McKee, 23 Ind. 447; Walpole *v.* Smith, 4 Blackf. 304; Whitney *v.* Burnette, 3 Wis. 625.

[81] Mulheisen *v.* Lane, 82 Ill. 117. "The sheriff who has seized the goods of a debtor on execution has a special property in them, and, if they are taken from him, he may sustain trover, trespass or replevin." Ladd *v.* North, 2 Mass. 516; Pomeroy *v.* Trimper, 8 Allen, 399; Fitch *v.* Dunn, 3 Blackf. (Ind.) 142.

[82] Walpole *v.* Smith, 4 Blackf. (Ind.) 304.

[83] Yates *v.* St. John, 12 Wend. 74; Earl *v.* Camp, 16 Wend. 562; Dunlap *v.* Hunting, 2 Denio, 643.

NOTE VII. *Levy.*—A mere execution lien does not entitle the officer to maintain replevin; his duty is to levy upon the goods and reduce them to his possession, or at least bring them within his immediate control, Persels *v.* McConnell, 16 Ills. Ap. 526. A mere pen and ink levy, is not sufficient, *Id.*

Even an officer holding the senior execution which is by law a lien on the goods of the defendant therein, cannot, having made no levy, maintain, as against an officer who seizes the property under a junior execution, either replevin or trover, Mulheisen *v.* Lane, 82 Ills. 117.

The goods must be in the power or at least in view of the officer, Carey *v.* Bright, 58 Pa. St. 70. The levy must identify the property, or afford means of identifying it, so that the particular goods, and no other, may be chargeable. The goods must be seized manually, or by an assertion of control that may be made effectual to bring them within the dominion of the law, Quackenbush *v.* Henry, 42 Mich. 75, 3 N. W. 262. Everything required by the statute must be done, Clark *v.* Patterson, 58 Vt. 677, 5 Atl. 564. The officer's merely looking through the window at a stock of goods, endorsing a levy and giving a copy of his writ to the deputy sheriff who is in possession, amounts to nothing, Larsen *v.* Ditto, 90 Ills. Ap. 384. Two constables had writs of attachment against the same defendant; the plaintiff in this suit was at the door of the carriage-house with his writ in his hand and with the key to the house, intending to levy; held this was not an attachment. And the defendant having crowded in as soon as plaintiff unlocked the door and having first laid hands on the carriage in question, his levy was held superior. No importance was attached to the circumstance that when plaintiff unlocked the door, he announced an attachment of the goods within, naming them, Hollister *v.* Goodale, 8 Conn. 332.

But in Gaines *v.* Becker, 7 Ills. Ap. 315, it was held not essential to a valid levy that the officer should even touch the goods; if he have them in view where he can control them, and assumes dominion over

§ 131. **Possession of a receiptor to an officer.** But whether a receiptor to the sheriff, who has levied on the goods, can maintain this action, is a question upon which the authorities are somewhat variant. In New York, the possession of the receiptor is the possession of the officer.[84] When goods were attached by the sheriff, and left in the hands of the debtor, who gave a receipt, and they were afterwards attached by another creditor, the attachment by the second officer might be regarded as a trespass on the right of the first, but not on the right of the debtor. The latter cannot complain as owner, and also as bailee of the first. He has no such special property in the goods as would entitle him to bring replevin in his own name.[85]

§ 132. **An agent who is responsible to the owner has sufficient possession to sustain replevin.** An auctioneer agent who is responsible to the owner may have replevin for goods committed to his possession and sold by him, and not paid

[84] Mitchell *v.* Hinman, 8 Wend. 667; Phillips *v.* Hall, 8 Wend. 610.

[85] Brown *v.* Crocket, 22 Me. 540. See Butts *v.* Collins, 13 Wend. 139; Miller *v.* Adsit, 16 Wend. 335; Browning *v.* Hanford, 5 Hill, 588; Dezell *v.* Odell, 3 Hill, 215. *Contra*, Burrows *v.* Stoddard, 3 Conn. 160. [In Hursh *v.* Starr, 6 Kans. Ap. 8, 49 Pac. 618, it was held that a receiptor may, notwithstanding his receipt, replevy from the officer. But in Bursley *v.* Hamilton, 15 Pick. 40, the conclusion of the court was that the receiptor must first return the goods. If his possession is interfered with by a stranger he may have replevin, Robinson *v.* Besarick, 156 Mass. 141, 30 N. E. 553. And in mitigation of damages he may show his title, Bursley *v.* Hamilton, *supra*, Edmonds *v.* Hill, 133 Mass. 445. In Perry *v.* Williams, 39 Wis. 339, it was held that a receiptor may defend an action upon the receipt, for non-delivery of the goods, by proving his title, or that he delivered the goods to the true owner. Where a forth-coming bond is given by defendant, and a married woman (she being disqualified), becomes surety, the bond will be treated as a mere receipt and the defendant as a receiptor, Hadley *v.* Hadley, 82 Ind. 95.]

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them with the express purpose of holding them under the writ, it is sufficient; but his control must be continued, either by the officer in person or by a custodian, Id. An officer appointed guardian for the plaintiff after the writ comes to his hand, cannot proceed; his subsequent acts are void; and though the defendant appears and pleads, this does not validate the attachment as to subsequently attaching creditors, Clark *v.* Patterson, *supra*. An officer may perfect an imperfect levy by subsequently taking the goods and maintaining the custody, Dawson *v.* Sparks, 77 Ind. 88. The valid levy of civil process invests the officer with a special property, Corbin *v.* Pearce, 81 Ills. 461.

for according to the conditions of the sale; this being a special property sufficient to sustain the action.[86]

§ 313. **Wrongful seizure or sale by an officer does not affect owner's right.** The wrongful sale of one's property, on an execution against a third party, does not divest title, and the owner can sustain replevin;[87] and, generally, in all cases where an officer wrongfully seizes and sells goods, the title is not divested by such sale, and the owner may have replevin for the goods against the purchaser.[88]

[86] Tyler *v.* Freeman, 3 Cush. 261.

[87] Dodd *v.* McCraw, 8 Ark. 83.

[88] Eggleston *v.* Mundy, 4 Mich. 295; Ward *v.* Taylor, 1 Pa. St. 238; Shearick *v.* Huber, 6 Binn. (Pa.) 2.

CHAPTER V.

POSSESSION BY THE DEFENDANT.

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§ 134. **Replevin does not lie against one not in possession of the goods.** It is also a rule in replevin that the action only lies against a defendant who is in possession of the goods at the time the demand is made or suit is begun. In order to hold a party liable for the immediate delivery of the goods, he must have the actual or constructive possession of them at the time, so that he can comply with the demand if made, or with the mandate of the writ for delivery if it should issue against him.[1]

[1] Ames *v.* Miss. Boom Co., 8 Minn. 470; Brockway *v.* Burnap, 8 How. Pr. Rep. 188; Roberts *v.* Randel, 3 Sandf. (N. Y.) 707; Bradley *v.* Gamelle, 7 Minn. 331; Hall *v.* White, 106 Mass. 600; McCormick *v.* McCormick, 40 Miss. 760; Burton *v.* Brashear, 3 A. K. Marsh, (Ky.)

A wrongful taking unless followed by a wrongful detention will not sustain the action.[2] In trespass, the restoration of the goods would be no bar to the suit. The action having once accrued, no act of the defendant's can deprive the plaintiff of it; but replevin, for the delivery of specific goods, only lies in case the goods are detained. Where the statute allows the plaintiff to have judgment for the goods or for their value, at his option, the reason for this rule would not apply.

§ 135. **The same; some exceptions.** For instance, a wrongful taking followed by an immediate restoration of the goods; or, where the taking, though wrongful, was in ignorance of the plaintiff's rights, and the goods have been in good faith sold or disposed of, before demand or suit brought; or, when the property has been destroyed; or an animal has died; in such case some other action than replevin must be pursued.[3] The gist of the action being the wrongful detention,[4] it lies for goods wrongfully detained though the taking was rightful;[5] but does not lie, unless there is a wrongful detention at the time the suit is brought.[6] In New York, a statutory provision allows the arrest of the defendant whenever it is shown that he has concealed, removed or disposed of the property to avoid the writ, or deprive the plaintiff of the benefit of it;[7] and the courts hold,

277; Howe *v.* Shaw, 56 Me. 291; Grace *v.* Mitchell, 31 Wis. 536; Baer *v.* Martin, 2 Carter, (Ind.) 229; Myers *v.* Credle, 63 N. C. 505.

[2] Savage *v.* Perkins, 11 How. Pr. Rep. (N. Y.) 17; Paul *v.* Luttrell, 1 Col. 317.

[3] Meriden *v.* Wheldon, 31 Conn. 118; Lindsay *v.* Perry, 1 Ala. (N. S.) 204; Richardson *v.* Reed, 4 Grey, 442; Coffin *v.* Gephart, 18 owa, 257; Moore *v.* Kepner, 7 Neb. 294.

[4] Haggard *v.* Wallen, 6 Neb. 272; Mercer *v.* James, 6 Neb. 06.

[5] Esson *v.* Tarbell, 9 Cush. 407; Waterman *v.* Matteson, 4 R. I. 539; Dimond *v.* Downing, 2 Wis. 498.

[6] Savage *v.* Perkins, 11 How. Pr. 17; Hayward *v.* Seaward, 1 Moore & Scott, 459.

[7] Watson *v.* McGuire, 33 How. Pr. Rep. 87. See Barnett *v.* Selling, 70 N. Y. 492. [To authorize an arrest there must be a concealment or disposal of some of the goods with intent to defeat the process of the court or deprive plaintiff of its benefits; *e. g.*, by a sale to a *bona fide* purchaser, or changing the form so as to prevent identification. Barnett *v.* Selling, 70 N. Y. 492. Plaintiff alleging facts which justify the arrest, must establish them or suffer a discontinuance. Lehman *v.* Mayer, 68 Ap. Div. 12, 74 N. Y. Sup. 194; and, prevailing, may have execution against the body, though no order of arrest was made, Id.

that in such cases, that the action may be prosecuted where the defendant has not the possession of the goods, having parted with them for the purpose of avoiding the writ;[8] but as we shall see, this ruling does not depend entirely upon the statute, but applies independent of the statute in many cases where the defendant has put the property out of his hands to avoid the writ.

§ 136. **The writ lies only for property in existence.** The property must also be in being, of tangible or appreciable form, subject to manual delivery, thus for the young which animals are expected to produce, replevin is not the remedy.[9] When A. agreed that his horse should serve the mare of B. upon condition that the produce should belong to C. Held, that C. took a sufficient title to sustain trover, but could not have replevin before the colt should be foaled.[10] Neither will the action lie for property destroyed, or for a slave who died before suit commenced;[11] but the plaintiff may have judgment for the young of animals recovered by him, notwithstanding they may have been born after the suit was begun.[12]

§ 137. **Proof that the defendant was about to take possession will not sustain replevin.** As has been stated, the action is in the nature of a proceeding *in rem* for the delivery of

Where the statute provides for a *capias* clause in the writ of replevin, and that defendant when arrested shall be discharged upon giving bond, etc., conditioned to "abide the order and judgment of the court," and "cause special bail to be put in if such bail be required," the bond stands as special bail where such bail is not required; and to charge the sureties there must be a return of *non inventus* on the capias *ad satisfaciendum*, Duncan *v.* Owens, 47 Ark. 388, 1 S. W. 698, Eddings *v.* Boner, 1 Ind. Ter. 173, 38 S. W. 1110. The order of arrest is not to be executed, under the statute of Arkansas, in force in the Indian Territory, unless bond be given for due prosecution, for return of the goods, and paying such sums as may be adjudged against the plaintiff in the action; and if such bond be not given, the arrest is unlawful and must be vacated, Eddings *v.* Boner, *supra*. Defendant's right to insist upon a bond is not waived by answer; the sureties in the appeal bond are not liable for the value of the goods but only for the presence of defendant in court, Id. After vacation of the order of arrest the action may still proceed and judgment be given against the defendant personally, *Id.*]

[8] Ellis *v.* Lersner, 48 Barb. 539; Nichols *v.* Michael, 23 N. Y. 264.

[9] Lindsay *v.* Perry, 1 Ala. 203; Chissom *v.* Hawkins, 11 Ind. 318.

[10] McCarty *v.* Blevins, 5 Yerger, (Tenn.) 196.

[11] Burr *v.* Dougherty, 21 Ark. 559; Caldwell *v.* Fenwick, 2 Dana, (Ky.) 333.

[12] Buckley *v.* Buckley, 12 Nev. 426.

the identical goods, and in such actions the defendant must have the actual or constructive possession of the property sued for at the time suit is brought, as the action lies only against one who has such possession and can deliver the goods sued for.[13] Proof, therefore, that the defendants were about to take possession, but had not actually done so, will not sustain the action;[14] nor will proof that the defendant intended or agreed to convert the goods to his own use, amount to a conversion, without some actual interference with the property.[15]

§ 138. **Neglect to deliver; when not a conversion.** When at the time of the service, the defendant was not in possession of the property, and denied having anything to do with it, but pointed out his son in whose house he lodged, who was then present and had possession; held, the action could not be sustained against the father, even though he advised his son not to deliver it.[16]

§ 139. **The same.** When the plaintiff and his wife occupied separate parts of the wife's house, pending a suit for divorce, after the divorce the plaintiff suffered his goods to remain in the house; afterwards, when plaintiff was out, the defendant fastened up the doors and windows. The plaintiff demanded to be let into the house, but did not demand the goods, the defendant offered to put out his property, but the plaintiff forbid her to do so, and brought replevin. Held, that the defendant was not guilty of detaining; she excluded the plaintiff from her building as she had a right to do, but there was nothing to show taking or detention of the goods.[17] And the rule appears general, that mere neglect to deliver goods unless they are actually in the defendant's possession at the time of demand, will not amount to a conversion.[18]

[13] Lathrop *v.* Cook, 2 Shep. (Me.) 414; Sawyer *v.* Huff, 12 Shep. (Me.) 464; Small *v.* Hutchins, 1 Appl. (19 Me.) 255; Learned *v.* Bryant, 13 Mass. 224; McCormick *v.* McCormick, 40 Miss. 761; Gaff *v.* Harding, 48 Ill. 148.

[14] Whitwell *v.* Wells, 24 Pick. 29.

[15] Herron *v.* Hughes, 25 Cal. 555. See Squires *v.* Smith, 10 B. Mon. (Ky.) 34.

[16] Johnson Admr. *v.* Garlick, 25 Wis. 705; Timp *v.* Dockham, 32 Wis. 151; Grace *v.* Mitchell, 31 Wis. 539.

[17] Bent *v.* Bent, 44 Vt. 634.

[18] Whitney *v.* Slauson, 30 Barb. 276; Hawkins *v.* Hoffman, 6 Hill, 586; Hill *v.* Covell, 1 Comst. 522; Hall *v.* Robinson, 2 Comst. 293; Miller *v.* Ill. Cent. R. R. Co., 24 Barb. 313.

§ 140. **Taking under a license not a conversion.** When the taking was made under an implied license to the taker, no conversion results. When H. hired a buggy and injured it, it was agreed that he should pay for the repairs; plaintiff took it to a shop for repair; next day, H. went to the shop and the buggy not being repaired or in process of repair, he took it to another shop and had it repaired; he did not take or obtain it for his own use or the use of anyone else, it was not injured in his possession, and in fact, no element of conversion appeared in any act of the defendant.[19] Such a taking is looked upon as by the owner's consent, rather than wrongful, but if the defendant while so in the actual possession of the goods had refused to deliver on demand, or done any act inconsistent with the owner's right, he would have been liable.

§ 141. **A firm may be responsible for the act of one member.** A firm may be responsible in this action for the taking and detention by one member when he acts for and on the part of all, though if his wrongful act was without the consent of the others, he would alone be liable.[20]

§ 142. **Taking by an officer; when sufficient to render him liable in this action.** Where the defendant was an officer who had levied on property, but did not remove it, the defendant in the execution who still retained the goods, will not be permitted to sustain replevin against the officer, as the possession was still in himself;[21] but when an officer levies on goods, and takes an inventory, and directs a receiptor to prevent their removal, he has a sufficient possession to enable the owner to sustain replevin.[22] And such a taking is sufficient ground on which to base an action against the officer.

§ 143. **Possession by an officer not possession of the creditor in the writ.** The actual possession of an officer who has seized goods on process in his hands, is not the constructive possession of the creditor in the writ.[23] An attachment creditor,

[19] Eldridge *v.* Adams, 54 Barb. 417.

[20] Howe *v.* Shaw, 56 Me. 291.

[21] Hickey *v.* Hinsdale, 12 Mich. 100. See Mitchell *v.* Roberts, 50 N. H. 486; Ramsdell *v.* Buswell, 54 Me. 548, overruling Sayward *v.* Warren, 27 Me. 453; English *v.* Dalbrow, Miles (Pa.) 160; Wood *v.* Orser, 25 N. Y. 355; Angel *v.* Keith, 24 Vt. 373.

[22] Fonda *v.* Van Horne, 15 Wend. 632.

[23] Gallagher *v.* Bishop, 15 Wis. 282; Booth *v.* Ableman, 16 Wis. 460;

therefore, is not jointly liable with the officer. He has no property in the goods, entire, general or special, and no possession or right of possession.[24] But where the attaching creditor claimed to be the owner of the property, and attached the goods to get possession of them, and had them in possession, he was liable in replevin as well as in trespass or trover;[25] and where the plaintiff in an execution directed the sheriff to levy on certain articles belonging to another party, the court considered the officer as the servant or agent of the plaintiff in execution, and sustained replevin against him, notwithstanding he was never in actual possession of the property.[26] Where an officer has levied on bulky articles, and endorses his levy on his process, and refuses to give them up, but asserts his right, he has such a possession as will justify replevin against him, there being no actual possession and control of the goods in any other person.[27]

§ 144. **Servant not usually liable for holding his master's goods.** As a general rule, the possession of the defendant must be a possession under some claim of right in himself. A servant is not, as a general thing, a proper defendant in replevin, when he only holds the goods as his master's, unless he is guilty of some wrongful act.[28] So, where a servant refuses to deliver goods entrusted to him by his master, without his master's order, the servant is not personally liable in replevin, the master being the proper defendant,[29] the possession being the possession of the master. So, in trover for a note, the defendant claimed to be agent for his wife, and the possession was regarded as in the wife.[30] But the agent of an express company may be sued if he refuse to deliver goods after payment or tender of legal charges.[31]

Ilsley *v.* Stubbs, 5 Mass. 283; Smith *v.* Orser, 43 Barb. 187; Grace *v.* Mitchell, 31 Wis. 533.

[24] Douglass *v.* Gardner, 63 Me. 462; Richardson *v.* Reed, 4 Grey, 442; Ladd *v.* North, 2 Mass. 516; Grace *v.* Mitchell, 31 Wis. 533; Small *v.* Hutchins, 19 Me. 255; Mitchell *v.* Roberts, 50 N. H. 486. *Contra*, see Hathaway *v.* St. John, 20 Conn. 346; Bowen *v.* Hutchins, 18 Conn. 550.

[25] Tripp *v.* Leland, 42 Vt. 488.

[26] Allen *v.* Crary, 10 Wend. 349.

[27] Hatch *v.* Fowler, 28 Mich. 212.

[28] Bennett *v.* Ives, 30 Conn. 329; Owen *v.* Gooch, 2 Esp. 567.

[29] Mires *v.* Solebay, 2 Mod. 242; Mount *v.* Derick, 5 Hill, 456; Storm *v.* Livingston, 6 Johns. 44; Alexander *v.* Southey, 5 Barn. & Ald. 247.

[30] Hunt *v.* Kane, 40 Barb. 638. See Matteawan Co. *v.* Bentley, 13 Barb. 643.

[31] Eveleth *v.* Blossom, 54 Me. 447.

§ 145. **Where defendant has put the goods out of his possession.** There are cases which hold that the action may, under certain circumstances, be brought against a defendant after he has parted with the possession of the goods; thus, when the defendant has let the goods for hire, and it appears he can resume them at pleasure.[32] Also, where the defendant has lately had possession of the goods, and has fraudulently made away with them, for the purpose of defeating the action, it may sometimes be sustained.[33] Where defendant was charged with fraudulently obtaining possession of plaintiff's property, and consigning it to his uncle in London, and that he had drawn drafts on the bill of lading, payable when it should arrive, the plaintiff might sustain action.[34] It will be seen that it is not absolutely necessary to sustain the action, that the officer be able to find and deliver the goods. Exceptions to the general rule arise in many cases.

§ 146. **Or put it out of the officer's power to execute the writ.** When the defendant puts it out of the power of the officer to proceed and execute the writ, the plaintiff may be allowed to proceed with the case and recover the full value of the goods, with damages for the detention.[35] Where the writ was for rails, and the defendant took part of them and built them into a fence, it was admitted the sheriff could not take them; but the plaintiff was permitted to recover damages to the full value. To permit the defendant so to take advantage of his own wrong is contrary

[32] Gaines *v.* Harvin, 19 Ala. 491; Bradley *v.* Gamelle, 7 Minn. 331; Harris *v.* Hillman, 26 Ala. 383.

[33] Drake *v.* Wakefield, 11 How. Pr. Rep. 107; Nichols *v.* Michael, 23 N. Y. 264; Ellis *v.* Lersner, 48 Barb. 539; Dunham *v.* Troy Union R. R. Co., 3 Keyes, (N. Y.) 543; Savage *v.* Perkins, 11 How. Pr. Rep. 17.

[34] Ellis *v.* Lersner, 48 Barb. 539. See, also, Burton *v.* Brashear, 3 A. K. Marsh, (Ky.) 278; Powers *v.* Bassford, 19 How. Pr. 309; Garth *v.* Howard, 5 Car. & P. 352; Ford *v.* Caldwell, 3 Riley, (S. C.) 277, 3 Hill & New Ed., 2 Hill, *238; Anderson *v.* Passman, 7 C. & P. 193; Harris *v.* Hillman, 26 Ala. 380; Clements *v.* Flight, 16 Exch. 42; Walker *v.* Fenner, 20 Ala. 198; Brockway *v.* Burnap, 16 Barb. 309, overruling S. C. (12 Barb.) 347; Southcote *v.* Bennett, Cro. Eliz. 815; Jones *v.* Dowle, 9 M. & W 19; Garth *v.* Howard, 5 C. & P. 346; Anderson *v.* Passman, 7 C. & Payne, 193; 8 B. & Ald. 703.

[35] Pomeroy *v.* Trimper, 8 Allen, 403; Bower *v.* Tallman, 5 Watts & S. 561; Baldwin *v.* Cash, 7 Watts & S. 426. See able dissenting opinion in Ramsdell *v.* Buswell, 54 Me. 548; Ross *v.* Cassidy, 27–37 How. Pr. 416. In New York, when the defendant had put the property out of his hands, for the purpose of preventing the writ, the statute formerly al-

to all the principles of the law.[36] When the officer caused the value of the property to be ascertained, and had taken security required by law, and had taken the property into his custody, when it was forcibly taken from him by the defendant, the plaintiff may proceed and recover the value as damages.

§ 147. **Fraudulent transfers of goods.** When one obtains goods by fraud, and had transferred them to a trustee for his creditors, a joint action lies against both.[37] Where A., without any authority, pledges the property of B. to C., action of detinue may be against both.[38]

§ 148. **Clothing worn on the person not subject to the writ.** While the property must be in the defendant's possession, yet it is not all property in his possession which is liable to be taken on a writ of replevin. Thus, where the property is in actual use by the defendant, or worn upon his person, as a jewel or watch, even though worn for the purpose of evading a seizure. The officers cannot take it so long as it continues to be worn on the person of the defendant. A man's clothes cannot lawfully be taken from his back, nor his watch from his pocket or his hand, by an officer upon a writ of replevin.[39]

§ 149. **Possession after dismissal of an action of replevin.** When the action of replevin was dismissed without an order for a return, the defendant is not liable to a second action for the same property, unless it appears that the goods have come into his possession, and that he has asserted a right or done some act inconsistent with the plaintiff's claim. The return of the property to an inn-keeper, from whose house it was taken, is not of itself a restoration to the defendant, unless he authorized or adopted the act as his own. The defendant in the first action

lowed an arrest. Roberts *v.* Randel, 3 Sandf. (N. Y.) 707. Consult Van Neste *v.* Conover, 20 Barb. 547; Ward *v.* Woodburn, 27 Barb. 346; Nichols *v.* Michael, 23 N. Y. 264; United States *v.* Buchanan, 8 How. 83; Brockway *v.* Burnap, 16 Barb. 309.

[36] Bower *v.* Tallman, 5 W. & S. (Pa.) 561. See Snow *v.* Roy, 22 Wend. 604.

[37] Nichols *v.* Michael, 23 N. Y. 269.

[38] Garth *v.* Howard, 5 Car. E. P. 346.

[39] Maxham *v.* Day, 16 Gray, (Mass.) 214; Gorton *v.* Falkner, 4 D. & East. 565 and 305; Storey *v.* Robinson, 6 Term. R. 139 and 73; Mack *v.* Parks, 8 Gray, (Mass.) 517; Sunbolf *v.* Alford, 3 Mees. & W. 248. As to whether the sheriff can break and enter a dwelling house, see *post*, power and duty of sheriff.

made no claim to the property, and this would seem to indicate that he did not intend further to assert any claim to it.[40]

§ 150. **Defendant acquiring possession with plaintiff's consent.** Where the defendant sells, or otherwise disposes of the goods, the owner standing by and making no objections, when he can, with propriety, speak, he cannot afterward sustain replevin against purchasers.[41] This rule finds numerous illustrations in different cases, but the general principle is the same in all—that when one stands in silence and permits another to act upon an erroneous state of facts, to the injury of the person whom he suffered to remain in error, he is estopped from setting up his rights.[42]

[40] Way *v.* Barnard, 36 Vt. 370.

[41] Skinner *v.* Stouse, 4 Mo. 93.

[42] Thompson *v.* Blanchard, 4 N. Y. 303; Erie Savings Bank *v.* Roop, 48 N. Y. 292; Brewster *v.* Baker, 16 Barb. 613; Otis *v.* Sill, 8 Barb. 102; Hope *v.* Lawrence, 50 Barb. 258.

NOTE VIII. Estoppel.—One who permits another to control his property and declares him to be the owner, is estopped to deny this as against an officer who, on the faith of such declaration, levies upon the goods under process against such other person, Nodle *v.* Hawthorn, 107 Ia. 380, 77 N. W. 1062: see Janes *v.* Gilbert, 168 Ills. 627, 48 N. E. 177. Covenant for title estops the seller of goods to set up title in himself or any third person, unless derived from his vendee, McLeod *v.* Johnson, 96 Me. 271, 52 Atl. 760. Landowner, who, with full knowledge, consents that one who claims under a lease granted by another, shall continue in possession, is estopped to claim the tenant's crop, grown while he occupies pursuant to this lease, Bowen *v.* Roach, 78 Ind. 361. Defendant who has urged plaintiff to bring replevin cannot object to the form of the action, Sparling *v.* Marks, 86 Ills. 125. If a married woman acquiesces in a sale or mortgage of her property by her husband as his own, she is estopped to assert title as against the purchaser or mortgagee, Ingals *v.* Ferguson, 59 Mo. Ap. 299. Plaintiff took a writ of replevin and certain goods were seized under it; to entitle himself to delivery he gave a bond as required by statute. Held, this was an adoption of the act of the sheriff in seizing the particular goods, Aldrich *v.* Ketcham, 3 E. D. Sm. 577.

The bailee is not estopped to deny the title of his bailor; nor to show that he obtained the possession unlawfully, and that the bailee at the institution of the action, was holding the goods by authority of the true owner, Gray's Admr. *v.* Allen, 14 Ohio, 59. The wife's conduct in permitting her husband to list the goods for taxation in his own name, is merely an admission, the effect of which is for the jury, Deck *v.* Smith, 12 Neb. 390, 11 N. W. 852. Defendant in trover, in order to avoid imprisonment, executes a bond conditioned for the forthcoming of the goods. This does not estop him from denying possession, Bell

§ 151. The action permitted in some States without delivery of the goods. In many of the States actions for the re-

v. Ober Co., 111 Ga. 668, 36 S. E. 904. Vendor of goods obtained upon credit by fraud, supposing the goods to have been actually delivered to the buyer, proved his claim under the assignment made by the buyer; he was not estopped from afterwards reclaiming the goods in the hands of the carrier upon discovering the facts, Lentz *v.* Flint, etc., Co. 53 Mich. 444, 19 N. W. 138. After a completed sale and delivery of an animal, it remained for some time in possession of the buyer; the seller then, without knowledge of the buyer, took it away; the buyer thereupon sued for the feed and pasturage, but, dismissed his action. Held that this suit might be some evidence of an assent on his part to the attempted rescission, but did not conclude him, Kuhns *v.* Gates, 92 Ind. 66. A statement or admission as to title, of which the adverse party has no knowledge at the time of acquiring his interest, does not raise an estoppel, Harward *v.* Davenport, 105 Ia. 592, 75 N. W. 487, First National Bank *v.* Ragsdale, 171 Mo. 168, 71 S. W. 178. A father authorized his son to mortgage certain livestock of the father, but did not authorize him to execute the mortgage in his own name; the son, without the father's knowledge, made the mortgage in his own name, reciting that he was the owner; the mortgage was so recorded. Held, the father was not estopped thereby as against one who levied an execution against the son upon the faith of the declarations contained in the mortgage, Harward *v.* Davenport, *supra*. The state does not lose title to logs cut upon the public lands, by its failure to assert title, though it claims and seizes other logs cut on the same lands, State *v.* Patten, 49 Me. 383. Failure to assert title when a particular animal is sold and turned out, is not an estoppel if the owner was not at the time aware of the fact that his animal was so sold and turned over, Bright *v.* Miller, 95 Mo. Ap. 270, 68 S. W. 1061, Lamotte *v.* Wisner, 51 Md. 543.

No one is estopped by the statements of another not shown to have authority to speak for him; nor by statements even of an authorized person, if made under mistake of facts, Pease *v.* Trench, 197 Ills. 101, 64 N. E. 368. A trainer sometimes entered in his own name horses left with him, to be trained, and raced; this does not estop the owner to claim the animals when attached for the trainer's debts, Anderson *v.* Helle, 23 Ky. L. R. 1115, 64 S. W. 849. A horse belonging to the wife, was in control of the husband, who put him in possession of another; the wife saw the horse in possession of such other person on several occasions and made no objection nor asserted any claim; but she was not then informed that the one so in possession made any claim to the animal on his part; held, she was not estopped to afterwards assert her rights, Ingals *v.* Ferguson, 138 Mo. 358, 29 S. W. 801.

Conduct of the owner of goods, not known to one who purchased from her husband, at the time of the purchase, does not estop her from asserting her title, McGinley *v.* Werthele, Neb. 101, N. W. 244.

rovery of goods in specie may be prosecuted without asking a delivery of the goods until after the final judgment of the court on the merits of the controversy. In such case, the reason for the rule which forbids the action against any one not in possession fails; and, while adjudications directly on this question are not numerous, no reasons exist why, in such, the plaintiff may not have an alternative judgment, for the goods or their value, against a defendant, after he has parted with the possession, as well as before.

CHAPTER VI.

JOINT OWNERS.

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§ 152. **One joint tenant cannot sustain replevin against his co-tenant.** One joint tenant cannot sustain replevin against his co-tenant for the possession of the chattels owned by them in common, for the reason that, unless there be some agreement to the contrary, one has as much right to the possession of the joint property as the other.[1]

[1] Prentice *v.* Ladd, 12 Conn. 331; Russel *v.* Allen, 13 N. Y. 173; Wilson *v.* Reed, 3 Johns. 177; Ellis *v.* Culver, 1 Har. (Del.) 76; Barnes *v.* Bartlett, 15 Pick. 71; Hardy *v.* Sprowle, 32 Me. 322; Wills *v.* Noyes, 12 Pick. 324; Eakin *v.* Eakin, 63 Ill. 160. But if one tenant in common destroys the thing, trover will lie. Wilson *v.* Reed, 3 Johns. 177; Co. Litt. 200*a*. Tenants in common are not like partners. One partner may

§ 153. **The same. Appearing in the writ, or pleaded by the defendant.** If the fact of joint tenancy be shown by the

sell the firm property without being liable in tort. Fox *v.* Hanbury, 2 Cowp. 450. But one partner cannot sustain replevin against his partner for the exclusive possession of the firm property. Azel *v.* Betz, 2 E. D. Smith, 188; Holton *v.* Binns, 40 Miss. 492; Noble *v.* Epperly, 6 Port. (Ind.) 416; Mills *v.* Malott, 43 Ind. 252; Rogers *v.* Arnold, 12 Wend. 30; Eakin *v.* Eakin, 63 Ill. 160; Wetherell *v.* Spencer, 3 Mich. 123; Hill *v.* Robinson, 16 Ark. 90; Hardy *v.* Sprowle, 32 Me. 322; M'Elderry *v.* Flannagan, 1 Har. & G. (Md.) 308. One partner cannot maintain replevin against the other for firm goods, and defendant may have return. Reynolds *v.* McCormick, 62 Ill. 415. See Chambers *v.* Hunt, 22 N. J. L. 554. The possession of one tenant in common is the possession of all. Walker *v.* Fenner, 28 Ala. 373. All the plaintiffs must be entitled to recover, or none of them can. *Ib.* By the common law, if a woman own chattels in common with another, and marry, the tenancy in common ceases, and the husband becomes tenant in common with the others. Walker *v.* Fenner, 28 Ala. 373. Husband and wife could not be tenants in common, as her chattels are absolutely his. *Ib.* If one tenant in common take all the goods, by common law, the other has no remedy, but might retake the goods, if he could. Co. Litt. 200*a*; Dixon *v.* Thatcher, 14 Ark. 145; M'Elderry *v.* Flannagan, 1 H. & Gill. (Md.) 308; Daniels *v.* Brown, 34 N. H. 454. In some of the states, statutory enactments have changed or modified this rule; as, in California, a statute provided that "Joint tenants" may jointly or severally bring or defend any civil action for the enforcement or protection of the rights of such party. This statute was construed, in Schwartz *v.* Skinner, 47 Cal. 6, which was a case for the undivided part of the furniture of a hotel. The defendant in possession refused to permit the plaintiff to take or share posession, and refused to pay any rent. The court directed a judgment for the plaintiff. The case of Schwartz *v.* Skinner seems to stand alone; but see Bostick *v.* Brittain, 25 Ark. 482; Hewlett *v.* Owens, 50 Cal. 475.

Note IX. *Tenants in Common.*—One joint tenant or tenant in common cannot recover the common property from his co-tenant. Balch *v.* Jones, 61 Calif. 234; Jackson *v.* Stockhard, 9 Baxt. 260; Pritchard's Administrator *v.* Culver, 2 Harr, Del. 129; Myers *v.* Moulton, 71 Calif. 499, 12 Pac. 505; Bernardiston *v.* Chapman, 4 East, 121; Pullian *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Upham *v.* Allen, 73 Mo. Ap. 224; Lisenby *v.* Phelps, 71 Mo. 522; Ellis *v.* Simpkins, 81 Mich. 1, 45 N. W. 646. Nor from a bailee of all the tenants in common, George *v.* McGovern, 83 Wis. 555, 53 N. W. 899; Smith-McCord Co. *v.* Burke, 63 Kans. 740, 66 Pac. 1036; nor from an officer who has levied upon the interest of his co-tenant, and seized the chattel under such levy, Phipps v. Taylor, 15 Ore. 484, 16 Pac. 171; Sharp *v.* Johnson, 38 Ore. 246, 63 Pac. 485; Hackett *v.* Potter, 131 Mass. 50; but see Jones *v.* Richardson, 99 Tenn. 614, 42 S. W. 440; Bray *v.* Raymond, 166 Mass. 146, 44 N. E. 131. Nor can several, as against

plaintiff in his pleadings, or in his writ, the suit must fail. The court will usually in such case direct that the writ abate,[2] and

[2] Hart *v.* Fitzgerald, 2 Mass. 509.

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one who shows himself entitled to an interest as tenant in common with any of them, Cinfel v. Malena, 67 Neb. 95, 93 N. W. 165; nor can a partner maintain replevin against his co-partner for partnership goods; the partnership accounts cannot be settled in an action of replevin, Jenkins v. Mitchell, 40 Neb. 664, 59 N. W. 90; Ferguson *v.* Day, 6 Ind. Ap. 138, 33 N. E. 213; one who purchases the interest of a co-partner in partnership goods, upon execution, acquires no right to possession; he has merely the right to an account. Reinheimer *v.* Hemingway, 35 Pa. St. 232. But where the articles of co-partnership provide that one of the firm named shall, on dissolution, "be entitled to the assets and property of the firm," he becomes vested with the absolute title whenever the dissolution occurs, and may maintain replevin against the other, Depew *v.* Leal, 2 Abb. Pr. 131. So it seems where the appliances used by the firm are the property of one partner, Calderwood *v.* Robertson, 112 Mo. Ap. 103, 86 S. W. 879. A partner cannot recover in replevin, basing his right upon a mortgage to the firm, Vinson *v.* Ardis, 81 Ala. 271, 2 So. 879. A musical association purchased instruments; by express agreement they were the property of the association, the association to purchase, at a valuation, the interest of any member removing; one member removing carried his instrument with him. Held the other members could not replevy. Heller *v.* Huffsmith, 102 Pa. St. 533. Stocks are borrowed from a co-tenant for hypothecation; failure to redeem them from the pledge is not a conversion and will not sustain an action by the co-tenant, Barrowcliffe *v.* Cummins, 66 Hun. 1, 20 N. Y. Sup. 787. But where chattels which are of the same nature and quality are mingled in one mass with the consent of the different owners, any owner may recover his aliquot part in replevin, Stall *v.* Wilbur, 77 N. Y. 158; Grimes *v.* Cannell, 23 Neb. 187, 36 N. W. 479; Eillingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659; even though there has been no division, Pitman *v.* Baumstark, 63 Kans. 69, 64 Pac. 968; Piazzek *v.* White, 23 Kans. 621; and by greater reason if there has been a division, and the wrongdoer has transferred to a stranger the moiety of the common goods, Cornett *v.* Hall, 103 Mo. Ap. 353, 77 S. W. 122; Stall *v.* Wilbur, 77 N. Y. 158. This doctrine was held applicable to pieces of timber of substantially the same size, shape and kind; an owner of a share in such timbers may sue in replevin for his part; or suing for the whole mass may recover the number to which he is entitled, Reid *v.* King, 89 Ky. 388, 12 S. W. 772. In Wattles *v.* Dubois, 67 Mich. 313, 34 N. W. 672, it was held applicable to wheat in the straw, which, it was said, was as much wheat and as capable of division as after threshing and winnowing. In Halpin *v.* Stone, 78 Wis. 183, 47 N. W. 177, it was held applicable to railway ties. But in Hoeffer *v.* Agee, 9 Colo. Ap. 189, 47

the defendant may have a return of the goods. But when the joint tenancy is pleaded by defendant, it is a matter of defense, and is the subject of proof. So when it appears during the trial that the parties own the property jointly, or are partners, the court will not for that reason dismiss the proceeding, but will leave it to the jury as one of the issues in the case, and will direct them, in case they find a joint tenancy, that the verdict must be found for the defendant.[3]

§ 154. **Replevin does not lie for an undivided interest.** Replevin does not lie for an undivided interest in a chattel, as an undivided part is not susceptible of delivery without the whole.[4]

[3] Belcher *v.* Van Duzen, 37 Ill. 282. Consult, also, Hunt *v.* Chambers, 1 Zab. (N. J.) 620; Chambers *v.* Hunt, 2 Zab. (22 N. J.) 554; D'Wolff *v.* Harris, 4 Mason C. C. 515; Holton *v.* Binns, 40 Miss. 491.

[4] Kindy *v.* Green, 32 Mich. 310; Price *v.* Talley's Admr., 18 Ala. 21; Parsans *v.* Boyd, 20 Ala. 112; Kimball *v.* Thompson, 4 Cush. (Mass.) 447; Hart *v.* Fitzgerald, 2 Mass. 509.

Pac. 973, it was rejected where the matter of the controversy was hay in stack and oats in the granary. And in Read *v.* Middleton, 62 Ia. 317, 17 N. W. 532, the doctrine was held to have no application to a crop of growing grain; and see Spooner *v.* Ross, 24 Mo. Ap. 599; Graham *v.* Myers, 74 Ala. 432.

The non-joinder of a co-tenant of the plaintiff can be objected only by plea in abatement, George *v.* McGovern, 83 Wis. 555, 53 N. W. 899; DeWolf *v.* Harris, 4 Mas. C. C. 539; Barnardston *v.* Chapman, 4 East. 121. *Contra*, it may be pleaded in bar or made the foundation of a motion in arrest of judgment, Hart *v.* Fitzgerald, 2 Mass. 509; Reinheimer *v.* Hemingway, 35 Pa. St. 432; Fay *v.* Duggan, 135 Mass. 242; Corcoran *v.* White, 146 Mass. 329, 15 N. E. 636. But where all the goods were separate property of the plaintiff, except one stack of fodder, the defendant's interest in which was trifling, the court refused to arrest the judgment, Pritchard's Admr. *v.* Culver, 2 Harr. Del. 129. And where one tenant in common replevies from a co-tenant, the judgment should restore the *statu quo* by returning the goods to the defendant, Boom *v.* St. Paul Co., 33 Minn. 253, 22 N. W. 538; Ingals *v.* Ferguson, 138 Mo. 358, 39 S. W. 801. One defendant disclaimed, the other was defaulted; plaintiff failed upon a technicality. The demand of the first defendant that the goods be returned to his co-defendant was rejected, Sheehan *v.* Golden, 85 Hun, 462, 33 N. Y. Sup. 109; and see Jenkins *v.* Mitchell, 40 Neb. 664, 59 N. W. 90. The mere fact that defendant appears to be tenant in common with the plaintiff will not suffice to reverse a judgment for plaintiff, the evidence not being preserved in the record; because one tenant in common may, notwithstanding the common tenancy, be entitled to exclusive possession, Deacon *v.* Powers, 57 Ind. 489.

The plaintiff must have an entire interest, or a right to the entire and exclusive possession, or his action must fail.[5] When a party claims only a lien unaccompanied by a right to possession, he cannot maintain replevin to obtain possession of the property in order to enforce his lien.[6]

§ 155. **Owners of separate interests cannot join, but joint owners must.** Where several plaintiffs claim several and distinct rights in the property they cannot join in an action for it.[7] But where the goods are the joint property of several, all must join as plaintiffs or replevin will fail. One joint owner cannot sue alone and recover possession of the goods, even from a third party.[8]

[5] Frierson *v.* Frierson, 21 Ala. 549; Bell *v.* Hogan, 1 Stewart, (Ala.) 536; Miller *v.* Eatman, 11 Ala. 609.

[6] Otis *v.* Sill, 8 Barb. 102.

[7] Chambers *v.* Hunt, 18 N. J. L. 339; Barry *v.* Rogers, 2 Bibb. 314; Hinchman *v.* Patterson, H. R. R. Co., 17 N. J. Eq. 75; Owings *v.* Owings, 1 Har. & Gill, (Md.) 484; Glover *v.* Hunnewell, 6 Pick. 222; Walker *v.* Fenner, 28 Ala. 373.

[8] McArthur *v.* Lane, 15 Me. 245; Reinheimer *v.* Hemingway, 35 Pa. St. 435; Demott *v.* Hagerman, 8 Cow. 220; Coryton *v.* Lithebye, 2 Saund. 116; Decker *v.* Livingston, 15 John. 479; Portland Bank *v.* Stubbs, 6 Mass. 422; D'Wolff *v.* Harris, 4 Mason C. C. 515; Eakin *v.* Eaken, 63 Ill. 160; Colton *v.* Mott, 15 Wend. 619. Consult Gilmore *v.* Wilbur, 12 Pick. 120; Pickering *v.* Pickering, 11 N. H. 141.

[Where land is let upon shares the landlord and tenant are tenants in common of the crop. De Mott *v.* Hagerman, 8 Cow. 220. Sale by one tenant in common does not sever a common tenancy; nor does his tortiously seizing the chattel and causing it to be sold on execution against a stranger, at which sale he becomes the purchaser. St. John *v.* Standring, 2 Johns. 468. If one tenant in common mortgage his interest to his co-tenant they still remain tenants in common. A futile attempt by the mortgagee to foreclose the mortgage is without effect to dissolve the common tenancy, Kline *v.* Kline, 49 Mich. 420, 13 N. W. 800. Tenants in common of a growing crop may make a partial severance, as the crop is gathered, so as to vest in each his share, in severalty, so far as the division proceeds, while they remain tenants in common of the residue, Gafford *v.* Stearns, 51 Ala. 434. Sale of the hull of a wrecked vessel, vendor retaining the machinery and that part of the hull above the main deck. Vendor failed to deliver, and failed to cut away or remove the parts retained. It was held vendor might replevy; and that the reservations did not constitute them tenants in common so as to prevent this remedy. Cheney v. Eastern Line, 59 Md. 557. Where the grain of several separate proprietors is placed in an elevator, by consent of all, all

§ 156. **Action by one of two joint owners does not lie against a stranger for the joint property.** It does not admit of dispute that one tenant in common cannot maintain replevin against his co-tenant. But the question has been suggested as to whether he could maintain the action against a stranger who wrongfully took the possession. There is no doubt that the part owner of chattel in his possession may support the action against one who, without right, should forcibly dispossess him. It is true, also, that one of two joint tenants is owner of the half of the whole, and as against all but his co-tenant would seem to have a better right to the exclusive possession than any stranger; but it must be remembered that his right extends only to half, and not to the whole, and that as against a stranger in possession he has no greater rights to his co-tenant's interest than any other third person. Therefore, when he relies on his title, and not on his prior possession, his title will not avail in action against a stranger. The case of *Schwartz* v. *Skinner*, 47 Cal. 6, and the dicta in *D'Wolf* v. *Harris*, 4 Mason, C. C., 515, may be quoted against these views; but the former was decided under a special statute, and the latter is mere *dicta*, and the entire current of authority is the other way.[9]

[9] Chambers *v.* Hunt, 18 N. J. L. 339; Hunt *v.* Chambers, 1 Zab. (N. J.) 623; Barnes *v.* Barlett, 15 Pick. 75; M'Eldery *v.* Flannagan, 1 Har. & G. (Md.) 308; Russell *v.* Allen, 3 Kern, (N. Y.) 178; Wilson *v.* Gray, 8 Watts. 35; Deacon *v.* Powers, 57 Ind. 489. Where the property is admitted to be in the plaintiff by the pleading, and the joint ownership is not made a ground of defense, the rule cannot be enforced—Tell *v.* Beyer, 38 N. Y. 161—and when one joint tenant sells a stranger the right to cut timber off the common property, the other cannot succeed in replevin for the timber after it is cut. Alford *v.* Bradeen, 1 Nev. 228. [The following cases agree with the doctrine of the text, George *v.* McGovern, 83 Wis. 559, 53 N. W. 899; Upham *v.* Allen, 73 Mo. Ap. 224; but in McArthur *v.* Oliver, 60 Mich. 605, 27 N. W. 689, it was held that one tenant in common may recover in replevin against a wrongdoer, who is a stranger to the title. And se Chaffee *v.* Harrington, 60 Vt. 718, 15 Atl. 350. And bailee of one of the ten-

become tenants in common in proportion to their respective interests, Forbes *v.* Fitchburg Co., 133 Mass. 159.

Where tenant in common purchases the interest of his co-tenant, the price to be paid in installments, and with proviso that the sale shall be void if default be made in any payment, upon such default and the election of the seller to terminate the sale, they remain tenants in common, Kehoe *v.* McConaghy, 29 Wash. 175, 69 Pac. 742.]

§ 157. **The same ; illustrations of the rule.** Where a landlord agreed to receive part of the crop for his rent, to be harvested and delivered to him in the crib, it was levied on as the property of the tenant while in the field. *Held*, the landlord could not sustain replevin for his share prior to a division.[10] So

ants in common cannot refuse the demand of the bailor asserting claim under the other tenant in common, Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229.]

[10] Sargent *v.* Courrier, 66 Ill. 245. The same rule was applied in Indiana. Lacy *v.* Weaver, 49 Ind. 376; Williams *v.* Smith, 7 Ind. 559; Lindley *v.* Kelley, 42 Ind. 294.

[A stipulation that the crops shall remain the property of the landlord, is valid as between the parties and as to all who have notice of it, Summerville *v.* Stockton Co., 142 Calif. 529, 76 Pac. 243; and the record of the lease is notice, Id.

Where, by the terms of a farm lease, the landlord retains title to the whole crop, agreeing merely to deliver to the tenant a share thereof upon performance by him of his covenants, he may maintain replevin for the whole product of the farm against the tenant's assignee, even though the latter purchased in good faith and without notice of the landlord's right, Angell *v.* Egger, 6 N. D. 391, 71 N. W. 547. Tenant's only remedy, if the landlord refuse to divide the crop, according to the terms of the lease, is by bill in equity; he cannot maintain replevin, Angell v. Egger, *supra.*

The landowner who employs another to plant and cultivate a crop under his direction, and harvest and store it, agreeing to allow him at the completion of the contract one-half of the grain raised, after deducting advances made in the meantime, is the sole owner of the crop until he shall have set apart to the other the share to which he is entitled, Porter *v.* Chandler, 27 Minn. 301, 7 N. W. 142. An agreement to divide the crop in kind does not make a partnership, Beatty *v.* Clarkson, Mo. Ap. 83 S. W. 1033. Where lands are let upon shares, and the tenant denies the landlord's right and refuses to divide the crop, the landlord may at once maintain replevin for his share, the crop being then matured and the harvest commenced; wheat in the head or in stack is, nevertheless wheat, and may be replevied as such; the writ may describe it as so many bushels, the sheriff making the division at the threshing. An over-estimate of the number of bushels will not defeat the action, Wattles *v.* Dubois, 67 Mich. 313, 34 N. W. 672.

Where lands are leased upon shares, the tenant is not required to clean and divide the grain unless so stipulated, Thomas *v.* Williams, 32 Hun. 257. Even if the lease so provide, the tenant's refusal is not a conversion of the landlord's moiety, Id. The landlord cannot maintain replevin until division, Bowen *v.* Roach, 78 Ind. 361. Creditors of the tenant may not levy on the whole crop, to the exclusion of the

where a party purchased land, and being unable to pay for it agreed to deliver a part of the crop for the use, but afterwards refused to do so, and was hauling the grain to the market and storing it in his own name and the names of other parties; the landlord brought a bill to restrain all the parties, which was held the proper remedy in such case. The plaintiff could not maintain replevin for an undivided portion of the corn; his only remedy was held by bill in equity.[11]

§ 158. **Landlord reserving a share of the crop cannot sustain replevin until his share is set apart.** Where a tenant agrees to deliver a share of the crop for his rent the landlord cannot sustain replevin for any portion until his share has been ascertained and set apart or separated from the tenant's.[12] But when the grain was harvested and put in the barn, and the tenant divided and took away his share, leaving the landlord's, it was held a sufficient division of the crops to enable the latter to maintain replevin for his share.[13]

§ 159. **Death of one partner, who entitled to the partnership property.** On the death of one of two partners the partnership is dissolved. In some of the States the survivor is entitled to retain possession of the partnership effects; and in such case, upon conforming to such regulations as the statutes provide concerning an account, he is entitled to the possession of all the chattels belonging to the firm, and may bring replevin for them. In other States the property of the deceased member of a firm goes to his administrator,[14] and in such case the surviving partner having only a joint interest cannot, upon that title, sustain replevin.

[11] Parker *v.* Garrison, 61 Ill. 251.

[12] Lacy *v.* Weaver, 49 Ind. 373; Williams *v.* Smith, 7 Ind. 559; Chissom *v.* Hawkins, 11 Ind. 316; Fowler *v.* Hawkins, 17 Ind. 211; Sargent *v.* Courrier, 66 Ill. 245; Alwood *v.* Ruckman, 21 Ill. 200; Dixon *v.* Nicolls, 39 Ill. 372; Daniels *v.* Brown, 34 N. H. 454.

[13] Burns *v.* Cooper, 31 Pa. St. 429.

[14] Putnam *v.* Parker, 55 Me. 236.

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landlord; the latter may in such case replevy his share, Atkins *v.* Womeldorf, 53 Ia. 150, 4 N. W. 905. The tenant may remove the fixtures which he has erected for the enjoyment of the premises, pending a proceeding to take the land for a public improvement, Schreiber *v.* Chicago Co., 115 Ills. 340, 3 N. E. 427; fixtures of this character are chattel property and may be replevied by the mortgagee of the tenant from the landlord, Hewett *v.* Watertown Co., 65 Ills. Ap. 153.

§ 160. **The same. Joint tenancy, how pleaded.** Where the plaintiff fails to establish his right to the possession exclusively in himself, he cannot succeed. The joint tenancy of others may be pleaded in abatement or may be taken advantage of on the trial, under a plea in bar setting up that fact.[15]

§ 161. **By agreement of all joint owners, the right to possession may be in one.** When by the agreement of all the joint owners, the right to the possession is vested exclusively in one of them, he may replevy with success even against his co-tenant's.[16] Where the property was the equipment of a whaling vessel, and the master had the exclusive right to possession during the voyage, but after the return the general agent, whose right and duty it was, under the contract with all the owners, to take charge of the stores and dispose of them, had the right to possession, the latter could sustain replevin against anyone who should interfere with his possession.[17] When the partnership was for the manufacture of saddles, and one partner was to furnish all the stock and the other to do the work, the partner owning the stock might replevy it from an officer who seized it on process against the working partner before any work was done on it.[18]

§ 162. **The severance of the joint tenancy by agreement.** The severance of the joint tenancy so that any allotted part is set off to either, will vest in him such a title as will enable him to sustain replevin. So when a certain part of a cargo was sold by consent of all the joint tenants, the purchaser was entitled to bring replevin.[19]

§ 163. **Severance by the act of one joint tenant.** The question sometimes arises how far a joint tenancy in chattels can be severed by the act of one of the joint owners. In a case where the parties owned a number of bags of coffee, not in any way distinguished by marks or otherwise, the court said each one might have taken the number of bags which belonged to him by his own

[15] Reinhelmer *v.* Hemingway, 35 Pa. St. 435; Cullum *v.* Bevans, 6 Har. & J. (Md.) 469; Harrison *v.* M'Intosh, 1 John. 380; Chambers *v.* Hunt, 3 Har. (18 N. J.) 339; Marsh *v.* Pier, 4 Rawle. 273. Consult D'Wolf *v.* Harris, 4 Mason, C. C. 515; Addison *v.* Overend, 6 Term. R. 357, 766.

[16] Newton *v.* Gardner, 24 Wis. 232; Corbett *v.* Lewis, 53 Pa. St. 331.

[17] Rich *v.* Ryder, 105 Mass. 307.

[18] Boynton *v.* Page, 13 Wend. 425.

[19] Seldon *v.* Hickock, 2 (Cain's Ca.) N. Y. Term R. 166.

selection.[20] Where the property, consisting of grain, raised and owned jointly by two, was put into two cribs, containing equal portions, and each tenant had a key to one of the cribs with the right to feed therefrom, there was not such a separation as would justify an action on the part of either against the other,[21] there being no formal settlement of division. But where a party purchases goods in bulk, and the separation depends on his own selection, he may, by making his selection, have the absolute property in the part so selected by him.[22] And where the joint property is of such a nature that one may take his share without in any way affecting the value of that remaining, cases can be found which say he may do so without consent of his co-tenants.[23]

§ 164. **Purchaser of a joint tenant's interest at sheriff's sale.** Where the interest of one partner is sold by the sheriff or executor, the purchaser becomes a *quasi* tenant in common with the other partners so far as to entitle him to an account, but not to the exclusive possession of any part of the property, and replevin by such purchaser would fail.[24]

§ 165 **Sale by one partner of his interest in goods.** When one partner sells his interest to a stranger, the purchaser cannot sustain replevin on the refusal of the other partner to admit him into partnership. The sale was a dissolution of the partnership, and the continuing member was not compelled to admit the purchaser into partnership with him.[25]

§ 166. **An officer with process against one member of a firm may seize all the partnership goods.** The rule is settled that a sheriff with process against one member of a firm, may levy upon the interest of that member in partnership property, and may sell such partner's interest.[26] Partnership accounts cannot be settled in replevin.[27]

§ 167. **The same.** Where there is a judgment against one partner and an execution issues thereon, the officer cannot seize a part of the partnership property; he must seize the entire property subject to levy and must take and retain the custody thereof.

[20] Gardner *v.* Dutch, 9 Mass. 427. But, see editor's note to this case.
[21] Usry *v.* Rainwater, 40 Geo. 328.
[22] Clark *v.* Griffiths, 24 N. Y. 596; McLaughlin *v.* Piatti, 27 Cal. 452.
[23] Forbes *v.* Shattuck, 22 Barb. 568; Tripp *v.* Riley, 15 Barb. 334.
[24] Reinheimer *v.* Hemingway, 35 Pa. St. 435.
[25] Reece *v.* Hoyt, 4 Port. (Ind.) 169.
[26] Waldman *v.* Broder, 10 Cal. 378; Scrugham *v.* Carter, 12 Wend. 131
[27] Chandler *v.* Lincoln, 52 Ill. 76.

This rule seems to arise from the necessities of the case. The officer cannot in any other way take possession of the property subject to levy and sale. And while the law does not permit the sale of more than the interest of the party against whom the execution runs, the interests of the other partner must so far yield as to permit the possession of the whole long enough for the sale of the undivided interest of the execution debtor who is part owner, and the other partner cannot sustain replevin.[28] The interest of a partner is not to be regarded as a specific share in the goods owned by them, but rather an interest in the surplus after the firm debts are paid.[29]

[28] Branch *v.* Wiseman, 51 Ind. 1; Ladd *v.* Billings, 5 Mass. 15; Haydon *v.* Haydon, 1 Salk. 392; Shaver *v.* White, 6 Munford, (Va.) 110; Mersereau *v.* Norton, 15 Johns. 179; Skipp *v.* Harwood, 2 Swanst. 586; Johnson *v.* Evans, 7 Man. & G. 240; Whitney *v.* Ladd, 10 Vt. 165; Remmington *v.* Cady, 10 Conn. 44; Lawrence *v.* Burnham, 4 Nev. 361; Rapp *v.* Vogel, 45 Mo. 524; Goll *v.* Hinton, 8 Abb. Pr. 120; James *v.* Stratton, 32 Ill. 202; White *v.* Jones, 38 Ill. 159; Sanders *v.* Young, 31 Miss. 111; Bernal *v.* Hovious, 17 Cal. 541; Hardy *v.* Donellan, 33 Ind. 501; Moore *v.* Sample, 3 Ala. 319. See Jones *v.* Thompson, 12 Cal. 191; Walsh *v.* Adams, 3 Denio, 125. But, compare these cases with Treadwell *v.* Brown, 43 N. H. 290; Gibson *v.* Stevens, 7 N. H. 353; Morrison *v.* Blodgett, 8 N. H. 238; Newman *v.* Bean, 21 N. H. 93; Crockett *v.* Crain, 33 N. H. 548.

[29] Garvin *v.* Paul, 47 N. H. 163.

CHAPTER VII.

DESCRIPTION, IDENTITY OF THE GOODS.

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§ 168. **Plaintiff must prove himself to be the owner of the identical property sued for.** It is an inflexible rule in replevin that the plaintiff must show himself to be the owner of the identical articles for which the suit is brought, or that he is

entitled to their immediate possession. It is not sufficient that he own goods of like description and value; he must show that the identical property described in the writ and pleadings is his, and also that the articles can be distinguished and separated from all others, or he will fail in his action.[1] The few exceptions to this rule are in cases where identification is impossible and of no importance. They will be noted hereafter.

§ 169. **The writ must describe the property particularly.** The writ must specify the particular property to be replevied.[2] Thus, when the property was described as "Buckwheat, valued at three hundred dollars," or "Sweet potatoes valued at thirty-nine dollars," or "About ten acres of potatoes," or "Four acres of squash," there was a failure to identify the property, or to furnish any means by which it could be ascertained, and the writ failed.[3] But where the sheriff levied on coin which was by consent and for convenience exchanged for bank bills, this alteration was held not to prejudice the rights of a stranger to the proceeding who claimed to own the money and sought to recover the bills in replevin.[4]

§ 170. **The property must be capable of delivery.** The property must be *in esse*, and in such form of existence that it may be the subject of delivery. Where a colt, the expected progeny of a mare owned by another, was the subject of dispute, replevin was not the proper form of action.[5] Neither would the action lie for a slave who was dead at the time of the commencement of the suit,[6] or for property destroyed before the suit was

[1] 3 Bla. Com. 145; 1 Ch. Pleadings, 163; Hurd *v.* West, 7 Cow. 752; Snyder *v.* Vaux, 2 Rawle, (Pa.) 423; Ames *v.* Miss. Boom Co., 8 Minn. 470.

[2] Snedeker *v.* Quick, (6 Halst.) 11 N. J. 179; Pope *v.* Tillman, 7 Taunt. 642; Davis *v.* Easley, 13 Ill. 192.

[3] Welch *v.* Smith, 45 Cal. 230. Reasonable certainty must be used in the description. Root *v.* Woodruff, 6 Hill, (N. Y.) 418; Snyder *v.* Vaux, 2 Rawle, 427; Kaufman *v.* Schilling, 58 Mo. 219; Gray *v.* Parker, 38 Mo. 160; Ryder *v.* Hathaway, 21 Pick. 305; Hart *v.* Fitzgerald, 2 Mass. 509; Carlton *v.* Davis, 8 Allen, (Mass.) 94; Low *v.* Martin, 18 Ill. 286; Reese *v.* Harris, 27 Ala. 306; Stevens *v.* Osman, 1 Mich. 92; Farwell *v.* Fox, 18 Mich. 169; Stanchfield *v.* Palmer, 4 G. Greene, (Iowa,) 25; Brown *v.* Sax, 7 Cow. 95; Heard *v.* James, 49 Miss. 245; Root *v.* Woodruff, 6 Hill, 424; Smith *v.* Sanborn, 6 Gray, 134; Dodge *v.* Brown, 22 Mich. 449.

[4] St. Louis & Alton R. R. *v.* Castello, 28 Mo. 380.

[5] McCarty *v.* Blevins, 5 Yerger, (Tenn.) 196.

[6] Caldwell *v.* Fenwick, 2 Dana, (Ky.) 333.

begun.[7] In these and similar cases, where the property is not in existence at the time the suit is commenced, there can be no delivery, and for that reason replevin is not the proper form of action.[8] Some novel and intricate questions will arise under this head touching the separation of goods purchased from bulk, the mixture or confusion of goods belonging to different owners, the change of form which goods may undergo in the hands of the defendant, the effect which these conditions may have upon the rights of the several parties claimant, as well as in relation to the description of the goods.

§ 171. **Strictness of the rule in regard to description and the reasons for it.** An exceedingly strict practice prevails as to the description of the chattels sued for. The rule is, that the property must be particularly described, not simply by the number and class of articles, but that each article, where this is practicable, be so described that it can be identified and delivered by reference to the description only. Thus, where the property is described as "six oxen," it is not sufficient. If they be called "six red oxen," this would confine the selection to a class—that is, to "red oxen"; but it would still be uncertain which "red oxen" were intended. To obviate this, the size, age, marks of spots, if any, and the place where they are, should be stated, with any other particulars that would lead to their identification,[9] the object being not only to apprise the defendant what property the plaintiff will assert title to, but to indicate to the officer the property which he is to seize and deliver under the writ, so that there may be no doubt or uncertainty:[10] for example, "fifteen hundred pounds of cotton seed" was held sufficient to describe the substance and quantity; but something further should have been added, as that it was in such a house or place, to enable the officer to find and identify it from the writ.[11]

[7] Burr *v.* Daugherty, 21 Ark. 559.

[8] Lindsey *v.* Perry, 1 Ala. (N. S.) 203; Chissom *v.* Hawkins, 11 Ind. 318. See Otis *v.* Sill, 8 Barb. 102, for an interesting case of sale of property not *in esse*.

[9] Farvell *v.* Fox, 18 Mich. 169; Stevens *v.* Osman, 1 Mich. 92; Wilson *v.* Gray, 8 Watts, (Pa.) 39. In Indiana, a description, "one white shoat, of the value of fourteen dollars," was held sufficient. Onstatt *v.* Ream, 30 Ind. 259. But this evidently falls short of the exactness usually required. Compare Dowell *v.* Richardson, 10 Ind. 573.

[10] Ruch *v.* Morris, 28 Pa. St. 245.

[11] Hill *v.* Robinson, 16 Ark. 90.

§ 172. **The same. A description good in trespass or trover not sufficient in replevin.** A description which is perfectly good in detinue, trover or trespass is not necessarily good in replevin. The distinction is, that in those actions the goods themselves are not in dispute, simply their value, while in replevin the identity of the property often forms the chief question in controversy; and, while it would be competent for a plaintiff to recover the value of a "red ox" in trover, yet that description would not be sufficient in an action for replevin.[12]

§ 173. **The same. Illustrations of the rule.** "Divers goods and chattels;"[13] or, "a quantity of corn, about two hundred bushels;"[14] or, "a lot of goods in the store of A.,"[15] would not be sufficient description in replevin, though perhaps they would be in trover. In an action of trover for "forty ounces of mace, nutmegs and cloves," without saying how much of either, the description was held sufficient, but would not have been in replevin.[16] So, "fourteen skimmers and ladles, and three pots," is faulty in replevin, but might not be in trespass or trover;[17] but a box of skins and furs marked "J. Windor, Logansport, Ind.," is sufficient.[18] And the general rule is, that a description which will enable the sheriff, aided by inquiries, to identify the property, will be sufficient to support the action.[19]

[12] Kinaston *v.* Moor, Cro. Car. 89; Farwell *v.* Fox, 18 Mich. 169; Taylor *v.* Wells, 1 Mod. 46; Gordon *v.* Hostetter, 37 N. Y. 103; Hartford *v.* Jones, 2 Salk. 654. The declaration ought to be accurate in setting up the number, kind and description of the cattle. Bull N. P. 52; Neller *v.* Kelley, 69 Pa. St. 407; Wood *v.* Davis, 1 Mod. 290.

[13] Pope *v.* Tillman, 7 Taunt. 642; Warner *v.* Aughenbaugh, 15 S. & R. (Pa.) 9.

[14] Stevens *v.* Osman, 1 Mich. 92.

[15] Edgerly *v.* Emerson, 3 Foster, (23 N. H.) 555.

[16] Hartford *v.* Jones, 2 Salk. 651.

[17] Bern *v.* Mattaire, Ca. Temp. H. 119.

[18] Minchrod *v.* Windoes, 29 Ind. 288.

[19] More *v.* Clypsam, Aleyn, 33; Same *v.* Same, Sty. 71; Smith *v.* McLean, 24 Iowa, 324; Lawrence *v.* Coates, 7 Ohio St. 194; Buckley *v.* Buckley, 9 Nev. 379.

NOTE X. *Description of the Goods.*—A description of the goods with reasonable certainty, is sufficient, Fordice *v.* Rinehart, 11 Ore. 210, 8 Pac. 285. A description which enables the officer by inquiry to identify the goods, Sexton *v.* McDowd, 38 Mich. 148.

Without such description the court should not proceed to a judgment, McElhannon *v.* Farmers Alliance Co., 95 Ga. 670, 22 S. E. 686.

The following descriptions have been held sufficient: "One hundred bushels of wheat harvested on the 28th of July, 1885, and grown

§ 174. **The same.** "All articles of household furniture now contained in said house, (describing it,) consisting of carpets,

upon and threshed from" certain described lands, Hall *v.* Durham, 117 Ind. 430, 20 N. E. 282. "One hundred cords of shingle bolts, and all cedar timber situated upon" particular land in a county named, Casey *v.* Malidore, 19 Wash. 279, 53 Pac. 60. "A quantity of wheat, rye and oats, being one-half the grain grown on the Simmons farm in the year 1892," Simmons *v.* Robinson, 101 Mich. 240, 59 N. W. 623. "One lot of wheat being one-third of seventeen-thirty-seconds of wheat raised by John Humphrey on the old Bayn farm in Spring Arbor, the share of William Bayn of the crop coming to him," Humphrey *v.* Bayn, 45 Mich. 565, 8 N. W. 556. "About two hundred thousand feet of pine and hemlock lumber and three hundred cords of slabs," Dillon *v.* Howe, 98 Mich. 168, 57 N. W. 102. "Sixteen and two-fifteenths barrels of flour, in sacks, part branded with Caveness & Sterling's brand, Island City Mills, and the others marked with the brand of the mill at Weston," Fordice *v.* Rinehart, *supra*. "One cow seven years old, two yearlings, red and white," Kelso *v.* Saxton, 40 Mich. 666. "Sufficient of the boots and shoes now in" a certain store named, "to satisfy the claim of plaintiff as mortgagee of said goods, amounting to $805," Pingree *v.* Steere, 68 Mich. 204, 35 N. W. 905. "Six oxen," Farwell *v.* Fox, 18 Mich. 166. "One blaze face cream-colored mare eight or nine years old," King *v.* Conevey, 52 Ark. 115, 12 S. W. 203. "Lawful money of the United States consisting of one hundred silver certificates of $5 each, one hundred fifty national bank-notes each for $10, and sixty-five treasury notes each for $20, Farmers Alliance Co. *v.* McElhannon, 98 Ga. 394, 25 S. E. 558.

A description of three hundred articles as "two Poland China pigs, two months old, thirty-three chickens, two bedsteads, spiral springs, four cords shingle wood, a lot of hardware, . . . all the furniture and carpets in a hotel building recently occupied by me and formerly owned by" parties named, Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10. "All the coal now in" two certain buildings described, "about fifteen hundred bushels," Cain *v.* Cody, Calif. 29 Pac. 778. "The good will, fixtures, furniture and stock in trade of the drug business now carried on in the name of etc., on the Southwest corner of Clinton & Mulberry streets in the city of Newark," Kraemer *v.* Kraemer Drug Co., 59 N. J. L. 9, 35 Atl. 791. "One white shoat," Onstatt *v.* Ream, 30 Ind. 259. "A box of skins and furs marked J. W. Logansport, Indo," Minchrod *v.* Windoes, 29 Ind. 288. "One stock of dry-goods, notions, fancy goods, etc., now in store occupied by them on Main street in Valparaiso," Malone *v.* Stickney, 88 Ind. 594. "Six head of hogs," James *v.* Fowler, 90 Ind. 563. "Ten thousand ninety wool pelts, the wool taken therefrom and the skins thereof, otherwise known as slots in pickle or lime," Marshal *v.* Friend, 33 Misc. 443, 68 N. Y. Sup. 502. "Nine fat hogs, mostly black," Crum *v.* Elliston, 33 Mo. Ap. 591. "Thirty-seven cases of Connecticut leaf tobacco," Lehman *v.* Mayer, 68 Ap. Div. 12, 74 N. Y. Sup. 194.

chairs," etc.,[20] is good. So, of "five hundred and seventy-two three-year old Texas cattle, now in possession of the party des-

[20] Beach *v.* Derby, 19 Ill. 619.

Plaintiff is not deprived of remedy by inability to remember the particulars of many separate items, or the particular bills and pieces of money converted; he may supplement the general description by a description of the place where the goods are, or by such circumstances as will put the defendant on notice of his demands, either by reference to the substantial characteristics of the chattel, or the circumstances of the taking or conversion, McElhannon *v.* Farmers Alliance Co., *supra.* Thus, "A certain number of bills United States treasury notes amounting to," a sum named, "notes or bills of the national bank, currency of the United States;" "Four per cent. United States bonds, treasury notes commonly called greenbacks and national bank currency amounting to" a sum named, in several counts, each averring that the denominations of the bills plaintiff was unable to give because in possession of defendant, was held sufficient. Hoke *v.* Applegate, 92 Ind. 570. So, "All the dry-goods, notions, carpets, wall paper, boots and shoes, fixtures, safe and personal effects" in a building described, McCarthy *v.* Ockerman, 154 N. Y. 565, 49 N. E. 153. "A Canadian dime and silver quarter-dollar, fifty-five twenty dollar gold coins, eight twenty dollar bills, all contained in the aforesaid canvas belt," Eddings *v.* Boner, 1 Ind. Ter. 173, 38 S. W. 1110. "A quantity of hosiery, underwear, dry-goods, and notions of the value of four thousand seven hundred dollars, shipped by Brown, Durrell & Company, now in the store occupied by defendants," giving the street number, Durrell *v.* Richardson, 119 Mich. 592, 78 N. W. 650. "Five promissory notes executed by J. M., John M. and P. M., on the 27th day of December, 1888, each bearing interest at four per cent. annually and due in five, seven, eight and nine years after date," averring inability to describe them more particularly, because "in possession of defendant ever since plaintiff's appointment as administrator of deceased payee," McAfee *v.* Montgomery, 21 Ind. Ap. 196, 51 N. E. 957.

A description of horses by name, age, color and value; a wagon by the name of the maker, McNorrell *v.* Daniel, 48 S. E. 680. "All farming utensils stored" in premises named; of "cotton seed," by reference to the house where it is stored, Id. Misnomer of the variety of wheat is immaterial where the premises upon which it is grown are set forth, Wattles *v.* Dubois, 34 N. W. 672. In Burr *v.* Brantley, 40 S. C. 538, 19 S. E. 199, an averment that goods were taken from the possession of plaintiff and retained in possession of defendants, was held to cure an indefiniteness in the description. An affidavit describing the goods as "five hundred barrels of prime mess pork which is wrongfully detained from deponent," by the said defendant, is held sufficient, Burton *v.* Curyea, 40 Ills. 320.

A receiver in insolvency brought replevin to recover a quantity of goods fraudulently transferred by the insolvent to the defendant.

ignated, in Morris Co., Kansas";[21] or, "all the stock, tools, and chattels belonging to the mortgageor, in and about the wheel-

[21] Brown v. Holmes, 13 Kan. 492.

The complaint alleged that the insolvent was "in possession of a large stock of groceries," and that prior to filing her petition in insolvency she "removed and secreted a large portion of said stock of the vale of about five hundred dollars . . . for the purpose of defrauding her creditors," and that defendant "for the purpose of assisting her in defrauding her creditors received said stock of groceries into his store building;" there was no other description of the property sought to be recovered. It was held, nevertheless, that the description was sufficient. Seligman v. Armando, 94 Calif. 314, 29 Pac. 710. But in a later case in the same court, a complaint which averred that an insolvent was the owner and in possession of "a stock of merchandise, principally hardware at, etc., and then and there transferred to defendant "the greater part of said merchandise, to wit, paints, oils, brushes and glass, six hundred twenty-five dollars; pumps, pipe and plow implements, three hundred twenty-two dollars; tools, shelf ware, buck-saws, etc., one hundred five dollars; and sundries $———," without any mention of quantity, quality, values or price, for any particular kind of property; was held insufficient, Hawley v. Kocher, 123 Calif. 77, 55 Pac. 696.

The following were held insufficient: "16—0, octagon solid copper lining, full glass," Springfield Co. v. Wielar, 26 Misc. 863, 56 N. Y. Sup. 394. "One lot of staves and saw logs," Johnson v. McLeod, 80 Ala. 433, 2 So. 145. "Six thousand pounds of seed cotton, three thousand bundles of fodder, and fifteen bushels of corn," Lockhart v. Little, 30 S. C. 326, 9 S. E. 511. "Two stallion horses," even in the judgment, Cooke v. Aguirre, 86 Calif. 479, 25 Pac. 5. "Thirty-five hundred dollars lawful money of the United States," McElhannon v. Farmers Alliance Co., 95 Ga. 670, 22 S. E. 686. "Corn of about the value of one hundred dollars," Edwards v. Eveler, 84 Mo. Ap. 405. Judgment for "forty-nine head of hogs, the same described in the complaint herein, or five hundred eighty-five in case delivery cannot be had;" the complaint described "sixty-eight head of hogs on the macadamized road in said county on place formerly kept by W. S." Held the judgment was bad for uncertainty, there being nothing by which the sheriff could determine which forty-nine hogs out of the sixty-eight were to be delivered, Guille v. Wing Fook, 13 Ore. 577, 11 Pac. 277. Complaint averred that defendants were in possession of the personal goods of the plaintiff, to wit, "two hundred seventy dollars in lawful money of the United States, thirty dollars in lawful currency of the United States, being two ten dollar bills and five dollar bills;" that two hundred seventy dollars of the same was in bank to the credit of Tharp and was checked out on a day named to defendant Livingston and deposited with him as bail on a warrant against Tharp; that the entire three hundred dollars was delivered to Livingston as constable

wright shop now occupied by him."[22] A description which is sufficient to pass property is usually sufficient in replevin.[23]

[22] Harding *v.* Coburn, 12 Met. 333; Morse *v.* Pike, 15 N. H. 529; Burdett *v.* Hunt, 25 Me. 419; Wolfe *v.* Dorr, 24 Me. 104; Winslow *v.* Merch. Ins. Co., 4 Met. 306.

[23] City of Fort Dodge *v.* Moore, 37 Iowa, 388.

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for making the arrest on the warrant above-mentioned, and turned over to Enson, "who holds the same for said Livingston." Held, that the description of the moneys was too indefinite, and that inasmuch as all the money was obtained by check it did not appear, and was not to be inferred, that the money so obtained was the identical money deposited, McLennan v. Livingston, 108 Ga. 342, 33 S. E. 974.

A house was described by the officer in his levy as situate on lot eight, when in fact it was situated on another lot. Held in replevin that the fact and truth of the matter and the identity of the house demanded with that sold upon the execution, might be shown by parol, Elliott *v.* Hart, 45 Mich. 234, 7 N. W. 812.

After judgment all intendments are in favor of the successful party; thus where the plaintiff claimed as mortgagee of certain live stock, and described the property as "Nineteen head of steers from twelve to eighteen months old of different colors branded 4 on the right side;" the mortgage attached to the petition described "fifty-four calves all branded 4 on the right side;" the date of the institution of the suit did not appear; the court held the description of the mortgage applicable to the animals claimed in the petition, Merrill *v.* The Equitable Company, 49 Neb. 198, 68 N. W. 365.

Uncertainty of description in the complaint is ground of a motion to make more definite and certain, Smith *v.* McCoole, 5 Kans. Ap. 713, 46 Pac. 988.

The defendant cannot claim to have been misled by any uncertainty in the description if by his answer he asserts title, Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10. If the answer makes no question as to the identity of the goods, all imperfections in description are waived, Kocher *v.* Palmetier, 112 Ia. 84, 83 N. W. 816; Oliver *v.* Wooley, 68 Mo. Ap. 304. If defendant has concealed or disposed of the goods so as to place them beyond the reach of the sheriff he is not prejudiced by indefiniteness in the description, Lehman *v.* Mayer, 68 Ap. Div. 12, 74 N. Y. Sup. 194. One giving a bond and retaining the goods admits the possession of goods answering the description of the goods in the writ, Farmers Alliance Co. *v.* McElhannon, 98 Ga. 394, 25 S. E. 558; and cannot object to indefiniteness in the description, Ruch *v.* Morris, 28 Pa. St. 245; Clemmons *v.* Brinn, 36 Misc. 157, 72 N. Y. Sup. 1066; Foredice *v.* Rinehart, 11 Ore. 208, 8 Pac. 285. A variance between the description in the bill of sale and the things actually delivered is controlled by the delivery, Whittle *v.* Phelps, 181 Mass. 317, 63 N. E. 907.

§ 175. **When the sufficiency of description is a question for the jury.** Where the identity of the property or the correctness of the description becomes a question, it is for the jury to determine from the evidence. Suppose the description ran, "A black horse, now in the stable of A." This would doubtless be sufficient; but suppose the evidence showed there were two black horses in that stable. It would then be a proper question for the jury to determine whether or not the plaintiff was entitled to the horse delivered.[24] And this rule would apply in all cases where the question is as to whether a given description applied to or covered the property in dispute; but if the question was as to the sufficiency of a given description to pass title or sustain the action, it would be for the court, and not the jury, to decide.

§ 176. **Synonymous descriptions, Illustrations of, and when allowable.** The term heifer may be used to describe a cow. "I know of no authority," says GRAY, J.,[25] "for considering 'heifer' to be a mis-description of a cow, except in penal statutes."[26] Upon the authority of these cases, it may be proper to describe a hog as a pig, or *vice versa*; colt may perhaps be used for horse. But the safer way is to make the description accurate, and in the terms which are in common use where the suit is brought, or in the trade or business with which it is connected.

§ 177. **The rule as to certainty of description.** This action does not lie for money, unless it be in a bag or package, or in some way distinguished from all other money;[27] but it lies for

[24] Vennum *v.* Thompson, 38 Ill. 144.

[25] Pomeroy *v.* Trimper, 8 Allen, (Mass.) 403.

[26] H. P. C., 183; Carruth *v.* Grassie, 11 Gray 211; Freeman *v.* Carpenter, 10 Vt. 434. A man brought replevin for a "heifer," and in his writ of second deliverance he called it a "cow." FITZHERBERT said the writ was good. It was a heifer; it may be a cow now. Y. B. 26 H. 8, 6, 27.

[27] Holiday *v.* Hicks, Cro. Eliz. 661; Draycot *v.* Piot, Cro. Eliz. 818; Rapalje *v.* Emory, 2 Dall. 51. "If I bail twenty pounds to one to keep for my use, if the money were not contained in a bag, coffer or box, detinue doth not lie"—Core's Case, Dyer, 22 *b*; 6 E. 4 11; 7 H. 14; Banks *v.* Whetstone, Moore, 394—but trover would lie. Hall *v.* Dean, Cro. Eliz. 841. As to bank bills, see Dows *v.* Bignall, Lalor's Suplmt. 408; Warner *v.* Sauk Co. Bank, 20 Wis. 492; Jackson *v.* Anderson, 4 Taunt. 24; Skidmore *v.* Taylor, 29 Cal. 619; Ames *v.* Miss. Boom Co., 8 Minn. 472.

money or jewels in a bag,[28] or bonds which are numbered and can be identified.[29] When coin belonging to several different owners was in a safe, and the sheriff, with a writ of attachment, separated eighteen hundred dollars from the remainder, and put it in a bag, and the plaintiff brought suit in replevin to recover the money from the sheriff, the court regarded the separation as sufficient to enable him to sustain the action.[30]

§ 178. **The same.** The plaintiff alleged that he was induced by fraud to buy a book, and to pay one thousand dollars, by a draft, which was delivered to a banker, and by him collected and placed to the credit of the seller. Plaintiff sued for one thousand dollars gold. On leave given to amend, he induced the defendant, the banker, to put nine hundred and fifty dollars in coin in a bag, and brought replevin for it. *Held*, that he could not recover; that he showed no title to the specific property; that the banker could not make it the money of his depositor, so as to subject it to the replevin suit, by putting it in a bag, without the depositor's consent.[31]

§ 179. **Description of numerous articles, as the goods in a store.** Where the articles are numerous, and a separate description of each would not aid in their identity, a more general method, if it be definite, may be employed. Thus: "A certain storehouse, warehouse, and the goods therein contained, being the store in Council Bluffs, in said State and county, known and designated as the store of your petitioner," is sufficient for the store and contents.[32] So, when a chattel mortgage enumerates sundry articles specifically, and also includes "all other articles of personal property in and about the mortgagor's shop," the general description will pass all.[33]

[28] Bull N. P. 32.

[29] Sager *v.* Blain, 44 Hand. (N. Y.) 448.

[30] Griffith *v.* Bogardus, 14 Cal. 410. The distinction between money and specific property is stated by Lord MANSFIELD in Clarke *v.* Shee, 1 Cowp. R. 200.

[31] Pilkington *v.* Trigg, 28 Mo. 98.

[32] Ellsworth *v.* Henshall, 4 G. Greene, (Ia.) 418. To invoice a stock would be tedious, expensive, and sometimes impossible; and the courts have held that when the store is identified, the "contents" are sufficiently ascertained by such description. Litchman *v.* Potter, 116 Mass. 373.

[33] Harding *v.* Coburn, 12 Met. 333.

§ 180. **Descriptions which may refer to kind or quantity.** It may be a question, at times, whether the words used in the writ are employed to designate the kind and description of the article, or the quantity. Thus, "barrels of lime" may mean lime in barrels, or it may refer to the quantity in bulk; "barrels of flour" may be a proper description of flour in bags, because the common usage of the trade in many parts of the country warrants it, but the better practice is to avoid any description which may be ambiguous. Where the writ directed the sheriff to take "barrels of No. 1 mackerel," and the return showed that he took barrels and half barrels, the defendant moved for a return of the half barrels, upon the ground that they were not described in the writ; whereupon plaintiff proved that when the writ was being served, the defendant agreed that two half barrels should be taken for a whole one, and the court held that "the term 'barrel' should be regarded as a designation of quantity, irrespective of the mode in which it was packed, or the particular vessels in which it was contained."[34]

§ 181. **A quantity described as "about" so much.** On a writ of replevin for "about four hundred tons bog ore," the sheriff was not authorized to deliver seven hundred and twenty tons. Such a writ was held defective, and that the sheriff might have refused to execute it. If the ore had been identified as such a lot or such a pile, describing it, the number of tons might have been regarded as surplusage.[35]

§ 182. **The proof as to description, must correspond with the writ.** The proof must correspond to the writ and declaration as to description of the property; any material variance will defeat the action. Where the suit was for two "bay horses," and the proof showed one of them to be a sorrel, the variance was fatal.[36] In trover for "a slave named John," the proof showed conversion of a slave but not that his name was John; *held*, the plaintiff could not recover.[37] When a note was described in the declaration as "a note for $180," and the proof was a note for $300; *held*, a fatal variance.[38] But an omission of some words in the description which does not render the writ so

[34] Gardner *v.* Lane, 9 Allen, (Mass.) 493.
[35] DeWitt *v.* Morris, 13 Wend. 495.
[36] Taylor *v.* Riddle, 35 Ill. 567.
[37] Ward *v.* Smith, 8 Ired. (N. C.) 296.
[38] Bissel *v.* Drake, 19 Johns. 66.

defective that the property cannot be identified, such as the omission of the word "feet," in describing timber, does not render the writ void. The sheriff may perhaps refuse to serve it unless it be amended, but if he does, by taking the right property, the court will have jurisdiction.[39]

§ 183. **Exact quantity need not be given where the particular property is indicated.** It is not essential that exact quantities be stated when the description is otherwise certain; as for example, "a pile of wheat," or "a quantity of barrels of pork," in a certain warehouse, would be good without mentioning the number of bushels or barrels; and a description sufficient to pass title will be good in this action.[40]

§ 184. **Writ of return and verdict may follow declaration, as to description.** The description in the writ of return is sufficient, if it describe the property the same as the declaration. If there is a misdescription the plaintiff is responsible and must suffer the consequences.[41] Where property was specifically described in the complaint, and in the verdict was referred to as "said property," it was sufficient.[42]

§ 185. **When objections to the insufficiency of description must be taken.** When the defendant desires to object to the description for uncertainty, he must do so at the first available opportunity; if he omit to do so and plead to the merits, or give bond under the statute, as owner, to retain the property, he will be considered as having waived such defects.[43] So a declaration for a "lot of sundries," is bad and would undeniably have been so held; but, after the defendant has pleaded that they are his, and has gone to trial, he cannot ask the court to reverse the judgment because the description is uncertain. If he had really labored under this want of knowledge, he had the means to protect himself, before pleading.[44] The reason of this rule is, that the objection is in the nature of a dilatory motion, and the rules which apply to such motions must generally govern here.

§ 186. **Replevin does not lie for goods sold, unless they**

[39] Nolty *v.* The State, 17 Wis. 668.

[40] Scudder *v.* Worster, 11 Cush. 573; Groat *v.* Gile, 61 N. Y. 431; Susquehanna Boom Co. *v.* Fluny, 58 Pa. St. 200.

[41] Lammers *v.* Myers, 59 Ill. 216.

[42] Anderson *v.* Lane, 32 Ill. 103.

[43] Ruch *v.* Morris, 28 Pa. St. 245.

[44] Warner *v.* Aughenbaugh, 15 S. & R. (Pa.) 9.

are in some way separated from others or identified. One of the familiar rules of the law concerning sales, is, that a simple bargain is not sufficient to transfer title to chattels unless it be accompanied by some actual or symbolic delivery, or by some separation of the chattels sold, to distinguish them from others.[45] Thus, a contract to sell and deliver a certain number and kind of hogs belonging to the seller, at a particular time and place, will not vest sufficient title in the purchaser to sustain replevin,[46] for the reason that where anything remains to be done to complete the contract of sale, the title does not pass. The contract must be completed before it will transfer the title. Where a party agreed to deliver hedge plants and to take his pay in land, and learning that the title to the land was defective, refused to deliver, yet notified the party he could have the plants on paying for them, the purchaser took no such title as would sustain replevin.[47] But where one bought and paid for a quantity of corn out of the seller's lot, and the vendor afterwards sold the whole, the fact that the corn was not measured or set apart, will not defeat an action for money had and received.[48]

§ 187. The same. If the owner of a large quantity of a particular kind of merchandise sells part of it, property in that part does not pass unless it be in some way set apart or distinguished from the rest. Consequently, the purchaser cannot maintain replevin, even though he has paid full value for it.[49] But if the property is so indicated by description that it may be separated, it will be sufficient to pass title upon which to base the action.[50] Where the action was for the price of bark, sold at a stipulated price per ton, it was agreed that it should be weighed by two persons, each party to name one. Part of the bark was weighed and delivered, but the balance was injured by a storm,

[45] Hutchinson *v.* Hunter, 7 Barr. (Pa. St.) 140; White *v.* Wilks, 5 Taunt. 176; Stevens *v.* Eno, 10 Barb. 95; Stephens *v.* Santee, 49 N. Y. 35.

[46] Lester *v.* East, 49 Ind. 588. See Suggetts, Admr. *v.* Cason, 26 Mo. 221.

[47] Barrett *v.* Turner, 2 Neb. 174. See Sutro *v.* Hoile, 2 Neb. 186; Bell *v.* Farrar, 41 Ill. 403; Tyler *v.* Strang, 21 Barb. 198; Dixon *v.* Hancock, 4 Cush. 96.

[48] Long *v.* Spruill, 7 Jones, (N. C.) 96.

[49] Crofoot *v.* Bennett, 2 N. Y. 258; Scudder *v.* Worster, 11 Cush. 573.

[50] Ropes *v.* Lane, 9 Allen, (Mass.) 510; Groat *v.* Gile, 51 N. Y. 431.

and the purchaser refused to take it. The court held that, as the bark was to be weighed before delivery, the property remained with the seller, and the loss fell on him.[51]

§ 188. **The same.** Defendant agreed to make three wagons for the plaintiff; but as the contract did not relate to any particular wagons, it would not sustain replevin by the purchaser.[52] Neither would an agreement to sell entitle the purchaser to an action for possession unless the particular property was agreed upon and sold.[53] So, of a contract to sell two hundred tons pig iron. Vendors were daily making large quantities. It was piled up as they saw fit; not marked, nor did the purchaser ever see it. *Held*, that he could not maintain replevin against the sheriff, who levied on it by virtue of an execution against the vendor.[54]

§ 189. **The same.** A party bought and paid for two thousand rolls of paper. He left one thousand rolls in the store, not separated, to remain until he should call for it. The seller soon after made an assignment for the benefit of his creditors, and the purchaser replevied the paper from the assignee, who thereupon brought trespass against the plaintiff in replevin and the sheriff. GIBSON, C. J., said: "Had the pieces been separated from the rest, a small excess would not have vitiated the sale; but there is no evidence that the bargain regarded any gross lot, or any particular pieces. The witness testified that the purchaser was to have his paper out of the seller, but that he had not selected it, nor had any particular rolls been set apart for him. The vendors might have delivered him any other paper in the store." *Held*, that trespass lay by the assignee.[55]

§ 190. **The same. Selection by the purchaser; when sufficient.** When the action was for one billiard table, the defendants justified, and claimed a return. It appears that the defendants sold four billiard tables, and took a chattel mortgage. At the foot of the bill of sale was an agreement, that after three hundred dollars should be paid, they would give a receipt in full for one table, and so continue, as payments were made, until all

[51] Simmonds *v.* Swift, 5 B. & C. 857.

[52] Upkike *v.* Henry, 14 Ill. 378; Halterline *v.* Rice, 62 Barb. 593. See, also, Pettengill *v.* Merrill, 47 Me. 109.

[53] Suggett's Admr. *v.* Cason, 26 Mo. 224.

[54] First Nat. Bank of Marquette *v.* Crowly, 24 Mich. 498. See, also, Scott *v.* King, 12 Ind. 203; Cloud *v.* Moorman, 18 Ind. 40.

[55] Golder *v.* Ogden, 15 Pa. St. 528.

were paid for. They afterwards received the amount and executed a receipt in full for one table. The purchaser afterwards sold all his title to the four tables. The subsequent payments not being made, the defendants, under their chattel mortgage, seized all four of the tables and sold them. The assignor of the purchases then demanded one of the tables, and afterwards brought this suit The court held, in substance, that the defendant had, under the chattel mortgage, a right to three of the tables, but not to four. That upon the execution of the receipt in full for one table, nothing remained but to select or designate that particular table out of the four. Until this was done they could not claim any one; but, as they took the four tables from the room where they were stored, they obviously must have taken them one at a time. In legal effect, they made their selection of their three, when they had removed three, and that they had no right to take the fourth. That the plaintiff's right vested absolutely in the fourth table, when the defendants had exercised their right in selecting three, and they must be regarded in legal effect as having selected the first three which they took [56]

§ 191. **The same.** Where the defendants agreed to sell all the rye they had, to be delivered at a certain warehouse, within ten days, and to take a note at three months, the vendor delivered the grain at the warehouse, where it was stored, subject to his own order. The note was not tendered within the time agreed upon, but a day or two thereafter the purchaser sent a carrier with an order for the grain. The vendor refused to deliver on the order, but delivered it to the carrier, to be carried and delivered on his own account. While in the charge of the carrier, it was replevied by the purchaser under the contract. *Held*, that there was no delivery of the grain under the contract. If the delivery to the carrier had been for the use of the purchaser, it would have been different.[57]

§ 192. **Property acquired by verbal gift, without delivery.** Questions concerning the title acquired by verbal gift of personal property, with or without actual delivery, frequently arise. The general rule may be stated, that a verbal gift, without being accompanied by delivery, will not vest the donee with the title. But when there has been an actual manual delivery, or where the

[56] Clark *v.* Griffith, 24 N. Y. 596.

[57] Lester *v.* McDowell, 18 Pa. St. 94. See, also, Bradley *v.* Michael, 1 Carter, (Ind.) 552.

article is bulky and incapable of actual manual delivery, a constructive delivery will pass the title to the donee, who may maintain an action as the owner.[58]

§ 193. **The general rule applicable in these cases.** A full discusion of these questions is more particularly appropriate to work on contracts, or sales. As affecting the action of replevin, the rule gathered from the cases before mentioned, and sustained by the authorities, is, that a sale and agreement to deliver property, without any actual or symbolic delivery, or some separation or indication of the property sold, to distinguish it from other similar property, will not support replevin by the purchaser;[59] but any separation or distinguishing of the goods from others, so that they can be identified as the particular lot sold, will be sufficient to complete an otherwise valid sale, so as to pass the title and enable the vendee to maintain replevin. When barrels of mackerel were inspected and marked "No. 1," "No. 2," etc., a sale of all marked No. 1 will pass the title to such as are so marked, without any other separation.[60]

§ 194. **Symbolic delivery.** Delivery of a bill of lading by the owner of the goods shipped, with the intention to transfer title to them, or as security for money advanced, is a symbolic delivery of the goods shipped under it, and vests in a party advancing money thereon a right to recover the property in replevin.[61] Such a transfer, however, is not absolute, but open to explanation.[62] Unexplained, it amounts to a *prima facie* transfer of the goods. When, however, the bill of lading is accompanied by a draft, it must be understood to mean that the consignees take the property subject to the payment of the draft,[63] and the fact that the consignor was indebted to them on overdrafts would not alter the case. When in such case the consignees obtained possession of the goods without payment of the draft, the consignors could sustain trover or replevin for their recovery.

[58] Consult Hanson *v.* Millett, 55 Me. 184; Reed *v.* Spaulding, 42 N. H. 114; Carswell *v.* Ware, 30 Geo. 267; Kidder *v.* Kidder, 33 Pa. St. 268; Hunter *v.* Hunter, 19 Barb. 631; Woodruff *v.* Cook, 25 Barb. 505.

[59] Barrett *v.* Turner, 2 Neb. 172; Lester *v.* East, 49 Ind. 588; Straus *v.* Ross, 25 Ind. 300. See Hodgkins *v.* Dennett, 55 Me. 559; Winslow *v.* Leonard, 24 Pa. St. 14.

[60] Ropes *v.* Lane, 9 Allen, (Mass.) 510.

[61] Nat. Bank G. Bay *v.* Dearborn, 115 Mass. 219.

[62] Pratt *v.* Parkman, 24 Pick. 42.

[63] First Nat. Bank *v.* Crocker, 111 Mass. 163.

§ 195. **Goods distinguished by marks, or by separation.** Sale of bales distinguished by marks and numbers, then lying in vendor's warehouse, to remain rent free, at buyer's option, was held to be a sufficient identification.[54] So, where one contracted, with the owner of timber lands, for the right to make staves at a certain rate per thousand, the title passed as soon as the staves were completed, and the maker was allowed to bring replevin for those which the owner had seized before they were counted or paid for.[55]

[54] Hotchkiss *v.* Hunt, 49 Me. 213. See, also, Fifth Nat. Bank. Chicago *v.* Bayley, 115 Mass. 229; Carter *v.* Willard, 19 Pick. 1; Gibson *v.* Stephens, 8 How. (U. S.) 384; Nat. Bank Cairo *v.* Crocker, 111 Mass. 163. Fettyplace *v.* Dutch, 13 Pick. 388, is an interesting case of conflicting liens and symbolic delivery. Morrison *v.* Dingley, 63 Me. 553; May *v.* Hoaglan, 9 Bush. (Ky.) 171.

[55] Mohn *v.* Stoner, 14 Iowa, 115.

CHAPTER VIII.

CONFUSION OF GOODS OF DIFFERENT OWNERS—CHANGE OF FORM.

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§ 196. **Mixture or confusion of goods belonging to different owners.** It frequently happens that property of similar kinds belonging to different owners become mixed, by accident or

design, and as a result of such mixture neither owner can distinguish what portion of the whole, or which articles comprised in the mass belong to him.

§ 197. **Willful mixture. All belongs to the innocent party.** "If one willfully intermixes his money, corn, or hay, with that of another, without his approbation or knowledge, or casts his gold in like manner into another's melting pot, our law, to guard against fraud, allows no remedy in such case, but gives the entire property, without account, to him whose original dominion is invaded, and endeavored to be rendered uncertain, without his consent. But, if the mixture be by consent, then both have a common interest in proportion to their respective shares."[1]

§ 198. **The same. Illustrations of the rule.** Where a person bought a stock of mortgaged drugs and mixed his own with them, the mortgagee still had a right to take his goods. And if in so doing he took some not his own, they being so confounded with his that he could not distinguish them, it would be wrong to charge him in trespass.[2] The party is allowed to take such articles as he can positively identify, under the idea, that as to such goods, no mixture or confusion has taken place, and the party has lost none of his rights to them.[3]

§ 199. **The same. Illustrations of the rule.** Where an officer having attached goods, mixed them with other similar goods previously attached by another officer, he loses his special property.[4] And where a mortgageor carelessly or purposely mingles his unincumbered goods with those mortgaged and sells both, the mortgagee may replevy the whole;[5] and it is for the purchaser to furnish evidence to distinguish the different articles, and on his failure to do so, the whole may go to the mortgagee.

[1] 2 Bla. Com. 405. See, also, Ward *v.* Æyre, 2 Bulst. 323; Root *v.* Bonnema, 22 Wis. 539; Lupton *v.* White, 15 Ves. 432; Hart *v.* Ten Eyck, 2 John. Ch. R. 62. See Dodge *v.* Brown, 22 Mich. 451; Low *v.* Martin, 18 Ill. 286; McDowell *v.* Bissell, 37 Pa. St. 164; Sims *v.* Glazener, 14 Ala. 699.

[2] Fuller *v.* Paige, 26 Ill. 359.

[3] Dillingham *v.* Smith, 30 Me. 372; Colwill *v.* Reeve, 2 Campb. 575; Smith *v.* Morrill, 56 Me. 566.

[4] Gordon *v.* Jenney, 16 Mass. 469.

[5] Adams *v.* Wildes, 107 Mass. 124. Upon this subject, consult Johnson *v.* Neale, 6 Allen, 227; Ropes *v.* Lane, 9 Allen, 502; Rockwell *v.* Saunders, 19 Barb. 473; Siebert *v.* M'Henry, 6 Watts, (Pa.) 301; Hyde *v.* Cookson, 21 Barb. 92; Barron *v.* Cobleigh, 11 N. H. 557.

§ 200. **The same.** When tools belonging to different workmen, A. and B., were mixed, so that it was difficult to distinguish them, and A. sold his tools to C., without specifying them, and B. had the tools removed, and in so doing, some of A.'s were taken; in trespass for such removal, the judgment was for defendant.[6]

§ 201. **The same. General principles in such cases.** The principle which seems to govern in such cases, is, that the mixing or confusion is regarded as a wrongful attempt to deprive the owner of the means of identifying his goods. To guard against this wrong, the law leaves the party who has been guilty, without a remedy, and gives the goods without account to him whose rights have been invaded. But this principle is not carried to the extent of revenge or punishment, except in cases where the trespass was willful. The law will not suffer the principle to be carried further than is required for the protection of an innocent party from injury, with as little loss to the other as is consistent with the innocent party's rights.[7] The further prin-

[6] Rose *v.* Gallup, 33 Conn. 338.

[7] Holbrook *v.* Hyde, 1 Vt. 286. See Simmons *v.* Jenkins, 76 Ill. 483.

NOTE XI. *Confusion of Goods.*—If one having charge of the property of another so confuses it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion, Brackenridge *v.* Holland, 2 Blf. 377; Williams *v.* Morrison, 32 Fed. 177; Hentz *v.* The Idaho, 3 Otto, (93 U. S.) 575, 23 L. Ed. 978; Simmons *v.* Jenkins, 76 Ills. 479; Bryant *v.* Ware, 30 Me. 295.

Where, at the time of the levy upon goods, the party having title to a portion thereof indistinguishable from the residue, makes no claim to these, specially, and fails to inform the officer of his right to these goods, but claims the whole stock under a sale afterwards shown to be fraudulent, he thereby waives his right in the particular goods and will not be heard afterwards to assert it, Zielke *v.* Morgan, 50 Wis. 560, 7 N. W. 651. And where one permitted his goods to be mingled with those of a debtor and refused on request to point out his own goods to an officer having a writ of attachment against the goods of the debtor, it was held the officer was justified in seizing the whole, Smith *v.* Welch, 10 Wis. 91.

The question whether the goods are distinguishable, is for the jury, Cadwell *v.* Pray, 41 Mich. 307, 2 N. W. 52. And where one had permitted his goods to be confused with those of a judgment debtor so that it was impossible to distinguish them, it was held he could not recover damages from the sheriff for the levy thereon, the sheriff having done no act to embarrass him after demand made, Wildman *v.* Sterritt, 80 Mich. 651, 45 N. W. 657.

But the forfeiture of one man's goods by reason of confusion with

ciple is to be gathered from the cases cited, that the fact of mixture or confusion of goods does not change the rights of the respective owners, unless it produce such confusion that the separate property of each cannot be distinguished. The wrongful turning of horses into a pasture with others would not forfeit the horses, though the party might be liable for the trespass. Neither would the mixture of any other goods produce a change in the title nor make the parties joint owners, unless the separation of the different articles became impossible or impracticable.

§ 202. **Changing marks to produce confusion.** If property is marked in a particular way by the owner, and another

those of another is not allowed, where it can be consistently avoided, Kewenaw Association *v.* O'Neil, 120 Mich. 270, 79 N. W. 183, citing Mittenthal *v.* Heigel, 31 S. W. 87. The wrongful confusion of lumber manufactured partly from logs belonging to plaintiff and partly from other logs, no bad faith being shown, and no difference in the kind, quality or value of the lumber, does not confer title to the whole upon the plaintiff, Id. And the forfeiture does not ensue where the intermixture is accidental or even intentional, if not wrongful; nor where the identification is still possible; nor where all are of the same quality and value, Hentz *v.* The Idaho, *supra;* St Paul Co. *v.* Kemp, Wis. 103 N. W. 259; neither owner has, in such case, the right to take all; he must notify the other to make a division, or take his own proportion, having care to leave to the other owner his proper share, Ryder *v.* Hathaway, 21 Pick. 298; Queen *v.* Wernwag, 97 N. C. 383, 2 S. E. 657. Busch cut logs from the lands of Nestor, as also from his own lands; they were all marked with the same marks and mingled in one mass; it was held that Nestor was entitled to select from themass, logs to the number cut from his land, of like kind, and quality, but that, as the confusion was not malicious, he was not entitled to a greater number than his own, nor to keep possession of the others from Busch beyond a time reasonably sufficient to make the separation, Busch *v.* Fischer, 89 Mich. 192, 50 N. W. 788; see Eldred *v.* O'Conto Co.; 33 Wis. 133; Young *v.* Miles, 20 Wis. 646; Bent *v.* Hoxie, 90 Wis. 625, 64 N. W. 427; Halpin *v.* Stone, 78 Wis. 183, 47 N. W. 177; Hart *v.* Morton, 44 Ark. 447.

A mortgagor of chattels cannot by confusing them with other like goods defeat the mortgage, so as to retain them himself, or enable one claiming under him, to retain them. Tootle *v.* Buckingham, 190 Mo. 183, 88 S. W. 619.

Where shingles and lumber manufactured from trees cut by a trespasser, partly upon lands of A. and partly upon lands of B. are confused by the trespasser, either A. or B. may, as against the trespasser, or one claiming under him, seize the whole mass, Bryant *v.* Ware, 30 Me. 295.

without his consent changes the mark, or marks his own property in a similar manner for the purpose of creating confusion, the law usually gives the whole to the innocent owner; and although he could not sustain replevin for a part of the property unless he could identify it, yet he may in many cases have replevin for the whole. Where plaintiff was the owner of certain logs, marked in a particular manner, and the defendant caused another mark to be put upon them so that they would be marked like his own, the plaintiff was permitted to sustain replevin for the entire lot.[8]

§ 203. **Mixture of grain; when each owner may take his share.** When the mixture occurs without wrong, and where from the very nature of the property the different articles are incapable of being distinguished, and where such separation, could it be made, would not be of the least advantage to any one, the just rule and the current authorities is, that each must take his share from the common mass. Thus, when like grain of different owners is mixed, the separation is not only impossible, but the failure to make it cannot injuriously affect either party in the slightest degree. And in all such cases when the mixture has been by consent, or under circumstances in which the mixture would be reasonably expected by both, or when it has been occasioned by accident, or mistake, and without any wrong intent, the law will give to each his just proportion,[9] for the reason that in such case the mixture does not change the title, nor are the consequences such as follow the mixture of ingredients incapable of separation.[10]

§ 204. **The same.** When plaintiff delivered barley on contract to sell for cash, and it was put in a warehouse with other barley, but was not paid for according to contract; *held*, in an action for conversion, that the plaintiff had a right to the amount of his grain from the common bulk.[11]

[8] Wingate *v.* Smith, 20 Me. 287; Jenkins *v.* Steanka, 19 Wis. 127; Willard *v.* Rice, 11 Met. 493; Beach *v.* Shmultz, 20 Ill. 185; Well *v.* Silverstone, 6 Bush. (Ky.) 698; Thome *v.* Colton, 27 Iowa, 427; Gilman *v.* Hill, 36 N. H. 311; Stephenson *v.* Little, 10 Mich. 433; Seavy *v.* Dearborn, 19 N. H. 351; Ryder *v.* Hathaway, 21 Pick. 299.

[9] Stephenson *v.* Little, 10 Mich. 433; Buckley *v.* Buckley, 9 Nev. 379; Lupton *v.* White, 15 Ves. 432; Forbes *v.* Shattuck, 22 Barb. 568; Tripp. *v.* Riley, 15 Barb. 334.

[10] Story on Bailments, this title; Wilson *v.* Nason, 4 Bosw. (N. Y.) 155; Ryder *v.* Hathaway, 21 Pick. 298.

[11] Morgan *v.* Gregg, 46 Barb. 183; Bristol *v.* Burt, 7 John. 254.

§ 205. **The same.** The law is well settled that, where property cannot be identified or separated so as to be seized, replevin is not the proper remedy. But in cases like the preceding, where the goods mixed are of the same kind, though not capable of separation by identification, yet if a separation and delivery can be made of the proper quantity without injuriously affecting the remainder, each may claim his share from the general mass, and may employ this action to secure it.[12]

§ 206. **The same. Rule in Illinois.** In Illinois the rule seems to be that if the mixture was by consent, the parties became tenants in common, and neither could sustain replevin. If by fraud the tenancy in common does not arise, and the innocent may sustain replevin for the whole. A warehouseman received a quantity of corn in store, and mixed it with other corn owned by himself and others, with the consent of the owner, and with the understanding that a like quantity and quality should be delivered to him out of the common mass, the court held that they were tenants in common, and neither could maintain replevin against the other.[13] But if the mixture had been made by the wrongful act of the warehouseman, without the owner's consent, it would have been otherwise.[14]

§ 207. **The rule in New York.** In New York, where the wheat of A. and B. was mixed in a bin by consent, it was held to create a tenancy in common.[15]

§ 208. **Where an officer is induced by fraud of a third party to levy on goods not the property of the defendant**

[12] Kaufmann *v.* Schilling, 58 Mo. 219; Inglebright *v.* Hammond, 19 Ohio, 337; Ryder *v.* Hathway, 21 Pick. 305. So when wood of two persons became mingled, without the fault of either, each was held entitled to his share. Moore *v.* Erie R. R. Co., 7 Lans. (N. Y.) 39. Where a warehouseman gave a receipt for wheat that was never delivered to him, the holder of the receipt could not set up a claim to a portion of the wheat as against owners that actually put in. Jackson *v.* Hale, 14 How. (U. S.) 525.

[13] Low *v.* Martin, 18 Ill. 286. See Parker *v.* Garrison, 61 Ill. 252.

[14] Warner *v.* Cushman, 31 Ill. 283.

[15] Nowlen *v.* Colt, 6 Hill, 461. When the property of several owners is in its nature severable (like corn, wheat, etc.,) without injury to the mass or to the interest of the other owners, one may appropriate his share if it can be determined, without the consent of the others. Forbes v. Shattuck, 22 Barb. 568; Tripp *v.* Riley, 15 Ib. 334; Morgan *v.* Gregg, 46 Ib. 184. So, also, in Minnesota. Ames *v.* Miss. Boom Co., 8 Minn. 473.

in the process. The defendant in execution was the owner of a piano which was left with a third party, who caused it and another one resembling it to be boxed up for shipment. The officer notified the bailee that he held an execution, and desired her to point out the piano which belonged to the defendant in the process. She, however, induced him to levy on the one belonging to herself, for which she afterwards brought replevin, while the one which she knew the officer intended to levy on was shipped away. The court held that under such circumstances she was estopped from asserting title to the piano which had been seized by her procurement.[16]

§ 209. **General statement of the rule in the foregoing cases.** It does not appear that any general rule can be deduced from the cases above cited. A different practice has grown up in different States. The rule, as stated in Michigan, and a similar rule applies in Wisconsin and Missouri, seems to commend itself not only as being fair, but as certain and convenient of application. It may be stated, in substance, that when goods of similar description, belonging to different owners, become mixed, so that separation becomes impossible, either may take his share or proportion from the common mass, and may if he choose, resort to replevin for the purpose of asserting his right. When logs are mingled in the river, the plaintiff can only pursue such as he can identify; but if not able to distinguish his own, there being no evidence that they differed in value or description from others, with which they were mixed, he may maintain replevin for a quantity out of the common mass equal to the quantity owned by him.[17] Where the defendant cut logs on the land of another by mistake, and mingled them with his own, so that they could not be distinguished, the plaintiff might have replevied the amount belonging to him from the mass.[18] Where wheat was stored in a warehouse, and by consent of the owner it was mixed with that of the warehouseman, after shipments from the bulk, until an amount not more than that stored by the plaintiff remained, he was held the absolute owner; and a sale by the warehouseman of such remainder was a wrongful conversion, and the owner would

[16] Colwell *v.* Brower, 75 Ill. 522.

[17] Eldred *v.* The Oconto Co., 33 Wis. 141. See also, Kaufmann *v.* Schilling, 58 Mo. 218.

[18] Stearns *v.* Raymond, 26 Wis. 74. Such is also the law in Minnesota. Schulenberg *v.* Harriman, 21 Wall. 44.

have the right to follow it as long as he could identify it.[19] In Missouri it was said, when the goods are of the same kind, and not capable of identification, that if a division can be made of equal value, as in the case of grain, each may claim his proportionate part.[20]

§ 210. **Change of form, and the effect of such change on the rights of the parties.** It frequently happens that goods in the possession of a defendant have undergone a material change while in his hands. Cloth may have been made into garments, leather into shoes, logs sawed into boards, or wheat ground into flour; or, perhaps, the article has become a part of something else, as hoop-poles may have been placed upon barrels, timber converted into a house or ship, skins into parchments, on which valuable deeds have been written; or the thing may have undergone a chemical change, which has completely destroyed the original, as corn manufactured into whisky, grapes into wine, apples into cider or vinegar. And the question must be decided what effect these changes have had on ownership, or the right to recover them in replevin.

§ 211. **Rule of the civil law.** Justinian said, "If a man make wine with my grapes, oil of my olives, or garments with my wool, knowing they are not his own, he shall be compelled, by action, to produce the wine, oil or garments."[21] Pufendorff states the law: "In all cases, it is to be enquired whether the person who bestows a shape on another's matter doth it with an honest or dishonest design. For he who acts thus out of a knavish principle can by no means pretend that the thing belongs to him, rather than to the owner of the matter, though all the former reasons should occur; that is, though the figure should be most valuable, though the matter should be, as it were, lost or swallowed up in the work, and though he should be in very great want of what he has thus compacted. For the greater part of the two doth not draw it itself; the less, barely by its own virtue, or on its own account. Hence, if a man, out of willful and designed fraud, puts a new shape on my matter, that he may by

[19] Young *v.* Miles, 23 Wis. 644; Young *v.* Miles, 20 Wis. 615.

[20] Kaufmann *v.* Schilling, 58 Mo. 218; Inglebright *v.* Hammond, 19 Ohio, 337; Ryder *v.* Hathaway, 21 Pick. 305. Compare Kimberly *v.* Patchin, 19 N. Y. 330; Scudder *v.* Worster, 11 Cush. 573; Gardner *v.* Dutch, 9 Mass. 427, leading cases on this subject.

[21] Justinian Inst.; Digest, Liber, 10 Tit. 4 Leg. 12.

this means rob me of it, he neither gains any right over the matter by his act, nor can he demand of me a reward for his labor, any more than the thief who digs through my walls can claim to be paid for his trouble in making a new door to my house. * * * All this doth not proceed from any positive constitutions, but from the very dictate and appointment of natural reason. Though nature doth not determine any particular penalty in the case." [22]

§ 212. **Property taken by mistake.** No general rule can be stated which will be applicable in all these cases; each must greatly depend on its own peculiar surroundings. A rule which would be just and convenient in one case, might, in another very similar case, be exceedingly unjust. Thus, if one cut trees by mistake, on another's land, and convert them into logs, the owner of the trees might recover the logs, and the person who had cut them would lose his labor.[23] But suppose the trees are made into slabs, and the slabs into costly furniture, then the rule might be extremely unjust.

§ 213. **Change of form does not change the title. Where the goods can be identified, owner may sustain replevin.** The rule may be stated as having a general application, that it is not essential the property should remain in its original form, in order to support replevin, provided it can be identified.[24] In other words, a change of form, when the property can be identified, is not a bar to the action unless the change has been wrought in good faith by an innocent party, and has materially increased the value, or it has become incorporated with, and forms part of, another thing, which is the principal.[25]

§ 214. **The same.** Two cherry trees, growing on the unenclosed wood-land of the plaintiff, were cut by some one unknown; defendant hauled the logs to mill, where they were sawed, and took the boards to his house. The court sustained replevin brought by the owner of the land, saying that whatever alteration of form property may assume, the owner may reclaim it, if he can establish the identity of the original material.[26] In Pennsylvania, the court held replevin would not lie when the property had undergone any essential change, so that its identity cannot be

[22] Pufendorff Law of Nature, Book 4, Ch. 7, § 10.
[23] Snyder *v.* Vaux, 2 Rawle, 427.
[24] Wingate *v.* Smith, 20 Me. 287.
[25] Gray *v.* Parker, 38 Mo. 165.
[26] Davis *v.* Easley, 13 Ill. 198.

ascertained. But simple change of form will not defeat the plaintiff's right.[27]

§ 215. **Goods taken by a thief or trespasser, and enhanced in value by his skill or labor.** It is an elementary principle in the law of all civilized communities that no man can be deprived of his property, except by his voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such taking. The subsequent possession by the thief or the trespasser is a continuing wrong, and if, during its continuance, the wrong-doer enhances the value of the chattel, by labor and skill bestowed upon it, the manufactured article still belongs to the owner of the original material, and he may retake it, or recover its increased value. Even if the wrong-doer sell the chattel to a purchaser having no notice of the fraud, he obtains no title, because the trespasser had none to give.

§ 216. **Rule where the goods come to the hand of an innocent purchaser.** But if a chattel, wrongfully taken, afterward comes into the hands of an innocent holder, who, believing

[27] Snyder *v.* Vaux, 2 Rawle, (Pa.) 427; Curtis *v.* Groat, 6 Johns. 168; Babcock *v.* Gill, 10 John. 287; Brown *v.* Sax, 7 Cow. 95. [The owner of logs wrongfully cut may replevy the shingles which have been manufactured therefrom, though worth greatly more than the logs, Nelson *v.* Graff, 12 Fed. 389; or railway ties, McKinnis *v.* Little Rock Co., 44 Ark. 210; even though the trespasser acted in the bona fide belief that he was the owner of the land from which he cut the trees, and the ties were worth greatly more than the logs, Eaton *v.* Langley, 65 Ark. 448, 47 S. W. 123. So long as the original article can be traced and identified, a change of property by change of form is never admitted, unless the value expended upon it is so great, as compared with the original value, as to make the appropriation of it in its changed form by the original owner a palpable injustice, Isle Royal Company *v.* Hertin, 37 Mich. 332. The trespasser, no matter how innocent, acquires no property in the logs which he cuts from another's land, nor a lien thereon, for his labor and expenses, Gates *v.* Rifle Boom Co., 70 Mich. 309, 38 N. W. 245. One who has been defrauded of his goods may retake them in whatever changed condition he may find them, Sommer *v.* Adler, 36 Ap. Div. 107, 55 N. Y. Sup. 483;—as wool manufactured into garments, Joslin *v.* Cowee, 60 Barb. 48. But one whose money has been stolen cannot maintain replevin for the goods which the thief purchased with the money, Vogt Co. *v.* Oettinger, 88 Hun, 83, 34 N. Y. Sup. 729. And the owner of goods which have been tortiously taken cannot maintain replevin for other goods for which they have been exchanged, Power *v.* Telford, 60 Miss. 195.]

himself to be the owner, converts it into a thing of different species, so that its identity is destroyed, the original owner can not reclaim it. In a case of this kind, the change is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original material, and the true owner is not in such case permitted to trace its identity into a manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent party who wrought the change; but he is to put his action for damages as for a thing converted, and he may recover its value as it was when its conversion or consumption took place.[28] It will be seen that the question is not whether a defendant can acquire property by mixing it with other property, or by destroying its identity, but whether the plaintiff can separate his property after such change.[29]

§ 217. **Owner should reclaim his property before its value is greatly enhanced.** The rule in Wisconsin seems to commend itself, as well for its plainness as for the manifest justice which it seems to deal out to all parties. It is there held that the owner of chattels does not lose his property by mere change of form, at the hands of another; but he should reclaim it before the new possessor has greatly increased its value by the bestowal of his skill and labor. And, in event of his failure to do so, he should be restricted in his recovery to the amount of damages he has actually sustained, unless the taking was accompanied with some circumstances of malice or insult that might make it proper to inflict exemplary damages. This rule, while it protects the owner fully, will be easy of application, and do jus-

[28] Hiscox *v.* Greenwood, 4 Esp. 174; Wetherbee *v.* Green, 22 Mich. 311; Betts *v.* Lee, 5 Johns. 348; Curtis *v.* Groat, 6 Johns. 168; Chandler *v.* Edson, 9 Johns. 362; Hyde *v.* Cookson, 21 Barb. 92; Baker *v.* Wheeler, 8 Wend. 508; Snyder *v.* Vaux, 2 Rawle, 427; Riddle *v.* Driver, 12 Ala. 590; Ryder *v.* Hathaway, 21 Pick. 305; Heard *v.* James, 49 Miss. 237; Martin *v.* Porter, 5 Mees. & W. 352; Rightmyer *v.* Raymond, 12 Wend. 51; Baker *v.* Wheeler, 8 Wend. 505; Wild *v.* Holt, 9 Mees. & W. 672; Harris *v.* Newman, 5 How. (Miss.) 658; Putnam *v.* Cushing, 10 Gray, (Mass.) 334; Mallory *v.* Willis, 4 Comst. 76. See Linch *v.* Welsh, 3 Pa. St. 294. (Logs are cut by a wilful trespasser, and converted into lumber; the innocent purchaser from him is liable for the full value of the lumber, Bolles Woodenware Co. *v.* United States, 16 Otto., (106 U. S.) 432, 27 L. Ed. 230. Even an innocent purchaser is liable for the increased value, Nesbit *v.* St. Paul Co., 21 Minn. 491, citing Silsbury *v.* McCoon, 3 N. Y. 379, and rejecting Single *v.* Schneider, 30 Wis. 570.)

[29] Ames *v.* Miss. Boom Co., 8 Minn. 470.

tice to both parties, when such a result is attainable.[30] In Michigan, a somewhat similar doctrine prevails. When timber worth twenty-five dollars had, by one in the exercise of a supposed right, in good faith, been converted into hoops worth seven hundred dollars, it was held that the title passed to the party who had in good faith expended his labor, and the owner of the timber in such case could not sustain replevin for the hoops.[31] In Pennsylvania, the plaintiff sought to recover, in trover, the value of coal dug out of his mine by mistake, and was allowed only the value of the coal before it was mined. The court says: "It is apparent that any other rule would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her much more than compensation for the injury done." [32]

§ 218. **Where the taking was wrongful, the taker cannot change the title by any change in the property.** In New York, in a case in trover, where the defendant wrongfully cut logs on the plaintiff's land and converted them into lumber, the court held, that the property was not changed, and laid down the rule, that in cases of wrongful taking, the defendant cannot by any act of his change the title to the property.[33] Probably the strongest case in the books will be found in New York. It was where corn was taken by a willful trespasser and converted into whisky. The court held, that the change of form had not changed the ownership, and that the whisky belonged to the owner of the corn, and was liable to be seized on execution for his debts.[34] This case gains importance from the fact that it had

[30] Weymouth *v.* C. & N. W. Ry. Co., 17 Wis. 550; Single *v.* Schneider, 30 Wis. 572; Hungerford *v.* Redford, 29 Wis. 345. Consult Austin *v.* Craven, 4 Taunt. 644.

[31] Wetherbee *v.* Green, 22 Mich. 311.

[32] Forsyth *v.* Wells, 41 Pa. St. 291. *Contra*, see Robertson *v.* Jones, 71 Ill. 405. If a man take my garment and embroider it with silk, I may take back the garment; but if I take the silk from you and embroider or face my garment, you shall not take my garment for your silk, which is in it, but are put to your action for my taking the silk from you. Anon Popham, 38.

[33] Brown *v.* Sax, 7 Cow. 95. See, also, Hyde *v.* Cookson, 21 Barb. 92; Martin *v.* Porter, 5 Mees. & W. 352; Betts *v.* Lee, 5 Johns. 348; Rightmyer *v.* Raymond, 12 Wend. 51; Wild *v.* Holt, 9 Mees. & W. 672; Curtis *v.* Groat, 6 Johns. 168; Babcock *v.* Gill, 10 John. 287; Ricketts *v.* Dorrel, 55 Ind. 470. So, when wool was taken and made into coats. Curtis *v.* Groat, 6 Johns. 168.

[34] Silsbury *v.* McCoon, 3 Comst. 380.

twice before been considered in the supreme court and a contrary conclusion reached.[35]

§ 219. **Measure of damages in such cases.** The rule as before stated does not apply to cases of willful taking. A trespasser cannot change the property by changing the form, so long as the identity of the article can be shown. If the labor of the defendant has added to the value, it is in his power to relinquish the increased value or to keep it himself. If he claims the property, it is, under the statutes in many States, in his power to retain it by giving bond to the sheriff; and the effect of a verdict for plaintiff, for value, is a transfer of the title to the defendant. The rule of damages, if the trespass was by mistake, would be the value before the defendant had, by bestowal of his own labor, increased it. If the trespass was willful, the damages would be the value at the time of bringing suit.[36]

[35] Silsbury *v.* McCoon, 3 Comst. 380, and S. C., 4 Denio, 332; S. C., 6 Hill, 426. See, also, Gray *v.* Parker, 38 Mo. 160. See the able and exhaustive argument of Mr. Hill in note to 3 Comst. 380.

[36] Herdic *v.* Young, 55 Pa. St. 178; Young *v.* Herdic, 55 Pa. St. 172; Snyder *v.* Vaux, 2 Rawle, 427; Heard *v.* James, 49 Miss. 236; Bull *v.* Griswold, 19 Ill. 631. [If a trespasser cut logs the property remains in the owner of the land, no matter what alteration in form they undergo, or what increase in value, so long as the thing is susceptible of identification, Street *v.* Nelson, 80 Ala. 230. The owner recovers the thing in its changed form or its value, if the wrong be wilful, Bly *v.* United States, 4 Dill. 464. Trees tortiously cut, even by mistake, and converted into cord wood, the trespasser is not entitled to any allowance for his labor; such a doctrine is to offer a premium for recklessness and carelessness in dealing with the property of another, Isle Royal Co. *v.* Hertin, 31 Mich. 332. Plaintiff cut trees from the lands of defendant adjoining his own lands and mixed them with other logs of his own in the boom; it was held that the defendant was entitled to select in the boom, from the logs run by plaintiff, a number of average quality, equal to those cut upon his land, and was not liable to defendant for the difference between the value of the trees and the logs. If the trespasser has acted in good faith, even though the authority under which he assumed to act was in law absolutely void, or his trespass was unintentional or accidental, the value of the property is estimated as of the time and place of the taking and in its then condition, with interest to the date of the verdict, State *v.* Shevlin Co., 62 Minn. 99, 64 N. W. 81. The owner of the land recovers the value at the time of the first severance, Moody *v.* Whitney, 38 Me. 174. One who seizes a raft, the property of another, which has drifted upon his premises, and converts it into firewood, will not be allowed compensation for his labor in changing its form, Eastman *v.* Harris, 4 La. An. 193. Purchaser, in

§ 220. **Change of form by agreement does not affect the rights of the parties.** Where a levy was made upon gold coin, which for convenience was converted into large bills, and the bills were then replevied by a stranger to the execution, *held*, that the substitution of the bills by agreement would not defeat the action.[37]

§ 221. **Property taken and annexed to real estate or other thing which forms the principal.** If property taken, be annexed to and made part of some other thing which forms the principal, the owner cannot, as a rule, sustain replevin, but must resort to his action for damages. When timber has been converted into boards and they have been incorporated with others into a house, the chattel is regarded as a part of the building, and replevin does not lie.[38] It will be seen that these rules are for the most part arbitrary, differing widely in cases which are very similar. And the difficulty of deducing any rule applicable in all cases is apparent. It should in each case be considered whether the taking and subsequent change of form was made by mistake, while in the exercise of a supposed right, or was in willful disregard of the rights of the owner. In the former case, where the property had undergone a material change, largely increasing its value, the rights of the party who had in good faith bestowed such increase of value must be respected. But when the taking and subsequent change was in willful disregard

fraud, of cloths, manufactures them into garments; the seller replevying them from an officer who has taken them under an execution against the fraudulent purchaser, will recover the value of the thing sold, Sommer *v.* Adler, 36 Ap. Div. 107, 55 N. Y. Sup. 483. In Eaton *v.* Langley, 65 Ark. 448, 47 S. W. 123, the rule is declared to be that where the goods of another have been taken wrongfully, but without evil intention, the wrongdoer acting in the belief that the property was his own, and the wrongdoer has changed the form and increased the value, his rights should be dependent, not upon the mere increase in value but upon the relative value of the thing in its original form, and his expenditures upon it, and that the owner ought to be allowed the value of the chattel in its new form, less the value of the labor and material expended in transforming it, provided these do not exceed the increase in value, otherwise the value in the new form, less the increase.]

[37] St. L. A. & C. R. R. *v.* Castello, 28 Mo. 380. For a case of trover for the produce of stolen notes, see Golightly *v.* Reynolds, Lofft. 88.

[38] Snyder *v.* Vaux, 2 Rawle, 423; Ricketts *v.* Dorrel, 55 Ind. 470; Betts *v.* Lee, 5 Johns. 348; Brown *v.* Sax, 7 Cow. 95; 2 Bla. Com. 404.

of the rights of the plaintiff, it is eminently proper that the taker should not be permitted to derive any profit from his wrongful act, and that the owner be allowed to recover his goods, even if it result in taking with them some of the fruits of the wrongdoer's labor.

§ 222. **Description to be employed where the property has undergone a change.** When the suit is brought for property which has undergone a change of form, the writ and proceeding should describe it in the form in which it exists at the time when the suit is begun.[39] And the ownership of the original materials and proof of identity may be given in evidence upon the trial.

[39] Wingate *v.* Smith, 20 Me. 287.

CHAPTER IX.

CHATTEL MORTGAGE.

	Section.
Rights of a mortgagee in a chattel mortgage	222 *a*
The mortgageor has an interest which may be seized and sold on execution	222 *b*
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§ 222 *a*. **Rights of a mortgagee in a chattel mortgage.** Upon a failure of the mortgageor of chattels to perform the conditions, the legal title to the property conveyed in a chattel mortgage of the usual form becomes vested absolutely in the mortgagee,[1] and he may recover the property in replevin. Where there are several notes he does not lose his lien upon the non-payment of the first note becoming due, but may wait until the last note matures, and then take the property.[2]

§ 222 *b*. **The mortgageor has an interest which may be seized and sold on execution.** Where a mortgageor is in possession of mortgaged chattels under a clause in the mortgage which gives him the right to retain possession until the mortgage is due, he has an interest which but for the clause giving the mortgagee, (in case he feels himself insecure,) a right to take possession, might be seized and sold on execution against him.[3] When such goods are seized and the debt matures before the sale, or where the mortgage contains the insecurity clause above re-

[1] Brown *v.* Bement, 8 Johns. 96; Saxton *v.* Williams, 15 Wis. 292; Ackley *v.* Finch, 7 Cow. 290; Butler *v.* Miller, 1 Comst. (N. Y.) 496; Langdon *v.* Buel, 9 Wend. 80; Livor *v.* Orser, 5 Duer, 501; Patchin *v.* Pierce, 12 Wend. 61; Heyland *v.* Badger, 35 Cal. 411; Brookover *v.* Esterly, 12 Kan. 149.

[2] Cleaves *v.* Herbert, 61 Ill. 127. See Reese *v.* Mitchell, 41 Ill. 365.

[3] Saxton *v.* Williams, 15 Wis. 292; Redman *v.* Hendricks, 1 Sandf. (N. Y.) 32; Prior *v.* White, 12 Ill. 261; Schrader *v.* Wolflin, 21 Ind. 238; Mattison *v.* Baucus, 1 Comst. (N. Y.) 295; Cotton *v.* Watkins, 6 Wis. 629.

ferred to, the mortgagee may demand the goods, and on refusal may sustain replevin for them.[4] In such cases the possession of the mortgagee can only be asserted in compliance with the terms of the mortgage. The distinction between a chattel mortgage and a pledge is clearly stated in *Heyland* v. *Badger*, 35 Cal. 409. The mortgage passes the property to the mortgagee, subject to be redeemed according to the terms of the contract, and if not redeemed the property becomes absolute in the mortgagee, who may sustain replevin for the goods, or trover for their value. The mortgageor could not maintain trover against the mortgagee for refusing to deliver the goods, or for selling them, for the title at law is in the mortgagee and trover depends on title, general or special, to support it, and the mortgageor has no title—only an equitable right to redeem the property by payment of the amount due on the mortgage.[5]

§ 223. **Rights of mortgagee against third parties.** Where a chattel mortgage is properly executed and recorded, so as to be a valid transfer of the property in the county where the property is situated, and where the parties and property are bound, the subsequent removal of the property by the mortgageor. to another county or State in contravention of the terms of the mortgage, will not deprive the mortgagee of his right to the property. He may follow it and assert his title in an action of replevin against the mortgageor so removing it, and the authorities are tolerably uniform that a purchaser of such property in a foreign country or State, without notice and for value, cannot resist the claim of the mortgagee. The mortgage being an absolute transfer of the property to the mortgagee with a statutory permission to the mortgageor to retain possession for a limited

[4] Simmons *v.* Jenkins, 76 Ill. 481; Carty *v.* Fenstemaker, 14 Ohio St. 457; McIsaacs *v.* Hobbs, 8 Dana, (Ky.) 268; Putnam *v.* Cushing, 10 Gray, (Mass.) 334; Bates *v.* Wilbur, 10 Wis. 415; Randall *v.* Cook, 17 Wend. 55; Newman *v.* Tymeson, 13 Wis. 172; Bailey *v.* Burton, 8 Wend. 339; Eggleston *v.* Mundy, 4 Gibbs, (Mich.) 295; Beach *v.* Derby, 19 Ill. 622; Frisby *v.* Langworthy, 11 Wis. 379.

[5] Consult White *v.* Phelps, 12 N. H. 385; Burdick *v.* McVanner, 2 Denio, 171; Holmes *v.* Bell, 3 Cush. 323; Tannahill *v.* Tuttle, 3 Mich. 110, citing many cases. Wood *v.* Dudley, 8 Vt. 430; Brown *v.* Bement, 8 Johns. 96; Tabot *v.* De Forest, 3 G. Greene, (Iowa,) 586; Dewey *v.* Bowman, 8 Cal. 150; Ferguson *v.* Thomas, 26 Me. 499. See, in this connection, Mobley *v.* Letts, 61 Ind. 11; Hunt *v.* Bullock, 23 Ill. 325; Titus *v.* Mabee, 25 Ill. 257.

time, the bare possession does not confer title. Sale by the mortgageor under such circumstances is, in its most favorable light, looked upon as a sale by a bailee, without right, and such sale cannot affect the title of the mortgagee.[6]

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[6] Welch *v.* Sackett, 12 Wis. 243; Smith *v.* McLean, 24 Iowa, 322; Cotton *v.* Watkins, 6 Wis. 629; Blystone *v.* Burgett, 10 Ind. 28; Pickard *v.* Low, 15 Me. 48; Offut *v.* Flagg, 10 N. H. 46. See, also, Martin *v.* Hill, 12 Barb. 633; Brackett *v.* Bullard, 12 Met. 309; Pyan *v.* Clanton, 3 Strob. (S. C.) 413; Barker *v.* Stacy, 25 Miss. 471; Jones *v.* Taylor, 30 Vt. 42; Loeschman *v.* Machin, 2 Stark. 311.

Note XII. *Nature of Mortgagee's estate.*—Mortgagee in possession has the legal title, Hunt *v.* Holton, 13 Pick. 216; an absolute title after default, Klinkert *v.* Fulton Company, 113 Wis. 493, 89 N. W. 507, Simmons *v.* Jenkins, 76 Ills. 479;—until default a defeasible title, Klinkert *v.* Fulton Company, *supra.*

Mortgagee in possession after condition broken is regarded as the owner. No leviable interest remains in the mortgageor, Ottumwa Bank *v.* Totten, Mo. 89 S. W. 65, *arg.* In the Indian Territory the mortgageor after condition broken has only an equity. He cannot even upon tender of the debt maintain replevin for the goods, or confer this right upon another, Schaffer *v.* Castle, Ind. T. 91 S. W. 35. Mortgagee of chattels has the legal title; but until default and possession assumed, his interest as against the mortgagee is special. The mortgagee may sell and give title subject to the mortgage, and such title, though equitable, is good as against the world except the mortgagee. In case of conversion the mortgagee recovers the value of his special interest, to wit the amount of the mortgage debt. Illinois Bank *v.* Stewart Company, Wis. 94 N. W. 777. The mortgageor may effectually execute a second mortgage, Illinois Bank *v.* Stewart Company. *Supra.*

What Incidents pass by Mortgage.—A mortgage of the properties used in the publication of a newspaper carries the good will of the business; but in the absence of covenant to that effect the mortgageor is not prohibited from the publication of a different newspaper, as the agent of another, using for the circulation thereof the subscription list of the original periodical, Vinall *v.* Hendricks, 33 Ind. Ap. 413, 71 N. E. 682.

What is the Subject of Mortgage?—Mortgage of the product in future years of particular land creates a valid lien, Payne *v.* McCormick Co., 11 Okl. 318, 66 Pac. 287, citing Grand Forks Bank *v.* Minneapolis, etc., Co., 6 Dak. 357, 43 N. W. 806; Merchants Bank *v.* Mann, 2 N. D. 456, 51 N. W. 946; and the mortgagee may have replevin for the crop when harvested, Id. A thing to be subsequently created cannot be effectually mortgaged; but where subsequent to such an attempted mortgage the article is actually manufactured, in pursuance of the agreement of the parties, and delivered to the mortgagee, the effect

is the same as if the mortgage were executed at the time of the delivery, Falk *v.* Decou, 8 Kans. Ap. 765, 61 Pac. 760. Mortgage will not at law pass chattels in which the mortgageor has no present interest, actual or potential, Holliday *v.* Poston, 60 S. C. 103, 38 S E. 449. Mortgage of goods to be afterwards acquired, not the product or increase of something already owned by the mortgageor, is no more than an agreement to give a mortgage; it confers no lien, Burns *v.* Campbell, 71 Ala. 271. Mortgage of "all the lumber purchased by," the mortgageor from the mortgagee, where no lumber at all had been designated, the mortgage is without effect as to third parties, and of doubtful validity as between the parties themselves, Cass *v.* Gunnison, 58 Mich. 108, 25 N. W. 52. But in Morten *v.* Williamson, 72 Ark. 390, 81 S. W. 235. It was held that lumber to be afterward manufactured at a particular mill may be effectually encumbered by mortgage. The tenant who by verbal contract with the landlord is entitled to one-half of the crops raised, has such an interest as may be effectually mortgaged even before division, Denison *v.* Sawyer, Minn. 104 N. W. 305, citing McNeal *v.* Rider, 79 Minn. 153, 81 N. W. 830, 79 Am. St. 437. A mortgage of pledged goods in the actual possession of the pledgee is without effect, Ottumwa Bank *v.* Totten, Mo. 89 S. W. 65. But it seems that such a mortgage would entitle the mortgagee to possession of the goods on payment of the pledgee's demand.

Parties.—Partnership may take security by chattel mortgage to secure a partnership debt, Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364. Mortgage by the sole legatees of a decedent, one of whom is the executor of the will, of goods pertaining to the estate, is voidable at the instance of a creditor, but valid as against strangers, Boeger *v.* Langenberg, 42 Mo. Ap. 7. Mortgage of intestate's goods by the administratrix, is not assailable by a stranger, Springfield Company *v.* Shackelford, 56 Mo. Ap. 642. *Semble*, the president and secretary of a corporation organized in another state, doing business in Texas, have power to execute a chattel mortgage of its properties, McLeod Co. *v.* Craig, Tex. Civ. Ap. 43 S. W. 934.

Irregular Instruments.—A lease by which the landlord retains title to the whole crop, agreeing to deliver to the tenant or cropper, a certain proportion on conditions specified, is not a chattel mortgage; the landlord may recover the whole crop from one to whom the tenant has assigned his interest, even though the purchaser took in good faith and without notice, Angell *v.* Egger, 6 N. D. 391, 71 N. W. 547. Verbal agreement that certain chattels shall "stand good" for a particular debt, does not confer a legal title nor will it sustain detinue, Jackson *v.* Rutherford, 73 Ala. 156. A writing by which A. transfers to B. certain personal property in consideration of acts to be done by B, and "reserves a lien" upon the goods until the acts stipulated by B. are performed, does not secure a legal title in A., does not amount to a mortgage, and will not sustain detinue by A. against B., Jones *v.* Anderson, 76 Ala. 427. A writing, assuming to transfer "the entire crop raised the present year" on particular lands, con-

ditioned to be void if the maker discharges a specified debt at its maturity, and authorizing the creditor to sell the goods in case of default, is a mortgage, though there be added or endorsed upon it, of the same date, a writing conferring a lien upon the crop, Gafford *v.* Stearns, 51 Ala. 434. A writing contained a promissory note, a pledge of a piano as security for the note, and a power of sale, held not a mortgage, and does not acquire such effect by registration, Harding *v.* Eldredge, 186 Mass, 39, 71 N. E. 115. The same writing may operate both as a mortgage and as a statutory lien, Gafford *v.* Stearns, 51 Ala. 434. To create an agricultural lien under the statute requires a strict compliance with the provisions of the statute, Patapsco Co. *v.* Magee, 86 N. C. 350;—such an instrument failing as a lien and not assuming to convey the goods will not operate as a mortgage, *Id.* Any language which indicates that specific personal property is hypothecated for performance of an act, is sufficient as a mortgage, *e. g.*, "the articles so purchased shall be held . . . as a pledge and lien for the performance of the agreements herein," Esshom *v.* Watertown Co., 7 S. D. 74, 63 N. W. 229. A bill of sale absolute is a mortgage if so agreed at the time of its execution, Clark *v.* Williams, Mass. 46 N. E. 723. Or if intended as security, Farrel *v.* Danbury, 104 N. W. 383. A contract by which A. sells to B. the timber standing on certain lands, B. to pay, at a rate specified, in each month, for the logs sawed in the previous month, and in default this contract "to cease; all lumber in possession of B. to stand subject to amount owed," gives A. a mere lien, and one who purchases the lumber in possession of B, without notice of the contract, has the better right, Thornton v. Dwight Company, 137 Ala. 211, 34 So. 187. A junior mortgagee may protect himself by discharging the senior mortgage, Illinois Bank *v.* Stewart Company, Wis. 94 N. W. 777. And he is entitled to demand an assignment of the first mortgage upon payment of the amount due thereon. His rights are not affected by a secret agreement between the senior mortgagee and the mortgageor; nor by the fact that the mortgage was given as an accomodation, Williams *v.* Hanmer, 132 Mich. 635, 94 N. W. 176. The junior mortgagee does not obtain priority over the senior mortgagee by reason of any statements or promises made by the mortgageor at the time of obtaining the second loan; or by reason of the fact that a portion of the moneys obtained by the second loan was paid to the senior mortgagee, Citizens Bank *v.* Smith, 125 Iowa 505, 101 N. W. 172. Under a statute allowing the mortgageor "or his assignee" to redeem from a sale of the mortgaged chattels within a certain time, a second mortgagee may make redemption. He is an assignee within the meaning of the statute, Brown *v.* Smith, N. D. 102 N. W. 171. A statute allowing the mortgageor or his assignee to redeem from a sale of the mortgaged chattels and requiring, in order to such redemption, that notice shall be given of the desire to redeem "at the time of the sale" is not to be taken literally; the words "at the time of the sale" must be interpreted to mean within a reasonable time, and to require

prompt and vigorous action. A notice served within thirty-three minutes after the completion of the sale is in time, Brown *v.* Smith, N. D. 102 N. W. 171.

Mortgage for Purchase Money.—Mortgage for purchase money of the goods, duly acknowledged and recorded, on the day following its execution, takes precedence of an execution already in the hands of the officer, Brewster *v.* Schoenhofen Co., 66 Ills. Ap. 276. A mortgage for purchase money, though not properly acknowledged, or noted in the justice's docket, is good as against one who takes with notice, or without payment of a consideration, Jones *v.* Glathart, 100 Ills. Ap. 630. Mortgage taken with intent to circumvent and anticipate the vendor in securing his purchase money—the mortgagee having notice that the mortgageor has not paid for the goods—is, though first recorded, subordinate to a mortgage given for the purchase price, Jones *v.* Glathart, *supra*, citing Blachford *v.* Boyden, 122 Ills. 657; Montgomery *v.* Keppel, 75 Calif. 128; and one who buys such prior mortgage with notice of facts which put him upon inquiry, is in no better position than the mortgagee, Jones *v.* Glathart, *supra.* Twenty hours were permitted to elapse between the sale and delivery of the chattels and the recording of the chattel mortgage for the purchase money; held that in this interval an execution then in the hands of an officer against the purchaser became a perfected lien superior to the mortgage, Self *v.* Sanford, 4 Ills. Ap. 328. A purchase money mortgage given by the tenant is superior to the landlord's lien for the rent afterwards accruing, Arnold v. Hewitt, Ia. 104 N. W. 843.

Securing Several Notes.—Mortgage to secure a series of notes maturing at different dates, those first to mature must first be paid from the proceeds of the mortgaged chattels, Campbell Co. *v.* Roeder, 44 Mo. Ap. 324; and the equities of parties may be adjusted in replevin. *Id.*

For Indemnity.—Mortgage given as an indemnity cannot be foreclosed until the event against which it is a provision, has occurred, or the mortgageor has suffered the damage for which ths indemnity was provided, Honaker *v.* Vesey, 57 Neb. 413, 77 N. W. 1100. If the sureties in a promissory note, without the knowledge of the creditor, take and record, for their own indemnity, a mortgage to the creditor securing the note, in seeking to enforce such mortgage, the facts must be pleaded; it will not be admissible to seek the foreclosure of the mortgage as assignees of the note, averring payment by themselves, Wittaker *v.* Sanders, Tex. Civ. Ap. 52 S. W. 638.

Where a mortgage is given to indemnify a surety against liability, the mortgagee may, on default, replevy the goods without paying the debt, Pierce *v.* Batten 3 Kans. Ap. 396, 42 Pac. 924, citing Bates *v.* Wiggin, 37 Kans. 44, 14 Pac. 442. Such a mortgage and the promissory note therein described may be assigned to the holder of the principal debt, Bodley *v.* Anderson, 2 Ills. Ap. 450;—if the mortgage so provide, it matures with the principal debt, and mortgagee must then assume possession of the goods or lose his security, even though the promissory note described in the mortgage is not yet due by its

terms, Bodley *v.* Anderson, *supra.* But if a bill of sale, given as an indemnity expressly provides that the vendor shall retain the goods, sell them, and apply the proceeds to discharge a chattel mortgage thereon, the vendee cannot maintain replevin, Rogers *v.* Nideffer, Ind. T. 82 S. W. 673.

To Secure Future Advances or Debts to Accrue in the Future.—A mortgage of chattels may effectually be made to secure subsequent advances. It affects one who purchases the goods with notice, Davis *v.* Carlisle, Ind. T. 82 S. W. 682. Parol evidence is not admissible to show an agreement by the mortgagee to make other advances than those named in the mortgage, Carraway *v.* Wallace, Miss. 17 So. 930. If mortgagor continue purchasing after mortgagee has refused particular advances, until the full amount covenanted for has been advanced, he will not be heard to complain of the prior refusal, *Id.* A mortgage cannot be extended to cover advances not covenanted for, nor contemplated at the time of its execution, Sims *v.* Mead, 29 Kans. 124. Mortgage given to secure in part the value of plantation supplies to be furnished for the cultivation of a certain plantation; mortgagee by abandoning the plantation and the attempt to make a crop, excuses future advances, and the mortgage may be enforced for the advances already made, Cartwright *v.* Smith, 104 Tenn. 689, 58 S. W. 331. A mortgage to secure rents subsequently to mature, according to the terms of a lease recited or contained in the mortgage, takes precedence of a sale by the mortgagor as security for rents accruing subsequent to such sale, even though at the date of the sale no rent was in arrear, Esshom *v.* Watertown Co., 7 S. D. 74, 63 N. W. 229.

Foreign Mortgage.—A mortgage in one state, of chattels being there, acknowledged and recorded in that state according to its laws, binds the goods when carried into another state, even as against a bona fide purchaser, Smith *v.* McLean, 24 Ia. 322; Kerfoot *v.* The State Bank, 14 Okl. 104, 77 Pac. 46. The rule is based upon the comity of states and not upon the theory that the record imparts notice. And the mortgage affects a subsequent purchaser of the goods in another state, to which they have been removed without the privity of the mortgagee, even though the purchase be in open market, and full value paid, Schmidt *v.* Rankin, Mo. 91 S. W. 78; Creelman Company *v.* Lesh, 73 Ark. 16, 83 S. W. 320, citing Shephard *v.* Hynes, 45 C. C. A. 271, 104 Fed. 449, 52 L. R. A. 675; Alferitz *v.* Ingalls, 83 Fed. 964. *Contra*, Corbett *v.* Littlefield, 84 Mich. 30, 47 N. W. 581; Snyder *v.* Yates, 112 Tenn. 309, 79 S. W. 796, distinguishing, Bank of Louisville *v.* Hill, 99 Tenn. 42, 41 S. W. 349, and Hughes *v.* Abston, 105 Tenn. 70, 58 S. W. 296.

Mortgage by Partner.—A mortgage by a partner of the goods of the firm binds the interest of the other partner if he assent to it at the time, Smith *v.* McLean, 24 Ia. 322. A mortgage by one partner of his interest in the partnership stock to secure his individual debt, is void as against partnership creditors, Harvey *v.* Stephens, 159 Mo. 486, 60 S. W. 1055. A mortgage of firm property by one partner

without the knowledge of the other, and with intent to defraud the latter is voidable; and if the non-consenting partner obtain possession of the goods it seems that the purchaser at a sale under the mortgage will not be allowed replevin as against him, Walsh *v.* Taitt, Mich. 105 N. W. 544. A partner cannot mortgage partnership goods to secure his individual debt without the consent of the other partner, Sedalia Bank *v.* Cassiday Co., Mo. Ap. 84 S. W. 142. And such mortgage even though executed by all of the partners is void as to the firm creditors. Upon the death of the debtor partner the survivors are entitled to possession, as against the mortgagee, for the purpose of discharging the debts of the firm, Enck *v.* Gerding, 67 O. St. 245, 65 N. E. 880.

Execution, Acceptance.—Acceptance by the mortgagee is essential to the validity of the mortgage, Wells *v.* German Co., Ia. 105 N. W. 123; and will not be presumed from the mere fact that it is beneficial, Whitaker *v.* Sanders, Tex. Civ. Ap. 52 S. W. 638, citing Milling Co. *v.* Eaton, 86 Tex. 401, 25 S. W. 614.

A. executed a mortgage of his goods to B. without B.'s knowledge, recorded it and endorsed the note therein described in the name of B, obtaining the money on it; he was held estopped to impeach the genuineness of the paper, First National Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987. But a delivery to the party beneficially interested is effectual although the trustee named therein has no knowledge of it, and repudiates it upon receiving notice, Wells *v.* German Company, Ia. 105 N. W. 123. A mortgage which omits to state the day of its execution, takes effect from the record, Becker *v.* Bower, Tex. Civ. Ap. 79 S. W. 45.

Authentication, Acknowledgment.—Error in the date of the certificate of acknowledgment, the record being of the proper date, does not impair the validity of the mortgage, Durfee *v.* Grinnell, 69 Ills. 371. An acknowledgment may be taken by a justice of the peace anywhere in his county. *Id.*:—and where the statute requires a minute of the mortgage in the justice's docket it is not essential that the docket should be kept in his township, *Id.* The statute requiring a mortgage to be acknowledged in the town or election district in which the mortgageor resides, an acknowledgment before a police magistrate having by statute the same jurisdiction as a justice of the peace and elected in the town in which the mortgageor resides, though not in the same election district, was sustained, Ticknor *v.* McClelland, 84 Ills. 471. In Kansas a mortgage by words is valid between the parties, though the posession remain with the mortgageor, Well *v.* Ryus, 89 Kans. 564, 18 Pac. 524. The acknowledgment of the mortgage of a slave need not declare that the deed was executed on the day of its date nor that the party acknowledged that he "signed, sealed and delivered;" an acknowledgment of the paper "as his free act and deed" is sufficient, Parsons *v.* Boyd, 20 Ala. 112; the statute providing that every chattel mortgage shall be void unless it appears thereupon, "over the signature of the mortgageor, that a true copy thereof has

been delivered to and received by him," a mortgage without such receipt appearing subscribed by mortgageor, will not sustain replevin, even against a third person, Park *v.* Robinson, 15 S. D. 551, 91 N. W. 344. The mortgage of a corporation, acknowledged three days prior to the resolution of the directors authorizing it, but not delivered until after such resolution, is valid, Gilbert *v.* Sprague, 88 Ills. Ap. 508, S. C. 196 Ills. 444, 63 N. E. 993. The recitation of the mortgage do not preclude the mortgagee from showing the residence of the mortgageor, *Id.* If the mortgageor in fact resided in the town where he made the acknowledgment, a false recitations of his residence in the mortgage does not impair its validity, *Id.* Objections to the acknowledgment founded upon the residence of parties, must be made in the first instance, McCarthy *v.* Hetzner, 70 Ills. Ap. 480. No proof need be made of the official character of the officer who certifies the acknowledgment, unless objection is made upon this ground specifically, *Id.* Under the code of North Carolina, probate and registration of a mortgage is *prima facie* evidence of its execution, Griffith *v.* Richmond, 126 N C. 377, 35 S. E. 620. A mortgage which assumes to convey, with other goods, the household furniture of a family, and which is void as to this, because not in compliance with an express statute, is void as to all its contents, Glidden v. Nason, 186 Mass. 140, 71 N. E. 304.

Record, Notice, Precedence.—One who under a chattel mortgage contests the claims of an officer who has levied under an execution against the mortgageor, must show that the mortgage was recorded, Kahn *v.* Hayes, 22 Ind. Ap. 182, 53 N. E. 430. Disregard of the requirement of a statute that a mortgage shall be attested by two witnesses does not impair its effect as to one who purchases with actual notice of the mortgage, Strahorn Co. *v.* Florer, 7 Okla. 499, 54 Pac. 719. The officer who justifies under an attachment as against one having a lien not recorded, which, by statute, is subordinated only to the claims of subsequent purchasers and creditors without notice, has the burden of proof that the creditor whom he represents was within the statute; that is, that he attached without notice, Singer Co. *v.* Nash, 70 Vt. 134, 41 Atl. 429. Though not recorded the mortgage is valid as against the mortgagee, Thompson *v.* Dyer, 25 R. I. 321, 55 Atl. 824; and without possession delivered, Warner *v.* Warner, 30 Ind. Ap. 578, 66 N. E. 760. And though the mortgaged chattels constitute the whole estate of the husband, and have been set off to the widow by the probate court as her separate property, the widow will not be heard to assail the mortgage for the defect of a record. *Id.* As to property at the time in possession of the mortgagee no record is required, Clark *v.* Williams, Mass, 76 N. E. 723;——so as to mortgaged chattels in the hands of a third person to whom notice of the mortgage is given, Clark *v.* Williams, *supra.* Actual notice of a prior mortgage does not affect a subsequent mortgagee where the senior mortgagee fails to file the notice of extention required by the statute, the statute declaring that the mortgage shall in such case be "void" as to subsequent purchasers or mortgagees in good faith,

McKennon *v.* May, 39 Ark. 442. A mortgage is recorded when lodged for record with the proper officer, Parker *v.* Palmer, 13 R. I. 359; Scaling *v.* First National Bank, Tex. Civ. Ap. 87 S. W. 715; Heflin *v.* Slay, 78 Ala. 180; otherwise if he is instructed not to record, Parker *v.* Palmer, *supra.*

In Missouri a mortgage of chattels affords notice to all the world from the time of the filing thereof for record in the office of the recorder; a purchaser under execution subsequent to this date takes subject to the mortgage, Miller *v.* Whitson, 40 Mo. 97. The recorder's certificate of filing, endorsed upon the mortgage, though not under his seal, was received as evidence of the filing, *Id.* In Texas the record of a deed absolute of personalty, is notice, Monday *v.* Vance, Tex. Civ. Ap. 51 S. W. 346. A chattel mortgage takes precedence of an agister's lien depending solely upon contract with the mortgageor subsequent to the record of the mortgage, Central Bank *v.* Brecheisen, 65 Kans. 807, 70 Pac. 895. The requirement of the statute that the mortgage shall be void as to creditors, etc., after the expiration of one year unless within a time specified an affidavit, showing the interest of the mortgagee, be filed, has no application when the mortgagee, before the lapse of the year, assumes possession, Wood *v.* Weimar, 14 Otto. (104 U. S.), 786, 26 L. Ed. 779. Where mortgaged chattels were sold by the mortgageor and the money paid to a bank in another county from that in which the mortgage was recorded, to apply on a precedent debt, the bank having no notice of the mortgage; held, it could not be charged as trustee, Burnett v. Gustafson, 54 Ia. 86, 6 N. W. 132. In Illinois a chattel mortgage is required to be acknowledged before a justice of the peace and a minute of it made in his docket. An entry in a book kept expressly for the purpose, not the general docket, suffices; the purpose of the statute is to afford notice, and a substantial compliance is all that is required, Pike *v.* Colvin, 67 Ills. 227. The recital in a chattel mortgage of a prior lien on the goods affects the mortgagee, though he fail to read such recital, Perkins *v.* Best, 94 Wis. 168, 68 N. W. 762. A mistake in the record as to the day on which the debt matures, the year and month being given correctly, is not misleading and cannot avail one who buys from the mortgageor after record of the mortgage and prior to the maturity of the debt, even according to the record, Buck *v.* Young, 1 Ind. Ap. 558, 27 N. E. 1106. In Wisconsin a mortgage by one retaining possession, not recorded in the proper township, is invalid as against a purchaser, even although he has actual notice of the mortgage, and that the debt remains unpaid, Paroski *v.* Goldberg, 80 Wis. 339, 50 N. W. 191. A statute that every mortgage or conveyance intended to operate as a mortgage of chattels, not accompanied by an immediate and continued change of possession, is void against creditors, unless duly filed, etc., extends to a bill of sale absolute, intended as security, Talcott *v.* Crippen, 52 Mich. 633, 18 N. W. 392; a mere constructive possession will not answer the requirements of the statute, Sledenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275. Notice to a creditor that particu-

lar goods are the same intended to be conveyed in a mortgage, the description in that instrument being vague, affects the officer who levies the execution of the same creditor, Starr *v.* Cox, 9 Kans. Ap. 882, 57 Pac. 247. The statute provided that chattel mortgages should be recorded in a series of volumes separate from those used for conveyances of land; there was in fact only one series of books kept; but the transfers of personal property were recorded in volumes of this series distinct from those in which conveyances of land were recorded; held, this was a substantial compliance with the statute, Hume Bank *v.* Hartsock, 56 Mo. Ap. 291. Where a mortgage conveys both lands and goods, a record in the volume containing only conveyances of real estate, is sufficient, Jennings *v.* Sparkman, 39 Mo. Ap. 663. In Indiana a mortgage not recorded within ten days after execution, is without effect as to bona fide purchasers, Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545; but a mortgage duly recorded binds all persons, *Id.*, Heflin *v.* Slay, 78 Ala. 180.

It seems that in Michigan the agreement of a merchant that he holds his stock on consignment for a creditor to be sold for the creditor's account, and that the creditor may assume possession when he has reasonable cause to deem himself insecure, prevails as against a subsequent chattel mortgage first recorded, Norris *v.* Vosburg, 98 Mich. 426, 57 N. W. 264. But see Sachs *v.* Norn, Mich., 102 N. W. 983, and Lingle *v.* Owasso Co., Mich., 102 N. W. 639, where it was held that under a statute providing that a chattel mortgage not recorded or accompanied by an immediate change of possession shall be absolutely void as against a second mortgagee in good faith, such second mortgagee may avail himself thereof although his mortgage be not recorded. Several mortgages of the same owner upon the same goods are to be satisfied in the order of priority of record, Washington *v.* Love, 34 Ark. 93. A purchaser from the mortgageor with actual or constructive notice of the mortgage, takes subject thereto, Heflin *v.* Slay, 78 Ala. 180. Where possession of chattels remains with the mortgageor, an unrecorded mortgage is without effect as to third persons, *e. g.*, a receiver of the estate of the mortgageor, Harrison *v.* Warren Co., 183 Mass. 123, 66 N. E. 589; or a judgment creditor, or a receiver appointed in supplemental proceedings, Stephens *v.* Perrine, 143 N. Y. 476, 39 N. E. 11; as to any and every creditor, Russell *v.* St. Mart, 180 N. Y. 355, 73 N. E. 31; as to a junior mortgagee who takes without notice, Patterson *v.* Irwin, Ala. 38 So. 121. If the purchaser leaves the purchased property in possession of the vendor, a mortgage by the purchaser will not be constructive notice to subsequent purchasers from the original vendor, Martin *v.* Le San, Ia. 105, N. W. 996, citing Nuckolls *v.* Pence, 52 Ia. 582, 3 N. W. 631. Mention casually made to an agent while no affair of the principal is pending, and having no reference to the principal, does not affect him, Patterson *v.* Irwin, *supra*. In Missouri a chattel mortgage withheld from record, though by mere inadvertence, has no effect as to creditors whose debts are contracted during the period of withholding,

Harrison *v.* South Carthage Co., 106 Mo. Ap. 32, 89 S. W. 1160. But the negligent omission to record a mortgage is not conclusive in favor of creditors of the mortgageor, as to its fraudulent character, Ward *v.* Parker, Ia. 103, N. W. 104. And a creditor assailing an unrecorded mortgage must show affirmatively that he extended credit to the mortgageor upon the faith of his apparent ownership of the chattels unincumbered, Ward *v.* Parker, Ia. 103, N. W. 104. A judgment in part for indebtedness accruing before the execution of an unrecorded mortgage, cannot be asserted, as against such mortgage in respect to any part of it. The whole judgment, by such confusion, is uninforcible against the mortgage creditor, Harrison *v.* South Carthage Company, *supra.* A record not authorized by law is not notice, Snyder *v.* Yates, 112 Tenn. 309, 779 S. W. 796. So of a chattel mortgage not authenticated as required by statute. Its record does not afford constructive notice, Tisdale *v.* Pray, N. H. 62 Atl. 168. And the record of a mortgage in the name of A. W. D. is not notice that J. W. D. executed it. Johnson *v.* Wilson, 137 Ala. 468, 34 So. 392. Even though the mortgage was given for the purchase money of the mortgaged chattels. *Id.* But if duly recorded the mortgage is constructive notice, Howard *v.* Deens, Ala. 39 So. 346; and a record in a series of books kept for recording mortgages of lands, of a deed of trust conveying both lands and chattels, is effectual as to both and constructive notice to all the world, Long *v.* Gormand, 100 Mo. Ap. 45, 79 S. W. 181. The mortgagee in a mortgage which includes usury is not a *bona fide* purchaser, and may not object to the failure to record a prior mortgage, Morris *v.* Bank of Attalla, Ala. 38 So. 804.

Renewal.—Separate affidavits of the mortgageor and the mortgagee made at the same time, and upon the same paper, are to be taken together; and if it appears from the two that there was an agreement for the extension of the mortgage, and the two taken together contain the requirements of the statute, and are recorded in due time, the statute is satisfied, Hamilton *v.* Seeger, 75 Ills. Ap. 599. The statute required an affidavit of the extension of a mortgage to be filed within thirty days next preceding the maturity of the mortgaged debt; the debt matured at midnight November 21, and the affidavit was filed on that day,—held in due time, the 21st being one of the thirty days next preceding the maturity of the debt. *Id.*

In Kansas a mortgage not renewed within thirty days next preceding the term of one year after its filing becomes void as to creditors, unless actual possession is taken. The renewal is by affidavit filed in the proper office, Moore *v.* Shaw, 1 Kans. Ap. 103, 40 Pac. 929; if the mortgagee plead actual possession taken he must prove it, *Id.* Fractions of a day are not regarded; the year expires at the same hour at which the mortgage was filed on the last day of the year, *Id.* There is not an actual and continued possession in the mortgagee where the mortgageor continues in the management and control, though he claims to be acting as agent for the mortgagee, *Id.*; where the affidavit is required to be filed "within thirty days next preceding the maturity

of the debt, days of grace are to be counted in determining the maturity, Gilbert *v.* Sprague, 88 Ills. Ap. 508, S. C. 196 Ills. 444, 63 N. E. 993.

Subsequently Acquired or Substituted Goods.—In DeWolf *v.* Harris, 4 Mason, 531, it is stated as a manifest proposition that where goods are assigned by way of security, the assignee becomes entitled to the proceeds gained by the exchange thereof, and that by greater reason the rule is the same where the assignment is of the goods "and the proceeds thereof."

I have not found this case cited to this proposition in any later authority.

Mortgagee cannot hold goods substituted for those described in the mortgage unless possession is delivered before other liens attach; and even then his right is cognizable only in equity, Simmons *v.* Jenkins, 76 Ills. 479; Schimerhorn *v.* Mitchell, 15 Ills. Ap. 418; but in Michigan it was held that additions to a stock of mercahndise made subsequent to a mortgage are subject thereto if the mortgage so declare, Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823; Cadwell *v.* Pray, 41 Mich. 307, 2 N. W. 52. New material purchased to supply the wear, tear and decay of a newspaper plant, and so mingled with the original as not to be readily distinguished, becomes part of the mortgaged property by acquisition, Fowler *v.* Hoffman, 31 Mich. 215, citing Willard *v.* Rice, 11 Metc. 493; Loomis *v.* Green, 7 Greenl. 493; Barron *v.* Cobleigh, 11 N. H. 559; Weatherbee *v.* Green, 22 Mich. 317. A mortgage of "all furniture, lumber and materials" in a certain factory, which was described, also "furniture hereafter made in said factory," binds the furniture afterwards manufactured from the mortgaged materials, Dehority *v.* Paxson, 97 Ind. 253. A lease gave the landlord a lien upon all cattle of the tenant "brought upon the premises;"—held subordinate to a chattel mortgage executed prior to their acquisition by the tenant, Parkhurst *v.* Sharp, 10 Kans. Ap. 575, 61 Pac. 531.

In Mississippi it is settled that under certain limitations a mortgage may bind future acquisitions; but the deed must refer to and designate particular things which may in the ordinary course of things, and with reasonable certainty, come into being, and the mortgageor must at the date of the mortgage have an actual interest *in presenti* in the thing from which the subject of the mortgage is subsequently to arise, *e. g.*, the wine of the moirtgageors' vineyard, the wool of his sheep, or the product of his fields, Fidelity Company *v.* Sturtevant, Miss. 38 So. 783.

The thing out of which the mortgaged product is to arise must be described with certainty. *Id.*

Where mortgaged chattels are exchanged for others, with one having notice of the mortgage, the mortgagee has an equitable lien upon the thing given in exchange, and may assert it in an action of replevin brought by the party who made the exchange, and who claims the goods under a chattel mortgage for a balance unpaid of the price

of the goods which he gave in the exchange, American Company *v.* Futrall, Ark. 84 S. W. 505.

Where the mortgage provided for replenishing the stock of merchandise mortgaged so that the same should be kept salable and that the newly purchased goods should be subject to the mortgage, it was held that the mortgagee obtaining possession before the rights of third parties intervene had both an equitable and legal title, Burford *v.* First National Bank, 30 Ind. Ap. 384, 66 N. E. 78.

In Massachusetts after acquired property does not pass to the mortgagee as against subsequent purchasers or incumbrancers, even though the mortgage so provide; yet such provision in the mortgage operates as an executory agreement and the mortgagee may seize and sell the goods at any time before the rights of a third party intervenes; and a mere creditor without lien will not be heard afterward to complain, Wasserman *v.* McDonnell, Mass. 76 N. E. 959.

Mortgagee in Possession with Power to Sell.—If, by any arrangement, expressed or implied, between mortgageor and mortgagee, the former continues selling the merchandise mortgaged, for his own benefit, the mortgage is void as against creditors, Simmons *v.* Jenkins, 76 Ills. 479; Wright *v.* Texas Co., Tex. Civ. Ap. 90 S. W. 905; White *v.* Graves, 68 Mo. 218; Wilson *v.* Voight, 9 Colo. 614. Only as against creditors who become such after its execution and before its record, Chapin *v.* Jenkins, 50 Kans. 385, 31 Pac. 1084; Standard Co. *v.* Schultz, 45 Kans. 52, 25 Pac. 625; Rathbun *v.* Berry, 49 Kans. 735, 31 Pac. 679; Smith *v.* Epley, 55 Kans. 71, 39 Pac. 1016. Mortgage of merchandise left in the hands of the mortgageor for sale, with the consent of the mortgagee, is fraudulent as to creditors, Schemerhorn *v.* Mitchell, 15 Ills. Ap. 422; but only presumptively so, and good faith may be shown, Lorton *v.* Fowler, 18 Neb. 224, 24 N. W. 685; First National Bank *v.* Calkins, 16 S. D. 445, 93 N. W. 646. That the mortgageor of a stock of merchandise remains in possession disposing of the goods in the ordinary way, is a circumstance tending to prove fraud but is not conclusive, Heidiman Benoist Co. *v.* Schott, 59 Neb. 20, 80 N. W. 47. Mortgage by merchant of specific articles, a show-case, tools, stoves, etc, the goods being suffered to remain in the store, but segregated from the stock; held, that being capable of use without sale, the power "to use and enjoy" was not a power to sell, and the mortgage was sustained, Wilson *v.* Jones, Colo. Ap. 78 Pac. 622. Many cases hold that a provision in the mortgage of merchandise that the mortgageor shall "retain and use" the goods until default, imports an authority to sell, and is therefore void; but in Sargent *v.* Chapman, 12 Colo. Ap. 529, 56 Pac. 194, it was doubted whether these words should be given this effect in the face of an express covenant not to sell; and later in the same Court when the mortgage of a stock of merchandise was conditioned that "until default made in some one or more of the agreements, covenants and conditions above or hereinafter mentioned," the mortgageor "may keep, retain and use the said goods and chattels," also contained a provision that until full payment, etc.,

the mortgageor would not "sell or dispose of" the goods or chattels or any part thereof without the written consent of mortgagee; held, while the use ordinarily made of a stock of merchandise is to sell it, and that to confer upon the mortgageor authority to use in such case, is in effect a power to sell, and the mortgage therefore void as to creditors, yet the covenant "not to sell or dispose of," etc., must be held to control the other provisions of the mortgage and limit its terms to some other manner of use, and the mortgage was sustained as against an attaching creditor. The report does not show whether in fact sales had been made, or whether the mortgagee had knowledge thereof. Estes v. First National Bank, 15 Colo. Ap. 526, 63 Pac. 788. In Wilson *v.* Voight, 9 Colo. 614, 13 Pac. 626, where the mortgage included both merchandise and other chattels and the mortgageor remained in possession, and was permitted to sell and retain the proceeds, the mortgage was declared void as to both species of property; but in Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330, it was held that such a mortgage might be void as to the merchandise, and valid as to the other properties. Mortgage of dairy stock kept for permanent use, a sale of two of the animals, not consented to by the mortgagee, is not within the rule in the above cases, and the court is not at liberty to say as a matter of law that it was the intention of the parties to confer upon the mortgageor the power of disposition, Starr *v.* Cox, 9 Kans. Ap. 882, 57 Pac. 247. A power of sale in the mortgageor will be implied in the mortgage of a dairy farm, where authority is expressly given by the mortgage to substitute other chattels for those described, Goddard *v.* Jones, 78 Mo. 518; but this doctrine was held inapplicable where the mortgage of a saw-mill provided that other property of the same kind bought by the mortgagor, or "substituted to supply breakage, loss or waste," and "all property of similar kind hereafter acquired and used in connection with said saw-mill, whether added to or substituted for the same under the circumstances aforesaid," should be subject to the lien of the mortgage, Jennings *v.* Sparkman, 39 Mo. Ap. 663. Where the infirmity of the mortgage in this respect appears upon its face the court must declare it void; if extrinsic evidence is adduced to show that this was the actual intent of the parties, the question is for the jury, Jennings *v.* Sparkman, *supra*. Provision in a chattel mortgage of merchandise that the mortgageor shall remain in possession selling and applying the proceeds, less necessary expenses, to the mortgage debt, is valid, Burford *v.* First National Bank, 30 Ind. Ap. 384, 66 N. E. 78; Pritchard *v.* Hooker, Mo. Ap. 90 S. W. 415. The result is the same where there is an oral agreement that the stock shall be kept up, even though there is no express agreement that the proceeds of sale shall be applied on the mortgage debt. Ward *v.* Parker, Ia. 103 N. W. 104. So where the agreement was that the mortgageor should sell the mortgaged property only to the mortgagee, or if to others, the shipment should be in the name of the mortgagee, and the proceeds remitted by the purchaser directly to the mortgagee, to apply on the mortgage, Morton *v.* William-

son, 72 Ark. 390, 81 S. W. 235. Power in the mortgagee to exchange the horses mortgaged for others, which shall stand in the place of those exchanged, does not warrant a sale, Cooper *v.* McKee, Ky. 89 S. W. 203.

Mortgagor retaining possession contrary to the Mortgage.—In Illinois the law makes possession of chattels by the mortgageor contrary to the terms of the mortgage, fraudulent *per se* as to creditors, *e. g.*, if the mortgageor retain possession after default made, and the mortgage provide that he may retain possession only until default. Where parties reside in the same county a failure to assume possession within one day after default exposes the goods to the mortgageor's creditors, Reese *v.* Mitchell, 41 Ills. 365; so also in Colorado, Atchison *v.* Graham, 14 Colo. 217, 23 Pac. 876. Where the mortgage debt matured upon Saturday assumption of possession by the mortgagee at any time on the following Monday was held to be in apt time. Allen *v.* Steiger, 17 Colo. 552, 31 Pac. 226. Mortgagee is not required to take possession at the very instant of a default; he is allowed a reasonable time, according to the circumstances of the case, and his right is not dependent upon actual assumption of possession. Mortgagee demanded the goods promptly on the maturity of the debt, and being refused brought replevin before a justice of the peace; the mortgageor gave a forthcoming bond and retained the goods; the justice, a few days after the trial, gave judgment in the mortgagee's absence, dismissing the action, because the value exceeded his jurisdiction. A creditor of the mortgageor then levied execution upon the goods; two days later the mortgagee demanded the goods, and it was held he had acted with diligence. Crocker *v.* Burns, 13 Colo. Ap. 54, 56 Pac. 188. Putting a custodian in posession with instructions not to allow the mortgageor to use the mortgaged animals, is a sufficient possession as against creditors of mortgageor, though the animals are left on the mortgageor's premises, Gaines v. Becker, 7 Ills. Ap. 315. The statute provided that a mortgage of chattels, possession remaining with the mortgageor, shall if duly acknowledged and recorded, "be good and valid * * * until maturity of the entire debt or obligation, provided such time shall not exceed two years"; a mortgage to secure several promissory notes, some not maturing within two years, was held void as against creditors even in respect to the notes maturing within the two years; and the insecurity clause, and an election of the mortgagee thereunder, within two years from the recording of the mortgage to declare the whole debt due did not effect this result. Silvis *v.* Ault man, 141 Ills. 632, 31 N. E. 11. But the statute having been amended by a proviso that "unless within thirty days next preceding the expiration of such two years the mortgagee shall file * * * an affidavit" setting forth the amount remaining due, and that thereupon "the mortgage lien * * * shall be continued * * * for and during * * * two years from the filing of such affidavit or until the maturity of the indebtedness," it was held that a mortgage made after this amendment, to secure an indebtedness not maturing within two years, was valid, and that a levy made before the lapse of two years was tortious.

Keller *v.* Robinson, 153 Ills. 458, 38 N. E. 1072. There must be an actual and continued change of possession, and where the mortgaged chattels consisted of the furniture of a hotel, and the mortgagee, after maturity of the mortgage, continued the ostensible proprietor in charge, there was no such change of possession as the law requires. Moore *v.* Shaw, 1 Kans. Ap. 103, 40 Pac. 929; and it is not competent for a witness to testify upon such issue that the plaintiff "had possession," this is a mere conclusion, Id. In Nebraska, mortgageor remaining in possession after default, the mortgage is presumptively fraudulent; the presumption may be overcome by proof of execution in good faith to secure a bona fide debt. Houck *v.* Linn, 48 Neb. 228, 66 N. W. 1103. Where the statute provides that to the validity of a chattel mortgage immediate possession shall be essential, a delay of nearly six months renders it inoperative, even as against a receiver in insolvency of the mortgagor. Pryor *v.* Gray, N. J. Eq., 62 Atl. 439.

Liens created by the Mortgagor.—Where by the terms of the mortgage possession is to remain with the mortgagor, he may by procuring necessary repairs upon the mortgaged article create an artificer's lien superior to the mortgage. Rupert *v.* Zang, N. J. L., 62 Atl. 998. In Hammond *v.* Danielson, 126 Mass. 294, the mortgagor of a hack which, by the terms of the mortgage the mortgageor was entitled to retain until default, had procured repairs; and having failed to pay for the same, the mechanic detained it for the satisfaction of his demand; it was held that inasmuch as it was the manifest intention of the mortgage that the hack should continue in use, and be kept in a proper state of repair for that purpose, the mortgageor was impliedly authorized to procure the repairs and charge the thing with a lien superior to the mortgage. Where a lien is given by statute to one who feeds and sustains animals "at request of the one in lawful possession thereof," a mortgageor in possession may confer upon the agister a lien superior to the mortgage. Smith *v.* Stevens, 36 Min. 303, 31 N. W. 55. But an agister's lien given by a statute is inferior to the lien of chattel mortgage previously recorded, unless the statute manifests an intention to give it precedence; the lien depends upon and is limited by the statute. Hanch *v.* Ripley, 127 Ind. 151, 26 N. E. 70. In State Bank *v.* Lowe, 22 Neb. 68, 33 N. W. 482, the statute provided that when any person shall hire another to feed and take care of any live stock "it shall not be lawful for him to gain possession of the same by writ of replevin until he has tendered the contract price or a reasonable compensation for taking care of the same." The defendant was in possession of live stock as an agister under contract with the mortgageor in a prior mortgage, duly recorded. It was held that the operation of the statute extended no further than the person making the contract, and consequently the right of the agister was inferior to that of the mortgagee. In Easter *v.* Goyne, 51 Ark. 222, 11 S. W. 212, it was held that unless a contrary intention be manifested in the statute, an agister's lien is subordinate to that of a prior registered mortgage. The same result was reached in McGhee *v.* Edwards, 87 Tenn. 506, 11 S. W. 316, the

court citing Burns *v.* Pigot, 9 C. & P. 208, where it was held that the innkeeper has no lien upon a horse placed in his stable by one not a guest nor the owner of the animal; and Broadwood *v.* Granara, 10 Exch. 417, where it was held that an innkeeper gains no lien on property not belonging to a guest, but sent to the hotel by the manufacturer for the temporary use of a guest. But in Case *v.* Allen, 21 Kans. 217, it was declared, in a well-reasoned opinion, that the mortgagee of live stock in possession, according to the terms of the mortgage, might effectually charge them with an agister's lien for their maintenance, which will be superior to the lien of the mortgage. The court says that the possession of the agister was rightful; that his lien was given by the statute; that his service was as much for the interest of the mortgagee as of the mortgageor; and that where the mortgagee leaves the possession with the mortgageor, he must be deemed to assent to the creation of the lien given for any expenditure reasonable and necessary for the preservation, or ordinary repair of the thing mortgaged, and that it is essential that this should be the rule for the protection of the mechanic or other person given a lien for labor or material furnished, for the sustenance or betterment of the mortgaged chattel. Where the statute gives the laborer a lien upon the property of the employer, and provides that when the property of an employer is placed in the hands of a receiver, assignee or trustee, claims due for labor performed within three months prior to the appointment of such assignee shall be first paid, a chattel mortgage takes precedence of the wages of the laborer. The right of redemption is in such case all the right that the mortgageor has. The chattels themselves are not the property of the employer, but of the mortgagee. St. Mary's Company *v.* National Co., 68 O. St. 535, 67 N. E. 1055.

Where the statute giving the agister a lien expressly declares that "nothing herein shall be considered as impairing or affecting the right of parties to create liens by contract," the lien of the agister is inferior to that of a prior mortgage of which he has notice; even though the mortgagee knows the animals are being kept at the agister's stable. Masterson *v.* Pelz, Tex. Civ. Ap. 86 S. W. 56.

A purchase money mortgage given by the tenant is superior to the landlord's lien for the rent afterwards accruing. Arnold *v.* Hewitt, Ia. 104 N. W. 843.

A mortgage of crops to be grown upon specified lands is inferior to the right of one who has bargained the land to the mortgageor upon credit, with provision that if he fails to make certain payments at specified times he is to become at once, and without notice or re-entry, a tenant of the vendor; and this is true even though the mortgage is taken without notice of this agreement. British Company *v.* Cody, 135 Ala. 622, 33 So. 833.

Insecurity Clause.—Proviso, that the mortgageor shall retain possession until maturity of the debt, but that the mortgagee may take possession at any time he "shall think the property in danger of being sold, removed, etc.," the mortgagee cannot proceed arbitrarily; he

must show that he acted upon circumstances which would have inspired a reasonable person with the belief of danger. Furlong *v.* Cox, 77 Ills. 293; Davenport *v.* Ledger, 80 Ills. 574; Deal *v.* Osborne, 42 Minn. 102, 43 N. W. 835; Brown *v.* Hogan, 49 Neb. 746, 69 N. W. 100; Allen *v.* Corney, Neb. 94 N. W. 151; National Bank *v.* Teat, 4 Okla. 454, 46 Pac. 474; Brook *v.* Bayless, 6 Okla. 568, 52 Pac. 738. The mortgagee is the sole judge of the crisis, but he must act in good faith and upon probable cause; if he has no reasonable grounds to apprehend danger, the taking is unlawful. Roy *v.* Goings, 96 Ills. 361; Fellor *v.* McKillip, 109 Mo. Ap. 61, 81 S. W. 641. The cause must be some cause not existing at the date of the mortgage. The mortgagee is authorized to replevy the goods from the officer who has taken them under execution against the mortgageor, Lewis *v.* D'Arcy, 71 Ills. 648; but only after demand made, Simmons *v.* Jenkins, 76 Ills. 479. The action must be in the *detinet* and not in the *cepit*. The mortgagee sued in trespass for seizing the goods under this clause may prove his instructions to the person making the seizure, and if the goods were taken at an unreasonable hour, the time when the instructions were given, in order to rebut malice,—Davenport *v.* Ledger, 80 Ills. 574. And it may be shown that the mortgageor purchased the mortgage in order to compel the mortgageor's husband to pay a demand held against him, Deal *v.* Osborne, 42 Minn. 102, 43 N. W. 835. If the goods are taken from the mortgagee under a writ of replevin issued by a senior mortgagee (the mortgageor participating and aiding), the mortgageor claiming that the first seizure under the junior mortgage was without cause and malicious, recovers only the difference betwen the market value of the goods, when taken by defendant, and when replevied, with any loss to his business or otherwise, the direct result of the taking. Where the mortgage contains the insecurity clause the goods cannot be sold on execution against the mortgageor except by consent of the mortgagee, Durfee *v.* Grinnell, 69 Ills. 371. If the goods be taken under a distress warrant against the mortgageor, mortgages may replevy, McCarthy *v.* warrant against the mortgagor, mortgagee may replevy, McCarthy *v.* Hetzner, 70 Ills. Ap. 480; or if taken under the levy of an execution, Farrell *v.* Hildreth, 38 Barb. 178. A junior mortgage is a violation of a condition against "any attempt to dispose of the property," Deal *v.* Osborne, 42 Minn. 102, 43 N. W. 835. And a sale by the mortgageor entitles them ortgagee to immediate possession. Buck *v.* Young, 1 Ind. Ap. 558, 27 N. E. 1106. Plaintiff purchased of defendant a stock of goods, paying a portion of the purchase price by a conveyance of land, and executing for the residue a note secured by chattel mortgage of the goods, the note expressed to be payable from the proceeds of sales, and all such proceeds less the necessary expenses, in a limited sum. The mortgageor reserved the right to "handle the goods in a regular, legitimate and mercantile way," but provided also that in case of default or the removal of the goods contrary to the stipulations of the mortgage, "or whenever the mortgagee shall choose," he might take immediate possession, etc. The latter clause was in the printed form upon which the mortgage was prepared; the former clause quoted was

in writing. Held that the first clause must prevail and that possession assumed by the mortgagee before any default or breach of condition by the mortgageor, was wrongful, Sylvester *v.* Ammons, 126 Ia. 140, 101 N. W. 782. The mortgage was executed in June. It covered growing crops. The debt matured in January following. On the 19th of August the mortgagee brought replevin for two thousand bushels of wheat, part of that described in the mortgage. It appeared that the mortgageor had already sold five hundred bushels of the mortgaged wheat. The other crops were of little or no value, and the mortgagee was insolvent. Moreover he was threatening to continue selling the wheat. What remained hardly exceeded in value the mortgaged debt. By the law of the state a mortgage upon growing crops did not impart notice to a buyer of grain in open market. It was held that the mortgagee was entitled to deem himself insecure. Allen *v.* Cerney, Neb. 94 N. W. 151. *Description and Character of the Debt.*—A mortgage which fails to describe the debt with particularity, or misrepresents it, is open to suspicion; but it will be sustained on proof of fairness, Wood *v.* Weimar, 14 Otto. (104 U. S.) 786, 26 L. Ed. 779. Mortgage for a sum of money, for a large part of which the mortgagee is liable only as surety for another, is not open to the charge of fraudulent exaggeration. Sargent *v.* Chapman, 12 Colo. Ap. 529, 56 Pac. 194.

Assignment.—The assignment of the debt carries the security, Tilden *v.* Stilson, 49 Neb. 383, 68 N. W. 478; First National Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987; Wyandotte Bank *v.* Simpson, 8 Kans. Ap. 748, 55 Pac. 347. The assignee may maintain replevin for the mortgaged goods, Houck *v.* Linn, 48 Neb. 228, 66 N. W. 1103; Crocker *v.* Burns, 13 Colo. Ap. 54, 56 Pac. 199. But in Perry County Bank *v.* Rankin, 73 Ark. 589, 84 S. W. 725, it was held that while the assignment of the debt carries the lien of the mortgage, it does not invest the assignee with the property in the goods and such assignee cannot maintain replevin. The assignment of the mortgage debt passes all interest of the mortgagee in the mortgaged goods to the assignee, the legal effect is the same as if the mortgagee being in possession had sold and delivered the goods to the assignee, Satterthwaite *v.* Ellis, 129 N. C. 67, 39 S. E. 727. The assignee is not bound by the agreements of the mortgagee of which he has no notice, *Id.* Long *v.* Gorman, 100 Mo. Ap. 45, 79 S. W. 180. The administrator of a decedent cannot assign a mortgage, given the latter in his lifetime to indemnify him against liability as surety, without leave of the probate court, even to the creditor, for whose demand the decedent became surety. Pierce *v.* Batten, 3 Kans. Ap. 396, 42 Pac. 924. An assignment of the mortgage passes a legal title, Russell *v.* Walker, 73 Ala. 315; but without the assignment of the debt it confers no right, Hamilton *v.* Browning, 94 Ind. 242. The assignor of the mortgage, for value, is estopped by the recitations of the assignment, May *v.* First National Bank, Neb. 104 N. W. 184. An assignment of a chattel mortgage need not be recorded, Kerfoot *v.* The State Bank, 14 Okla. 104, 77 Pac. 46. An assignment of part of the mortgage debt is a transfer *pro tanto* of

the mortgage security; the assignee may maintain a bill to foreclose. Penney *v.* Miller, 134 Ala. 593, 33 So. 668. And where in such case the transfer is silent as to the priority between assignor and assignee, the assignee generally has the preference. Penney *v.* Miller, *supra.* The mortgagee is bound to exercise good faith towards the assignee. His duty is to use care to prevent waste and destruction of the mortgaged chattels. Losses which are occasioned by wilful default or gross negligence on his part must go in reduction of his demand. Penny *v.* Miller, *supra.*

Description of the Goods.—Mortgage of the wheat grown upon a certain quarter section will not sustain replevin for wheat raised upon another quarter section, Coman *v.* Thompson, 43 Mich. 389, 5 N. W. 452. "Our entire stock of dry-goods, boots, shoes, hats, clothing, notions, and such other goods as are usually kept in a first class country store," without any designation of its whereabouts, is not sufficient, Jaffrey *v.* Brown, 29 Fed. 476, and see Everett *v.* Brown, 64 Iowa, 420, 20 N. W. 743; Ivins *v.* Hines, 45 Iowa, 73. "Twenty-five cattle, ten cows, seven steers and eight heifers now in my possession," there being forty or more head in the possession of the mortgagor at the same time answering the same description, and no separation or identification being made, is void for this uncertainty. Union Bank *v.* Hutton, 61 Neb. 571, 85 N. W. 535. A mortgage of 600 head of ewes, described as branded with a certain brand, and as situated upon a particular ranch named, will not warrant a recovery where it appears that there were other ewes of the same brand upon the same ranch at the same time, there being nothing to distinguish them, Perry Company *v.* Barto, 3 Neb. Unof. 654, 92 N. W. 762, First National Bank *v.* Hughes, 3 Neb. Unof. 823, 92 N. W. 986. But see Avery *v.* Popper, *post.* Mortgage of a specific number of cattle, oxen and horses, without other description, is void, even though it appear that at the date of the mortgage mortgageor owned the exact number of animals set down and owned no others of that description, Kelly *v.* Reid, 57 Miss. 89; *Contra*, the mortgage reciting possession in mortgageor, Peters *v.* Parsons, 18 Neb. 191, 24 N. W. 687. "One bay mare," held not sufficient, Cowden *v.* Lockridge, 60 Miss. 385; nor "twelve acres of cotton," Hampton *v.* State Geo. 52 S. E. 19. But the description need not be so definite as to permit identification without inquiry, Buck *v.* Young, 1 Ind. Ap. 558, 27 N. E. 1106; "one bay horse," giving his name, color and age, "one single seated buggy," "one single harness, all in my possession," the mortgage showing the county of mortgageor's residence, is sufficient,—Brock *v.* Barr, 70 Ia. 399, 30 N. W. 652, Colean Co. *v.* Strong, 126 Ia. 598, 102 N. W. 506. Jordan *v.* Hamilton Bank, 11 Neb. 499, 9 N. W. 654.

"Five freight wagons and twenty-five yoke of cattle, the team now in my possession," is sufficient, Smith *v.* McLean, 24 Ia. 322. Mortgage of 500 bushels of wheat in a granary specified, is not invalidated by the fact that the granary contains a larger quantity, and the particular wheat mortgaged is not ascertained and set apart, Burton *v.* Cochran, 5 Kans. Ap. 508, 47 Pac. 569; the undivided two-thirds of forty acres of

growing wheat "on the John Wise farm, Gilman Creek, Morris County," is sufficient, Simms *v.* Mead, 29 Kans. 124. Mortgage of "three bales of cotton, 500 pounds each, to be raised by me the present year," upon a plantation described, conveys a mere equity; but if the whole crop except three bales, or enough to make three bales, has been removed by the mortgageor, the mortgagee may treat this as a partition and replevy what remains, Washington *v.* Love, 34 Ark. 93. A mortgage of animals by color, sex and name, is sufficient; otherwise where the chattels are described as "one four-horse iron axle wagon" without other specification, Nicholson *v.* Karpe, 58 Miss. 34. Part of the description being inconsistent with the fact, public and notorious, may be rejected as surplusage, and a mortgage so reformed describing certain animals as to be "kept and fed on the Brecheisen farm, to-wit, Southeast quarter section thirty-four, town sixteen, range sixteen," is sufficient, Central Bank *v.* Brecheisen, 65 Kans. 807, 70 Pac. 895. "120 head of feeding cattle now on feed in Audrain County," is sufficient, until it is shown that at the date of the mortgage the mortgagor had other 120 head answering this description, and that the latter was the lot mortgaged, First National Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987. "All our right in the personal estate of Adolph Buecker, deceased, with all claims to which we are entitled as heirs, etc.," is sufficient, Boeger *v.* Langenberg, 42 Mo. Ap. 7. Parol evidence is admissible to aid the description, *Id.;* but where the article is perfectly well known by the name used, parol is not admissible to show that a different article never known by that name was intended. Standard Company *v.* Schloss, 43 Mo. Ap. 304. Defendant promised to mortgage to plaintiff a bale of cotton, which, as he said, a tenant "will owe me" at the end of the year; held ineffectual to encumber any particular cotton or entitle the plaintiff to replevy one bale of cotton, the tenant having possession of other cotton, Moore *v.* Brady, 125 N. C. 35, 34 S. E. 72. Mortgage described the animal as "one sorrel gelding with hind hoofs and bald face, sixteen and a half hands high, twelve years old, worth eighty dollars"; the complaint used the same description except the word "white" was written in lieu of "with"; held, there was no material variance, Buck *v.* Young, 1 Ind. Ap. 558, 27 N. E. 1106. Variances in the description, where the identity of the property is nevertheless certain, do not deprive the mortgage of effect, *Id.* Where the description is general, it may be aided by averment and proof that the attaching creditor knew that the goods levied upon were the same goods intended to be mortgaged, Starr *v.* Cox, 9 Kans. Ap. 882, 57 Pac. 247. Mortgage of a specified number of animals, the mortgageor being possessed of a larger number of the same description and there being no identification of the particular animals, confers on the mortgagee by implication the power to elect as to what animals he will take, Avery *v.* Popper, Tex. Civ. Ap. 45 S. W. 951; the election may be exercised by a suit to foreclose the mortgage and the sequestration of particular animals, *Id.* The mortgage is not impaired by the fact that in execut-

ing it the mortgageor had no definite cattle in mind, nor that the description was inaccurate and was not intended for any particular cattle, nor that the mortgagee was not intending to mortgage the particular cattle seized under the writ, First National Bank *v.* Ragsdale, 171 Mo. 168, 71 S. W. 178. "One open buggy with thills, new, made by Taylor Bros., Emmettsburg, and bought of them, and one sulky new, made by Taylor Bros., Emmettsburg," is void for uncertainty as against one without actual notice, Ormsby *v.* Nolan, 69 Ia. 130, 28 N. W. 569; and extrinsic evidence was held not admissible to identify the mortgaged goods, inasmuch as the mortgage fails to suggest an inquiry which may result in identification, *Id.* A mortgage showing that the mortgageor resides in H. County, that the goods are "now in my possession," and providing against the removal of the goods "from said H. County" is sufficient, and the record affords constructive notice, Wells *v.* Wilcox, 68 Ia. 708, 28 N. W. 29, Brock *v.* Barr, 70 Ia. 399, 30 N. W. 652.

Inconsistencies in a portion of the description do not invalidate the mortgage where enough remains, taken with all the circumstances, to put a subsequent purchaser upon inquiry, Kerfoot *v.* The State Bank, 14 Okla. 104, 77 Pac. 46. And especially as to one having actual knowledge of the identity of the mortgaged goods. Longerbeam *v.* Huston, S. D. 105 N. W. 743.

Description of cattle by reference to their ages, brands and the place where they are to be found is sufficient. Scaleing *v.* First National Bank, Tex. Civ. Ap. 87 S. W. 715. A mortgage of "279 head of cattle, to-wit,—160 cows of various colors from five to nine years old; 85 young steers and heifers; 30 steers, two and three years old, various colors; one hundred calves, various colors; four Durham bulls," and authorizing the mortgagee to take possession in case of any attempt to remove them from "said Creek nation," held sufficient. Kaase *v.* Johnson, Ind. T., 82 S. W. 680. Mortgage of "My two-thirds of the cotton and three-fourths of the corn raised by me on the farm of Thomas Fulcher in the county of G., state of, etc., about five miles northeast of Kingsbury, and one-half mile east of the San Marcos store" is sufficient to carry a crop growing at the time of its execution. Becker *v.* Bowen, Tex. Civ. Ap. 79 S. W. 45. "All my crop of corn, cotton, and all other produce I may raise, during the year 1891," supplemented by proof that the mortgageor owned a tract of land at the time of the execution of the mortgage, situate in the county where the mortgage was executed, is sufficient to carry the cotton and corn grown on that land during the year named. The record of such mortgage affects subsequent purchasers. Woods v. Rose, 135 Ala. 297, 33 So. 41. A chattel mortgage executed by two upon "all crops cultivated by us this year" on lands described, does not pass a crop cultivated and reared by one of the two, acting for himself. Furgerson *v.* Twisdale, 137 N. C. 414, 49 S. E. 914.

The maxim *falsa demonstratio non nocet* applies to a chattel mortgage as to other writings. National Bank *v.* Schufelt, Ind. T., 82 S. W. 927.—The place where the chattels are located, if given in the mortgage, is to receive the same effect as any other part of the de-

scription; so where two chattel mortgages of cattle were executed, the cattle being branded with the same brand, and located upon different ranches, specifically described in the mortgages, the cattle were afterwards turned upon the range, and became confused; and the assignee of the first mortgage brought replevin for certain cattle in possession of the assignee of the second mortgage, it was held that plaintiff must identify the cattle demanded with those which, at the date of his mortgage, were upon the range described therein. National Bank *v.* Schufelt, *supra*. A mortgage of cattle describing them truthfully as to breed, age, color and location is not impaired by the fact that they are termed "Steers," when in the trade they were designated as "Stags." Sedalia Bank *v.* Casiday Co., Mo. Ap. 84 S. W. 142. Mis-description of the cattle as to location, the other particulars set down amply identifying them, will not vitiate the mortgage. Toötle *v.* Buckingham, 190 Mo. 183, 88 S. W. 619.

Where it clearly appears that the animals in controversy are the same mortgaged, slight variations from the true description are immaterial. Saenz *v.* Mumme, Tex. Civ. Ap. 85 S. W. 59. *Change in description.*—The lien of a chattel mortgage duly recorded and which describes a horse by its color, is not lost by the natural or unnatural change in the color, even though the new coat in no manner resembles the original. The mortgage binds even one who purchased without actual notice of the mortgage, and after the mutation in color. Turpin *v.* Cunningham, 127 N. C. 508, 37 S. E. 453, 51 L. R. A. 800. So where by natural growth a calf mortgaged becomes a cow, or by castration a boar is made a barrow, *Id.*

Mortgagee's Right to Possession.—If the goods are sold on execution against the mortgageor, mortgagee may recover them from the purchaser, Peckinbaugh *v.* Quillin, 12 Neb. 586, 12 N. W. 104; Pike *v.* Colvin, 67 Ills. 227. The legal title passes to the mortgagee and upon default he is entitled to possession without foreclosure, Kellogg *v.* Olsen, 34 Minn. 105, 24 N. W. 364. If any part of the mortgage debt is unpaid the mortgagee upon default is entitled to possession of the mortgaged chattels, Burns *v.* Campbell, 71 Ala. 271, Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620. The mortgagee is entitled to possession from the date of the mortgage, Satterthwaite *v.* Ellis, 129 N. C. 67, 39 S. E. 727. If default be made in any part of the debt mortgagee is entitled to possession if the mortgage so provide, Gilbert *v.* Murray, 69 Ills. Ap. 664; and so for default in interest, Flinn *v.* Ferry, 127 Calif. 648, 60 Pac. 434. The assignee of the mortgage has the same right, Id.; he is not affected by agreements of the mortgagee of which he has no notice, Satterthwaite *v.* Ellis, 129 N. C. 67, 36 S. E. 727;—and the mortgagee may after default peaceably enter the mortgageor's premises to seize the goods, Burns *v.* Campbell, 71 Ala. 271. Part payment of the debt is no plea, Hudson *v.* Snipes, 40 Ark. 75; but payment in full is a bar, Id. Mortgagee is entitled to retain possession as against all who claim under the mortgageor, in order to foreclose his lien, Esshom *v.* Watertown Co., 7 S. D. 74, 63 N. W. 229; *e. g.*, a receiver of mortgageor's

estate, Hammond *v.* Solliday, 8 Colo. 610, 9 Pac. 781. Mortgagor will not be allowed to recover a portion of the goods on plea of excess in the security, Dreyfus *v.* Cage, 62 Miss. 733; but where the mortgage provides that the goods shall remain in mortgageor's possession until default, the mortgagee, to recover them before maturity of the debt, must show a breach of some other condition of the mortgage, Williams *v.* Wood, 55 Minn. 323, 56 N. W. 1066. If the mortgageor assume to sell free of the mortgage, this is a conversion and gives the mortgagee a right of action, Heflin *v.* Slay, 78 Ala. 180. Mortgagee may maintain replevin for a portion of the goods and so confer jurisdiction upon a justice of the peace; it is not a splitting of the cause of action, Kiser *v.* Blanton, 123 N. C. 400, 31 S. E. 878. An assumption of possession by the mortgagee pursuant to the terms of the mortgage, does not impair its lien. Summerville *v.* Stockton Co., 142 Calif. 529, 76 Pac. 243.

In Washington, mortgagee cannot before maturity of the debt recover possession of the goods from one to whom the mortgageor has delivered them, even though the mortgage contains the usual clause against removal and disposition, Silsby *v.* Aldridge, 1 Wash. 117, 23 Pac. 836. In Indiana, the mortgagee is not entitled to possession unless the mortgage so expressly provides, Johnson *v.* Simpson, 77 Ind. 412. The mortgageor may replevy the goods after seizure by the mortgagee, upon showing failure of consideration, *e. g.*, that she bought the article from the mortgagee as new when in fact it was second-hand, that she had paid the full value, that mortgagee had promised to replace it by a new one, and had failed in his promise, Hennessey *v.* Barnett, 12 Colo. Ap. 254, 55 Pac. 197. And where the plaintiff claims under a mortgage to secure advances, his account may be scrutinized in an action by the mortgageor for unlawfully seizing the goods, Burns v. Campbell, 71 Ala. 271. Mortgagee instituting replevin before the maturity of the debt must, if the mortgage provides that the goods shall remain in the possession of the mortgageor until maturity, show a breach of some other condition, Kellogg *v.* Anderson, 40 Minn. 207, 41 N. W. 1045. Bailiff of mortgagee who seizes the goods under the mortgage, cannot stipulate away the mortgagee's rights in a replevin suit brought against such bailiff; the court will give judgment according to the interest of the mortgagee in spite of such stipulation. Casper *v.* Kent Circuit Judge, 45 Mich. 251, 7 N. W. 816.

Defects Cured by Possession.—In Edinger *v.* Grace, 8 Colo. Ap. 21, 44 Pac. 855, it was held that a chattel mortgage unacknowledged, is invalid as to creditors of the mortgageor, and that the defect was not cured by the assumption of the possession by mortgagee before the rights of creditors accrued. But Jenney *v.* Jackson, 6 Ills. Ap. 32, is to the contrary; and surrender of possession of its premises by the mortgageor to the mortgagee was held sufficient, though the former superintendent of the mortgageor was retained in the same capacity, *Id.* And in Hardy *v.* Graham, 63 Mo. Ap. 40, held, that actual possession of the mortgagee cures all faults of the mortgage—*e. g.*, defects in the memorandum or record, Howard Co. *v.* National Bank, 93 Ills. Ap. 473;

—the want of a record, Trimble *v.* Mercantile Co., 56 Mo. Ap. 683, First National Bank *v.* Barse Co., 198 Ills. 232, 64 N. E. 1097; and absence of both acknowledgment and record, Springer *v.* Lipsis, 209 Ills. 261, 70 N. E. 641; and see Esshom *v.* Watertown Co., 7 S. D. 74, 63 N. W. 229. Even though the mortgageor by consent of the mortgagee remain in possession of a stock of merchandise, selling and converting the proceeds for a considerable time after execution of the mortgage, yet if, before any levy, the mortgagee assumes possession, the mortgage becomes validated and no leviable interest remains in the mortgageor, Ahlman *v.* Meyer, 19 Neb. 63, 26 N. W. 584; such possession cures all defects in description, Falk *v.* DeCue, 8 Kans. Ap. 765, 61 Pac. 760. Ottumwa Bank *v.* Totten, Mo., 89 S. W. 65. Delivery to a third person, for the mortgagee, assented to by the latter, is effectual, *Id.;* so is the actual control of the goods by the mortgagee, though they remain on the premises of the mortgageor, First National Bank *v.* Barse Co., *supra. Mortgageor's Right to Possession.*—Mortgageor is entitled to possession until forfeiture of the mortgage, Boeger *v.* Langenberg, 42 Mo. Ap. 7; mortgageor remains the owner until condition broken, Gottsschalet *v.* Klinger, 33 Mo. Ap. 410; Niven *v.* Burke, 82 Ind. 455; if mortgagee replevy before any breach of the conditions, mortgageor is entitled to a return of the goods, and in assessing the value of his interest the mortgage debt is not to be deducted, Manker *v.* Sine, 35 Neb. 746, 53 N. W. 734; if the mortgagee has lawful possession the mortgageor has no remedy except by bill in equity to redeem, Holzhausen *v.* Parkhill, 85 Wis. 446, 55 N. W. 892.

Mortgageor's Interest Leviable.—A mere equity of redemption or permissive possession in the mortgageor is not the subject of levy except by virtue of statute, Peckinbaugh v. Quillin, 12 Neb. 587, 12 N. W. 104; *contra*, Heflin *v.* Slay, 78 Ala. 181; McMillan *v.* Larned, 41 Mich. 521, 2 N. W. 662; Udell *v.* Slocum, 56 Ills. Ap. 216. A levy after the mortgageor has sold his interest, is void, Ashcroft *v.* Simmons, 159 Mass. 203, 34 N. E. 188. If, after levy, the mortgage matures, the officer's right is at an end and the mortgagee may replevy, Ament *v.* Greer, 37 Kans. 648, 16 Pac. 102. The sheriff may levy upon mortgaged goods and take possession for the purpose of an inventory; but if he levies in disregard of the mortgage and not subject to it, replevin lies by the mortgagee, without demand, Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823. In Indiana, only the equity of redemption in the mortgageor can be sold, Consolidated Tank Line Co. *v.* Bronson, 2 Ind. Ap. 1, 28 N. E. 155. Mortgagee cannot even after maturity of the debt and default made, maintain replevin against an officer who has levied upon the goods, Olds *v.* Andrews, 66 Ind. 147; Mortgageor in possession has, until condition broken, a leviable interest, Schweitzer *v.* Hanna, 91 Wis. 318, 64 N. W. 997. Where the mortgage contains no insecurity clause the mortgagee's interest is leviable, but upon maturity of the debt, before sale under execution the mortgagee may demand the goods of the officer and maintain replevin, Simmons *v.* Jenkins, 76 Ills. 479. The officer is not guilty of a trespass in making the levy,

Id. An officer justifying under a void execution cannot assail the validity of a chattel mortgage valid as between mortgageor and mortgagee. Cummins *v.* Holmes, 109 Ills. 15.

Release or Waiver of the Lien.—Mortgagee by consenting to the levy of an execution upon a portion of the mortgaged goods does not waive his lien on the residue, Woolner *v.* Levy, 48 Mo. Ap. 469. Consent to the sale by mortgageor of a portion of the mortgaged chattels waives the condition of the mortgage prohibiting such sale, so far as relates to the particular articles sold, Dixon *v.* Atkinson, 86 Mo. Ap. 24. Mortgagee may even after taking possession, surrender his right to the mortgageor by parol and without consideration, Stone *v.* Jenks, 142 Mass. 519, 8 N. E. 403; may assent to a sale by the mortgageor in good faith, without losing the lien; the case is not within the doctrine that the mortgage is void where the mortgageor remains in possession, selling in the ordinary course of trade, Houck *v.* Linn, 48 Neb. 227, 66 N. W. 1103. Taking possession and storing the goods in accordance with the terms of the mortgage, is not a waiver of the lien, Summerville *v.* Stockton Co., 142 Calif. 529, 76 Pac. 243. Permitting the plaintiff to pile upon defendant's mill-yard the lumber in controversy, in separate piles for its better curing and seasoning, is not a surrender of the possession or a waiver of the lien, Holderman *v.* Manier, 104 Ind. 118. The right of the mortgagee to possession is not lost by irregularities in the sale, Tackaberry *v.* Gilmore, 57 Neb. 450, 78 N. W. 32; Kelsey *v.* Ming, 118 Mich. 438, 76 N. W. 981; Pope *v.* Jenkins, 30 Mo. 528; Saunders *v.* Closs, 117 Mich. 130, 75 N. W. 295. An agreement between mortgageor and mortgagee, waiving the statutory notice of sale cannot be questioned by a creditor who then had no lien, Tackaberry *v.* Gilmore, *supra.* An intention by the mortgagee to remove the mortgaged goods to another county, does not impair his right to maintain replevin, though the statute requires that mortgaged chattels shall be sold where the mortgageor resides or where the goods are situated when mortgaged, Howard Co. *v.* National Bank, 93 Ills. Ap. 473. Agreement between mortgagee of tenant's interest in the crop, and the landlord having a lien thereon, that the landlord shall purchase the tenant's interest, harvest and sell the crop, taking the expense from the tenant's share and paying the residue to the mortgagee, is a valid agreement and not in contravention of a statute prohibiting the sale of mortgaged chattels to any person without consent of the mortgagee, Richey *v.* Ford, 84 Ills. Ap. 121. Replevy of goods attached and sale of a portion of them to satisfy the attacher's claim, the residue being returned to the sheriff, does not disturb the lien of the attachment, Pace *v.* Neal, 92 Ills. Ap. 416. Payment of a note given by a third person as collateral to the mortgaged debt, which was thereupon transferred to the party making the payment, does not discharge the mortgage, Park *v.* Robinson, 15 S. D. 557, 91 N. W. 344; but the lien is discharged by a tender of the amount due, Jones *v.* Rahilly, 16 Minn. 320. Surety in replevin bond, held a chattel mortgage upon the goods. After judgment of *retorno*, he

seized the goods under his chattel mortgage and delivered them to the defendant in satisfaction of the judgment. Held, he thereby waived his chattel mortgage, and could not recover the goods in another replevin, claiming under the mortgage. Rich *v.* Savage, 12 Neb. 413, 11 N. W. 863. The mortgagee waives his lien by levying an attachment upon the mortgaged chattels. Evans *v.* Warren, 122 Mass. 303. See *contra* Byran *v.* Stout, 127 Ind. 195, 26 N. E. 687; Barchard *v.* Kohn, 157 Ill. 579, 41 N. E. 902; First National Bank *v.* Johnson, Neb. 94 N. W. 837. Not by consent to a sale of the mortgaged goods, subject to the mortgage. Fields *v.* Jobson Company, 109 Mo. Ap. 84, 81 S. W. 636.

Payment.—Payment of the mortgage debt reinvests mortgagor with the property in the goods, even though made after breach of the conditions. Summer *v.* Kelly, 38 S. C. 507, 17 S. E. 364. The proceeds of the mortgaged chattels must be applied to the mortgage debt, *Id.* If the debt has been paid the mortgagee cannot lawfully intermeddle with the goods. Hase *v.* Schotte, 109 Mo. Ap. 458, 84 S. W. 1014; cannot recover the goods though the attorney through whom he acted converted the money and forged the client's name to a release of the mortgage, Dentzel *v.* City & Suburban Co., 90 Md. 434, 45 Atl. 201. Payments exacted in excess of the lawful rate of interest under claim of brokerage or commissions for indulgence will be treated as a payment upon the debt, Nunn *v.* Bird, 36 Ore. 515, 59 Pac. 808. And defendant may show that the mortgage was given in substitution for a former mortgage, expressed to bear only the lawful rate of interest, and that mortgagee had upon such pretense of commissions for indulgence exacted usury to an amount in excess of the principal and lawful interest due upon the debt, *Id.*

Bankruptcy of the Mortgagor.—A mortgage executed more than four months before bankruptcy is not voidable merely because not recorded until within the four months. First National Bank *v.* Johnson, Neb. 94 N. W. 837. The question whether a recordable instrument, *e. g.*, a chattel mortgage, constitutes a preference within the meaning of the bankruptcy act is to be determined by the state of facts existing at the time of its execution, and not at the time of the record; if not really a preference but given upon a new and adequate consideration a failure to record it until the maker becomes insolvent does not cause it to become a preference. Seager *v.* Lamm, Minn., 104 N. W. 1.

A mortgage of part of a mass or greater quantity without separation or identification, creates no lien; and if no identification or separation occur until within four months of the bankruptcy, the mortgage is an unlawful preference. First National Bank *v.* Johnson, *supra*. The bankruptcy of the mortgagor does not invalidate the mortgage, nor impair the mortgageor's right. Taylor *v.* Springfield Company, 180 Mass. 3, 61 N. E. 217.

But it is held that if the mortgagee in a mortgage executed by one who subsequently and within four months becomes a bankrupt, to secure an existing indebtedness, after notice of the mortgageor's in-

solvency causes the property to be sold by the mortgageor before his bankruptcy, and appropriates the proceeds, he is liable to the trustee in bankruptcy. Jackman *v.* Eau Claire Bank, Wis. 104 N. W. 98.

Foreclosure Pending Replevin.—Mortgagee securing possession by replevin may, while the replevin is still pending, foreclose his mortgage and confer a good title upon the purchaser, as against an inferior lien claimant; and it seems it is his duty to do so and proceed with diligence, Union National Bank *v.* Moline Co., 7 N. D. 201, 73 N. W. 527, Lewis *v.* D'Arcy, 71 Ills. 648; he is accountable to his adversary for the value of the goods from the time when taken, with interest, if by delaying to foreclose his mortgage the property is lost, *Id.* He must so proceed as to make the greatest amount reasonably possible from the security, so that the burden of his particular mortgage may be lessened, *Id.*

Sale under the Power.—In Bordeaux *v.* Hartman Company, Mo. Ap. 91 S. W. 1020, the mortgagee for default in the condition of the mortgage assumed possession of the goods. The conduct of its agents was in every respect lawful and considerate. No threats or rude language were indulged in; yet because the mortgageor, a nervous woman, lost her reason by occasion of this misfortune, it was held that the husband might maintain an action against the mortgagee. The mortgagee seizing the mortgaged chattels under a power of sale in the mortgage must do so in a peaceable manner. He is authorized to enter the mortgageor's premises. Bordeaux *v.* Hartman Company, Mo. Ap. 91 S. W. 1020. The power is irrevocable. *Id.* The mortgagee must exercise the utmost good faith; he may not sacrifice the property for less than a reasonable valuation, and if he do so he is liable to the mortgageor. Johnson *v.* Selden, 140 Ala. 418, 37 So. 249. Kellogg *v.* Malick, Wis. 103 N. W. 1116. The mortgageor sold twenty-eight head of cattle in one lot and seventy-seven head of cattle and one horse in another lot. The total sales amounted to thirteen hundred dollars. The property was worth over seventeen hundred dollars. The mortgageors requested that they should be sold in small lots and several persons were present desiring to buy in small lots but not the whole herd. Held, that the sale was unfair and the defendant having purchased the property was bound to account for its value. Kellogg *v.* Malick, *supra.* The sale of many items in one lot is *prima facie* unfair. Johnson *v.* Selden, *supra.* The sureties in a promissory note are not authorized to assume possession of goods mortgaged to secure the promissory note. Only the mortgagee can exercise those powers. Mardis *v.* Sims, 140 Ala. 388, 37 So. 243. The proof of posting of a notice of sale of chattels under a mortgage stated that the same was posted "*at or near*" a house named. Held, too indefinite, and that the sale under such notice was irregular and without effect as to a junior mortgagee. Powell *v.* Hardy, Minn. 94 N. W. 682. But a creditor will not be permitted to question, upon the ground of a defect in the notice, a sale to which the mortgageor has consented. Wasserman *v.* McDonnell, Mass. 76 N. E. 959.

Mortgage of Wife's Separate Property.—Where the mortgage is executed by both husband and wife it creates a lien upon the chattels described, whether it be community property or the separate property of the wife, Ayery *v.* Popper, Tex. Civ. Ap. 45 S. W. 951.

Conditional Sale.—A condition that the title to chattels shall remain in the vendor until payment, is valid in many of the states, even as against a bona fide purchaser of the vendee to whom possession has been delivered, Harkness *v.* Russell, 118 U. S. 663, 30 L. Ed. 285; Couse *v.* Tregent, 11 Mich. 65; Ross-Meehan Co. *v.* Pascagoula Co., 72 Miss. 608, 18 So. 364; Bennett *v.* Tam, 24 Mont. 457, 62 Pac. 780; Roof *v.* Chattanooga Co., 36 Fla. 284, 18 So. 597; Payne *v.* June, 92 Ind. 252; Cottrell *v.* Carter, 173 Mass. 155, 53 N. E. 375; Wall *v.* De Mitkiewicz, 9 Ap. D. C. 109; Fischer *v.* Cohen, 48 N. Y. Sup. 775; Wangler *v.* Franklin, 70 Mo. 659; Hodson *v.* Warner, 60 Ind. 214; Rice *v.* Crow, 6 Heisk, 28. Any writing, however informal, expressing the purpose to part with the property only on payment of the price is a conditional sale. Smith *v.* Aldrich, 180 Mass. 367, 62 N. E. 381; Plymouth Company *v.* Fee, 182 Mass. 31, 64 N. E. 419. But an agreement between vendor and vendee of chattels that they shall not be sold by the vendee until paid for, is not equivalent to a reservation of the title. Neal *v.* Cone, Ark. 88 S. W. 952. Upon an order for goods, prepared upon a blank form, used by a manufacturer both for making sales and for constituting agencies, was an endorsement, expressing a reservation of the title of goods manufactured, etc., until payment should be made. This was however under the title or caption "Agency Contract." The face of the contract imported an absolute sale, and that buyer should be at liberty to sell again. Held, that the endorsement did not work a reservation of the title. Oliver Plow Works *v.* Dolan, Mich. 103 N. W. 186.

A conditional sale is not a chattel mortgage. Neither acknowledgment nor record is necessary, Goodgame *v.* Sanders, 140 Ala. 247, 37 So. 200; Bronson *v.* Russell, Ala. 37 So. 672; Bennett *v.* Tam, *supra;* as against the original purchaser, even though the statute provides that "all bills of sale . . . for securing the payment of moneys . . . shall be deemed mortgages," Campbell Co. *v.* Walker, 22 Fla. 412; Sinclair *v.* Wheeler, 69 N. H. 538, 45 Atl. 1085;—but whether as against his subsequent creditors and *bona fide* purchasers from him, Quere, Campbell Co. *v.* Walker, 22 Fla. 412. And though a promissory note was given for the goods the vendor may show by parol that the title was to remain in him until payment, Hutchinson *v.* Hutchinson, 102 Mich. 635, 61 N. W. 60. And such conditional sale may be made by word of mouth, Crews *v.* Harlan, Tex. 87 S. W. 656, S. C. 88 S. W. 411. If the sale be of the timber standing upon certain lands vendor may recover the lumber manufactured from the logs even from those who purchase for value and without notice, Lilly *v.* Dunbar, 62 Wis. 198, 22 N. W. 467; Bent *v.* Hoxie, 90 Wis. 625, 64 N. W. 426; Hyland *v.* Bohn Co., 92 Wis. 163, 65 N. W. 369. The vendee takes no title until payment,

Wall v. De Mitkiewicz, 9 Ap. D. C. 109; Bennett *v.* Tam, *supra;* Stevens *v.* Georgia Co., 122 Geo. 317. His right of possession depends upon compliance with the terms of his purchase, Wiggins *v.* Snow, 89 Mich. 476, 50 N. W. 991. If the condition be that purchaser shall furnish approved security, the vendor is the exclusive judge of the sufficiency of the security offered. Bonham *v.* Hamilton, 66 O. St. 82, 63 N. E. 597. The conditional purchaser may ordinarily sell his right; but if he assume to sell the whole property this is a conversion, Partridge *v.* Philbrick, 60 N. H. 556. The conditions of the sale bind those who succeed to the purchaser's right, Quinn *v.* Parke Co., 5 Wash. 276, 31 Pac. 866. Chattel mortgage by the purchaser does not impair the vendor's right, Wiggins *v.* Snow, *supra*, 1. And so long as there is no default in the conditions of the purchase the purchaser has a leviable interest, and the seller cannot, in the absence of a provision to that effect in the contract, re-take the goods from the officer;— in case of sale of the goods upon execution the purchaser upon completing the payments takes the title, Savelle *v.* Wauful, 16 N. Y. Sup. 219. Upon default by the purchaser the seller may at once maintain replevin, Bancroft-Whitney Co. *v.* Gowan, 24 Wash. 66, 63 Pac. 1111; Gill *v.* De Armant, 90 Mich. 425, 51 N. W. 527; Webster *v.* Brunswick-Balke Co., 37 Fla. 433, 20 So. 536;—even from an officer who seizes them under process against the purchaser, Forbes *v.* Martin, 7 Houst. 375, 32 Atl. 327;—or from one to whom the purchaser has pledged them, Ferguson *v.* Lauterstein, 160 Pa. St. 427, 28 Atl. 852; even from a purchaser for value without notice, Lorain Co. *v.* Norfolk Co., 187 Mass. 500, 73 N. E. 646; and even though the contract of sale fails to stipulate for such action, Richardson Co. *v.* Teasdall, 52 Neb. 698, 72 N. W. 1028. Whoever succeeds to the vendor's rights, *e. g.*, his trustee in bankruptcy, Gordon *v.* Farrington, 46 Mich. 420, 9 N. W. 456; the endorsee of a note secured by the conditional sale, has the same right, Myres *v.* Yaple, 60 Mich. 339, 27 N. W. 536; Wall *v.* De Mitkiewicz, 9 Ap. D. C. 109; Ross-Meehan Co. *v.* Pascagoula Co., 72 Miss. 608, 18 So. 364. In McPherson *v.* Acme Co., 70 Miss. 649, 12 So. 857, it was held that the vendor might replevy the goods, although he had assigned the notes given in evidence of the purchase money, and that no one else could maintain such action; but that he would hold the goods and the proceeds as trustee to apply the proceeds to discharge the notes. Mere endorsement of a writing evidencing the purchase of goods upon credit and that the title remains in the vendor, does not entitle the endorsee to maintain replevin, Roof *v.* Chattanooga Co., 36 Fla. 284, 18 So. 597; Hyde *v.* Courtwright, 14 Ind. Ap. 106, 42 N. E. 647. There must be a previous demand, Moran *v.* Abbott, 26 Ap. Div. 570, 50 N. Y. Sup. 337; Heinrich *v.* Van Wrickler, 80 Ap. Div. 250, 80 N. Y. Sup. 226; Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788; *contra*, no demand is necessary, Proctor *v.* Tilton, 65 N. H. 3, 17 Atl. 638. And replevin for the goods is not a disaffirmance of the contract, Payne *v.* June, 92 Ind. 252;— the vendor need not tender back what he has received, Duke *v.* Shackelford, 56 Miss. 552; Fair-

banks *v.* Molloy, 16 Ills. Ap. 277. *Contra* Oskamp *v.* Crites, 37 Neb. 837, 56 N. W. 394. And if the contract provide that upon default the vendee may take possession of the goods and retain all prior payments as liquidated damages, the seller's right is not dependent upon any settlement with the buyer, Sanford *v.* Gates, 21 Mont. 277, 53 Pac. 749. But in Commercial Co. *v.* Campbell Co., 111 Geo. 388, 36 S. E. 756, it was held that if after receiving partial payment the seller brings his action to recover the goods he is liable to account for what he has received less the value of the hire. And replevin will not lie if nothing be due on the purchase price, even though a part be yet unpaid, Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788. A removal of the goods contrary to the conditions of the sale, but which has been waived, cannot be treated as a conversion so as to relieve of the necessity of a demand. Where the thing sold is a stock of merchandise, additions made by the buyer cannot be claimed by the seller, Richardson Co. *v.* Teasdall, 52 Neb. 698, 72 N. W. 1028. And the vendor cannot, as against a subsequent pledgee, claim goods pledged as additional security for the purchase price, no record of the writing of pledge having been made, Farr *v.* Kilgour, 117 Mich. 227, 75 N. W. 457. An infant who has purchased a machine conditionally, partial payments to be retained by the seller for its use, in case default is made, is not to be allowed his payments where, for his default and an attempted concealment of the machine, the seller recovers it, Wheeler Co. *v.* Jacobs, 21 N. Y. Sup. 1006. Delay does not impair the right of vendor to take possession, Quinn *v.* Parke Co., 5 Wash. 276, 31 Pac. 866. Mantel-pieces sold conditionally by a writing recorded in accordance with the statute remain personalty, though set up in the building of the purchaser, Nichols *v.* Potts, 71 N. Y. Sup. 765, citing, Duffus *v.* Furnace Co., 8 Ap. Div. 567, 40 N. Y. Sup. 925. In Pennsylvania a sale and delivery of personalty with an agreement, in whatever form, that the title still remains in the vendor, is void as against creditors and innocent purchasers, Ryle *v.* Knowles Loom Works, 87 Fed. 976, 31 C. C. A. 340; but the delivery accompanied by an agreement for a future sale on the payment of a specified price does not pass the property; the transaction is valid even as against creditors and purchasers, *Id.*

Assignee of the vendor in a conditional sale, is bound by the agreement of the assignor. He has no right to increase the purchase price, or demand the payment of other sums, as the condition of making title. Kimball *v.* Farnum, 61 N. H. 348. Silence of the purchaser in a conditional sale, when the assignee of the vendor proposes to make title to the goods if the buyer will discharge other sums of money, is not an assent, *Id.*

Conditional vendor does not lose title by taking judgment for the price. Forbes Co. *v.* Wilson, Ala. 39 So. 645.

The plaintiff purchased of the defendant a piano to be paid for by instalments, title being reserved. She subsequently married. Payments upon the contract were afterwards made by the husband on

the wife's account. At a later date the wife's contract to purchase was surrendered, and a similar contract executed by the husband. Default having been made, the vendor retook the property. It was held that the wife was not entitled to an action for conversion. The new arrangement with the husband being a mere substitution for the original contract, did not deprive the seller of his title. Lane *v.* Dreger, Minn. 103 N. W. 710.

Tender of the purchase price by the vendee, invests him with the title, *Id.* Goods delivered by A. to B. to be sold by B. if he should have demand for them, and then to be paid for, or if not sold they were to be returned on demand. Held, that the property vested in B., Cook *v.* Gross, 60 Ap. Div. 446, 69 N. Y. Sup. 924.

A vendor of furniture with the knowledge that it is to be used to equip a house of ill fame is deemed to aid in the immoral and illegal purpose of the purchaser, and will not be heard as against one who purchased the goods on execution against the original vendee to assert the conditional character of his sale and his retention of the title. Standard Co. *v.* Van Alstine, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889.

In Michigan by statute a condition in the sale of chattels that the vendor retains title until payment, is invalid as to subsequent *bona fide* purchasers. Hogan *v.* Detroit Company, Mich. 103 N. W. 543. In Texas all reservations of the property in chattels as security for the purchase money are declared by statute to be mortgages, and, when possession is delivered to the vendee, are void as to creditors and *bona fide* purchasers unless registered. The effect of this is declared to be that the transaction is a chattel mortgage, even as between the parties, whether in writing or parole; and that as to subsequent *bona fide* purchasers, the reservation of title by parole is void. Eason *v.* De Long, Tex. Civ. Ap. 86 S. W. 347; Crews *v.* Harlan, Tex. 87 S. W. 656; Wright *v.* Texas Company, Tex. Civ. Ap. 90 S. W. 905.

CHAPTER X.

PROPERTY SEIZED FOR A TAX.

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§ 224. **Property seized for the payment of a tax not repleviable.** There is a provision common to the laws of all the States, that goods seized on legal process issued for the collection of a tax cannot be retaken from the officer by a writ of replevin.[1]

[1] People *v.* Albany C. P., 7 Wend. 484; Bilbo *v.* Henderson, 21 Iowa, 56; Macklot *v.* City of Davenport, 17 Iowa, 379; Hershey *v.* Fry, 1 Iowa, 593; Vocht *v.* Reed, 70 Ill. 491; LeRoy *v.* East Sag. Ry. Co., 18 Mich 233; McClaughry *v.* Cratzenberg, 39 Ill. 122; Bringhurst *v.* Pol-

The reason for this rule is found in the necessity for protecting the public revenue, and to prevent the delay in its collections which might result if property seized by an officer upon a warrant for the collection of taxes were permitted to be taken from his hands pending an inquiry into the propriety of the seizure. While other and ample means of redress are provided for the owner, in case his property is wrongfully distrained, this remedy is forbidden. The prompt collection of the public revenue is regarded as a standing and public exigency, to which private rights must yield or be abridged; at least, of this action. The law therefore forbids replevin of goods so seized, and remits the party to his action for trespass or trover, or such other proper action as he may elect.[2] "Disastrous indeed," says Justice Breese, "would be the consequences to the public, was it allowed to every taxable inhabitant who may have conceived a notion that a law of general application imposing taxes is void, and therefore he shall be permitted to arrest its operation, and thus break down the financial system of the State. If one may do it, the whole community may, and ruin and disgrace would inevitably follow the extinction of the State credit thus brought about. The law forbids the consideration of the question of the legality of a tax, assessment or fine levied under any law standing on the statute book of this State, by means of the action of replevin, and for the reasons we have given."[3]

§ 225. **Irregularity in issuing the warrant does not change the rule.** Replevin will not lie for property taken by virtue of a warrant for the collection of a tax, even though the warrant may have issued erroneously or irregularly, or contrary to law. If on its face it gives the officer authority to collect a tax, and to seize property for that purpose, replevin for property so seized cannot be sustained in this action. It is not that greater license is given to an officer collecting a tax than to one executing other process. An irregular warrant or a void levy of a tax warrant is no protection to the officer; but the injured party cannot employ replevin; he cannot begin a contest over the regularity

lard, (Ind.) 452; Buell *v.* Ball, 20 Iowa, 282; Hudler *v.* Golden, 36 N. Y. 446; Stoddard *v.* Gilman, 22 Vt. 570; Troy & Lans. R. R. *v.* Kane, 72 N. Y. 614.

[2] Stiles *v.* Griffith, 3 Yeates, (Pa.) 82; Heagle *v.* Wheeland, 64 Ill. 423; LeRoy *v.* East Sag. Ry. Co., 18 Mich. 233.

[3] McClaughry *v.* Cratzenberg, 39 Ill. 122.

of the proceeding by withdrawing the property from the custody of the law.[4]

§ 226. **Nor the fact that no taxes are due from the party whose goods are seized.** When a defendant justified under a tax warrant, a replication that there were no taxes due from the plaintiff to the town would in effect bring up the entire question of the legality of the tax, and such a replication would be bad.[5]

§ 227. **Prohibition extends to goods seized for tax due the United States or an incorporated village.** The prohibition is not confined to goods seized for the payment of taxes due the State, but extends to and embraces goods which have been seized by virtue of a warrant for the collection of taxes levied under a law of Congress,[6] or under the internal revenue laws of the United States.[7] So, where the seizure was for taxes levied by virtue of a process for the collection of a tax due an incorporated city, town or village, levied under its corporate powers, the same rule applies, and prohibits replevin of the property from the officer seizing it. In this case the municipal authorities are regarded as acting under a law of the State, and all the reasons which prohibit the seizure in the case of the State apply when the tax is for the benefit of a local municipal corporation, to the same extent and in the same manner. In all these cases, therefore, when the seizure has been made by an officer acting under the authority of a tax warrant valid on its face, the property seized is exempt from the operation of the writ of replevin.[8]

§ 228. **The usual form of the prohibition is a requirement in the affidavit.** This exemption, as was stated, is a statutory provision common to all the States where this action is in use; and though the common law was not unlike the statute on this subject, local statutes have defined and emphasized the prohibition,

[4] People *v.* Albany Com. Pleas, 7 Wend. 485; Hudler *v.* Golden, 36 N. Y. 446; Buell *v.* Schaale, 39 Iowa, 293; Niagara Elev. Co. *v.* McNamara, 2 Hun, (N. Y.) 416.

[5] Mt. Carbon Coal Co. *v.* Andrews, 53 Ill. 177.

[6] O'Reilly *v.* Good, 42 Barb. 521.

[7] Delaware R. R. Co. *v.* Prettyman, 7 Int. Rev. Rec. 101; Pullen *v.* Kensinger, 11 Int. Rev. Rec. 197; Brice *v.* Elliot, 8 Legal News, 322.

[8] Mt. Carbon Coal Co. *v.* Andrews, 53 Ill. 183; People *v.* Albany Com. Plea, 7 Wend. 485; Savacool *v.* Boughton, 5 Wend. 178. *Due process* of law in the assessment of taxes does not require a judicial proceeding. McMillen *v.* Anderson, U. S. Sup. Ct. Oct. 1877; Cent. Law Journal, Nov. 23, 1877, P. 445; Pullen *v.* Kensinger, 11 Int. Rev. Rec. 197.

and control the practice in all cases. The usual form of the statutory prohibition is a provision that the writ shall not issue for the delivery of the property in any case, unless the plaintiff shall first file an affidavit that the goods for which the writ is about to be sued out have not been taken for any tax, etc., levied by virtue of any law of the State.[9] This provision is imperative, and any attempt to evade its letter or spirit will be regarded as an attempt to evade one of the vital prerequisites to the issuing of the writ. When the plaintiff filed an affidavit that "the property had not been taken for any *legal* tax, as this affiant is informed and believes," the court said the departure from the requirements of the statute was very palpable, and upon the plaintiff desiring leave to amend the affidavit, the court refused permission and quashed the writ, holding that it was informed of the design of the plaintiff to test the constitutionality of the law under which the tax was assessed. "The amended affidavit," said the court, "if filed, and trial had, would have presented the same question." The court would have been compelled to dismiss the suit the very moment it was shown that a question of taxation was involved, and the constitutionality of the law imposing the tax was the hinge on which the case turned.[10] Where the defendant in replevin pleaded formally that the property had been seized for a tax due the town of Murphreysboro', setting up, also, his authority as collector of taxes, and the plaintiff replied 1st, that defendant was not duly or legally appointed collector, etc. 2d. That there was no such corporation or city. 3d. No valid ordinance in force authorizing defendant to distrain, etc. 4th. No tax due from plaintiff. 5th. The goods not legally distrainable. To these replications a demurrer was interposed and sustained, and an appeal taken to the supreme court, where the decision was affirmed, the court holding, 1st. Replication was no bar, because it failed to deny that the defendant was collector *de facto* or *de jure*. The question whether he was lawfully in office could not be tried in this action; hence, the replication tendered a collateral issue. 2d. The question whether the town of Murphreysboro' was legally incorporated could not be tried in this proceeding. Had the replication been that the town had never been and was not then acting as a corporation, and the

[9] See Bringhurst *v.* Pollard, 6 Ind. 452.

[10] McClaughry *v.* Cratzenberg, 39 Ill. 123. See McPhelomy *v.* Solomon, 15 Ind. 189.

defendant acted without color of right, the question would have been different, and the replication might have been sufficient. "The fourth replication sought to present the question whether there was any tax due the town. It would, as pleaded, have opened the entire question whether the tax was legally levied, and might have led to an investigation whether the town had observed the requirements of its charter and ordinance in levying the tax, and led to the very controversy which the General Assembly intended should not be litigated in this form of action." The questions of the legality of the levy, or of the observance or neglect of any of the formal requirements of the levy, cannot be inquired into in this action.[11]

§ 229 **The jealousy with which the courts look upon attempts to evade this requirement.** The courts look with extreme jealousy upon all the provisions of the law upon this subject, and any attempt to evade them, or by indirection, to use this writ for the purpose of defeating or delaying the collection of a tax, will be stranded at the threshold. Where the affidavit stated that the property had not been taken "*in execution*" for any tax, assessment or fine, the court said: "The statute required an affidavit that the property had not been taken for any tax, etc. The plaintiff has sworn that it had not been taken by virtue of a particular process, that is, the process of execution; but this may be true, and still the property may have been distrained for taxes," and the affidavit was held insufficient.[12]

§ 230. **Questions of double assessment cannot be tried in this action.** Questions of erroneous, illegal, or double assess-

[11] Mt. Carbon C. & R. R. Co. *v.* Andrews, 53 Ill. 184.

[12] Campbell *v.* Head, 13 Ill. 126. When property which has been seized for a tax is by any means replevied from the officer, the court will at once, upon that fact becoming apparent, dismiss the action and order a return. McClaughry *v.* Cratzenberg, 39 Ill. 123; People *v.* Albany Com. Pleas, 7 Wend. 485; Bringhurst *v.* Pollard, 6 Ind. 452; Dowell *v.* Richardson, 10 Ind. 574. When the plaintiff made oath that goods were not taken for any tax, and the collector and his deputy both swore in positive terms that it was taken for a tax, we should probably assume that the plaintiff was mistaken, and did not know that it was taken for a tax. O'Reilly *v.* Good, 42 Barb. 521. A tax warrant, regular on its face, is a protection to the officer, so far as the writ of replevin is concerned, and while the owner may enquire into the legality of the levy by *certiorari* or other proceeding, he cannot by replevin of the property. Bilbo *v.* Henderson, 21 Iowa, 57.

ment, cannot be tried in this action. If error in the assessment, or mistake or illegality in the levy, could be tried, very few cases would be found to lack these elements, or some of them. Where a collector distrained for a tax assessed against the owner of property, he cannot replevy it by showing that it was, when assessed, in the hands of an agent, and had been assessed as belonging to the latter, and the tax paid on such assessment.[13]

§ 231. **Property seized for the payment of a tax due from another person.** When a party has his property seized for a tax due from another person, with whom he is in no way connected, and for which he is in no way responsible, replevin will be permitted at the suit of the owner. This rule will not apply where the tax-gatherer finds the property seized in the possession of the delinquent tax-payer; in making the seizure in such cases the officer does nothing but his duty.[14] But when the tax collector seizes upon the property of A. in A.'s possession, to satisfy a tax due from B., whether the seizure be by design or evident mistake, the act is wrongful, and the warrant, though never so formal and proper so far as A. is concerned, yet it is no warrant against B., and by all the analogies of the law in similar cases, will not furnish any justification to the officers.[15] A warrant for the collection of taxes by distraint on the goods of A. is, in fact, no justification of a wilful trespass by the officer upon the goods of B.,[16] and replevin will lie.

§ 232. **The same.** The case of *Vocht* v. *Reed*, 70 Ill. 491, holds a doctrine directly contrary to that stated above. The law in Illinois is of course settled by this case: and in States where a similar statute exists, should the case arise for the first time, the construction adopted in Illinois may be followed, or the decision in Michigan or New York may be thought the most worthy example.[17]

[12] Palmer *v.* Corwith, 3 Chand. (Wis.) 297.

[14] Sheldon *v.* Van Buskirk, 2 Const. (N. Y.) 473.

[15] Travers *v.* Inslee, 19 Mich. 100; Stockwell *v.* Veitch, 15 Abb. Pr. 412.

[16] Atlantic, etc., R. R. *v.* Cleino, 2 Dillon, 175; Noyes *v.* Haverhill, 11 Cush. 338. See and compare Heagle *v.* Wheeland, 65 Ill. 425.

[17] Opinion of the court by Mr. Justice CRAIG: Upon comparison of the two clauses of § 3, it will be seen there is a striking difference between them. The one reads, "And that the same has not been taken for any tax, assessment or fine, levied by virtue of any law of this state;" and the other clause reads, "nor seized under any execution

§ 233. **The prohibition of his remedy does not affect the right of the party to employ any other proper remedy.** While the law prohibits the use of the action of replevin for the recovery of goods seized for a tax, it by no means debars the injured party of other and proper remedies. The intention of the law is to prevent the withdrawal of property seized for a tax from the custody of the officer; not to prevent the party from proceeding to recover damages in case the seizure was wrongful. The owner of goods so seized may, therefore, sue the officer in

or attachment against the goods and chattels of such plaintiff *liable to execution or attachment.*" Where the goods of a stranger to an execution are taken, he can, with truth and propriety, swear that the property was not taken by virtue of an execution or attachment against his goods and chattels liable to execution or attachment; but where property is taken by a tax collector under a warrant for taxes, a different case is presented. The point is not whether the property is *liable* to a tax warrant, as is the case when taken on execution or attachment, but has the property been taken on a tax warrant? If it has, the writ of replevin cannot issue, because the statute says no writ shall issue until an affidavit is filed that the property has not been taken for any tax assessment or fine levied by virtue of any law of this state. The effect of the statute is that the action of replevin does not lie in any case where the property is seized by a tax collector under a tax warrant. The object and intent of the statute are obvious. The government cannot be carried on, and the laws enforced, without the revenue is collected. If the collectors of the revenue were to be hampered and tied up by replevin suits when they are collecting taxes, it would be found difficult, if not impossible, to make collection; and we have no doubt the legislature foresaw these difficulties, and prohibited the action of replevin for the very purpose of avoiding them. It is, however, insisted by appellee that it is a great hardship to have one man's property taken to pay a tax of another. The tax collector has no right to take the property of one to pay the tax of another; if he does it, he is liable. The injured party has his remedy in trespass or trover. If the officer takes property of one to pay the tax of another, he acts at his peril; and the laws of the country will compel him to respond in ample damages to the injured party; so that the law, while it prohibits a remedy by action of replevin, affords ample protection in another form of action. The judgment of the circuit court will be reversed and the cause remanded.

BREESE, Chief Justice, dissenting: I cannot believe it was the intention of the legislature to authorize the levy and sale of the property of A. to pay the taxes of B. The design of the statute evidently was to prevent any person whose property has been levied on, for taxes assessed against him, to question it in an action of replevin, and that is the extent of McClaughry v. Cratzenberg, 39 Ill. 117, as

trespass, or any other proper form of action, and may recover the value of his goods with damages for the taking and detention.[18]

§ 234. **The action permitted where the plaintiff does not ask delivery of the property.** The action of replevin has been permitted to contest the legality of a tax in cases where the plaintiff does not claim delivery of the goods pending the suit. This, it will be observed, in no way interferes with the prompt collection of the revenue, which is the only reason for the general rule, and there appears no objection in the principle to allowing the action in all cases as a means of contesting the validity of the tax levy, provided the writ is not allowed to interfere with the possession of the property by the officer who holds the tax warrant, or delay the collection of the tax. The statute in many States permits the plaintiff to sue in this form of action without asking deliverance until the court shall have had an opportunity to try

the reasoning of the opinion shows. A person may be passing through a town or city of this state, with his vehicle, and it was seized by a tax-gatherer for the taxes, not assessed against that property or its owner, but against another person. Under this decision, that official, in Chicago or any other place, can enter the dwelling of a person and take from it his choicest furniture, his heirlooms, and valuable works of art, to pay taxes not assessed against it, and for which it is not liable. It is poor satisfaction, and the merest trifling with one's right to property, to say he can sue the officer in trespass or trover. The officer may not be able to respond in damages, and in the meantime the owner has lost an article of property for which money would be no compensation, as there is a matter of sentiment involved in the possession of such. It would be no satisfaction to one on a journey to have his horse and carriage taken from him in this way, and be denied a speedy remedy, by replevin, to repossess himself of his property and proceed on his journey. Nor would it be to a farmer who has brought a load of wheat to market. In this case, there is no public necessity for this levy, as the land, upon which the tax was assessed, was immovable, and could be sold, as in like cases, for the taxes. I cannot believe it could have been the intention of the lawmakers that this act should have the construction now given by this court. Every man's property is now at the mercy of the tax-gatherer, whether taxes are due upon it or not. This is, in my opinion, a great wrong and injustice.

Mr. Justice Scott: I concur with the Chief Justice in the above construction of the statute. Vocht *v.* Reed, 70 Ill. 491.

[18] Dow *v.* Sudbury, 5 Met. 73; Shaw *v.* Becket, 7 Cush. 442; Cardinal *v.* Smith, Deady, C. C. 197; Ware *v.* Percival, 61 Me. 391; People *v.* Supervisors of Chenango, 11 N. Y. 563; Supervisors, etc., *v.* Manny, 56 Ill. 161; Lauman *v.* Des Moines C., 29 Iowa, 310.

the title and pronounce upon the rights of the parties. In such case the action is similar to trover; the judgment is for the property, or its value in case it cannot be had. This proceeding in no way delays the collection of the taxes, and none of the rules which apply in such cases apply in this.[19]

§ 235. **The prohibition does not extend to a purchaser at tax sale.** While property which has been seized upon a warrant for the collection of a tax or a fine cannot be replevied, the prohibition goes no further than to the officer. The owner of goods wrongfully seized and sold for taxes may employ this remedy against the purchaser, and may show that the judgment levy or sale was void, or that no tax was due, or in fact may set up any error which would make the sale void. A void judgment, levy, or sale for tax conveys no better title to the purchaser than a void judgment upon any other claim. So, also, where the property is seized and sold for a tax due from another person, the owner may have replevin against the purchaser.[20]

§ 236. **The bare assertion of the defendant that the goods are seized for tax, not sufficient.** While the law will not permit the action of replevin in a case where the property sought to be recovered was seized for a tax, yet the bare assertion of the defendant that such is the case, or an unsupported plea, will not justify the court in refusing to proceed with the case. The defendant should produce some warrant, or valid authority to him, to take the property, or show the court by satisfactory evidence that his claim is valid and just, and that the seizure was made in the discharge of his duty as a tax collector.[21] Were the law otherwise any defendant, whether an officer or trespasser, might claim the immunity which the law only extends to its officers.

§ 237. **The warrant must be regular on its face, and purport to be issued by competent authority.** The warrant must be regular on its face; it must purport to be a regular tax warrant; it must in terms authorize the officer to proceed with the collection of the tax mentioned by seizure of the goods of the tax payer. It must also purport to be issued by some competent

[19] Dudley *v.* Ross, 27 Wis. 680.

[20] Dudley *v.* Ross, 27 Wis. 679; Macklot *v.* Davenport, 17 Iowa, 379; Heagle *v.* Wheeland, 64 Ill. 423; Stiles *v.* Griffiths, 3 Yeates (Pa.) 82; Bilbo *v.* Henderson, 21 Iowa, 57.

[21] Mt. Carbon Coal Co. *v.* Andrews, 53 Ill. 177; Hudler *v.* Golden, 36 N. Y. 446; LeRoy *v.* East Sag. R. R., 18 Mich. 238.

legal authority, and must be for a tax which can by legal possibility be levied.[22] A sham warrant issued by irresponsible parties, or a regular warrant for a sham tax, where it is apparent from the face of the warrant that it was issued without jurisdiction, will furnish no protection to the officer and replevin will lie. When the law authorized the village trustee to assess the value of the improvement of a *sidewalk* on the property of adjoining owners, and they did assess the value of an improvement of the *street*, and the warrant so showed on its face, it was held to confer no authority, and replevin of property seized under it was sustained.[23] So when the defendants justified the seizure by virtue of a tax warrant for taxes due the city of Muscatine; the boundaries were extended, taking in the plaintiff's farm land for purposes of taxation, and the act had been held unconstitutional—*held*, that replevin would lie.[24] And in the latter case the plaintiff in replevin was held not estopped from denying the validity of the tax by the fact that he has paid several similar taxes on the same property before.[25]

§ 238. **It must appear to be for a tax which, by legal possibility, may be valid.** It must appear that the tax was such as could by legal possibility have been properly and lawfully levied by regular and proper legal proceedings for that purpose. Thus, when the act of incorporation of a railroad company provided that the company should pay annually a specified tax of one-half of one per cent. on the whole amount of its paid in capital stock, in lieu of all other taxes on the property of the company, was allowed to sustain replevin against a collector who seized their property for the payment of a tax assessed by a city situated on the line of its road.[26] Where it is made to appear that the tax under which the seizure was made was never levied, or that the levy was afterwards legally rescinded, the owner of the property seized for such tax may sustain replevin. Thus, at a town meeting a certain tax for road purposes was laid, but at a subsequent legal town meeting the tax was rescinded. The collector could not legally proceed to collect such tax, and where he seized prop-

[22] Hudler *v.* Golden, 36 N. Y. 446.
[23] Wright *v.* Briggs, 2 Hill, 77.
[24] Morford *v.* Unger, 8 Iowa, 82.
[25] Buell *v.* Ball, 20 Iowa, 282.
[6] LeRoy *v.* East Saginaw City Ry., 18 Mich. 237.

erty for that purpose the owner was permitted to sustain replevin.[27]

§ 239. **The seizure must be made by an officer.** The seizure must be a legal seizure by an officer duly authorized to act in that behalf. It is true the title of the officer cannot be questioned in this action,[28] but the officer must at least assume to be an officer authorized to act at the time and place where the seizure was made. An officer duly authorized in one county or district would have no authority to go into another county or district to seize property, even though the property was once within his bailiwick and assessed there.

[27] Stoddard *v.* Gilman, 22 Vt. 570.

[28] Mt. Carbon Coal Co. *v.* Andrews, 53 Ill. 183.

NOTE XIII. *Goods not Liable for the Tax.*—The owner may replevy where his goods are seized for a tax upon lands, and by law the land alone is liable, Buell *v.* Ball, 20 Ia. 282. He may not replevy where the statute forbids replevin for goods taken "under process." The tax warrant is process, State *v.* Spiva, 42 Fed. 435; nor merely because the goods were not assessable to the plaintiff, Forster *v.* Brown, 119 Mich. 86, 77 N. W. 646. Goods sold while free of any lien for the tax cannot be seized for the tax in the hands of the purchaser. One who is a stranger to the tax and not in privity with the person assessed, is not prohibited by the statute forbidding replevin for goods taken for a tax, Tousey *v.* Post, 91 Mich. 631, 52 N. W. 57.

Absence of Law.—Where goods not assessable are levied upon, replevin lies, Hood *v.* Judkins, 61 Mich. 575, 28 N. W. 689. Where the statute authorizes the taxation of the goods in a place other than the residence of the owner, if he hires or occupies there "a place for storage;" lumber is taxable where it is piled to dry and retained for a considerable time, Hood *v.* Judkins, *supra*. If a tax is levied in a township or locality having no authority to tax the particular goods, replevin lies. McCoy *v.* Anderson, 47 Mich. 502, 11 N. W. 290; but in Roberts *v.* Denio, 118 Mich. 544, 77 N. W. 7, it was held that where goods have been taken for a tax replevin cannot be maintained by proof of the invalidity of the tax.

A statute, the purpose of which is to secure indemnity to a municipal corporation for expenditures made for the benefit of the property owner, is to be liberally construed; if it empowers the municipal authorities to require the owner to incur the expense, and the frame of the writ is such as to protect the officer, the property owner will not be permitted to maintain replevin for goods taken under it, Hudler *v.* Golden, 36 N. Y. 446. Except by statute the collector has no power to distrain personal property for a tax, Hedman *v.* Anderson,

8 Neb. 180. The fact that the officer has already advertised lands for sale for a portion of the same tax is no ground of replevin, Emerick *v.* Sloan, 18 Ia. 139. No burden is upon the officer to show a legal assessment, Adams *v.* Davis, 109 Ind. 10, 9 N. E. 162. The fact that a portion of the tax is illegal will not warrant replevin for the goods, Emerick *v.* Sloan, *supra.*

Irregularities.—Mere irregularities in the tax proceeding are no ground for replevin where the tax is lawful, Buell *v.* Ball, 20 Ia. 282; nor where the school district board, having authority to tax, have violated a long prevailing custom, or levied an extravagant tax, or made the levy without notice to the electors, of the district meeting to vote the tax, Bilbo *v.* Henderson, 21 Ia. 56; or where the warrant is regular upon its face, Troy Co. *v.* Kane, 72 N. Y. 614; Power *v.* Kindschi, 58 Wis. 539, 17 N. W. 689; however irregular the proceedings, Hood *v.* Judkins, *supra.* Misnomer of the owner in the warrant will not support replevin where the statute declares that "no tax upon property shall be held invalid" for such misnomer, Hill *v.* Graham, 72 Mich. 660, 40 N. W. 779. Where the law requires the County Clerk to deliver the tax list to the treasurer, and before doing so to attach to it his warrant under the seal of the County commanding the collection of the tax, the delivery of the list in two parts, one containing the personal property and city lots, the other the farm lands, with the warrant at the end of the latter only, is a mere irregularity not invalidating the warrant, Reynolds *v.* Fisher, 43 Neb. 172, 61 N. W. 695; Reynolds *v.* McMillan, 43 Neb. 183, 61 N. W. 699. The fact that the return day of the warrant is passed and that the officer has actually returned it, before the levy, is immaterial, Keystone Company *v.* Pederson, 93 Wis. 466, 67 N. W. 696. The fact that the officer at the time of the seizure did not have his warrant with him is no ground to replevy the goods, Bonnin *v.* Zuehlke, Wis. 99 N. W. 445. A demand for the tax need not be in express words, it is sufficient if a desire of payment is indicated, *Id.* Goods seized for a tax, though the seizure be made without a prior demand, and the statute expressly prohibits such seizure, cannot be replevied by the person who is himself charged with the tax; the statute providing that the plaintiff to obtain the writ must make oath that the goods have not been taken *under process* against the property of the affiant forbids it, State *v.* Spiva, 42 Fed. 435. The taxation of the wife's goods in the name of the husband will not make the taking unlawful nor the officer liable, Enos *v.* Bemis, 61 Wis. 656, 21 N. W. 812. That the tax was assessed many years prior to the issue of the warrant under which the officer levied, and in some of the intervening years was omitted from the warrant, on account of the absence or supposed insolvency of the taxpayer is not ground of replevin for the goods, Adams *v.* Davis, 109 Ind. 10, 9 N. E. 162. If there was a valid tax and the officer had authority to levy upon personalty, the court will not inquire whether his proceeding was entirely regular or whether he made proper return, *Id.* Even though the warrant issued irregularly or erroneously or contrary to law, if

on its face it gives authority to collect a tax and seize the chattels for that purpose replevin cannot be maintained, *Id.* The protection of the statute does not extend to the purchaser at tax sale, Power *v.* Kindschi, *supra.*

Fraud.—Where goods are taken for a sidewalk tax, levied under authority of a municipal ordinance, the owner will not be permitted to contest the tax on the ground that the ordinance was procured by fraud. Buell *v.* Ball, 20 Ia. 282.

Lien of the Tax.—Where the tax upon personalty is not made by statute a lien thereon, a purchaser of the goods is not liable for the tax, Lyon *v.* Receiver of Taxes, 52 Mich. 271, 17 N. W. 839; Tousey *v.* Post, 91 Mich. 631, 52 N. W. 57. Where the tax was a lien only from and after a certain day a purchaser before that date may replevy, Tousey *v.* Post, *supra.* But the purchaser of personalty then subject to a lien for a tax cannot replevy. The omission of the return to the County Treasurer by the Township Treasurer, as required by statute, prior to the issuance of the warrant, makes no exception, the warrant under which the seizure was made being fair on its face, Northwestern Co. *v.* Scott, 123 Mich. 357, 82 N. W. 76.

Tax Against a Third Person, in Possession of the Goods.—By the statute of New York, goods which by consent of the owner are in possession of one against whom a tax has been assessed may be taken for the tax. The question whether in the particular case the owner was consenting, is for the jury, Coie *v.* Carl, 82 Hun, 360, 31 N. Y. Sup. 565. Goods taken for a tax against another, or goods which may under the statute be lawfully taken by the collector for a tax upon lands; *e. g.*, an engine and cars found upon such land, cannot be recovered in replevin, Lake Shore Co. *v.* Roach, 80 N. Y. 339. Goods transiently upon the land of another, but under control of the owner of the goods for his own purposes, are not "in possession" of the owner of the land, within the meaning of the tax law, *Id.*

Payment of the Tax.—The payment of the tax subsequent to the institution of replevin for the goods distrained by the collector will not support the action, Bonnin *v.* Zuehlke, 122 Wis. 128, 99 N. W. 445.

Excessive Tax.—If the goods are taken for an excessive tax the owner may tender the just amount and have replevin; but his tender must be continuous, must be so averred, and must be renewed upon the trial, Miller *v.* McGehee, 60 Miss. 903.

Evidence.—Under a statute making the tax warrant presumptively valid it is prima facie evidence of the facts stated therein, and of its own validity, Hood *v.* Judkins, 61 Mich. 575, 28 N. W. 689. Where the tax warrant is regular upon its face the officer need not in replevin for the goods distrained show a legal assessment, Adams *v.* Davis, 109 Ind. 10, 9 N. E. 162. To defeat replevin for goods taken for a tax it is only necessary to show that there was a tax, that the treasurer had the authority to levy, and that he seized and took the goods into his possession, Adams *v.* Davis, *supra.* Where it is shown that the goods were taken for a tax the plaintiff's case is at an end,

§ 240. **Where an officer goes out of his bailiwick.** When plaintiff's wagon was distrained for a school tax, it appeared that after the tax was levied a new school district was created, and plaintiff resided in the new district and contended that the seizure by distress was unlawfully made by the secretary of the old district within the limits of the new. *Held*, that tax was no lien until seizure; that the tax gave no right to seize the wagon where it could be found, and the seizure without the district was unauthorized and illegal. The law forbids the replevin of property seized for any tax, assessment or fine levied under the authority of law. The principle extends to the seizure as well as to the assessment, and equally forbids all questions respecting the validity and regularity of the warrant and of the assessment, but there must be some color of authority for making the seizure. For instance, it has been held that when the warrant was issued without jurisdiction, and when the statute under which the assessment was made was unconstitutional, that replevin would lie. If this were not the rule defendant in replevin might always defeat the action by pretending that the property had been taken to satisfy a tax. An officer without his bailiwick is without authority, and his seizure by distress for tax is illegal.[29]

§ 241. **The prohibition extends to goods seized for the payment of a fine.** The statute which prohibits the replevin of goods seized for the payment of a tax also embraces goods seized for the payment of a fine.[30] Cases of replevin for goods seized for non-payment of a fine are not numerous, but the same principles would apply in such a case that govern cases of seizure for tax. The seizure should be by process formal on its face,

[29] McKay *v.* Batchellor, 2 Colorado, 591.

[30] Pott *v.* Oldwine, 7 Watts, 173; Martin *v.* Mott, 12 Wheat. 19.

Id. The statute authorizing the prosecution of replevin without demanding immediate possession of the goods, makes no change in the rule; the plaintiff must show that he was entitled to immediate possession, and in order to do this it must appear that the goods were not taken for a tax, *Id.*

Of the Judgment.—If the plaintiff has obtained the goods by falsely deposing that they were not taken for a tax, the judgment should require a return thereof, Kaehler *v.* Dobberpuhl, 60 Wis. 256, 18 N. W. 841. The plaintiff must not only make the affidavit required by the statute but he must establish the facts therein averred, Adams *v.* Davis, *supra.*

issued by a tribunal which has by law authority to impose a fine, and in a case where by legal possibility a fine can rightfully be imposed. The execution of the process ought to be by an officer who at least is an officer *de facto* at the time and place where the seizure is made. Should any one of these essentials be lacking in a seizure for a fine, by the analogies which obtain in other cases, replevin would lie for the goods so seized.[31]

§ 242. **Replevin against a purchaser.** Where the defendant justified under a poundmaster's sale, it was held that an officer to justify a seizure of property must produce a process regular and valid on its face. That to sustain a sale by a poundmaster he would be bound to prove that the animal was in the situation which the ordinance had designated to authorize him to make seizure before he could be justified. The main fact that they are officers of the law does not constitute a justification for seizing and selling property, but the authority must be shown. A person having purchased any article of personal property at a sheriff or constable's sale, and sued by the former owner for its recovery, must deraign and show his title through and by an execution against the claimant, or the owner of the property, and a sale by the officer. The mere proof of a sale would not suffice to establish the transfer of the title to the purchaser. Nor has the law created any greater or different presumption in favor of sale made by a poundmaster than by a sheriff or constable. In either case the validity of the sale must be established by showing the authority, which cannot be presumed. In the one case it is done by documentary evidence; in the other it is necessarily oral.[32] Where property is sold for a fine or penalty, the owner

[31] See Martin *v.* Mott, 12 Wheat. 19.

[32] Clark *v.* Lewis, 35 Ill. 422. NOTE XIV. *Animals impounded.*— In replevin for animals impounded by the road supervisor as running at large in violation of the statute, plaintiff, no failure of the officer to observe the requirements of the statute being shown, must prove payment or tender of his lawful charges, Wilhelm *v.* Scott, 14 Ind. Ap. 275, 40 N. E. 537, 42 N. E. 827. Whoever justifies the impounding of live-stock running at large must comply strictly with the substantial requirements of the statute; notice given to a son of the owner who resided upon her farm where the hogs were kept, and looked after the mother's business, not directed to his *as* agent, was held not sufficient, Wyman *v.* Turner, 14 Ind. Ap. 118, 42 N. E. 652. No distinction can be taken between an officer and a private individual; each must observe the statute, *Id.* The fact that the owner sent for the animals

may employ replevin against the purchaser, and require him to show the validity of the proceeding under which the sale was made.[33]

[33] Heagle *v.* Wheeland, 64 Ill. 423.

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the same person upon whom the notice was served, does not change the result, *Id.* Where only a resident is permitted by the statute to impound animals running at large, one who justifies upon this ground must aver residence in the township at the time of the act done, residence at the time of answering will not suffice, Frazier *v.* Goar, 1 Ind. Ap. 38, 27 N. E. 442. One who claims an animal as "taken up" under the estray laws must show a strict compliance with the statute, James *v.* Fowler, 90 Ind. 563; he can exact nothing but indemnity, Amory *v.* Flyn, 10 Johns, 102. If he fails to comply with the statute he is a trespasser *ab initio*, so that if the animal strays from him, his prior wrongful possession will not sustain replevin against one afterwards found in possession and claiming to be the owner, Bayless *v.* Le Faivre, 37 Mo. 119. It seems that until the contrary appears it will be presumed that the officer advertised the animals according to the statute, Wilhelm *v.* Scott, *supra;* but this proposition seems questionable. Animals which have broken out of an enclosed pasture and which the owner promptly sets out to recover on learning of their escape, are not "running at large" within the meaning of the statute, Wolf *v.* Nicholson, 1 Ind. Ap. 222, 27 N. E. 505; McBride *v.* Hicklin, 124 Ind. 499, 24 N. E. 755. Where the animals are found in a partially enclosed pasture not the property of their owner, they are not "running at large," or "pasturing upon any of the enclosed lands" of the township, Nafe *v.* Leiter, 103 Ind. 138, 2 N. E. 317. The statute permitting a possessory warrant when possession has been taken "under some pretended claim or authority without lawful warrant," it appeared that defendant as marshal of the city had impounded plaintiff's colt running at large within the city limits contrary to an ordinance, it was held that judgment of *retorno* was erroneous, King *v.* Ford, 70 Geo. 628.

CHAPTER XI.

GOODS IN THE CUSTODY OF THE LAW.

Section.

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§ 243. **Replevin does not lie for goods in the custody of the law.** It was an ancient maxim of the law, that goods seized by an officer, in obedience to legal process, were in the custody of the law.[1] The court regarding the officer only as its minister, and goods in his possession, upon the order or mandate of the court, as in the custody of the court, they could only be taken upon its order or permission. Any attempt to interfere with them, without such permission, was looked upon as a contempt. Replevin, therefore, from an officer so holding property was looked upon as a contempt, and punished.[2]

[1] McLeod *v.* Oates, 8 Ired. (N. C.) 387; Jenner *v.* Joliffe, 9 Johns. 384; Buckley *v.* Buckley, 9 Nev. 379; Raiford *v.* Hyde, 36 Geo. 93; Phillips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122; Reade *v.* Hawks, Hob. 16; Reeside *v.* Tischer, 2 Har. & G. (Md.) 320; Watkins *v.* Page, 2 Wis. 97; Hall *v.* Tuttle, 2 Wend. 478; Morgan *v.* Craig, Hardin, (Ky.) 101.

[2] Funk *v.* Israel, 5 Iowa, 450; Phillips *v.* Harriss, 3 J. J. Marsh. (Ky.) 123; Cooley *v.* Davis, 34 Iowa, 128; Powell *v.* Bradlee, 9 Gill. & J. (Md.) 220; Hagan *v.* Deuell, 24 Ark. 216; Goodrich *v.* Fritz, 4 Ark. 525; Allen *v.* Staples, 6 Gray, (Mass.) 493; Beers *v.* Wuerpul, 24 Ark. 273; Shearick *v.* Huber, 6 Binn. 4; Spring *v.* Bourland, 6 Eng. (Ark.) 658; Watson *v.* Todd, 5 Mass. 271; Mulholm *v.* Cheney, Addis, (Pa.) 301; Good-

§ 244. **Limitation upon this rule.** This rule, though still in force, must be understood as applying only to cases where the

heart *v.* Bowen, 2 Bradw. (Ill.) 578; Badlam *v.* Tucker, 1 Pick. 389; Brownell *v.* Manchester, 1 Pick. 234; Milliken *v.* Selye, 623; Squires *v.* Smith, 10 B. Mon. 33. Though trover or trespass was permitted. Cromwell *v.* Owings, 7 Har. & J. 55. [Goods in the hands of the sheriff, under writ of replevin, cannot be taken from him under replevin, even by a stranger to the first writ, Welter *v.* Jacobson, 7 N. Dak. 32, 73 N. W. 65; Yost *v.* Schleicher, 62 Neb. 601, 87 N. W. 308; Bonney *v.* Smith, 59 N. H. 411; McCarthy *v.* Ockerman, 154 N. Y. 565, 49 N. E. 153; Weiner *v.* Van Rensalaer, 43 N. J. L. 547. But it seems otherwise if the plaintiffs in the first writ waive actual delivery to them; and one of two partners may effectually agree to such waiver, Powell *v.* Bradlee, 9 G. & J. 220. And the sheriff cannot be required to levy execution upon goods which he holds under writ of replevin, First National Bank *v.* Dunn, 97 N. Y. 149; the sheriff is not liable in tresspass to the owner of goods for taking them under writ of replevin against another having them in possession, Foster *v.* Pettybone, 20 Barb. 350;— but the owner may take his goods if he can without breach of the peace. And a third person cannot replevy the goods even by proving that they are not those named in the writ, because the parties to the original writ are not bound by the judgment in the second suit, and the sheriff is responsible to those parties, Welter *v.* Jacobson, *supra*, In Iowa it is no answer that the defendant as sheriff, holds the goods under a writ of replevin at the suit of another party; the goods of one person cannot be taken upon a process against another, and if so taken they are not in custody of the law, Davis *v.* Gambert, 57 Ia. 239, 10 N. W. 658. In New Hampshire it was held that where goods replevied had been delivered to the plaintiff, they may at once be replevied by another claimant, Bonney *v.* Smith, 59 N. H. 411. Goods attached and replevied from the officer cannot be taken in execution or under an attachment by the plaintiff in the attachment suit, while the replevin is pending, Shull *v.* Barton, 56 Neb. 716, 77 N. W. 132. The marshal who seizes goods under writ of replevin from the federal court, cannot be arrested by the state court for so doing; the owner must come into the federal court and by ancillary process, determine his rights, Beckett *v.* Sheriff of Harford, 21 Fed. 32; and where property has been seized under writ of replevin from one court and placed in the hands of the plaintiff, no other court without supervisory control of the first should interfere with such possession, Domestic Society *v.* Hinman, 13 Fed. 161. But in Patterson *v.* Seaton, 64 Ia. 115, 19 N. W. 869, it is held that the replevin of goods from an officer who has seized them under an attachment against a stranger, does not prevent the levy thereon of other writs against the same defendant, and see Jacobi *v.* Schloss, 7 Coldw. 385, Frankle *v.* Douglas, 1 Lea, 476. And goods delivered to the plaintiff in replevin under bond conditioned to return the goods or pay the value, if return shall be adjudged, are in

seizure is rightful, and upon valid and sufficient process, and not generally to all cases where an officer assumes to execute process.

§ 245. **Lies for goods wrongfully seized by an officer upon process.** If an officer, in attempting to execute process of

custody of the law, so far as the parties are concerned, and exclude the right of the one in possession to sell them; the successful party may pursue them in the hands of the purchaser *pendente lite*, Mohr *v.* Langdon, 162 Mo. 474, 63 S. W. 409,— over-ruling Donohoe *v.* McAleer, 37 Mo. 312. The plaintiff in replevin is not, while the action of replevin is pending answerable as a garnishee of the defendant; he holds the goods to answer the suit; they are in custody of the law, Nicholson *v.* Mitchell, 16 Ills. Ap. 647.

One who purchases goods from the defendant in replevin, pending the action, the defendant being in posession under a delivery bond, is bound by the judgment; the goods so retained are in the custody of the law and the defendant can make no transfer which will defeat the judgment of the court, Sherburne *v.* Strawn, 52 Kans. 39, 34 Pac. 405.

And goods taken in execution and for which forthcoming bond has been given, are in custody of the law and cannot be levied upon under another execution, Bates County Bank *v.* Owen, 79 Mo. 429. The mortgagor's interest in mortgaged chattels is not attached by serving trustee process upon the mortgagee who is in possession. The goods are not, by such service, in the custody of the law. Jenness *v.* Shrieves, 188 Mass. 70, 74 N. E. 312.

Goods in the hands of the plaintiff in replevin cannot be subjected to execution, because this would occasion a forfeiture of his bond without fault on his part, Caldwell *v.* Gans, 1 Mont. 570.

And so as to goods in the possession of the defendant under forthcoming bond, Semel *v.* Dunn, 55 N. Y. Sup. 1006, citing Bank *v.* Dunn, 97 N. Y. 156, The Bank *v.* Blye, 123 N. Y. 132, 25 N. E. 208.

So, where a third person claiming goods taken, under forthcoming bond, Taylor *v.* Ellis, 200 Pa. St. 191, 49 Atl. 946, Hagan *v.* Lucas, 10 Pet. 400, 9 L. Ed. 397. But where goods were seized by an officer under execution and a junior mortgagee brought replevin, and the officer gave bond to retain the goods, it was held that a senior mortgagee might maintain replevin, Ament *v.* Greer, 37 Kans. 648, 16 Pac. 102.

The weight of authority is that, pending replevin, the party in possession cannot confer a good title to the goods, Union National Bank *v.* Moline Co., 7 N. Dak. 201, 73 N. W. 527. The possession of the party so in possession is temporary, and continues only until the right is determined, and a sale by him confers only such right as he has.

But in Katz *v.* Hlavac, 88 Minn. 56, 92 N. W. 506, it is held that goods replevied, and delivered to the plaintiff, under bond as required by the statute, or to the defendant on forthcoming bond, are no longer in custody of the law, the bond stands in place of the goods, and one in possession may dispose of them as if no action were pending.

execution or attachment, by mistake or design take goods not the property of the defendant in the writ, or goods not lawfully subject to seizure on such writ, he is a trespasser, and acquires no right to the goods seized;[3] and the injured party may have replevin for their recovery, or may proceed against the officer in trespass or trover, at his election.[4]

§ 246. **Of the right of a person to take possession of his goods which have been wrongfully seized by an officer.**

[3] Clark *v.* Skinner, 20 John. 468; Tison *v.* Bowden, 8 Fla. 70; Gardner *v.* Campbell, 15 John. 401; Chinn *v.* Russell, 2 Blackf. 172.

[4] Hunt *v.* Pratt, 7 R. I. 283; Gibson *v.* Jenney, 15 Mass. 205; Foss *v.* Stewart, 14 Maine, 312; Bean *v.* Hubbard, 4 Cush. (Mass.) 85; Deyo *v.* Jennison, 10 Allen, 410; Levitt *v.* Metcalf, 2 Vt. 343; Haskill *v.* Andros, 4 Vt. 609; Mulholm *v.* Cheney, Addis, (Pa.) 301; Stone *v.* Bird, 16 Kan. 488. [Cavener *v.* Shinkle, 89 Ills. 161; Wise *v.* Jefferis, 51 Fed. 641, 2 C. C. A. 432; Rogers *v.* Wier, 34 N. Y. 463; Mitchell *v.* Sims, 124 N. C. 411, 32 S. E. 735. And the owner of the goods may have replevin in any court of competent jurisdiction of the state, Wilde *v.* Rawles, 13 Colo. 583, 22 Pac. 897; Carpenter *v.* Innes, 16 Colo. 165, 26 Pac. 140; Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260;—even though the process under which the goods are taken proceeds from the Supreme Court of the State, State *v.* Brooker, 61 Miss. 16. The custodian of an officer in pursuance of a valid levy cannot be dispossessed under junior process, Flanagan *v.* Newman, 5 Colo. Ap. 245, 38 Pac. 431. And the statute prohibiting "cross-replevin or replevin for property in the hands of an officer", forbids an action of replevin, even by the owner, who is a stranger to the process under which the chattels are taken, Butts *v.* Woods, 4 Johns. N. M. 187, 16 Pac. 617. But a statute that no replevin shall lie at the suit of any "defendant in execution" has no application where an assignee for creditors replevies from an officer, who has seized the goods on execution against his assignor, Kingman *v.* Reinemer, 166 Ills. 208, 46 N. E. 786. And though the chattels are permitted to remain in the hands of the debtor, they are still in custody of the law and in possession of the officer, and this prevents another levy, Pugh *v.* Callaway, 10 O. St. 488, Brown *v.* Loesch, 3 Ind. Ap. 145, 29 N. E. 450. But in Hove *v.* McHenry, 60 Ia. 227, 14 N. W. 301, it was held that although the sheriff declare a levy upon the goods, and exact a delivery bond from the owner, yet if he do not remove or take them into possession he cannot be charged in replevin.

The mere lien of an execution does not have the effect to place the goods in custody of the law, Conley v. Deere, 11 Lea, 274. A tenant instituted an action against his landlord to restrain certain trespasses; injunction was granted which allowed the landlord to assume possession of the ranch and cultivate, graze, etc., but with a proviso that he "should place the straw in a safer enclosure and protect the same from injury by his animals"; held this did not place the straw in custody of the law, Erecca *v.* Meyer, 142 Calif. 308, 75 Pac. 826.]

A man is not a trespasser for taking possession of his own goods, if he does so peaceably; and when he does so acquire the possession of his own property, the fact that it had, before then, been levied on by the sheriff, by virtue of an execution, or taken on a writ of replevin, to which he was not a party, will not render him liable as a trespasser; nor would replevin lie against him for the possession of his property so taken.[5] When, therefore, goods which had been levied on by the sheriff came peaceably to the possession of the owner, who was a stranger to the execution, and they were retaken from him by the sheriff, he was entitled to sustain replevin for their recovery.[6] This is but an application of the well-known rule, that an officer, taking possession of goods by virtue of process, must keep possession. A voluntary surrender releases the levy.

§ 247. **Replevin does not lie for goods in the hands of a receiver of court.** Property in the hands of a receiver of court, duly appointed to take charge of that property, is in the custody of the law, and cannot be seized upon execution or attachment, or replevied without permission of the court by whose appointment it is held. It is for the time in the custody of the court, to be disposed of as the law directs.[7] But when the receiver assumes to hold property not included in the decree, and to which the debtor never had any title, with respect to such goods he is not regarded as an officer, but as a trespasser, and the rightful owner can sue him in any appropriate form of action, either for the property or for damages.[8] The more appropriate course would

[5] Spencer *v.* M'Gowen, 13 Wend. 256; Sims *v.* Reed, 12 B. Mon. (Ky.) 51; Wood *v.* Hyatt, 4 John. 313; Hyatt *v.* Wood, 4 John. 150; Merritt *v.* Miller, 13 Vt. 416; Barnes *v.* Martin, 15 Wis. 240; Marsh *v.* White, 3 Barb. 518; Kunkle *v.* State, 32 Ind. 220; Bills *v.* Kinson, (1 Fost.) 21 N. H. 448.

[6] Hall *v.* Tuttle, 2 Wend. 476.

[7] Wiswall *v.* Sampson, 14 How. 52; Noe *v.* Gibson, 7 Paige, 515; Robinson *v.* Atlantic & Gt. W. Ry. 66 Pa. 160; Parker *v.* Browning, 8 Paige, 388.

[8] Hills *v.* Parker, 111 Mass. 510; Paige *v.* Smith, 99 Mass. 395; Leighton *v.* Harwood, 111 Mass. 67. [The receiver of a national bank, appointed under Section 5242 Rev. Stat. U. S., gains no title to effects not the property of that bank, and such effects, though claimed by the receiver, are liable to the process of the state court, Corn Exchange Bank v. Blye, 101 N. Y. 303, 4 N. E. 635. If the receiver desires to retain the possession, he must give security, like any other body, *Id.* A receiver of a corporation has no power to detain the goods of a third person, though found in possession of the corporation at the time of

be to apply to the court under whose authority the receiver assumes to act, and upon a showing of the facts the court will unquestionably make such order as would fully protect the rights of the claimants; and if he show himself to be the owner, the court will, without doubt, order the property to be surrendered.[9]

§ 248. **Does not lie at the suit of a defendant in execution against the sheriff.** By the common law, and by a provision existing in the statutes of all, or nearly all, the States, a defendant in an execution or attachment cannot sustain replevin for goods which have been taken from him by virtue of process to which he is party defendant, unless the property is by statute exempt from seizure.[10] So, when the mortgageor of chattels brought replevin against the sheriff for seizing the mortgaged property on execution against the mortgagee, it appeared that the judgment and execution was against both the mortgageor and mortgagee, in such case neither could sustain replevin against the officer.[11]

his appointment; and replevin lies against him even without leave of the court of appointment, Hills *v.* Parker, 111 Mass. 508. A creditor who has procured a lien on the goods of his debtor will not be prevented from proceeding with his execution by the appointment of a receiver for the debtor's property; and even though he proceeds without leave of the court of appointment, the receiver will not be permitted to recover the goods, Conley *v.* Deere, 11 Lea, 274.]

[9] Parker *v.* Browning, 8 Paige, 388; *In re* Vogle, 7 Blatchf. 19.

[10] Hopkins *v.* Drake, 44 Miss. 622; Yarborough *v.* Harper, 25 Miss. 112; Dearmon *v.* Blackburn, 1 Sneed. (Tenn.) 390; Wilson *v.* McQueen, 1 Head, (Tenn.) 19; Orner *v.* Hollman, 4 Whart. (Pa.) 45; Kellogg *v.* Churchill, 2 N. H. 412; Ilsley *v.* Stubbs, 5 Mass. 280; Morris *v.* DeWitt, 5 Wend. 71; Melcher *v.* Lamprey, 20 N. H. 403; Perry *v.* Richardson, 9 Gray, 216.

[11] Talbot *v.* De Forest, 3 G. Greene, (Iowa,) 586. [Defendant in execution cannot replevy goods not exempt, though he is mere bail, and though the sheriff has failed to exhaust the property of the principal as required by law, Miller *v.* Hudson, 114 Ind. 550, 17 N. E. 122;—even though the judgment under which the execution issued was given without process served upon him. Even without a statute, goods taken in execution cannot be replevied, Howard *v.* Crandall, 39 Conn. 213; unless the goods are exempt, Hartlep *v.* Cole, 101 Ind. 458. An affidavit averring that the goods were taken "by execution issued against plaintiff *on a void judgment*," is vicious. The affiant is not to determine the validity of the judgment and cannot question it in his affidavit, Wilson v. Macklin, 7 Neb. 50. In Mississippi replevin will not lie for goods taken under civil process, even against a stranger, Clark *v.* Clinton, 61 Miss. 337; but generally, the rule is otherwise. An assignee for cred-

§ 249. **Nor at the suit of a grantee of such defendant after seizure.** Neither can a grantee of such defendant, after the goods were seized, sustain the action, as he occupies no better position than the defendant.[12] The rule may therefore be stated as general, that when goods, not exempt by law, are taken from the possession of the defendant named in the process, by virtue of an execution regular on its face, replevin will not lie at the suit of such defendant.[13]

§ 250. **The reason for the rule.** The reason for this rule is apparent when it is considered that if the defendant were permitted to maintain replevin, it would be in his power to prolong and perhaps defeat a valid claim, upon which he has had a full opportunity to make his defense when judgment was rendered against him; and this would produce delay in the execution of a process which is final in its nature. Statutory provisions exist in some States which permit the replevying of property attached, but such proceedings are a part of the attachment suit, and are not affected by any of the ordinary rules in this action.[14]

§ 251. **Qualifications of the rule.** The execution, however, must be a valid one, and issued by competent authority, as an ex-

itors may replevy goods taken under execution against the assignor, Kingman *v.* Reinemer, 166 Ills. 208, 46 N. E. 786. An order of the live-stock sanitary commission directed to the sheriff, commanding him to seize certain horned cattle as infected, is in the nature of an execution and is a sufficient justification to the officer, without proof of any investigation or finding by the commission, Hardwick *v.* Brookover, 48 Kans. 609, 30 Pac. 21. But plaintiff in the replevin may traverse the inspection and try the question as a question of fact; he is not concluded by the finding of the commission, *Id.* An execution reciting payment of the judgment by one of the judgment debtors, and the contribution as claimed, is, notwithstanding these recitations, a justification for removal thereunder; the defendant cannot replevy, Kelso *v.* Youngren, 86 Minn. 177, 90 N. W. 316. An execution is not void because including items of costs which are not taxable, Hall *v.* Bramell, 87 Mo. Ap. 285.]

[12] Hines *v.* Allen, 55 Me. 115; Gardner *v.* Campbell, 15 Johns. 401; Dunham *v.* Wyckoff, 3 Wend. 280; Shaw *v.* Levy, 17 S. & R. (Pa.) 102.

[13] Hall *v.* Tuttle, 2 Wend. 478; Judd *v.* Fox, 9 Cow. 262; Ilsley *v.* Stubbs, 5 Mass. 283; Thompson *v.* Button, 14 John. 84; Gardner *v.* Campbell, 15 Johns. 402; Mills *v.* Martin, 19 Johns. 32; Shaddon *v.* Knott, 2 Swan, (Tenn.) 358.

[14] Green *v.* Holden, 35 Vt. 315. The Kentucky reports contain many cases of this nature.

ecution void on its face is no justification.[15] Also, in case the levy is void or wrongful, for any misconduct of the officer, the defendant in the process may take advantage of the error, and bring replevin as though he was a stranger to it. When the levy was made on Sunday, the statute of the State forbidding service on that day, the levy was held void, and the defendant in the process was permitted to sustain the action.[16] Or where a constable who has no authority to execute a particular process attempts to make a levy, the levy is void.[17] These cases are all based upon the principle that the taking, though under color of legal process, was wrongful, and afforded no protection to the officer, even when suit was brought by the defendant named in the process.

§ 252. **Does not lie for liquors seized under an act to prevent the sale of intoxicating beverages.** The protection which the law affords to property in its custody is governed by rules which will be best understood by illustrations, the principles which underlie all these being substantially the same, to-wit: That when the law has assumed control of property for the purpose of disposing of it between disputing claimants, it will not suffer it to be withdrawn from its custody until final disposition has been made by the court. Where liquors had been seized, and

[15] White *v.* Jones, 38 Ill. 165; Campbell *v.* Williams, 39 Iowa, 646. [Plaintiff brought an action against a bank to recover the amount of certain certificates of deposit; the bank defended, on the ground that the certificates were in fact the property of another. The certificates having been produced to the court, under subpœna, by the other claimant, the court ordered the clerk to take them into his custody and retain them until the further order of the court; held that the court had no authority to so impound the certificates, that the order clothed the clerk with no immunity to an action by the true owner, and that the principle that where a court through its receiver or officer has gained control of property in litigation its possession cannot be disturbed, without leave of the court, had no application. Read *v.* Brayton, 143 N. Y. 342, 38 N. E. 261; and see Conley *v.* Deere, 11 Lea, 274. Even where goods are lawfully in custody, it is a matter of course to permit an action to be brought by a third person claiming rights which cannot be adjudged in the pending action; or if the action has been instituted by such third person without prior permission, and the conduct of the plaintiff has not been wilful or contumelious, to permit it to proceed, Read *v.* Brayton, *supra*, citing Hills *v.* Parker, 111 Mass. 508.]

[16] Peirce *v.* Hill, 9 Porter, (Ala.) 151.

[17] Conner *v.* Palmer, 13 Met. 302.

were awaiting the action of the court, under a process looking to their condemnation under a statute forbidding intoxicating liquors to be kept or sold, they could be replevied by the owner,[18] and the court properly dismissed the action, on motion. Even if the defendant had proved that he had the liquor for the lawful purpose of making vinegar, it would have been no defense as against the motion to dismiss. If the defendant's purpose was lawful, that fact could be made to appear in the original proceeding, but the court would not allow property so seized to be withdrawn from its custody at the suit of the owner, until it had passed on the question of the seizure. The same rule was applied in New Hampshire, where liquors, having been illegally kept, had become a nuisance, and were seized by an officer under a warrant to seize and keep them until final action of the court. They were regarded as in the custody of the law, and not subject to be taken upon a writ of replevin.[19] These cases proceed upon the ground that when a seizure has been made by an officer in the execution of his duty, the courts will retain the possession of the property pending the inquiry into the propriety of the seizure, and will not suffer a claimant to withdraw the property under pretense that he desires to contest the seizure.

§ 253. **Where the seizure was under an ordinance which had been declared void.** But where liquors were seized under a town ordinance for the suppression of the sale of intoxicating liquors, and the ordinance had been held void by a court of competent jurisdiction, the owner brought replevin and recovered.[20]

[18] Funk et al. *v.* Israel, 5 Iowa, 450; Monty *v.* Arneson, 25 Iowa, 383.

[19] State *v.* Barrels of Liquor, 47 N. H. 374. So in Massachusetts, Allen *v.* Staples, 6 Gray, (Mass.) 491.

[20] Sullivan *v.* Stephenson, 62 Ill. 297. [Goods detained as the fruits of a crime, and as evidence upon the prosecution, are in custody of the law and cannot be replevied, Simpson *v.* St. John, 93 N. Y. 363.

The constable under warrant against certain persons charged with keeping a tippling house in violation of law, seized certain liquors as required by statute; the statute, it seems, required the liquors to be destroyed in case of conviction, but made no provision for notice to third persons, and gave no opportunity to such claimant to assert his rights; held, in view of these omissions that a third person, the owner of the goods, might replevy them from the officer, In re Massey, 56 Kans. 120, 42 Pac. 365. Goods alleged to have been stolen were, by the officer, pursuant to an order of the court, delivered to the accused upon

§ 254. **Does not lie for cattle legally impounded.** The action does not lie against a poundmaster for cattle legally impounded, so long as he retains them in the custody of the law; but when he removed them from the lawful pound and put them in his own pasture or barn, and the owner finding them there took them, and the poundmaster re-took them; *held*, that the pound master had lost his legal custody and the owner could recover.[21] This, however, will not preclude the owner from testing the legality of the seizure and impounding of his cattle in this action. If the owner, in such a case, can show the seizure or detention to be illegal, for example, suppose the pound master should refuse to deliver the cattle upon demand after payment of all dues; replevin would unquestionably be a proper remedy.

§ 255. **Lies for powder seized under an ordinance prohibiting its introduction in large quantities into a city.** Although the common council of a city may pass an ordinance prohibiting the bringing of powder in large quantities into the city, and though it may impose a penalty for the violation, or may compel the removal of the powder, such an ordinance will not justify the council in declaring the powder forfeited or withholding the possession from the owner, who may bring replevin if it be withheld from him.[22]

§ 256. **Does not lie for property taken on a writ of replevin until after the former case is decided.** When an officer has taken property by virtue of a writ of replevin for the purpose of delivering it in obedience to the mandate, he is regarded as holding it in the custody of the law, and it is not liable to any other replevin from him.[23] One of the reasons which seems to govern in such cases is that the writ of replevin com-

his giving bond with surety; but the order expressly provided that the right of the true owner should not be impaired by the execution of the bond; it was held that the goods were not in custody of the law, and the true owner might maintain replevin, Byrne *v.* Byrne, 89 Wis. 659, 62 N. W. 413. The fact that the intoxicating liquors for which the writ of replevin has been applied for, were seized by the defendant as sheriff in a criminal prosecution against the plaintiff in replevin, is no reason why the clerk should refuse the order of delivery, where the requirements of the statute have been complied with, Easter *v.* Traylor, 41 Kans. 493, 21 Pac. 606.]

[21] Bills *v.* Kinson, 1 Fost. (21 N. H.) 449; Cate *v.* Cate, 44 N. H. 211.

[22] Cotter *v.* Doty, 5 Ohio. 395.

[23] *Contra*, see Hagan *v.* Deuell, 24 Ark. 216.

mands the officer to seize the identical property and make a particular disposal of it; and while the officer is acting in obedience to that command the law will not permit any other party to interfere and prevent him from doing what the writ directs him to do.[24]

§ 257. **The distinction between a writ of replevin and an execution, or attachment.** There is a marked distinction to be observed between goods taken by an officer on an execution, or attachment, and goods taken on a writ of replevin. In the latter case the identical goods are in the custody of the law, and are before the court to be disposed of as it shall see proper; and the proceeding is so far *in rem* that the goods cannot be seized upon any process until the court shall have taken action. If, therefore, a party finds his goods in the hands of an officer upon a valid writ of replevin, and that they have been taken from the possession of the defendant named in the writ, his remedy is by an application to the court to be permitted to come in and set up his claim to them, and not by an independent replevin. Whereas, if goods are wrongfully seized by an officer upon execution or attachment it cannot be said to confer any lien on them, or to bear any resemblance to a proceeding *in rem*.[25]

§ 258. **Cross-replevins not allowed.** Instances have occurred where the defendant in replevin has sought to forestall the action by another replevin at his own suit for the same goods. This is in the nature of a cross-replevin, which the law does not permit.[26] Neither can a grantee of the defendant, after suit

[24] Sanborn *v.* Leavitt, 43 N. H. 473; Lowry *v.* Hall, 2 W. & S. (Pa.) 131; Bell *v.* Bartlett, 7 N. H. 188; Maloney *v.* Griffin, 15 Ind. 214; Willard *v.* Kimball, 10 Allen, 211; Shipman *v.* Clark, 4 Denio, 446; Foster *v.* Pettibone, 20 Barb. 350; Stimpson *v.* Reynolds, 14 Barb. 506; Ilsley *v.* Stubbs, 5 Mass. 280; Morris *v.* De Witt, 5 Wend. 71; Rhines *v.* Phelps, 3 Gilm. (Ill.) 455; Spring *v.* Bourland, 6 Eng. (Ark.) 658.

[25] Watkins *v.* Page, 2 Wis. 95. Property in the hands of the sheriff by virtue of a writ of replevin is in the custody of the law and is not liable to a second distress. Milliken *v.* Seyle, 6 Hill, 623; Gilbert *v.* Moody, 17 Wend. 358; Lovett *v.* Burkhardt, 44 Pa. St. 174.

[26] Hagan *v.* Deuell, 24 Ark. 216; Powell *v.* Bardlee, 9 Gill & Johnson, 220; Shaw *v.* Levy, 17 Serg. & R. 103; Maloney *v.* Griffin, 15 Ind. 213; Dearmon *v.* Blackburn, 1 Sneed, (Tenn.) 390. When property is taken by writ of replevin the defendant cannot retake it by second writ while the first is pending. Ilsley *v.* Stubbs, 5 Mass. 280; Morris *v.* De Witt, 5 Wend. 71; Sanborn *v.* Leavitt, 43 N. H. 473; Belden *v.* Laing, 8 Mich.

brought. The rights of all parties can be determined in the first action. This is now a statutory provision in many States.[27]

§ 259. **The same. Illustration.** A. replevied property and obtained possession of it without there being service on defendants. The proceeding, except the issue of the writ, was set aside by the court. The defendant in first sued out replevin against plaintiff for same property; defendant in the second suit pleaded general issue (*non cepit*), and gave notice that *he would prove* the pendency of the first suit, etc. *Held*, that as the proceedings in the first suit were set aside, that taking was the same as though it had been without any writ, and in such case the second replevin, though by the defendant from the plaintiff in the former suit, is not a cross-replevin.[28]

§ 260. **The sheriff charged with the execution of process must obey it at his peril.** It is an old and well established rule that a sheriff charged with the execution of a process must obey its mandates at his peril. Where a writ of execution or

503; Clark *v.* West, 23 Mich. 243; Lowry *v.* Hall, 2 W. & S. (Pa.) 131; Hagan *v.* Deuell, 24 Ark. 216. [The owner cannot bring replevin against one who has obtained the goods in a suit in replevin against the owner's bailiff; the fact that the parties are different, is immaterial, Larsen *v.* Nichols, 62 Minn. 256, 64 N. W. 553; Ford *v.* Bushor, 48 Mich. 534; 12 N. W. 690; but see *contra*, Westbay *v.* Milligan, 74 Mo. Ap. 179. And a cross-replevin cannot be maintained by joining other parties, or omitting parties, so long as the right asserted is identical, Fisher *v.* Busch, 64 Mich. 180, 31 N. W. 39; Beers *v.* Wuerpul, 24 Ark. 272; and the defendant cannot, pending the action, by a sale of the goods, confer upon another the right to institute cross-replevin, Hines *v.* Allen, 55 Me. 114. Plaintiff, to whom goods have been delivered under replevin in a state court, cannot be deprived of them by a cross-replevin in the federal court; return will be awarded so that the controversy may be litigated in the state court, Williams *v.* Morrison, 32 Fed. 177. The first suit may be pleaded in abatement of the second, or in bar; but the writ cannot be quashed on motion, Fisher *v.* Marquette Circuit Judge, 58 Mich. 450, 25 N. W. 460. But if the officer replevy and deliver to the plaintiff goods not named in the writ, defendant may maintain replevin for these, Warren *v.* Leland, 2 Barb. 613. If the goods are taken by defendant from possession of the plaintiff, return will not be awarded; the defendant prevailing in such case recovers only his costs.]

[27] Hines *v.* Allen, 55 Me. 115. A second suit brought by the defendant in the first suit and his partner against the same plaintiff is a cross-replevin. Beers *v.* Wuerpul, 24 Ark. 273.

[28] Smith *v.* Snyder, 15 Wend. 324.

attachment directs him to seize upon the goods of A. he must assume the responsibility of determining what goods belong to A.; and if he seize upon the goods of B. the writ is no protection to him in so doing, and he becomes liable to B. in trespass or replevin at his election.[29] If the seizure was made with a deliberate wrongful intention on the part of the officer to seize the goods of one who was in no way connected with the writ, no one would for a moment attempt to justify such a seizure; and if it was made by mistake it would be equally absurd to contend that the blunder of an officer could deprive the real owner of his goods, or of any of his rights in them.[30] Even when the officer does not remove articles, a levy by him may become a trespass as against the real owner, and render him liable under that action; or the owner may, if a stranger to the process, maintain replevin, provided his possession is taken from him.[31]

§ 261. **The same.** This question was considered in a late case in Illinois, where plaintiff in attachment, who had prosecuted his suit to judgment, asked a process against the sheriff to compel him to sell the attached property. The sheriff replied that it had been taken from him by a writ of replevin, describing it. "The question then occurs," said Mr. Justice Scholfield, in delivering the opinion, "is replevin a proper remedy against a sheriff who has levied a writ of attachment against one person upon the property of another, at the instance of the party whose property is thus wrongfully levied upon? It seems well settled that this remedy would be appropriate in such cases, aside from anything to be found in our statute."[32]

[29] Ackworth *v.* Kemp, Doug. (Eng.) 40; Ralston *v.* Black, 15 Iowa, 47.

[30] Stewart *v.* Wells, 6 Barb. 79; Buck *v.* Colbath, 3 Wall. (U. S.) 334; Allen *v.* Crary, 10 Wend. 349; Shipman *v.* Clark, 4 Denio, 447; Hall *v.* Tuttle, 2 Wend. 476; Ilsley *v.* Stubbs, 5 Mass. 280; Phillips *v.* Harriss, 3 J. J. Marsh, (Ky.) 121; Caldwell *v.* Arnold, 8 Minn. 265; Bradley *v.* Holloway, 28 Mo. 150; Drake on Attachments, § 223; Brown *v.* Bissett, 1 Zab. 21, (N. J. L.) 268. Where an officer improperly levies on property which does not belong to the defendant in his process, the owner may maintain replevin. Gimble *v.* Ackley, 12 Iowa, 27. See, also, Phillips *v.* Harriss, 3 J. J. Marsh, (Ky.) 124; Smith *v.* Montgomery, 5 Iowa, 370; Wilson *v.* Stripe, 4 Green. 551; Miller *v.* Bryan, 3 Iowa, 58; L. & Portland Canal *v.* Holborn, 2 Blackf. 267; Chinn *v.* Russell, 2 Blackf. 172; Ralston *v.* Black, 15 Iowa, 47.

[31] Gallagher *v.* Bishop, 15 Wis. 276.

[32] Samuel *v.* Agnew, 80 Ill. 554. See, also, Ralston *v.* Black, 15 Iowa,

§ 262. **Replevin lies for goods wrongfully sold by sheriff on execution.** Where the sheriff seizes and sells goods not the property of the defendant in execution, such sale passes no title to the purchaser, and the owner may sustain replevin against him; and, although it had been held that no demand is necessary, the safer way would be to make it before suit.[33]

§ 263. **Distinction between replevin for the goods and an action against the officer as a trespasser.** There is a distinction to be observed in this connection, between an action against the officer in trespass, and an action for the goods. An execution regular on its face, issued by a court of competent jurisdiction, will protect an officer in an action of trespass brought against him by the defendant named in the writ, but it cannot be made the basis of a claim of right to the property, without proof of a valid judgment to sustain it.[34]

§ 264. **Writ of replevin. When and how far a protection to the officer serving it.** A writ of replevin, valid on its face, is a perfect protection to the officer in taking the goods from the possession of the defendant therein named.[35] That is, it affords the officer a definite and limited protection so long as he proceeds within the authority which the law confers upon him; but beyond that the law does not in any way shelter him.[36] When, therefore, an officer, in pursuance of the command of a writ of replevin issued from a competent court and valid on its face, takes possession of the property, from the defendant named in the writ, he is not liable to the defendant, even though the latter may be the real owner of the property, and the replevin suit be determined in his favor. The failure of the plaintiff in replevin to make out his case cannot render the officer liable to the defendant

48; Chinn *v.* Russell, 2 Blackf. 172; Megee *v.* Belrni, 3 Wright, (Pa.) 50; Woodruff *v.* Taylor, 20 Vt. 65; Barber *v.* The Bank, 9 Conn. 407; Allen on Sheriff, 272; Gardner *v.* Campbell, 15 John. 401; Judd *v.* Fox, 9 Cow. 259; Louisville & Portland Canal Co. *v.* Holborn, 2 Blackf. (Ind.) 267.

[33] Hicks *v.* Britt, 21 Ark. 422; Coombs *v.* Gorden, 59 Me. 111; Crittenden *v.* Lingle, 14 Ohio St. 182.

[34] Adams *v.* Hubbard, 30 Mich. 104; Underhill *v.* Reinor, 2 Hilton, (N. Y.) 319; Beach *v.* Botsford, 1 Doug. (Mich.) 199; LeRoy *v.* East Sag. Ry., 18 Mich 233; Earl *v.* Camp, 16 Wend. 563.

[35] Clark *v.* Norton, 6 Minn. 412; U. S. Dist. Court Western Dist. Tenn.; Waddy Thompson, *ex parte*, 15 Am. Law Reg. 522.

[36] Whitney *v.* Jenkinson, 3 Wis. 408.

in damages.[37] But the protection afforded the officer does not by any means extend to the party who has procured the writ to issue.[38]

§ 265. **Whether the writ authorizes a seizure of the goods from a stranger.** Whether the writ will protect the officer in taking the goods from the possession of one who is a stranger to it, is a question upon which there is some difference of opinion. The writ of replevin commands the officer to take certain articles which are particularly described. In case these articles are found in the hands of the defendant named in the writ, no question can arise; but if they are found in the hands of one who is not a party to the writ, but who has possession and claims to own them, the case presents more difficulties.[39] In New York, before the code was passed, the form of the writ required the officer to take the property if it could be found in the county, and provisions were made for the arrest of the defendant in case the goods were not found. Under such a statute the officer was not liable as a trespasser for seizing the goods wherever found.[40] But under a subsequent statute, it was held that an officer was not protected by a writ of replevin in taking property from a third person claiming to own it, even though the goods were the specific chattels which the writ directed him to take;[41] and this

[37] Williard *v.* Kimball, 10 Allen, (Mass.) 211; Weinberg *v.* Conover, 4 Wis. 803; Shipman *v.* Clark, 4 Denio, 446; Stimpson *v.* Reynolds, 14 Barb. 506; Foster *v.* Pettibone, 20 Barb. 350; Watkins *v.* Page, 2 Wis. 97.

[38] *Ex parte* Waddy Thompson, 15 Am. Law Reg. 522.

[39] The ancient case of Hallett *v.* Byrt, Carth. 380, says: "There is a difference between replevin and other process. In replevin the officer is expressly commanded to take property, but in an execution he is commanded to take the goods of the party, which the officer serving must do at his peril." S. C., 1 Ld. Raym. 218—Skinn. 674. (The several reports do not agree. I cite the report as in Carth.) This case has been cited and approved in many modern cases. Shipman *v.* Clark, 4 Denio, 447; Watkins *v.* Page, 2 Wis. 97; Spencer *v.* M'Gowen, 13 Wend. 256; Silsbury *v.* McCoon, 4 Denio, 332; Griffith *v.* Smith, 22 Wis. 647; Battis *v.* Hamlin, 22 Wis. 669; Foster *v.* Pettibone, 20 Barb. 350; Shaw *v.* Coster, 8 Paige, (N. Y.) 344.

[40] King *v.* Orser, 4 Duer. 436. See Foster *v.* Pettibone, 20 Barb. 350; Shipman *v.* Clark, 4 Denio, 446. Consult Buck *v.* Colbath, 3 Wall. (U. S.) 334.

[41] Stimpson *v.* Reynolds, 14 Barb. 506.

doctrine is fully sustained by subsequent cases.[42] Both these cases hold that the writ is no protection to an officer in taking goods from the possession of one not a party to it.

§ 266. **The same.** One of the best considered cases on this subject is found in Ohio. The conclusion there reached is, that an officer has no right to take goods described in a writ of replevin from the possession of a person not named in the process. It is important to observe, says the court, in substance, that while the rights of the defendant are sedulously guarded by a bond required from the plaintiff, no guard or protection is afforded to the rights of third persons, and that unlike proceeding strictly *in rem*, as in admiralty or chancery, where the officer is directed to take possession of specific property, that the rights of the several claimants may be ascertained, the property is not retained in the possession of the officer, but is delivered to the claimant, and no provision is made for third persons to come in and assert their claims.[43] A very similar line of reasoning was followed in Maine, where the court held that replevin could only be maintained against the person having possession of the goods.[44] But there is no authority for saying that bare possession, by a stranger, of the goods described in the writ ought to deter the sheriff from making the delivery, when it is apparent that they really belong to the defendant in the process. The sound discretion of the officer is called largely into use. If the property described in the writ has been recently in the hands of the defendant named, and he, for fraudful purposes, puts it in the hands of another, in anticipation of the writ, and for the purpose of defeating it, such facts would probably go far to justify the officer in seizing the goods from such third party. If, however, the goods had never been in the possession of the defendant in the writ, but had for a long period been in the hands of another claiming to own them, the officer would unquestionably be justified in refusing to dispossess such third party under a writ in which he was not named. If he assume to serve the writ he must show that the goods were actually the property of the defendant named in the process,[45] and must

[42] Bullis *v.* Montgomery, 50 N. Y. 353; Otis *v.* Williams, 70 N. Y. 208.

[43] State *v.* Jennings, 14 Ohio St. 73.

[44] Ramsdell *v.* Buswell, 54 Me. 546. See Willard *v.* Kimball, 10 Allen, 201.

[45] Hilliard on Torts, 194; Crosby *v.* Baker, 6 Allen, (Mass.) 295;

take the risk of a suit for trespass, against which he ought, when his act has been in good faith, to be fully indemnified by the party in whose interest he acts.

§ 267. **Writ of retorno authorizes seizure only from the person named.** When a writ of *retorno* issues, the sheriff cannot take the property from any other person than the one named in the writ.[46]

§ 268. **Replevin lies for exempt property wrongfully seized.** There exists in many, if not all the States, statutory provisions exempting a certain amount in value of property, or certain specific articles, from levy and sale upon execution. As to such property, the rule is, that notwithstanding there may be a judgment and execution against the defendant, valid in all respects, and sufficient to authorize the seizure of property of the debtor not exempt; as to exempt property, he is by law privileged to retain it, notwithstanding the execution; and if an officer, disregarding such exemption, seize upon the property, the debtor may assert his right in replevin for the goods, or in an action against the officer for their value.[47]

Commonwealth *v.* Kennard, 8 Pick. 133; Brush *v.* Fowler, 36 Ill. 59; Jansen *v.* Acker, 23 Wend. 480; Perkins *v.* Thornburg, 10 Cal. 189.

[46] Lear *v.* Montross, 50 Ill 509.

[47] Wilson *v.* McQueen, 1 Head. (Tenn.) 17; Bean *v.* Hubbard, 4 Cush. 86. A non-resident cannot assert this privilege. Newell *v.* Hayden, 8 Iowa, 140; Sims *v.* Reed, 12 B. Mon. 53; Moseley *v.* Andrews, 40 Miss. 55; Wilson *v.* McQueen, 1 Head. (Tenn.) 16; Elliott *v.* Whitmore, 5 Mich. 532; Wilson *v.* Stripe, 4 G. Greene, (Iowa,) 551; Lynd *v.* Picket, 7 Minn. 184; Douch *v.* Rahner, 61 Ind. 64. Dental tools held mechanical tools, and exempt as such. Maxon *v.* Perrott, 17 Mich. 333. Whether the articles claimed as tools are necessary as tradesman's tools, and for that reason exempt, is a question for the jury to determine. A judgment and order to sell exempt property is no bar to an action of replevin; but the replevin of the property will not avoid the judgment. Wilson *v.* Stripe, 4 G. Greene, (Iowa,) 551.

Note XV. *Exempt Goods.*—Goods exempt by law from execution may be replevied by the debtor, in Florida, Allen *v.* Ingram, 39 Fla. 239, 22 So. 651; in South Dakota, Linander *v.* Longstaff, 7 S. D. 157, 63 N. W. 775; in North Dakota, Wagner *v.* Olson, 3 N. D. 69, 54 N. W. 286; in Nebraska, Eikenbary *v.* Clifford, 34 Neb. 607, 52 N. W. 377; in Arkansas, Mills *v.* Pryor, 65 Ark. 214, 45 S. W. 350.

Not by defendant in the execution, in Vermont. Prescott *v.* Starkey, 71 Vt. 118, 41 Atl. 1021.

Where the statute forbids the husband to mortgage exempt goods without the wife's signature, and allows her to sue for such exempt

§ 269. **The aid of the statute must be invoked.** An officer with execution is not bound to consult with the execution

goods, as if they were her separate property, the husband cannot replevin them from the wife. Smith *v.* Smith, 52 Mich. 538, 18 N. W. 347. Exempt goods, of the wife taken on execution against the husband may be replevied, Sherron *v.* Hall, 4 Lea, 498. An officer is not a trespasser for levying upon goods which may turn out to be exempt. Settles *v.* Bond, 49 Ark. 114, 4 S. W. 286.

One who has come to the state to remain is a resident and entitled to the exemption. Chesney *v.* Francisco, 12 Neb. 626, 12 N. W. 94. In Michigan the exemption is given to the individual; a partnership cannot maintain an action based upon a claim of exemption. Gottesman *v.* Chipman, 125 Mich. 60, 83 N. W. 1026, citing Russell *v.* Lennon, 39 Wis. 570; Rogers *v.* Raynor, 102 Mich. 473, 60 N. W. 980.

Where the exemption is not specific, *e. g.*, "other goods to the value of, etc.," the debtor must make his claim to the exemption when notified by the officer of the levy, or within a reasonable time thereafter, otherwise the exemption is waived. Zielke *v.* Morgan, 50 Wis. 560, 7 N. W. 651. Provisions, when levied upon by the officer, defendant, were kept in plaintiff's basement, both for the use of his family and for sale; none of them were set apart for use before the levy, nor did plaintiff, after the levy, claim any of them as exempt. The officer had no knowledge that they were kept, otherwise than for sale. Held they were not exempted under the statute as "provisions necessary . . . . and intended for the use of the family," and that the officer was not liable in trover. Nash *v.* Farrington, 4 Allen, 157.

The statute required the debtor, desiring to avail himself of the exemption of "other personal property" not to exceed, etc., to serve upon the officer a schedule of all his property, and provided that property not included in the schedule "shall not be exempt." Held, that failure to include in the schedule all the debtor's property, had no other consequence than that prescribed by the statute. Wagner *v.* Olson, 3 N. D. 69, 54 N. W. 286. Where the statute requires a debtor, proposing to insist upon his exemption, to file a schedule of his property, specifying the particular goods which he claims as exempt, the debtor failing to pursue the statute waives his right. Chambers *v.* Perry, 47 Ark. 400, 1 S. W. 700; Settles *v.* Bond, 49 Ark. 114, 4 S. W. 286. Replevin will not lie until the schedule is filed. *Id.*

In Illinois, the debtor may claim as exempt necessary apparel, bibles, school books, and family pictures. The head of a family may exempt four hundred dollars in value of other property to be selected by him; but to avail himself of the statutory privilege he must schedule all his personal property, including money on hand, and bills receivable; and after all are duly appraised he may make his selection. Woodbury *v.* Tuttle, 26 Ills. Ap. 211. The exemption is a privilege granted by statute, and the terms of the statute must be

debtor as to what property is exempt, but he may seize and proceed to sell any or all the debtor's property upon which he can

complied with. Kahn *v.* Hayes, 22 Ind. Ap. 182, 53 N. E. 430. If the contrary does not appear it will be presumed that a debtor claims the exemptions to which he is entitled. Towne *v.* Leidle, 10 S. D. 460, 74 N. W. 232. One who asserts title to goods, against an officer levying under execution against a third person, by virtue of a chattel mortgage from such third person, and the exempt character of such goods, must, where the statute requires a schedule to establish such exemption, show such schedule and claim of exemption, made to the officer against the particular levy under which the officer holds. A schedule made as against a previous levy under a different writ will not avail. Holler *v.* Coleson, 23 Ills. Ap. 324.

The statute provided that goods to the value of one thousand dollars, of any person, shall after his death be "exempt from the payment of his debts, if he leaves a widow surviving him," and that it shall be the duty of the administrator to "permit said widow to select the property exempt from the administration; and if she fails to make such selection then three disinterested persons to be selected by the probate judge must make such selection," "and provided, further, that such property vests in such widow." The husband died, and the wife survived him only four days; an administrator was appointed upon the estate of each. The personal goods of the husband amounted to less than one thousand dollars, and the whole amount was applied by his administrator to the payment of his debts. No claim of the exemption was made by the widow's administrator; and that estate was closed and the administrator discharged. Held, that no title vested in an administrator *de bonis non* of the widow subsequently appointed; that the statute did not, without a selection, vest anything in the widow, and that her administrator *de bonis non* could not maintain trover against the husband's administrator, for failing to deliver the personalty of that intestate to appraisers whom he had procured to be appointed. Tucker *v.* Henderson's Admr., 63 Ala. 280. Where the statute makes an exemption for the benefit of the family, the husband may assert it, though the goods are the property of the wife and taken in execution against her. Starrett *v.* Deerfield, 40 Neb. 846, 59 N. W. 352, following Hamilton *v.* Flemming, 26 Neb. 240, 41 N. W. 1002. The husband had left his family and gone away, as it was said to avoid his creditors; the family had broken up the household, and were moving to the home of the wife. Held, notwithstanding the husband's absence, he was entitled to the statutory exemption in favor of a householder;" and that the wife could not waive it, Woodward *v.* Murray, 18 J. R. 400. The statute which imposes upon the wife the duty of maintaining the husband, in case of his disability, confers also by implication the right to claim an exempton from execution, of personal property, the fruit of her own labor, Linander *v.* Longstaff, 7 S. D. 157, 63 N. W. 775. The wife and minor children may, the

lay his hands;[48] and if the debtor desires the protection of the statute, he must invoke its aid. It does not operate unless its

[48] Twinam *v.* Swart, 4 Lans. (N. Y.) 263.

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husband being confined in jail, maintain a possessory warrant against one who has unlawfully seized an animal exempt by statute. Tucker *v.* Edwards, 71 Ga. 603. Chattels exempted to the family may be the property of either spouse, or community property. McClelland *v.* Barnard, Tex Civ. Ap. 81 S. W. 591. Under the statute of Nebraska the claim of exemption may be made at any time before sale, Chesney *v.* Francisco, 12 Neb. 626, 12 N. W. 94; Crans *v.* Cunningham, 13 Neb. 204, 13 N. W. 176. Where the separate articles levied upon are distinguishable and separable, the doctrine of Nash *v.* Farrington, 4 Allen, 157, has no application; although the debtor fail to claim the exemption it is the duty of the officer to leave the number of each article, to which, under the statute, the debtor is entitled, *Id.* An exemption for the sustenance of animals does not take effect if the debtor has no such animals, King *v.* Moore, 10 Mich. 538. Whether immature crops may be claimed, under the exemption of "provisions" Quere? *Id.* In California, the statute exempts the homestead from forced sale on execution. Another statute exempts the farming implements of the debtor, certain work animals, food for the same for a time, and "all seed grain or vegetables actually provided, reserved or on hand, for sowing or planting, at any time within the ensuing six months." In view of this latter provision, held impossible to declare the whole crop grown on the homestead exempt. Horgan *v.* Amick, 62 Calif. 401. Arms may be exempted as household goods. Smith *v.* Smith, 52 Mich. 538, 18 N. W. 347. Under the statutory exemption from execution of tools and implements kept and held by the debtor for carrying on his business, the keeper of a hotel may claim an omnibus, as exempt. White *v.* Gemeny, 47 Kans. 741, 28 Pac. 1011, 27 Am. St. 320;—and a solicitor of insurance, the horse and buggy which he uses in his business. Wilhite *v.* Williams, 41 Kans. 288, 21 Pac. 256. The phrase "Mechanic, miner or other person" includes an insurance agent, and abstractor of titles, and he may claim as exempt as tools, a safe, a lot abstracts, a cabinet and table, Davidson *v.* Sechrist, 28 Kans. 324. The statute exempting two horses in addition to "the farming utensils and implements of husbandry" of the debtor, it was held that where the debtor had but two horses, one of them a stallion, used principally as such, so that "almost the entire income from that is from the service of such horse as a stallion," the horse was nevertheless exempt. But an unbroken colt cannot be claimed as a work animal. Drake *v.* Crane, 112 La. 156, 26 So. 306. It is not necessary that the owner shall devote himself exclusively to husbandry, nor that the exempt implements, etc., should be exclusively devoted to the purposes of husbandry. McCue, *v.* Tunstead, Calif. 3 Pac. 863. The statute must receive a liberal construction, Conklin *v.*

shelter is sought. When exempt property is levied on, the debtor ought, at the time, or seasonably thereafter, to specially claim the

McCauley, 41 Ap. Div. 452, 58 N. Y. Sup. 879. In Minnesota, partnership goods cannot be demanded as exempt. Baker *v.* Sheehan, 29 Minn. 235, 12 N. W. 704. Otherwise in South Dakota, Linander *v.* Longstaff, 7 S. D. 158, 63 N. W. 775; Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1069. Where there is an exception in the exemption law, *e. g.*, of goods seized on execution isued upon a judgment for the price, whoever asserts the exception, must bring the case within it; he must show that the goods claimed as exempt, were sold by the creditor. Wagner *v.* Olsen, 3 N. D. 69, 54 N. W. 286. No exemption is allowed where the demand is for the purchase price of the goods, Gottesman *v.* Chipman, 125 Mich. 60, 83 N. W. 1026. But *semble* the officer cannot take the whole of the stock, where there is a just claim of exemption as to part of the goods, and those were not purchased of the creditor, *Id.* Voluntary transfer of exempt goods does not render them liable to execution for the debts of the donor, Furman *v.* Finney, 28 Minn. 77, S C. sub. nom. Furman *v.* Fenny, 9 N. W. 172. Fraudulent transfer of exempt goods by husband to wife, does not render them liable to seizure for the husband's debt. Daniels *v.* Cole, 21 Neb. 156, 31 N. W. 491. Where the wife is entitled to claim household goods as exempt, no act of the husband can impair her right. Hanselman *v.* Kegel, 60 Mich. 540, 27 N. W. 678. Receiptor, in an action by the officer upon the receipt, is not estopped to show that the goods are exempt. Williams *v.* Morgan, 50 Wis. 548, 7 N. W. 541. Failure of a debtor to claim his exemption at the time of a levy, he having knowledge of the levy, is not, as matter of law, a waiver. Copp *v.* Williams, 135 Mass. 401. The sheriff cannot defeat the exemption by failing to cause an appraisement to be made, in response to the debtor's demand. Linander *v.* Longstaff, 7 S. D. 157, 63 N. W. 775. Where the right is given to the wife, it cannot be defeated by showing that the goods were turned out by the husband, King *v.* Moore, 10 Mich. 538. The fact that the householder is temporarily sojourning within the family of another will not deprive him of the exemption. Chesney *v.* Francisco, 12 Neb. 626, 12 N. W. 94. Where exempt goods are levied upon under execution, and replevied by defendant in execution, and judgment of return is given, and the plaintiff in the replevin returns the goods, without making a distinct claim of his exemption, before the sale under execution, the judgment in replevin will be a bar to a subsequent action by the plaintiff in replevin for taking exempt goods. McGuire *v.* Galligan, 57 Mich. 38, 23 N. W. 479. The right to exempt property must be asserted at the time and in the manner prescribed by law, or it is lost. But where the statute authorizes replevin for goods unlawfully detained a householder may replevy goods unlawfully attached without moving for the discharge of the property under the attachment suit. Upp *v.* Neuhring, Ia., 104 N. W. 350; Boesker *v.* Pickett, 81 Ind. 554. The fact that the debtor presents

benefit of the exemption; he cannot sustain replevin for property he has not selected and claimed as exempt.[49] So, when a certain

[49] O'Donnell *v.* Seger, 25 Mich. 371; Seaman *v.* Luce, 23 Barb. 240. As to the practice, see Newell *v.* Hayden, 8 Iowa, 140. But, see Frost *v.* Mott, 34 N. Y. 253.

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at first a schedule differing from that finally relied upon, does not deprive him of his exemption, *Id.* The fact that the debtor has once sold an article does not preclude him from a claim to exempt it, after he has rescinded the sale. *Id.* The exemption need not be asserted in the petition in replevin. Eikenbary *v.* Clifford, 34 Neb. 607; 52 N. W. 377. The debtor is entitled to the exemption prescribed by the statute although he has previously secured an exemption and disposed of or consumed the goods. Hart *v.* Cole, O. St. 76 N. E. 940, citing Krauters Appeal, 150 Pa. St. 47, 24 Atl. 603; Weis *v.* Levy, 69 Ala. 209; Chatten *v.* Snider, 126 Ind. 387, 26 N. E. 166; Frost *v.* Naylor, 68 N. C. 325. Where the whole property of the debtor does not amount in value to the statutory exemption, he is the absolute owner without any selection or doing any act or thing, and may make any disposition of it at his pleasure. No creditor can assail his transfer as fraudulent. Skinner *v.* Jennings, 137 Ala. 295, 34 So. 622; McClelland *v.* Barnard, Tex. Civ. Ap. 81 S. W. 591. The fact that the debtor is intending to remove from the state does not deprive him of his statutory exemption if he has not actually begun to remove. The delivery of his household goods to a carrier to be transferred to another state, consigned to the debtor himself, is not sufficient. The first residence is not lost until a second is gained and so long as the debtor retains his residence he is entitled to the exemption. Brown *v.* Beckwith, 51 S. E. 977. Where the statute declares that a married woman shall be liable jointly with the husband for necessaries furnished the family and that the wife shall be made a party to the action and "all questions involved determined therein and recited in the judgment and execution"—a judgment conforming to this statute does not preclude the widow of the debtor from claiming, as exempt, goods which the judgment expressly declared to be subject to execution for the satisfaction thereof. White *v.* Wilson, 106 Mo. Ap. 406, 80 S. W. 692. Whoever asserts the exemption must establish all the precedent conditions prescribed by the statute and upon which exemption depends. Williamson *v.* Finlayson, Fla. 38 So. 50: *e. g.*, where the statute gives the exemption only for "debts founded on contract," the complaint for exempt goods taken in execution, must show among other things requisite to entitle plaintiff to the exemption, that the judgment upon which the execution issued was for "a debt founded on contract." Newcomer *v.* Alexander, 96 Ind. 453. Where defendant's answer asserts a right to retain the goods by virtue of a lien thereon, but does not demand a return of them, no notice demanding judgment for the return as prescribed by Sec. 1725 of the Code, is required. McCobb *v.*

amount of a particular kind of property is exempt, the debtor must select and claim, or in some lawful manner assert his rights. If the sheriff levy execution on the whole of that class of property, the debtor cannot sustain replevin until he select and demand the exempted portion.[50] A waiver of exemption in favor of one creditor cannot be taken advantage of by another.[51] Nor will a mortgage be a waiver of the right to claim property as exempt, except as against the mortgagee.[52] Under a statute which exempts swine, the flesh of such swine, when killed and dressed, is also exempt.[53] So of butter made from a cow which is exempt.[54] But hay or grain exempted for the purpose of feeding domestic

[50] Tullis *v.* Orthwein, 5 Minn. 377.
[51] Frost *v.* Mott, 34 N. Y. 253.
[52] Reynolds *v.* Salee, 2 B. Mon. (Ky.) 18.
[53] Gibson *v.* Jenney, 15 Mass. 206.
[54] Leavitt *v.* Metcalf, 2 Vt. 342; Haskill *v.* Andros, 4 Vt. 610.

Christiansen, 28 Misc. 119, 59 N. Y. Sup. 303. Complaint for a piano as exempt, averred, not that the instrument was a necessary article of household furniture, nor that it was exempt by virtue of the statute; but that at the time it was taken plaintiff *notified defendant that the same was a necessary article of household furniture*, and that she claimed it as exempt. Held, that by fair intendment the complaint could be sustained, as importing that the piano was a necessary article of household furniture; and an amendment at the close of the trial was held properly permitted. Conklin *v.* McCauley, 41 Ap. Div. 452, 58 N. Y. Sup. 879. Plaintiff claiming goods as exempt must in his complaint show the facts which entitle him to the exemption. It is not enough to aver that the goods are exempt. Donnelly *v.* Wheeler, 34 Ark. 111. If part of the goods only are exempt, the one claiming the exemption has the burden of showing to what it extends, Hilman *v.* Brigham, 117 Ia. 70, 90 N. W. 491, citing Hays *v.* Berry, 104 Ia. 455, 73 N. W. 1028. Where exempt goods have been replevied, defendant recovers them or their full value, without deduction on account of any indebtedness of the defendant to plaintiff, Rawlings *v.* Neal, 126 N. C. 271, 35 S. E. 597. The cause cannot be controlled by one theory as to the officer levying an execution, and by a different theory as to the creditor in that execution; a finding in favor of the officer that the goods are not exempt, precludes a judgment against the creditor who has purchased them at the execution sale. Redinger *v.* Jones, 68 Kans. 627, 75 Pac. 997. Under the code of Kansas replevin for exempt goods, admits the validity of the judgment upon which the execution issued. *Id.* In trover for exempt goods no set off is allowed, Caldwell *v.* Ryan, Mo. Ap. 79 S. W. 743.

animals is not exempt unless the party claiming it has the animals.[55]

§ 270. **The exemption a personal privilege.** This exemption of property from forced sale on execution is a personal privilege and must be exercised by the debtor personally, or it will be regarded as waived.[56] In replevin against the sheriff, the plaintiff claimed a span of horses, by purchase from B. The sheriff replied that he had seized them on an execution against B., and that they were B.'s property. The plaintiff asked the court to instruct the jury that, "under the laws, one span of horses was exempt, and that if B. had no other horses than these, which were exempt, the defense of the sheriff would fail." The court properly refused the instruction. The exemption was the personal privilege of the debtor, and might be waived by him, and if so waived, it could not be asserted by another.[57]

§ 271. **The same. Damages and costs in such cases.** While the rule which permits replevin for property by law exempt is supported by abundant authority, it has been said that neither damages nor costs should be awarded in such cases;[58] but this does not seem to rest on any well-founded reason. The sheriff who willfully or ignorantly takes property in defiance of the law, should respond to the injured party in compensatory damages, at least.[59]

§ 272. **Jurisdiction in replevin, where goods have been wrongfully seized.** When goods have been wrongfully seized by an officer upon process, and the owner desires to contest the validity of the seizure, the question arises, in what court shall his suit be brought? There may be a court competent to take jurisdiction over the subject matter of the controversy, as well as the person of the defendant, within easy access; while the court from which the process issued, upon which the wrongful seizure was made, may be distant and difficult of access. Whether any exclusive jurisdiction attaches to this latter court may be a question of importance. There appears to be no good reason why the

[55] Foss *v.* Stewart, 11 Me. 312.

[56] Bonsall *v.* Comly, 44 Pa. St. 442; Mickles *v.* Tousley, 1 Cow. 114; Earl *v.* Camp, 16 Wend. 562.

[57] Howland *v.* Fuller, 8 Minn. 50.

[58] Saffell *v.* Walsh, 4 B. Mon. (Ky.) 92.

[59] Pozzoni *v.* Henderson, 2 E. D. Smith 146; Whitaker *v.* Wheeler, 44 Ill. 447; Livor *v.* Orser, 5 Duer. 501.

court issuing the process, behind which the officer assumes to shelter himself, should alone have jurisdiction in such cases. Upon process of attachment issued from the Superior Court of Cook County, the sheriff levied upon goods which were afterwards replevied from him by the owner, (who was not the defendant in the attachment,) upon a writ of replevin issued out of the Circuit Court of Cook County. The court said, "there is no apparent reason why, if the action of replevin might be brought in the Superior Court of Cook County, it might not, with equal propriety, be brought in the Circuit Court of that county, which is practically a branch of the same court."[60] The court, however, in this case, cites *Taylor et al.* v. *Carryl*, 20 How. (U. S.) 583, and *Freeman* v. *Howe*, 24 How. 450, and seems to recognize the doctrine that when goods are in the custody of the officer of a United States court, under its process, they cannot be taken by process from a State court.

§ 273. **The same. The question stated.** It is unquestionably the law, that when goods are rightfully in the custody of an officer of the United States court, under judicial process from such court, replevin will not lie to dispossess him; but where an officer assumes to take goods, in violation of the commands of his writ, he cannot be said to take them by virtue of the process of the court. On the contrary, all the authorities agree that an officer so holding is a trespasser. His holding is, in fact, a disobedience of the mandate of the court, and he is personally liable to the injured party. This presents the question, as to whether a party whose property has been wrongfully taken by an officer of the United States, on process from a federal court, can employ the officers and process of the State courts to recover it.

§ 274. **The rule in Freeman v. Howe.** The leading case on this subject is *Freeman* v. *Howe*, which originated in a State court in Massachusetts, and was subsequently passed upon by the Supreme Court of the United States. Process of attachment in a suit for debt was issued from a United States Court to its marshal, commanding him to attach the property of the Vermont & Massachusetts R. R. Co. Upon that process the marshal seized upon thirteen cars, which were afterwards replevied upon a writ issued from a State court in Massachusetts. Upon the trial, the marshal contended that the property was taken by him under

[60] Samuel *v.* Agnew, 80 Ill. 554.

process from the United States court, and that replevin in a State court would not lie. Dewey, J., in delivering the opinion of the appellate court in Massachusetts, said: "These articles were not seized for the purpose of being proceeded against in the courts of the United States by any proceeding *in rem*. They were not the subject of the case then to be tried. The process from the United States court was that usually issued for the recovery of a debt, unaccompanied by any lien or charge upon the goods, except that resulting from an attachment to secure an alleged debt. The only process to the marshal was one commanding him to attach the property of the Vermont & Massachusetts R. R. Co. not a warrant to seize these cars." And upon this reasoning the court held that replevin in a State court, by the real owner, against the marshal, was proper.[61] The case, however, went to the United States Supreme Court, and the decision of the State court was reversed; the reversal being placed upon the ground that the right of the defendant, the marshal, to hold the goods was a question belonging to the federal court, under whose process they were seized, and that there was no authority in an officer, under process issued from a State court, to interfere with property which had been seized by a marshal under process from a United States court.[62]

§ 275. **The doctrine in this case considered.** This decision has not provoked the discussion which it would certainly have occasioned had it been a similar opinion from any other court. The bare authority of the Supreme Court of the United States being a sufficient reason for avoiding all question as to its correctness. The reasoning has, nevertheless, been criticized in a number of cases in the State courts, and explained at least once in the United States Supreme Court. Mr. Justice Paine, of Wisconsin, remarks, "that the conclusions of the court, (in *Freeman* v. *Howe*,) do not appear to be based upon any effect given to any provision of the constitution or laws of the United States, so that its decision would not, according to the prevailing opinion, be binding in the State courts; but it seems to rest upon grounds of comity." And while the doctrine in that case is followed,[63] it is with doubt and misgiving as to the correctness of the principle. In Minnesota, in replevin from a United States

[61] Howe *v.* Freeman, 14 Gray, (Mass.) 527.

[62] Freeman *v.* Howe et al., 24 How. (U. S.) 450.

[63] Kinney *v.* Crocker, 18 Wis. 79. See Buck *v.* Colbath, 7 Minn. 310.

marshal, the answer of the marshal denied the plaintiff's right, and set up that the defendant, a United States marshal, held a valid writ of attachment against the goods of L.; that he levied on the goods as the property of L. and that they were his property, and demanded a return. To this plea there was no answer, and the court said the case stands admitted for want of an answer. The court, in delivering its opinion, cited the case of *Freeman* v. *Howe*, and said: "If we understand this decision, it is based upon the sole ground that one court cannot take the property from the custody of another by replevin, or any other process; for this would produce a conflict extremely embarrassing to the administration of justice. Whether this evil may be greater than that of always compelling a party to resort to the court out of which the process issued, upon which his property has been seized, to assert his legal rights, may well be questioned. * * * It cannot be denied but that there are expressions and statements in the opinion in *Freeman* v. *Howe* which would lead to the conclusion that the court in that case reversed the decision of the State court upon the ground that the State court had not jurisdiction of the case, but we think not * * * Conceding, therefore, the correctness, or, at least, the binding force of the decision in *Freeman* v. *Howe*, we think the judgment must be for a return."[64]

§ 276. The same. The same court had the question before it again, where it employed the following reasoning: "If there is any principle of law which may be considered as settled by a long series of uniform decisions, it is, that he, whether an officer of the law or otherwise, who takes the property of another without authority, is a wrong-doer, and the taking is wrongful. * * * The only approach to any innovation upon this rule, so far as we are aware, by the courts of this country, is the case of *Freeman* v. *Howe*, 24 How. (U. S.) 450. Even though the officer acted upon the fullest knowledge and information obtainable, as to the ownership of the property, and that he fully and honestly believed, and had good reason to believe, that the property was the property of the defendant, and that he was in duty bound to levy on it, it is no defense. The law has not left the rights of property and the protection afforded thereto to depend on the mere belief or good faith of the officer holding process; nor will his good faith protect him from the consequences of his illegal acts.

[64] Lewis *v.* Buck, 7 Minn. 104.

The sheriff, when he levies on property, must do so at his own risk, and if he seizes property not authorized by his process, he is a trespasser." [65] In Wisconsin, the doctrine was distinctly stated, that when property exempt from seizure by the laws of the State, was seized by a United States officer, for debt, replevin would lie in the State court. It was claimed in this case that the horses were taken and held by virtue of an execution issued out of the District Court of the United States, and hence were in the custody of the law. "But how could they be in the custody of the law unless the marshal had a lawful right to take them into his custody? The idea that an unlawful custody of property can be the custody of the law is absurd." [66]

§ 277. **The same.** While the case of *Freeman* v. *Howe* may be regarded as a decision of this question by the court of the last resort, the reasoning of the court and the conclusions arrived at do not produce that conviction of the soundness of the doctrine laid down which usually follows the opinion of that eminent tribunal. It seems to be in conflict with the earlier case of *Slocum* v. *Mayberry*, 2 Wheat. 2. It is difficult to see where any material inconvenience would follow the enforcement of a contrary rule; while it is apparent that the practical operation of the rule as laid down is to permit an officer with process of execution or attachment against A. either ignorantly or willfully to seize on the goods of B., and to compel the real owner to submit to their loss, or be at the vexation and expense of a resort to a distant court.

§ 278. **The same.** From the time of the case of *Hallet* v. *Byrt*, Carth. 380 (A. D. 1687), until the present day, the courts have, without an exception (unless it be in *Freeman* v. *Howe*), sustained the doctrine promulgated in that ancient case, that where the sheriff by process of execution or attachment is directed to levy on the goods of the defendant in the process, and this he must do at his own peril, not at the peril of the owner of the goods. Another and serious embarrassment which seems to grow out of the enforcement of the rule as laid down in the case of *Freeman* v. *Howe*, is that it draws into the Federal courts all

[65] Caldwell *v.* Arnold, 8 Minn. 265.

[66] Gilman *v.* Williams et al., 7 Wis. 329. See the case of Booth *v.* Ableman, which appeared in 16 Wis. 463, and again in 18 Wis. 496, and in 20 Wis. 23 and 633; Ward *v.* Henry, 19 Wis. 77; Weber *v.* Henry, 16 Mich. 399; Hanna *v.* Steinberger, 6 Black, 521.

litigation in respect to the title to property attached by the United States marshal, though between strangers to the attachment suit and although involving the adjudication of mere legal claims between citizens of the same State, which the Constitution designed to exclude from Federal jurisdiction.

§ 279. **The same.** *Slocum* v. *Mayberry*, 2 Wheat. 2, was a case where a ship was seized for a suspected violation of law; the cargo was taken with the ship and detained by the United States officer; the owner of the cargo brought replevin in the State court of Rhode Island, and was sustained by the United States Supreme Court. Chief Justice Marshall, delivering the opinion of the court, said: "The cargo remained in the custody of the officer because it had been placed on a vessel in his custody, but no law prevents it being taken out of the vessel. The owner has the same right to his cargo that he has to any other property, consequently he may demand it from the officer in whose possession it is, that officer having no legal right to withhold it from him; and if it be withheld he has a right to appeal to the laws of his country for relief. The acts of Congress neither expressly nor by implication forbid the State court to take cognizance of suits instituted for property in the possession of an officer of the United States, not detained under some law of the United States, consequently the jurisdiction remains. Had the replevin been for the vessel, which was detained by the authority of the law of the United States, the case would have been entirely different."

§ 280. **The same.** Chancellor Kent lays down the law that if a marshal of the United States, under an execution against A., should seize the property of B., then the State courts have power to restore the property so illegally taken.[67] This statement is, in the opinion of *Freeman* v. *Howe*, 24 How. 459, said to be "an error into which the learned chancellor fell, from not being practically familiar with the jurisdiction of the Federal courts." But the opinion of Chief Justice Marshall, in the case before cited, seems in substantial principles to sustain the statements of the chancellor. *Davidson* v. *Waldron*, 31 Ill. 121, was an action of trover, where Davidson, with others, sought to recover the value of lumber which he alleged was levied upon by himself as United States Marshal. The defendants resisted on the ground

[67] 1 Kent Com. 410, citing Slocum *v.* Mayberry, *supra.*

of the insufficiency of the levy, and this was objected to by Davidson on the ground that the validity of the levy could not be enquired into in the State court; but the court said that the remedy was sought by the party as an individual, not as an officer of court. "There is no principle of law which renders writs issued by United States courts, or the acts of officers claiming to act under such writs, invulnerable to criticism in the State courts." And this appears to offer a solution of the question. An officer of the United States court ought not to have any special privilege to commit trespass.

§ 281. **The same.** *Buck* v. *Colbath*, 3 Wal. (U. S.) 334, was an action of trespass originally begun in a State court in Minnesota. The defendant pleaded that he was a United States marshal for the District of Minnesota; that a writ of attachment came to his hands, and that he levied on goods, for the taking of which he was sued by Colbath, but he did not in his plea *aver* that the goods were the property of the defendant in the attachment. The plaintiff had judgment in the State court, and the case was taken to the United States Supreme Court, under Sec. 25, of the judiciary act of the United States. Mr. Justice Miller, in delivering the opinion of the latter court, says: "The decision in *Freeman* v. *Howe* took the profession generally by surprise, overruling as it did the unanimous opinion of the Supreme Court of Massachusetts, as well as the opinion of Chancellor Kent." The court, however, follows the doctrine in *Freeman* v. *Howe*, alleging as a reason, that a departure from the rule in that case would lead to the utmost confusion and endless strife. The court further says substantially, that property may be seized by an officer of court under a variety of writs These may be divided into two classes: 1st, Those in which the process or order of the court describes the property to be seized and which contain a direct command to the officer to take possession of that particular property. Of this class are the writ of replevin at common law, orders of sequestration in chancery, and nearly all the processes of the admiralty courts by which the *res* is brought before it for its action. 2d, Those in which the officer is directed to levy the process on the property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any particular property to be thus taken. Of this class are the writ of attachment, or other mesne process, by which the property is seized before judgment, and the final process of execution,

elegit, or other writ by which an ordinary judgment is carried into effect. It is obvious, on a moment's reflection, that the claim by the officer executing these writs to the protection of the courts from whence they issue, stand upon very different grounds in the two classes. In the first class, he has no discretion to use, no judgment to exercise, no duty to perform but to seize the property. And if the court had jurisdiction, and the process was valid on its face, and the officer had kept himself within the mandatory clause of the writ, it is a complete protection in all courts. In the other class of cases, the officer has a large and important field for the exercise of his discretion. 1st, In determining that the property on which he proposes to levy is the property of the person against whom the writ is directed. 2d, That it is subject to levy, etc. So where the action was trespass in the State court against the marshal for wrongful levy of an attachment issued from the Federal courts, the court said there was nothing in the fact that the writ issued from the Federal court, to prevent the marshal from being sued in the State court for his own tort for levying on property of a person not named in the writ. Among courts of concurrent jurisdiction, that one which first obtains jurisdiction has the exclusive right to decide every question in the case, but this only extends to suits between the same parties or persons seeking the same relief, and does not affect the parties so far as other and distinct relief is concerned, nor does it affect strangers to the proceeding.[68]

§ 282. **The same.** Apart from the eminent authority of the cases in conflict with the doctrine laid down in *Freeman* v. *Howe*, 24 How. 450, the principles of the law which have been recognized since the earliest consideration of this question, warrant the conclusion that where an officer with process commanding him to take the goods of A., does with a willful and deliberate purpose of oppression, take the goods of B., the writ is no protection to him in his willful trespass; or, where an officer with such process ignorantly or carelessly levies on the property of a stranger to the writ, it affords him no justification, or confers any right or title to the property. That in either of these cases, the outraged owner may proceed against the wrong-doer personally, and in such case he cannot plead license from any court whose authority he has abused and whose mandate he has disobeyed. The

[68] Buck *v.* Colbath, 3 Wall. (U. S.) 334.

principles gathered from these cases seem to be in conflict, but the task of harmonizing them must be left to future consideration of the courts. Whether the State courts will feel bound to follow the ruling of the United States court upon this question, which does not involve the construction of the Constitution, or any of the laws of the United States, is a question upon which different courts will be likely to entertain different views.[69]

[69] Kinney *v.* Crocker, 18 Wis. 79; Bruen *v.* Ogden, (11 N. J. L.) 6 Halst. 371.

NOTE XVI. *Jurisdiction of the Federal Courts.*—The federal court, within each state, exercises the same jurisdiction as those of the state, Healey *v.* Humphrey, 27 C. C. A. 39, 81 Fed. 990; but will not interfere with the possession of the sheriff under process from the state court, Melvin *v.* Robinson, 31 Fed. 634. See however, Wise *v.* Jefferis, 2 C. C. A. 432, 51 Fed. 641, where it was held that goods taken by the sheriff under an attachment from a state court may be replevied in the Federal court, in case, before the institution of the replevin, the judgment in the state court in which the attachment issued, has been fully satisfied. The Federal court will not appoint a receiver for a church or other structure pertaining to a mission school situate upon an Indian Reservation, where it appears that the same structure is the subject of a suit in replevin pending in the state court; nor enjoin the plaintiff in the state court from interfering with the property which, under the process of the state court, has been placed in his possession, Domestic Society *v.* Hinman, 13 Fed. 161. The Federal courts cannot allow the writ of replevin where, as in Virginia, the writ is abolished, Baltimore Co. *v.* Hamilton, 16 Fed. 181. The owner of goods wrongfully taken, who is a fellow citizen of the same state with the wrong-doer, may assign the title to a non-resident, and he may maintain replevin in the Federal court, notwithstanding the prohibition contained in Section 11 of the Judiciary Act of 1789, Deshler *v.* Dodge, 16 How. 622, 14 L. Ed. 1084.

Jurisdiction Generally.—Where the sheriff levies upon the goods of A under process against B, the action of the latter for their recovery is not confined to the court from which the process against B issued; it may be brought in any other court of competent jurisdiction within the state, Dayo *v.* Provinski, 90 Mich. 351, 51 N. W. 514; Johnson *v.* Jones, 16 Colo. 138, 26 Pac. 584; in the Federal court, in certain cases, Wise *v.* Jefferis, 2 C. C. A. 432, 51 Fed. 641. In the Indian Territory jurisdiction is conferred by statute upon the United States Commissioner's court, concurrently with the district courts, in replevin, where the value of the goods does not exceed three hundred dollars; proceedings are the same as in the district courts, and in the district court by statute, several causes of action may be united. Held that in the commissioner's court several causes of action in

replevin might be united in one complaint, each cause being within the jurisdiction as to amount, and the plaintiff might take judgment upon each cause of action, and "congregate the several sums into one judgment," Harris *v.* Castleberry, 3 Ind. Ter. 576, 64 S. W. 541.

Consent cannot confer.—Replevin was instituted before a justice of the peace; judgment of return given in the common pleas upon an appeal from the justice, was reversed, on error brought by the original plaintiff for want of jurisdiction in the magistrate; consent cannot confer jurisdiction where the law does not, Jordan *v.* Dennis, 7 Metc. 590.

Upon what the Jurisdiction Depends.—The jurisdiction does not depend upon the seizure of the goods, Laughlin *v.* Main, 63 Ia. 580, 19 N. W. 673; nor upon the issuance of a summons before execution of the writ of replevin; even though the summons is the institution of the action. American Bank *v.* Strong, Mo. Ap. 85 S. W. 639. In St. Martin *v.* Desnoyer, 1 Minn. 41, it was held that a justice of the peace has no jurisdiction, even by consent of parties, unless the goods are replevied; but a subsequent statute provides that notwithstanding the property is not found, the plaintiff may recover the value of his right and damages for the illegal taking or detention, McKee *v.* Metrau, 31 Minn. 429, 18 N. W. 148. The jurisdiction depends upon what is alleged, and not what appears to be the fact as to the value of the thing in controversy, Addison *v.* Burt, 74 Mich. 730, 42 N. W. 278. The appraisement made for ascertaining the amount of the bond is not the test of jurisdiction, Bates *v.* Stanley, 51 Neb. 252, 70 N. W. 972.

Where the statute allows judgment for the return of the property only where demanded in the answer, judgment for return given without demand is held to be void, Gallup *v.* Wortman, 11 Colo. Ap. 308, 53 Pac. 247. Where the statute provides that no justice of the peace shall issue a writ of replevin without an affidavit showing plaintiff's right, the detention, etc., the affidavit is jurisdictional, and the justice record must show on its face that the affidavit was made and filed, Evans *v.* Bouton, 85 Ills. 579.

How Defect of Jurisdiction may be Waived or Cured.—Objections to the jurisdiction must be made in the first instance, Clark *v.* Dunlap, 50 Mich. 492, 15 N. W. 565. Plea in bar or appearance in a justice court without objection, waives all defects in the jurisdiction, based upon the proposition that the action is not brought in the proper township, Henderson *v.* Desbrough, 28 Mich. 170; Buck *v.* Young, 1 Ind. Ap. 558, 27 N. E. 1106. If an administrator not sued as such appears, pleads the general issue and proceeds to a trial on the merits, he waives all exception to the jurisdiction, Singer Co. *v.* Benjamin, 55 Mich. 330, 21 N. W. 358, 23 *Id.* 25. But the absence of an affidavit where made a condition precedent by statute, is fatal to the jurisdiction, if objected to in the first instance; and going to trial afterwards, or an appeal, after verdict, does not waive it; nor does the verdict correct it, Barruel *v.* Irwin, 2 N. M. 223. No plea to the jurisdiction

of an inferior court, dependent on the value in controversy is required, Chilson *v.* Jennison, 60 Mich. 235, 26 N. W. 859.

How Jurisdiction may be ousted or lost.—By adjournment to a legal holiday the court does not lose jurisdiction; the cause stands adjourned till next term, Moore *v.* Herron, 17 Neb. 697, 24 N. W. 425. Where the statute allows an alternative judgment for the goods or their value, jurisdiction is not lost by the removal of the goods to another state, Healey *v.* Humphrey, 27 C. C. A. 39, 81 Fed. 990. The jurisdiction is not ousted by a mere averment in the answer that the value of the goods exceeds the jurisdiction; the plaintiff is entitled to go to trial upon the issue so formed, Corbell *v.* Childers, 17 Ore. 528, 21 Pac. 670. Even after a formal order of discontinuance upon the plaintiff's motion the court may retain the cause, ascertain the value and the damage sustained by the defendant, and give judgment for the return, or the value, and damages, Brannin *v.* Bremen, 2 N. M. 40.

In Nebraska the County Court has jurisdiction where the value of the goods does not exceed one thousand dollars. If the value ascertained upon the trial exceeds one thousand dollars, this does not oust the jurisdiction, but the judgment may not exceed the statutory limit. Bates *v.* Stanley, 51 Neb. 252, 70 N. W. 972. And upon appeal to the district court the defendant may have judgment for return, or in the alternative for the value, and damages for the detention, even though the value as ascertained in that court exceeds the jurisdiction of the County Court, *Id.* The circumstance that upon the trial of an appeal from the justice of the peace, the title to land is brought in issue, does not deprive the Circuit Court of jurisdiction, nor the justice. Miller *v.* Cheney, 88 Ind. 466.

Plea to the Jurisdiction.—No plea to the jurisdiction of a justice is necessary, Chilson *v.* Jennison, 60 Mich. 235, 26 N. W. 859. A plea that prays judgment of the writ, "for that the value of the property described in said writ exceeds one hundred dollars, contains no averment of fact and is bad, Addison *v.* Burt, 74 Mich. 730, 42 N. W. 278.

Remititur.—Where judgment is given for the value to an amount exceeding the jurisdiction, a remititur will not cure the excess; because plaintiff, to escape payment of the money judgment, would be required to return all the goods, Bates *v.* Stanley, 51 Neb. 252, 70 N. W. 972.

But in the District Court, upon appeal, where a portion of the goods had been awarded to each party, the court being able from the record to distinguish between the value of the goods awarded to plaintiff in the County Court, and the value of the others, and it appearing that the latter had been disposed of and could not be returned, allowed defendant to file a remititur as a condition of affirming the judgment to the extent of the value of what was awarded to the defendant, Bates *v.* Stanley, *supra.*

Conflicts of Jurisdiction.—Goods taken on mesne process may be replevied in a different court of the same state, though not of superior

authority, Wilde *v.* Rawles, 13 Colo. 583, 22 Pac. 897. Where by statute the court appointed to control the administration of the estate of an insolvent debtor, becomes, upon the filing of an assignment, possessed of the estate and property assigned, one claiming the goods included within the assignment, cannot maintain replevin therefor in another court, Hanchett *v.* Waterbury, 115 Ills. 220, 32 N. E. 194; Colby *v.* O'Donnell, 17 Ills. Ap. 473. But a vendor who has been defrauded of his goods by the insolvent and has rescinded the sale in reasonable time, and demanded the goods from the assignee, will be awarded the goods on petition, or if they have been sold, the proceeds will be paid to the vendor, Phoenix Co. *v.* Anderson, 78 Ills. Ap. 253. Sec. 67 f of the Statute of Bankruptcy (30 Stat., 565 U. S. Comp. Stat., 1901, p. 3450), applies to the seizure under the writ of replevin; any such seizure of property of an insolvent within four months prior to the filing of the petition upon which he is adjudged a bankrupt, is void, In Re Weinger, 126 Fed. 875. If an adverse claim is asserted against any part of the bankrupt's estate by any person, the bankruptcy court has jurisdiction to ascertain whether the claim of such party has a basis in fact, and is bound to enter upon the inquiry, *Id.* One unlawfully in possession of goods belonging to the bankrupt's estate, may, by order of the bankruptcy court be compelled to surrender them, even though he claims under process from a state court directed to himself as an officer, and a levy made obediently thereto, if such levy was made after the filing of the petition in bankruptcy, *Id.* The courts of one state may entertain an action for the recovery of sand severed from lands in another state and brought into the state of the action, McGonigle *v.* Atchison, 33 Kans. 726, 7 Pac. 550. Where property in the hands of the marshal under process from the federal court is seized under a writ of replevin from the state court, the latter should adjudge the return of it, or payment of the value, and this without any adjudication of the merits of the plaintiff's claim, Cantrill *v.* Babcock, 11 Colo. 143, 17 Pac. 296, 18 Pac. 342. But in Williams *v.* Chapman, 60 Ia. 57, 14 N. W. 89, it is held that in such case the proper judgment is for return absolute without any alternative. And goods attached upon mesne process from a state court cannot be taken in replevin upon a writ issuing from the Circuit Court of the United States, Melvin *v.* Robinson, 31 Fed. 634. Goods replevied in the state court, cannot be taken from plaintiff, by a cross-replevin in the federal court, Williams *v.* Morrison, 32 Fed. 177. The marshal may effectually relinquish a levy which he has made, and if he do so he can never reclaim the goods; and when the sheriff returns that he has taken the goods under a writ of replevin against the marshal, it will be presumed that the marshal waived his levy, Weber *v.* Henry, 16 Mich. 399. Where goods less than one hundred dollars in value were seized by the marshal it was held that, inasmuch as the jurisdiction of the Circuit Court of the United States, out of which the marshal's process issued, was limited to cases where five

hundred dollars or more was involved, exclusive of costs, so that the ancillary proceedings contemplated in Freeman *v.* Howe, 24 How. 450, 16 L. Ed. 749, would not lie in that court, the owner was entitled to maintain replevin in the state court, Carew *v.* Matthews, 41 Mich. 576, 2 N. W. 829. In Heyman *v.* Covell, 44 Mich. 332, 6 N. W. 846 the jurisdiction of the state court to entertain replevin against the marshal of the United States holding the goods of one person under a final process against another, was sustained. The reasoning of the Court is that it is not within the power of congress nor of the state legislature to deprive the owner of property, or of the right to vindicate his title by appropriate legal process; that unless in such case a remedy is given in the Federal Court, he must be at liberty to resort to the state court; that the only remedy suggested by the court in Freeman *v.* Howe, was a bill in equity; that in the latter case of Van Norden *v.* Morton, 99 U. S. 378, the Supreme Court had declared that equity had no jurisdiction; that as there is no jurisdiction in equity it follows that a common law action is the proper remedy; and as such action lies in the Federal Court only where the citizenship is diverse, as in such case the jurisdiction is made by express statute concurrent with that of the state courts, there was no ground to refuse the redress demanded. But upon writ of error from the Supreme Court of the United States, this judgment was reversed; the court declaring that the doctrine of Freeman *v.* Howe, is equally applicable, whether the goods are holden under mesne or final process; that the possession of the marshal is not to be disturbed under process from the state court; and that the only remedy of the owner is by an ancillary bill in the Federal Court; the identical remedy which in Van Norden *v.* Morton was rejected, Covell *v.* Heyman, 111 U. S. 176, 28 L. Ed. 390.

It is worthy of remark that in Van Norden *v.* Morton, *supra*, the decision in Freeman *v.* Howe, was not called to the attention of the court, nor is the decision in Van Norden *v.* Morton adverted to, or attempted to be explained in Covell *v.* Heyman.

In Gumbell *v.* Pitkin, 124 U. S. 131, 31 L. Ed. 374, it was again held that where a contest arises between the marshal in possession under process from the Federal Court and a third person claiming under process of the state court, the appropriate proceeding of the latter is by petition in the Federal Court. In this case the writ under which the marshal was holding possession was held to be illegal and the court declared it to be the duty of the marshal to surrender the goods to the officer of the state court, and made order accordingly.

The doctrine that the marshal's possession under process from the Federal Court cannot be disturbed by process from any state court, is reiterated in Denny *v.* Bennett, 128 U. S. 489, 32 L. Ed. 491; Rio Grande Co. *v.* Vinet, 132 U. S. 478, 33 L. Ed. 400; Byers *v.* Macauley, 149 U. S. 608, 37 L. Ed. 867; Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981. The officer of the bankruptcy court is under the same protection, Wood *v.* Schloerb, 178 U. S. 542, 44 L. Ed. 1183.

§ 283. **The power, duty and responsibility of the sheriff in serving the writ of replevin.** The responsibilities of the sheriff in serving the writ of replevin are considerable, and with the responsibility imposed, the law gives a corresponding authority to be exercised by the officer in his own protection. An officer has immunity for acts done in the proper discharge of his duty in executing legal process, but when he attempts to execute illegal process, or legal process in an illegal manner, it affords him no protection.[70]

§ 284. **He must see that the writ is in form.** An officer who assumes to act under color of authority of law, must take the responsibility of determining whether the law has given him the authority which he assumes to exercise. Thus, an officer is not justified in executing an order or process which is void on its face, or which the court has no jurisdiction to issue.[71] Neither has he a right to execute process, however legal or formal it be, in any other than a legal manner; as when the statute forbids service on Sunday, he would have no lawful authority to execute process on that day.[72] It therefore becomes the duty of the officer in receiving a writ of replevin to see that it is substantially in legal form. If for any defect on its face it is void or inoperative, he will be liable as a trespasser or may be liable for the value of the goods, if he proceed to execute it.[73]

§ 285. **And that it issues from a court of competent jurisdiction.** The officer must also decide whether the court had jurisdiction to issue the writ. This by no means requires him to inquire whether the court acted properly in issuing the writ, for that question is entirely beyond his right to determine. Neither is he called upon to determine the rights of the parties, or whether the writ was properly issued or not. If the process be formal and sufficient on its face, and if the court from whence it issued

[70] Driscoll *v.* Place, 44 Vt. 258. If an officer levy an execution after the return day has expired, he is a trespasser. Vail *v.* Lewis, 4 Johns. 450. Consult Dynes *v.* Hoover, 20 How. 65; Wise *v.* Withers, 3 Cranch. U. S. Sup. Ct. 331; Brown *v.* Compton, 8 Term. R. 424; Davison *v.* Gill, 1 East. 64.

[71] Leadbetter *v.* Kendall, Hempst. (U. S. C. C.) 302; Brown *v.* Compton, 8 Term. R. 424 and 231; Dynes *v.* Hoover, 20 How. (U. S.) 65; Wise *v.* Withers, 3 Cranch, (U. S.) 331.

[72] Peirce *v.* Hill, 9 Porter, (Ala.) 151; Allen *v.* Crary, 10 Wend. 349.

[73] Dame *v.* Fales, 3 N. H. 70.

had jurisdiction to issue such a writ, it will be a complete protection to him, acting in obedience to its commands, so long as he acts within the scope of his legal duties and for the purpose of obeying its commands. He is to employ sufficient force to execute its mandates.[74] But if he have knowledge *aliunde* of the want of jurisdiction and persists in executing the writ notwithstanding, he will be liable.[75] Or where, from the circumstances of the case appearing on the face of the paper, the officer can see that there may be cause to suspect that process apparently formal has been improperly issued, he ought to examine into the matter to see that it is regular before serving it.[76] As where under the statute an execution must issue within one year after judgment is rendered, without which a subsequent execution is void.[77] A judgment was rendered in 1863 and no execution issued thereon until 1869, when execution was issued and return *nulla bona*, and a transcript afterwards taken to the circuit court and another execution issued thereon. The latter execution was held no protection to the officer.[78] The officer should examine the description of the property in the writ, and if it be so uncertain that he cannot distinguish the property, or if the property shown him be essentially different from the goods described, he may refuse to serve the process.[79] It does not follow that the writ which may be sufficient to protect the officer, will also afford the same justification to the party.[80]

§ 286. **The writ does not authorize a seizure of goods from the person of the defendant.** When the defendant is wearing a watch, or other article, either of ornament or apparel, the writ would confer no authority on the officer to seize it from his person, even when worn for the purpose of keeping it from

[74] Fulton *v.* Heaton, 1 Barb. (N. Y.) 552; Ela. *v.* Shepard, 32 N. H. 277; Colt *v.* Eves, 12 Conn. 251; Young *v.* Wise, 7 Wis. 128; Sprague *v.* Birchard, 1 Wis. 458; McLean *v.* Cook, 23 Wis. 365; Bogert *v.* Phelps, 14 Wis. 88; Landt *v.* Hills, 19 Barb. 283; Earl *v.* Camp, 16 Wend. 563; Dominick *v.* Eacker, 3 Barb. 17; Bagnall *v.* Ableman, 4 Wis. 163.

[75] Sprague *v.* Birchard, 1 Wis. 457; Grace *v.* Mitchell, 31 Wis. 539; Colt *v.* Eves, 12 Conn. 243.

[76] Bacon *v.* Cropsey, 3 Seld. 195.

[77] Morgan *v.* Evans, 72 Ill. 586, and cases cited.

[78] Hay *v.* Hayes, 56 Ill. 343.

[79] De Witt *v.* Morris, 13 Wend. 495.

[80] Brown *v.* Bissett, 1 Zab. 21, (N. J.) 46.

such seizure, the person of the defendant being free from molestation upon process of this nature.[81]

§ 287. **The right of an officer to break and enter a dwelling to take goods.** The question as to whether an officer has a right to break and enter the dwelling of the defendant to serve a writ of replevin seems to present itself here. Under the ancient common law the right and duty of the officer was unquestioned. A man's house was his castle, and would protect his person or his goods from seizure on civil process, but the wrongful taking of the goods of another was looked upon as little better than robbery,[82] and the safeguards thrown around a dwelling-house would not privilege the owner to take or keep the goods of another. The Statute Westminister 1, Chapter 17, expressly directed the sheriff to break and enter a dwelling house or stronghold to make replevin of goods therein wrongfully detained. Authorities in modern times upon this question are meager, but it has been held that the sheriff had a right to enter the defendant's house to search for goods described in a writ of replevin, and that the legality of his entry did not depend on the fact of his finding the property therein. The court said, "It would be strange if the defendant, by secreting the goods, and thus adding to the wrongful taking, could have an action against the sheriff in coming to search for what he has good reason to suppose could be found there."[83] A man's house is not a castle, nor does it carry any privilege but for himself. It will not protect a stranger who may fly there, nor will it protect the goods of another brought there to avoid a lawful execution.[84]

§ 288. **Parties bound to know the sheriff.** If an officer serves the writ in person all parties are bound to know and recognize him. So, doubtless, of a regularly appointed deputy; but if the sheriff appoint a special deputy, though his power and authority is the same as the sheriff to serve that process, yet he

[81] Maxham *v.* Day, 16 Gray, 213. Nor will an innkeeper be permitted to assert a lien on the garments which his guest is wearing on his person. Sunbolp *v.* Alford, 3 Mees & W. 249.

[82] Gilbert on Rep. 70; Britton, title Replevin.

[83] Kneas *v.* Fitler, 2 S. & R. (Pa.) 265.

[84] Semaney's Case, 5 Coke, 91. The sheriff may break and enter a barn or outhouse to serve an execution. See M'Gee *v.* Given, 4 Blackf. 18, note; Haggerty *v.* Wilber, 16 Johns. 287. See cases in State *v.* Smith, 1 N. H. 346.

would be obliged to show his authority, if it were questioned, as the defendant is under no obligation to recognize him without it.[85]

§ 289. **Duty of the sheriff to take bond; his liability in respect to the bondsmen.** The law required the sheriff to take bond from the plaintiff, with two securities, conditioned that he would duly prosecute the suit, or make return, etc., and held the sheriff responsible for the solvency of these securities; not only that they were solvent when accepted by the sheriff, but that they should continue so down to the time when they should be legally called upon to make good the conditions of their bond.[86] The harshness of this rule has been greatly modified of late. And so far has the change in this direction been carried in many of the States that the statute provides a method by which the defendant may except to the bondsmen of the other party within a limited time, and in case of failure to do so within that time he is precluded from doing so afterwards.[87] And the sheriff is not liable unless a formal exception is sustained.[88] But if the securities fail to justify when excepted to, the sheriff is liable.[89]

§ 290. **Extent of the sheriff's liability.** The question has arisen as to the extent of the sheriff's liability; whether it is limited by the amount of the bond, or whether, in case the real damage sustained exceeds that amount, the sheriff should be held for the real damages. The penalty in the bond,[90] where the suit is for taking insufficient security, is usually the limit of damages. But where the sheriff fails to take any bond, or takes bond in a sum less than double the value of the property, the injured party may unquestionably recover the real damages he has sustained.[91] By statutes in some of the States, the clerk, not the sheriff, takes the security, which may be excepted to by the opposing party, if he think it insufficient. The general rule, however, requires the sheriff to take bond from the plaintiff before serving the writ,

[85] Burton *v.* Wilkinson, 18 Vt. 186. See, also, Alexander *v.* Burnham, 18 Wis. 200; State, etc., *ex rel.* *v.* Williams, 5 Wis. 308, and note to new ed. p. 631.

[86] Grant *v.* Booth, 21 How. Pr. Rep. 354.

[87] Clinton *v.* King, 3 How. Pr. Rep. 55; Weed *v.* Hinton, 7 Hill, 157; Burns *v.* Robbins, 1 Code R. 62.

[88] Wilson *v.* Williams, 18 Wend. 581.

[89] Hoefheiner *v.* Campbell, 1 Luc. (10 Mod.) 157.

[90] Evans *v.* Brander, 2 H. Bla. 557; Jeffrey *v.* Bastard, 4 Ad. & E. 823.

[91] People, etc., *v.* Core, 85 Ill. 248.

and the writ cannot be executed by delivery of the property unless the bond provided by statute be given.[92] And if he omits to require such bond as the statute provides, he is liable to the defendant for failure to take bond.

§ 291. **Return by sheriff of goods wrongfully seized by him.** When the sheriff wrongfully took property from a person other than the defendant named in the attachment, and afterwards, to a suit for such wrongful taking, he answered that he had returned the property to the parties from whom he took it; *held*, immaterial. The answer did not allege a return to the plaintiff, or any one by him authorized to receive it. The party who had it may himself have been a wrongdoer; or, suppose the property was seized while in the hands of a drayman, being moved from one point to another; a return to the drayman would not constitute a defense to the claim of the owner.[93] The plaintiff sues for a taking or detention of the goods from him, and it is no answer to his claim to say they have been voluntarily delivered to another.

§ 292. **Duty of the sheriff on receiving a writ of replevin.** It is the duty of the sheriff, on receiving a writ of replevin, to execute it in the manner required by the statute, which should be his guide. He must serve it on the defendant in person, if he can be found; but a seizure and delivery of the property must be made where that can be done, whether personal service is had on the defendant or not.[94] He must make all reasonable efforts to find the goods. If he cannot do so without, he must search and inquire. If, influenced by vague rumors, he returns the writ without obtaining the goods, when they could have been found by search and inquiry, he will be liable.[95] The writ will sometimes be of no avail to the parties unless served promptly; and while the sheriff is not bound to lay aside all other business to attend to it, he is bound to use all reasonable endeavors to execute the process, so that it may take effect as the party designed.[96]

[92] Smith *v.* McFall, 18 Wend. 521; Wilson *v.* Williams, 18 Wend. 581; Milliken *v.* Selye, 6 Hill. 623.

[93] Caldwell *v.* Arnold, 8 Minn. 265.

[94] Abrams *v.* Jones et al., 4 Wis. 806.

[95] Bosley *v.* Farquar, 2 Blackf. 66.

[96] Hinman *v.* Borden, 10 Wend. 367; Whitney *v.* Butterfield, 13 Cal. 339; Lindsay Exrs. *v.* Armfield, 3 Hawks. (N. C.) 548; Kennedy *v.*

In New York, when the sheriff has seized property under a writ of replevin, he is not bound to deliver it to the plaintiff before the securities on the bond have been accepted, or justified, and during the time the goods remain in his possession, he is not an insurer of them, but is bound to use such care of the goods as a careful man would exercise with his own property; whether he has done so or not, is a question for the jury.[97] It has been held that if the sheriff leaves goods in the hands of the debtor, taking security for their delivery, or payment of the debt, he becomes liable if they are destroyed by fire or otherwise, except by act of God or the public enemy.[98]

§ 293. **Duty of the sheriff with respect to severing articles claimed to be real estate.** One of the most difficult questions touching the power and duty of the sheriff, is, when he is called upon to serve the writ of replevin by taking and delivering property apparently real estate, and which requires to be severed from the realty, to enable the officer to obey the command of the process. The writ is effectual for the delivery of personal property only, and furnishes no justification to an officer who, in attempting to serve it, severs and delivers part of the realty.[99] So when suit was for rails, when defendant had built part of them into a fence before the writ was served, it was said those built into the fence were real estate, and could not be taken.[100] This rule undoubtedly governs in all cases. The sheriff is liable as a trespasser if he severs any part of the realty and delivers it, even though it is the identical property described in the writ. But the sheriff is also liable, if he refuse to serve the writ by delivering personal property therein described under pretense that it is real estate, unless such is really the case, and he must assume the responsibility, and act or refuse to act, as he shall judge proper. But in cases where there can be, and probably is, an honest difference of opinion, and the property is described as personal property in the affidavit and the writ, the sheriff ought to take proper indemnity

Brent, 6 Cranch, 187; Payne *v.* Drews, 4 East, 523; Van Winkle *v.* Udall, 1 Hill. 559.

[97] Moore *v.* Westervelt, 21 N. Y. 103; Moore *v.* Westervelt, 1 Bos. (N. Y.) 358. See Rives *v.* Wilborne, 6 Ala. 45.

[98] Browning *v.* Hanford, 5 Denio, 586.

[99] Roberts *v.* The Dauphin Bank, 19 Pa. St. 75; Ricketts *v.* Dorrel, 55 Ind. 470.

[100] Bowen *v.* Tallman, 5 S. & W. (Pa.) 560.

from the parties and execute the writ, giving the defendant due opportunity to restrain if he wishes to do so.[101]

§ 294. **The liability of the officer a personal one.** The officer should bear in mind that any act done under color of his office affecting the rights of parties not named in the writ, may render him liable as a trespasser.[102] So any failure or neglect on his part to serve the writ in a proper and legal manner, within the proper time, may subject him to an action at the hands of the injured party,[103] and an illegal service may render him liable to the defendant. His liability is a personal one, and his official position does not change it. Where he is guilty of an act of trespass, judgment against him must be satisfied out of his individual property, and his resignation, removal, or the expiration of his term, will not change his liability.[104] Therefore, when a reasonable doubt exists, he is not compelled to proceed without indemnity from the party in whose behalf he is acting.[105] When the law requires the officer to act, as to acts done in the performance of his duty, it will favor a presumption that he has performed it, and the burden of showing to the contrary is on the other party.[106] The act of the deputy in seizing property is the act of the sheriff, and the possession of the deputy is the possession of the sheriff.[107] So the possession of a bailiff or custodian is the possession of the sheriff, and while the custodian may have a sufficient possession to be made a defendant in replevin, it by no means follows that the officer is not also liable.[108] When a party obtains a valid writ of replevin against a sheriff, the officer should obey the writ by

[101] Elliott *v.* Black, 45 Mo. 374; Hamilton *v.* Stewart, 59 Ill. 331.

[102] State *v.* Jennings, 14 Ohio St. 78; Moulton *v.* Jose, 25 Me. 76; Caldwell *v.* Arnold, 8 Minn. 265.

[103] Brown *v.* Jarvis, 1 Mees. & W. 704.

[104] Stillman *v.* Squires, 1 Denio, 328.

[105] State *v.* Jennings, 14 Ohio St. 78; Colt *v.* Eves, 12 Conn. 243. [Martin *v.* Bolenbaugh, 42 Ohio St. 508; Wolf *v.* McClure, 79 Ills. 564. A bond reciting that the goods are claimed by another and conditioned to pay "all costs, charges and expenses to which he may be subject in consequence of the seizure and detention of the goods," is a valid obligation, and the sheriff may resort to it for indemnity. Martin *v.* Bolenbaugh, *supra;* although the ground of recovery against the sheriff was his default in omitting to take a replevin bond, *Id.*]

[106] Shorey *v.* Hussey, 32 Me. 580.

[107] Stillman *v.* Squires, 1 Denio, 328.

[108] Ralston *v.* Black, 15 Iowa, 48.

surrendering the goods in obedience to the process, but his refusal to do so does not make him a trespasser in the taking.[109]

§ 295. **The sheriff liable for the act of his deputies.** The sheriff is liable for all the acts of his deputies in their official capacity. In the view of the law, all the deputies are but the servants of the sheriff.[110]

§ 296. **Disputes between deputies of the same sheriff settled by the sheriff.** Disputes between deputies of the same sheriff as to the possession of property which both have levied on, should be settled by the sheriff; neither deputy has any technical property in the thing. The sheriff has to answer one or both the attaching creditors, and must settle the dispute.[111]

§ 297. **The officer's return.** The return of the officer should be made without delay.[112] It must distinctly and clearly set out his acts, under the authority of the writ. If a part of the property only has been taken, the return must show what part, so that from the return alone, the court can see what has been done. Otherwise, upon an order for a *return* of the property replevied, or on a question arising as to what was actually delivered, a dispute might arise and the court have no certain means of determining.[113] As to matters material to be returned, it is so far conclusive that it cannot be contradicted or avoided in the suit,

[109] Walker *v.* Hampton, 8 Ala. 412; Cole *v.* Conolly, 16 Ala. 271; Six Carpenter's Case, 8 Co. Rep.

[110] Grinnell *v.* Phillips, 1 Mass. 530; Miller *v.* Baker, 1 Met. 27; Tuttle *v.* Cook, 15 Wend. 274; The People *v.* Schuyler, 4 Comst. 173; Poinsett *v.* Taylor, 6 Cal. 78; King *v.* Chase, 15 N. H. 9; King *v.* Orser, 4 Duer. 431; People *v.* Brown, 6 Cow. 41; Terwillinger *v.* Wheeler, 35 Barb. 620. But not for the act of his deputy in levying a distress warrant illegally; in such case he acts as bailiff of landlord. Moulton *v.* Norton, 5 Barb. 286. See Vanderbilt *v.* Richmond Co., 2 Comst. 479; Cotton *v.* Marsh, 3 Wis. 240. In Vermont, the deputy seems to have an action in his own name for any interference with property seized by him. Stanton *v.* Hodges, 6 Vt. 64.

[111] Perley *v.* Foster, 9 Mass. 112; Ackeworth *v.* Kemp, Douglas, 40; Woodgate *v.* Knatchbull, 2 D. & East. 150. *Contra*, see Gordon *v.* Jenney, 16 Mass. 469, where it is held that deputies act independently of each other, and that one of them can maintain replevin against another, of the same sheriff.

[112] Hutchinson *v.* McClellan, 2 Wis. 17.

[113] Mattingly *v.* Crowley, 42 Ill. 300; Pool *v.* Loomis, 5 Ark. 110; Miller *v.* Moses, 56 Me. 134; Nashville Ins. Co. *v.* Alexander, 10 Humph. (Tenn.) 378;

for the purpose of defeating any rights which have been acquired by the parties under it;[114] but the return of collateral facts may be traversed.[115]

§ 298. **As to the service of a writ of replevin.** Where, as is the case in replevin, the writ points out the precise thing to be done or the specific property to be seized, the officer has no discretion. He must take the goods if found in the defendant's possession, and where he does so, the court will protect him in obeying its mandate.[116] This rule is illustrated in Wisconsin, in a case where an attachment for a laborer's lien was sued out. The writ commanded the officer to attach the identical property and replevin was not permitted, the lien being against that particular property,[117] and the writ was regarded as a protection to the officer in retaining possession of the property.[118] When an action of trespass was brought against an officer for taking away a horse, under a writ of replevin which commanded him to cause the beast of the plaintiff, "impounded or distrained," to be replevied, etc. The horse replevied was not distrained or impounded and the officer knew it, and it was contended that the officer ought not to have served the writ, and that in so doing he became a trespasser; the court, however, held that the defendant was a legal officer and that it was his duty, regardless of any supposed knowledge of his own that there existed no cause of action, to serve the writ committed to him; that the writ, valid on its face, was a protection, and it was no part of his duty to determine that the replevin was improperly issued; his duty was to obey the writ.[119] As has been shown, the statute in many of the States gives the defendant the right to interpose a claim of property, to give bond and retain the property in his possession until the

[114] Knowles *v.* Lord, 4 Whart. (Pa.) 500; Cornell *v.* Cook, 7 Cow. (N. Y.) 310; Messer *v.* Baily, 11 Fost. (N. H.) 9; Pardee *v.* Robertson, 6 Hill, (N. Y.) 550.

[115] Brown *v.* Davis, 9 N. H. 76; Messer *v.* Baily, 11 Fost. (N. H.) 9; Augier *v.* Ash, 6 Fost. (N. H.) 99; Lewis *v.* Blair, 1 N. H. 69; Evans *v.* Parker, 20 Wend. 622; Browning *v.* Hanford, 5 Denio, 586. In a suit against an officer for taking property by replevin, the return of the officer cannot be read against him without reading the writ. Weinberg *v.* Conover, 4 Wis. 803.

[116] Buck *v.* Colbath, 3 Wall. (Sup. Ct.) 334.

[117] Union Lumber Co. *v.* Trouson, 36 Wis. 129.

[118] Griffith *v.* Smith, 22 Wis. 647; Battis *v.* Hamlin, 22 Wis. 669.

[119] Watson *v.* Watson, 9 Conn. 140.

rights of the contestants are determined. When the defendant claims the property, the sheriff ought, in the absence of any statute fixing time, to allow him a reasonable time within which to give bond to retain the possession, and in an action of trespass against the sheriff, the writ will be no protection unless such time is allowed.[120]

§ 299. **Effects of the replevin of property seized on execution.** The levy of an execution will operate as a satisfaction of it, *sub modo.* Even though the property should be replevied the bond is regarded as an indemnity, and the sheriff cannot make any other or further levy upon that execution. If the result of the suit, however, is against the officer, the levy is not payment of the debt.[121]

§ 300. **Special property created by a levy on goods.** An officer who has seized property on a writ of execution or attachment has such a special property therein as will sustain replevin or trover.[122] This is founded on the officer's responsibility for the safe-keeping of the goods in his custody as well as his duty and responsibility under his process.[123] And a sale on such process conveys all the title which the defendant in the process had.[124] When the officer has delivered the goods to a receiptor for safe-keeping the officer is regarded as still in possession, and he may maintain trover for them.[125] When a marshal of an incorporated town seized goods by virtue of a legal process, and they were unlawfully taken from him, he was allowed to sustain replevin against the wrong-doer.[126]

§ 301. **Justification by an officer.** When an officer justifies his taking under a writ of attachment or an execution, the plea should state the nature of the writ, and the court or authority under which the same was issued. It should also state what the commands of the writ were, so that the court may see what he has done, and whether he has obeyed the writ or not. The plea

[120] Hocker *v.* Stricker, 1 Dall. 225, 245.

[121] Hunn *v.* Hough, 5 Helsk, 713.

[122] Lockwood *v.* Bull, 1 Cow. 322; Pollte *v.* Jefferson, 5 Har. (Del.) 338; Norton *v.* People, 8 Cow. 137; Dezell *v.* Odell, 3 Hill, 215.

[123] Lathrop *v.* Blake, 3 Foster, (N. H.) 56.

[124] O'Connor *v.* Union Line, 31 Ill. 230; Hazzard *v.* Benton, 4 Har. (Del.) 62.

[125] Norton *v.* The People, 8 Cow. 137; Dezell *v.* Odell, 3 Hill, 215.

[126] Fitch *v.* Dunn, 3 Blackf. 142.

should also show, if such be the fact, that the plaintiff in replevin was the defendant in the process, and in all cases that the goods belonged to the defendant in the process and were taken from him, or on the process against him, and are in the custody of the law.[127] But in some States the plea, or answer of general denial, is held broad enough to permit an officer who is defendant to show that he has taken the property upon process, and that the goods belong to the plaintiff, or to the plaintiff and another jointly, and were seized upon process against him.[128]

[127] Whittington *v.* Dearing, 3 J. J. Marsh, (Ky.) 684; McCarty *v.* Gage, 3 Wis. 404; Richardson *v.* Smith, 29 Cal. 529; Parsley *v.* Huston, 3 Blackf. 348; Dillon *v.* Wright, 4 J. J. Marsh, (Ky.) 254. See, also, Stephens *v.* Frazier, 2 B. Mon. (Ky.) 250; Gentry *v.* Bargis, 6 Blackf. 262; Dillon *v.* Wright, 4 J. J. Marsh, (Ky.) 254; Bridges *v.* Layman, 31 Ind. 384; Truitt *v.* Revill, 4 Har. (Del.) 1. The process need not be copied, but must be set up. Parsley *v.* Huston, 3 Blackf. 348; Wheeler *v.* McCorristen, 24 Ill. 42; Van Namee *v.* Bradley, 69 Ill. 301; Mt. Carbon Coal Co., etc., *v.* Andrews, 53 Ill. 185. For a form of plea in such case, see Lammers *v.* Meyer, 59 Ill. 216.

[128] Branch *v.* Wiseman, 51 Ind. 1. When the sheriff pleaded that the property belonged to A. and B. and that he had seized it under an attachment as sheriff; *held*, that it might be regarded as a plea of property in a third person. Levi *v.* Darling, 28 Ind. 498; Martin *v.* Watson, 8 Wis. 315.

NOTE XVII. *Justification, Generally.*—The sheriff cannot as against the true owner, justify under a levy upon execution against a mere trespasser, even though in actual possession, Post *v.* Berwind Co., 176 Pa. St. 297, 35 Atl. 111. Replevin lies against an officer who seizes the goods of one person upon a writ against another, Pike *v.* Colvin, 67 Ills. 227, Welter *v.* Jacobson, 7 N. D. 32, 73 N. W. 65, even though the officer levies only upon the interest of the defendant in the writ, if he has no interest, Leonard *v.* McGinnis, 34 Minn. 506, 26 N. W. 733. An officer is not protected in wrong-doing by the order of his superior officer, Fiedler *v.* Maxwell, 2 Bl. C. C. 552; nor under a writ issued by a clerk of one court upon the judgment of another court; nor under adequate process if he is assuming to act beyond the limits of his county, Dederick *v.* Brandt, 16 Ind. Ap. 264, 44 N. E. 1010. And the sheriff who takes the goods of A under process against B cannot defend by showing that he delivered them to a third person upon the order of court in a suit in which the owner was not party, Wise *v.* Jefferis, 2 C. C. A. 432, 51 Fed. 641. Nor can the officer who levies an attachment at the suit of an agister assert a lien in favor of the agister for the same demand mentioned in his writ, upon the identical animals attached; he must justify under his process or fail, Houck *v.* Lynn, 48 Neb. 228, 66 N. W. 1103. A receipt by the sheriff to an execution defendant for a sum of money, "to be applied" upon the execution,

§ 302. **The defense by sheriff when goods seized are replevied from him.** The sheriff, in levying an execution or at-

"provided said execution be just and legal," does not impose upon the sheriff the duty to institute an action to determine the legality of the process; so construed it would be invalid for want of consideration, and because opposed to good policy, Richards *v.* Nye, 5 Ore. 382. At the most such receipt only imports an undertaking to retain the money until return day of the writ to enable defendant to assail it; if no proceedings are then instituted the sheriff may then lawfully offer the money to the creditor, *Id. How far a Stranger to the Writ may assail it, or the Officer's Conduct.*—A stranger who replevies goods found in possession of the sheriff under execution against a third person cannot object that the execution is without seal, Broadwell *v.* Paradice, 81 Ills. 474. Defects in process which are waived by the parties cannot avail a stranger, Dogan *v.* Bloodworth, 56 Miss. 419. An officer's levy cannot be questioned for excess by a stranger to the writ, Pugh *v.* Calloway, 10 O. St. 495.

Process Fair on its Face.—The officer may justify under a writ fair upon its face, from a court of competent jurisdiction, though the judgment is void, Adams *v.* Hubbard, 30 Mich. 104; Muller *v.* Plue, 45 Neb. 701, 64 N. W. 232; Hartlep *v.* Cole, 101 Ind. 458. Even though the writ issues from a court of limited jurisdiction, Norcross *v.* Nunan, 61 Calif. 640; or from one exercising *de facto* the office of justice of the peace. And such process emanating from one who exercises the office under color of right, and who is not a mere intruder is a protection not only to the ministerial officer who executes it, but to the plaintiff in the writ, and it seems, to the justice himself, Hamlin *v.* Kassafer, 15 Ore. 456, 15 Pac. 778.

Where process is fair upon its face it is the duty of the sheriff to levy it; he is not concerned with the question how the judgment was obtained, Baker *v.* Shehan, 29 Minn. 235, 12 N. W. 704. The officer is not affected by defects in the proceedings upon which the writ is founded, Brichman *v.* Ross, 67 Calif. 601, 8 Pac. 316; Norcross *v.* Nunan, 61 Calif. 640; nor is the protection of the process lost by the failure of the plaintiff to enter the action, Hall *v.* Monroe, 73 Me. 123.

And the writ is admissible in evidence in connection with the affidavit and bond upon which it issued, though these latter are defective, Brichman *v.* Ross, *supra*. An attachment fair upon its face and issued from a court having jurisdiction of the subject matter and the parties, protects the officer in levying upon the goods of the defendant therein though they are found in possession of another, Matthews *v.* Densmore, 109 U. S. 216, 27 L. Ed. 912. And the officer is protected by a process regular upon its face, though the defendant therein named is in fact dead, Meyer *v.* Hearst, 75 Ala. 390. The sheriff, attaching goods upon a writ valid upon its face, will not be adjudged to surrender to one showing no right, Bruce *v.* Squires, 68 Kans. 199, 74 Pac. 1102. But process which, though regular upon its face, is void in fact; *e. g.*, where the

tachment, assumes the responsibility that the goods levied on belong to the defendant named in the process, and if the goods are

judgment defendant was dead at the entry of the judgment, cannot be used to build up a title to the goods therein; its protection is personal to the officer, Myer *v.* Hearst, *supra.* Nor can a writ founded upon a void affidavit enable the officer to assert title to the goods taken thereunder, Aspell *v.* Hosbein, 98 Mich. 117, 57 N. W. 27. And the officer, to maintain his title to the goods levied upon, must show not only a fair writ, but a valid judgment unsatisfied, Muller *v.* Plue, 45 Neb. 702, 64 N. W. 232.

And a judgment entered without authority of law, or an execution issued thereon, will not protect the officer. The county judge gave judgment for costs, on appeal the District Court remanded the cause for final judgment. Held, that as the county judge was acting merely as a justice, and the time within which a judgment could be rendered under the statute had expired, the District Court was without jurisdiction to so remand the cause, and this second judgment and all proceedings thereunder, were void, Best *v.* Stewart, 48 Neb. 859, 67 N. W. 881. *Where the officer knows of the illegality of the process.*—A sheriff has no right to be wiser than his process; what he is commanded to do he is to do, and will be protected in doing, Richards *v.* Nye, 5 Ore. 382. A tax collector is bound to obey a warrant issued by competent authority and regular on its face; he is under no duty, and has no power, to inquire into the precedent steps, Cunningham *v.* Mitchell, 67 Pa. St. 78. One acting as a member of a village board at a time when a tax was levied, and who afterwards becomes the marshal and receives a warrant for the collection of the tax, is not, in his new capacity, chargeable with notice of illegality in the levy, Bird *v.* Perkins, 33 Mich. 29. But the officer is not protected if the warrant issued from one having no authority, Cunningham *v.* Mitchell, *supra.* In Leachman *v.* Dougherty, 81 Ills. 324, it was held that a tax warrant issued by competent authority and fair upon its face was no protection to an officer who had notice that the tax was not levied, and who had contributed to the irregularity. In Taylor *v.* Alexander, 6 Ohio. 144, an officer sued in trespass for an assault, justified under a warrant which charged the plaintiff with larceny. The plaintiff offered to prove that defendants knew he was innocent and procured the arrest to bring him within the reach of civil process; the evidence was rejected and the Supreme Court held properly. The court say, that "it does not comport with correct policy to permit an executive officer to examine into the legality of the proceedings of the court whose process he has to execute, or to confer upon such an one authority to proceed or forbear as he may judge best;" and after adverting to the apparent validity and regularity of the warrant the court held "the officer was legally bound to execute it."

Justification under Writ of Replevin.—A writ of replevin is a complete protection to the officer who obeys its command, irrespective of

replevied from him his plea must aver that the goods were the property of the defendant in the process under which they were

who is the owner of the goods, Boyden *v.* Frank, 20 Ills. Ap. 169; Weiner *v.* Van Rensalaer, 43 N. J. L. 547. The officer to whom a writ of replevin is delivered is bound to execute it, notwithstanding the adverse claims of third parties, and is not liable to the action of such parties, Curry *v.* Johnson, 13 R. I. 121; and though the officer knows that the goods are not repleviable, Watson *v.* Watson, 9 Conn. 141; and though the officer takes the goods described therein, from the possession of a stranger to the writ, Boyden *v.* Frank, *supra*. *Contra*, Sexton *v.* McDowd, 38 Mich. 148. An officer who proceeds regularly in executing a writ of replevin, and who takes the very goods described therein, is protected by his process, and neither he nor his sureties are liable in damages to a third person, the owner of the goods, Phillips *v.* Spotts, 14 Neb. 139, 15 N. W. 332; see *contra*. The State *v.* Jennings, 4 O. St. 418. But he is liable if he takes goods not named in the writ, Klinkowstein *v.* Greenberg, 15 Misc. 479, 37 N. Y. Sup. 206.

But the writ is no protection to the plaintiff therein, who causes it to be issued and executed unlawfully, Watson *v.* Watson, *supra*.

Abuse of Process.—If the officer after seizing the goods under attachment delivers them to the attaching creditor, he becomes a trespasser *ab initio;* the lien of the attachment is gone, and he can no longer assail as fraudulent the title of one replevying the goods and claiming under a sale from the attachment defendant, Griswold *v.* Sundback, 4 S. D. 441, 57 N. W. 339. So where the officer delivers the replevied goods to the plaintiff, before the execution of the bond required by the statute, McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985. A tax collector does not become a trespasser *ab initio* by keeping property levied upon a little longer than absolutely necessary to make the advertisement and sale, Bird *v.* Perkins, 33 Mich. 29.

Of the Plea.—The officer may justify under a general denial, Best *v.* Stewart, 48 Neb. 860, 67 N. W. 881; Pico *v.* Pico, 56 Calif. 453; and if he pleads both the general denial and a special plea in justification, he will not be restricted to the matter set up in the special plea, Horkey *v.* Kendall, 53 Neb. 522, 73 N. W. 953. Where the defendant justifies a levy upon the goods as the property of a stranger to the action, he must aver that the goods were the property of such stranger, Olds *v.* Andrews, 66 Ind. 147. If the officer plead merely an execution and property in the defendant therein, he may show fraud in the sale under which an intervenor is claiming, Burrows *v.* Waddell, 52 Ia. 195, 3 N. W. 37. Where an answer avers that defendant is a constable, that an attachment was lawfully issued to him against W, shows compliance with the requirements of the statutes, that defendant found the goods in possession of W and levied the attachment thereon, judgment duly given and made in that action, for the plaintiff and against the defendant therein, and thereupon an execution issued upon that judgment, and delivered to defendant, and that thereunder he levied upon

seized.[129] When the officer wishes to contest the title of the plaintiff as fraudulent as to creditors whose process he holds, the fraud

[129] Smith *v.* Winston, 10 Mo. 301; Gentry *v.* Bargis, 6 Blackf. 262; Adams *v.* Hubbard, 30 Mich. 104; Buck *v.* Colbath, 3 Wall. 342, 334.

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the same goods, a complete justification is exhibited, Whetmore *v.* Rupe, 65 Calif. 237, 3 Pac. 851. An officer, justifying under an execution is not bound to anticipate the case of the plaintiff or to plead or know anything as to the origin or nature of the plaintiff's title, Stephens *v.* Hallstead, 58 Calif. 193. A plea in justification alleging that the goods were taken under attachment against the husband of plaintiff, that the same were purchased by the husband with his own means, and title taken in the name of plaintiff for the purpose of delaying, hindering and defrauding creditors, and that the plaintiff took the legal title in trust for the husband, fails to state a defense,—apparently for failing to aver title in the husband or that the goods were subject to attachment, Marrinan *v.* Knight, 7 Okla. 419, 54 Pac. 656.

Of the Evidence.—The officer must prove a judgment unsatisfied, Wyatt *v.* Freeman, 4 Colo. 14; Gidday *v.* Witherspoon, 35 Mich. 369; and existing when the process issued, Balm *v.* Nunn, 63 Ia. 641, 19 N. W. 810. A subsequent judgment *nunc pro tunc* will not suffice, Shue *v.* Ingle, 87 Ills. Ap. 522. An officer, seeking to impeach the plaintiff's title as fraudulent, as to creditors, must show a valid judgment, or, if he justifies under an attachment, a subsisting debt, Schemerhorn *v.* Mitchell, 15 Ills. Ap. 418; Newton *v.* Brown, 2 Utah. 126; Densmore Co. *v.* Shong, 98 Wis. 380, 74 N. W. 114. The debt may be established by showing a valid judgment, Densmore Co. *v.* Shong, *supra.* But the proof of the judgment is not required where the officer merely defends against personal liability, Kahn *v.* Hayes, 22 Ind. Ap. 182, 53 N. E. 430. He must show a completed levy, and if he would claim the goods must prove a judgment; though the execution merely, will protect him against personal liability, Gidday *v.* Witherspoon, *supra*, where validity of the execution is admitted, a valid judgment may be presumed, Brock *v.* Barr, 70 Ia. 399, 30 N. W. 652. Justifying and asserting title to the goods under an attachment, and assailing the plaintiff's title as fraudulent as against creditors, he must aver and prove a valid and subsisting claim of the plaintiff in the attachment against the attachment defendant, and a regular attachment, Jones *v.* McQueen, 13 Utah. 178, 45 Pac. 202. In Hall *v.* Johnson, 21 Colo. 414, 42 Pac. 660, it was held that the mortgagee in a mortgage void as to creditors, cannot maintain replevin against an officer, who seizes them under attachment against the mortgagor; and that the sheriff need not show the indebtedness which is asserted in the attachment suit. But this seems not to be the law. The officer in such case assails the mortgage as the representative of the creditor. In no other capacity is he entitled to call it in question. Unless there be an indebtedness to one whom he represents, there is no creditor. In Montana, an officer who justifies

should be specially pleaded; otherwise he may not be permitted to show it.[130] So when the claim of the plaintiff is wholly, or in part, void for usury—when the statutes allow the defense to be made by parties or privies—the usury may be pleaded.[131] Where property seized on execution is replevied from the officer, and he wishes an order for return, he must not only plead the execution and a judgment but a valid execution and judgment must also be

[130] Frisbee *v.* Langworthy, 11 Wis. 375.
[131] Dix *v.* Van Wyck, 2 Hill. 522.

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under an attachment, must show that the undertaking required by the statute, as preliminary to the writ, was given, Wise *v.* Jefferis, 2 C. C. A. 432, 51 Fed. 641; but see *contra*, Matthews *v.* Densmore, 109 U. S. 216, 27 L. Ed. 912. He must show that the writ issued regularly, Williams *v.* Eikenbury, 22 Neb. 210, 34 N. W. 373. But this rule is limited to substantial matters; the fact that the affidavit was sworn before plaintiff's attorney is not of this character, Horkey *v.* Kendall, 53 Neb. 522, 73 N. W. 953. And he must show that he proceeded regularly under his process, Ferguson *v.* Day, 6 Ind. Ap. 138, 33 N. E. 213; and he must prove that he is an officer *de jure*, Outhouse *v.* Allen, 72 Ills. 529;—but the officer was not in this case attacking a sale as fraudulent; his own testimony is competent, Larsen *v.* Ditto, 90 Ills. Ap. 384, Vaughn *v.* Owens, 21 Ills. Ap. 249. A constable who produces a certificate of his election granted pursuant to statute, with proof of his acting as constable, sufficiently establishes his official character, Schemerhorn *v.* Mitchell, 15 Ills. Ap. 418.

And he must show his process, Goodwin *v.* Sutheimer, 8 Kans. Ap. 212, 55 Pac. 486; Van Baalen *v.* Dean, 27 Mich. 104; Ditto *v.* Pease, 82 Ills. Ap. 192; if the process be lost he must show its contents by secondary evidence, Barkley *v.* Leiter, 49 Neb. 123, 68 N. W. 381. And justifying under a writ against A the seizure of goods in possession of B, he must show title in A, superior to that of B, Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528. Justifying under a writ of attachment in due form of law and from a court of competent jurisdiction, where the goods were seized in possession of defendant of that writ, the plaintiff being a stranger, the writ itself is a justification, Munns *v.* Loveland, 15 Utah. 250, 49 Pac. 743. A meat inspector cannot justify seizing the meats of a butcher without proving inspection and condemnation thereof; the mere fact that the inspector went to the market, selected the carcasses, marked them and took them away, is not a justification, Kamman *v.* Lane, 55 Mich. 426, 21 N. W. 872. The reversal on error of the judgment under which an officer justifies, is no bar to his defense, if the execution issued lawfully and the judgment had not been superseded when he made his levy. Acting lawfully, he is not to be turned into a trespasser by subsequent proceedings of the character in question, Shreck *v.* Gilbert, 52 Neb. 813, 73 N. W. 276.

given in evidence to support the plea.[132] And the plea and the evidence should show that the writ was in full force and not satisfied, and that the property was taken in obedience to the writ.[133]

§ 303. **The same.** When the vendee of goods replevied them from a sheriff who seized them on mesne process against the vendor before the sheriff could contest the sale on the ground that it was fraudulent, he was compelled to make out a *prima facie* case, at least, of indebtedness. His right depended on the existence of a debt due to the plaintiff in the process.[134] The officer, in such case, is representing the creditors, and they have no right to contest the sale unless they show a debt, or some obligation which the vendee is under to them. A sale by a sheriff can transfer no better title than the defendant had in the process upon which the sale was made.[135]

[132] Glascock *v.* Nave, 15 Harrison, (Ind.) 458; Beach *v.* Botsford, 1 Doug. (Mich.) 206; Clay *v.* Caperton, 1 T. B. Mon. (Ky.) 10; Sandeford *v.* Hess, 1 Head, (Tenn.) 679.

[133] Dayton *v.* Fry, 29 Ill. 526.

[134] Sanford Manf. Co. *v.* Wiggin, 14 N. H. 441; Damon *v.* Bryant, 2 Pick. 413.

[135] Goodrich *v.* Fritz, 4 Ark. 525; Shearick *v.* Huber, 6 Binns. (Pa.) 4; McDonald *v.* Prescott, 2 Nev. 109; O'Conner *v.* Union Line, etc., 31 Ill. 230; Hazzard *v.* Benton, 4 Har. (Del.) 62.

CHAPTER XII.

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§ 304. **Taking by theft, trespass or fraud.** With the growth of the common law, individual title to property became gradually strengthened, until the rule became crystalized in substantially the form in which it exists in the Constitution of these States. "No man shall be deprived of his property, unless by his own consent or due process of law." In this respect, the protection given to property was next to that extended to life and liberty.

§ 305. **Thief acquires no title to the stolen goods.** A thief acquires no title to the goods he steals and can convey none, by any sale and delivery he may make. The owner of such stolen goods may recover them from whosoever hands he finds them in.[1]

§ 306. **Sale in market overt.** An exception was made by the common law, in cases where goods which had been stolen, were sold in market overt. Such a sale passed absolute title to

[1] 2 Bla. Com. 449; Beazley *v.* Mitchell, 9 Ala. 780; Saltus *v.* Everett, 20 Wend. 275; Sharp *v.* Parks, 48 Ill. 513; Parham *v.* Riley, 4 Cold. (Tenn.) 9; Hoffman *v.* Carow, 20 Wend. 20; S. C. 22 Wend. 285; Courtis *v.* Cane, 32 Vt. 232; Lance *v.* Cowan, 1 Dana, (Ky.) 195; Arendale *v.* Morgan, 5 Sneed, (Tenn.) 703; Johnson *v.* Peck, 1 Wood & M. C. C. 334; White *v.* Spettigue, 1 Carr. & Ker. 673; Florence Sew. Mach. *v.* Warford, 1 Sweeny, (N. Y.) 433; [Parham *v.* Riley, 4 Cold. 5. Where one assumes forcible possession of land and excludes a prior possessor, he acquires no title to the product, Laurendeau *v.* Fugelli, 1 Wash. 559, 21 Pac. 29. One in possession of lands of the state unlawfully quarries stone therein; defendants enter, and without right, carry away the stone, replevin lies, Reynolds *v.* Horton, 2 Wash. 185, 26 Pac. 221. Plaintiff in violation of an injunction against another, acting in concert with him, assumes forcible possession of defendant's lands and plants a crop, the crop belongs to the defendant. Hanlon *v.* Goodyear, 103 Mo. Ap. 416, 77 S. W. 481.]

the purchaser. But the ancient law prohibited the sale of anything above the value of twenty pence, except in market overt. Sales in such markets were exceedingly formal and open, and were required to be preceded by proof of ownership on the part of the vendor, so that there was little danger of stolen goods being offered without immediate detection of the thief.[2]

§ 307. **Markets overt unknown in this country.** But markets overt are unknown to the law of this country.[3] Sales of chattels are made on all occasions without question, the purchaser and seller relying on the confidence each has in the other. This confidence, usually well placed, is sometimes betrayed by persons who obtain goods regardless of the owner's rights, for the sole purpose of making way with them. This is sometimes done by theft, sometimes by trespass, but oftener by means of a fraudulent purchase, followed by sale to some innocent third party. Where the goods have been so purchased, the question is, who shall bear the loss, the innocent and defrauded owner, or the equally innocent purchaser. Where the goods are overtaken in the hands of the wrongdoer, his fraud, as we shall see, is no protection, but where they are found in the hands of a *bona fide* purchaser, for value, the question presents more difficulty.

§ 308. **Replevin of stolen goods does not depend on the conviction of the thief.** As before stated, goods acquired by theft or robbery do not vest in the taker. The owner may retake them in this action, whether he finds them in the hands of the taker, or of an innocent purchaser for value; and the conviction of the thief, which was under the ancient law a prerequisite, is not now a necessary condition to a successful prosecution of the suit.[4]

[2] 2 Bla. Com. 449; Hoffman *v.* Carow, 22 Wend. 285.

[3] Griffith *v.* Fowler, 18 Vt. 390; Dame *v.* Baldwin, 8 Mass. 518; Parham *v.* Riley, 4 Cold. (Tenn.) 9; Ventress *v.* Smith, 10 Peters, 161; Newkirk *v.* Dalton, 17 Ill. 415; Lowry *v.* Hall, 2 W. & S. (Pa.) 134.

[4] With reference to the necessity of a conviction of the thief before the owner can reclaim his stolen property, see Foster *v.* Tucker, 3 Gr. (Me.) 458; Newkirk *v.* Dalton, 17 Ill. 415; Boston & W. R. R. *v.* Dana, 1 Gray, 83; Pettingill *v.* Rideout, 6 N. H. 454; Short *v.* Barker, 22 Ind. 148; Gordon *v.* Hostetter, 37 N. Y. 99; Bloody *v.* Keating, 4 Gr. (Me.) 164; Wells *v.* Abraham, L. R. 7 Q. B. 554; Hoffman *v.* Carow, 22 Wend. 285. The law which prohibited a private action against the thief was for the purpose of compelling the owner to prosecute him to conviction; the right to recover was suspended. Crosby *v.* Leng, 12 East. 409. But the prohibition only extended to suit against the thief.

§ 309. **A trespasser acquires no title, and can convey none, by any sale.** One who wrongfully takes goods without the owner's consent, acquires no title thereby, and can convey none, by any sale or transfer he may make. So when such a taker sells the goods, even to an innocent purchaser for value, the owner may pursue his property and retake it wherever found. Where a willful trespasser cut logs on another's land, and sold them to one who sold them to an innocent purchaser for value, the owner was permitted to recover their value with interest, from such purchaser; or, he might have recovered the logs had he been able to identify them.[5] Where the defendant, by his encouragement, procured a messenger to leave a machine with him, knowing that it was intended for another, and afterward made some repairs on it, the taking was regarded as wrongful, and the owner might sustain replevin without demand.[6]

§ 310. **Replevin lies for goods obtained by fraud, even from one who innocently purchases.** Where a party procured possession of leather by personating another, who was an agent of the owner, and shipped it to Chicago, and sold it in open market, the real owner was entitled to sustain trover against the purchaser for value. The possession was not delivered to the vendor, but was obtained under circumstances which might convict him of embezzlement. Under such circumstances no title passed, and the taker could confer none by sale. Possession is one of the *indicia* of ownership; but bare possession is not title, and when that possession is obtained by force or fraud, it confers no right.[7]

§ 311. **Innocent purchaser from a thief may elect to affirm the contract as against a thief.** While the sale or exchange of stolen goods does not divest the owner of his title, yet, as between the thief and his vendee, the innocent party is the only

therefore, if he had pawned it or sold it, the owner might bring his action against the purchaser or the pawnbroker without waiting for conviction of the thief. White *v.* Spettigue, 13 M. & W. 608. This cannot be reconciled with Horwood *v.* Smith, 2 T. R. 750; Gimson *v.* Woodfull, 2 Carr. & P. 41. See Stat. 24 and 25 Victoria, Chap. 96, § 100; 7 and 8 Geo. IV., Chap. 20, § 57.

[5] Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 491. See Riley *v.* Boston Water Power Co., 11 Cush. 11; Riford *v.* Montgomery, 7 Vt. 418; Courtis *v.* Cane, 32 Vt. 232; Schulenberg *v.* Harriman, 21 Wall. 44; Williams *v.* Merle, 11 Wend. 80; Gibbs *v.* Jones, 46 Ill. 320.

[6] Purvis *v.* Moltz, 5 Robt. (N. Y.) 653.

[7] Fawcett *v.* Osborn, 32 Ill. 411.

one to avoid the sale. Thus, if one buy or exchange for a stolen horse, the owner can recover the horse, and the purchaser may elect to rescind the contract and recover the consideration, or he may affirm the contract and recover the value of the horse from the thief who sold him.[8] When W. traded to B. a horse which he had stolen, and then sold to C. the horse he received from B., B. brought replevin against C., and it was held he could not recover. This was not a case where the owner of the stolen horse brought suit, but the plaintiff was seeking to recover property which he had voluntarily sold and delivered, and something that had come into the possession of a *bona fide* purchaser for value.[9] Some of the cases assert the doctrine that one who receives and sells stolen goods, as agent, and without any knowledge pays the money to the thief, is liable to the owner for the value.[10] For example, a stable keeper who receives a stolen horse, without any knowledge of the theft, would be liable in replevin, at the suit of the owner, as long as he held possession; and if he sells the horse, he has been held liable for the proceeds, and the fact that he has paid them over to the thief has been said to be no defense.[11]

§ 312. **Replevin by the owner of goods sold by a bailee without authority.** If a bailee, without authority, sell goods entrusted to his care, even though the purchaser pay full value, and have no knowledge of the fraud, still the owner does not lose his title.[12] The general rule is, that an agent cannot bind his

[8] Titcomb *v.* Wood, 38 Me. 561; Lee *v.* Portwood, 41 Miss. 111; Smith *v.* Graves, 25 Ark. 458.

[9] Brown *v.* Campsall, 6 Har. & J. (Md.) 491. Consult Doe *v.* Martyr, 4 Bos. & Pull. 332.

[10] Hoffman *v.* Carow, 20 Wend. 20; Same *v.* Same, 22 Wend. 285.

[11] Spraights *v.* Hawley, 39 N. Y. 441; Stanley *v.* Gaylord, 1 Cush. 536; Dudley *v.* Hawley, 49 Barb. 397. Compare Rogers *v.* Hule, 2 Cal. 571; where the contrary is held.

[12] 2 Kent, 324; Hilliard on Sales, 23; 1 Parsons on Contracts, 44; Dyer *v.* Pearson, (3 B. & C.) 10 E. C. L. 38; Williams *v.* Merle, 11 Wend. 80; Ingersoll *v.* Emmerson, 1 Carter, (Ind.) 78; Stanley *v.* Gaylord, 1 Cush. 536; Kitchell *v.* Vanadar, 1 Blackf. (Ind.) 356; Pribble *v.* Kent, 10 Ind. 325; Johnson *v.* Willey, 46 N. H. 76; Sanborn *v.* Colman, 6 N. H. 14; Poole *v.* Adkisson, 1 Dana, 110; Roland *v.* Gundy, 5 Ohio, 202; Lovejoy *v.* Jones, 30 N. H. 169; Sargent *v.* Gile, 8 N. H. 325; Galvin *v.* Bacon, 2 Fairfield, (Me.) 28; Nash *v.* Mosher, 19 Wend. 431; Howland *v.* Woodruff, 60 N. Y. 74; Neff *v.* Thompson, 8 Barb. 213; Sarjeant *v.* Blunt, 16 Johns. 74; Wilson *v.* Nason, 4

principal, where he transcends his authority, and persons who deal with an agent in the concerns of his principal ought to know the extent of his authority.[13] It is also a rule, that mere possession of chattels will not authorize a transfer of a better title than the possessor has.[14] So, where a mortgagor of chattels in Illinois took them to Indiana and sold them, the court said, that upon a proper showing, the mortgagee could recover them.[15] A servant who sells his master's goods without authority can convey no title.[16] So, when a servant quits the employ of his master, and takes away his master's goods, it is a conversion, and replevin, without demand, will lie.[17] Where one hires a horse, for the purpose of making a particular journey, and goes further, he is liable, and the owner might sustain replevin or trover; but if, on his return, he informs the owner of his increased journey, and he accepts payment under those circumstances, it is a waiver of the conversion.[18]

Bosw. 155; Lecky *v.* M'Dermott, 8 S. & R. (Pa.) 500. Compare Drummond *v.* Hopper, 4 Har. (Del.) 327.

[13] Cases last cited. Schemmelpennich *v.* Bayard, 1 Pet. 264.

[14] Hotchkiss *v.* Hunt, 49 Me. 213; Covill *v.* Hill, 4 Denio, 327.

[15] Blystone *v.* Burgett, 10 Ind. 28; Martin *v.* Hill, 12 Barb. 631. See Barker *v.* Stacy, 25 Miss. 477; Offutt *v.* Flagg, 10 N. H. 46; Jones *v.* Taylor, 30 Vt. 42.

[16] Trudo *v.* Anderson, 10 Mich. 357.

[17] Pillsbury *v.* Webb, 33 Barb. 214.

[18] Rotch *v.* Hawes, 12 Pick. 136. [If the horse die, even without his fault, he is liable for the value; if returned, this may be shown in mitigation of damages, Wheelock *v.* Wheelwright, 5 Mass. 104; Fisher *v.* Kyle, 27 Mich. 454; and he is liable for injuries occasioned by the fault of the horse. Even an infant may be charged in such case, Homer *v.* Thwing, 3 Pick. 492. He is liable for an injury to the horse, though the transaction occurs on the Lord's day, in violation of the statute, the hiring being as the plaintiff knows for mere pleasure, Hall *v.* Corcoran, 107 Mass. 251. But one who loses his way and goes by what he honestly thinks the best way home, not intending at any time to convert the horse, is not liable in trover, Spooner *v.* Manchester, 133 Mass. 270; Lucas *v.* Trumbull, 15 Gray, 306. The unauthorized use of another's chattel, is a conversion, Gove *v.* Watson, 61 N. H. 136; —so is any unlawful interference with the goods of another, *e. g.*, a levy by an officer and putting keeper in charge, Rider *v.* Edgar, 54 Calif. 127. If mortgagee sell the mortgaged goods at private sale it is a conversion, even though it be agreed that the sale does not extinguish the lien of the mortgage. The court declined to regard the sale as an assignment of the mortgage, Everett *v.* Buchanan, 2 Dak. 249, 8 N. W.

§ 313. **The same. Rights and authority of a bailee.** The law simply requires a party, in dealing with an agent or bailee, to look at the acts of the principal. Private communications to the agent would not generally affect the rights of *bona fide* third parties dealing with him about the business of the principal within the scope of his agency. If one send his horse to a place where horses are shod, it confers no authority on the smith to sell; but if he send his horse to an auction stable, it will not be presumed that he was sent there for safe-keeping, but for the purpose of sale generally carried on there.[19] If, therefore, in the latter case, the agent sell the horse, even on different terms than his private instructions warrant, the sale would be good;[20] but if the ordinary business of the agent was for purposes other than sale of horses, the sale would confer no title except such as the agent was specially entrusted with. Purchasers must ascertain his authority at their peril. A purchase from an agent without authority, even though the purchaser pay full value, and acts in good faith, carries no title, and the owner may sustain replevin.[21]

§ 314. **The same. Illustration of the rule.** If a man send

31. There may be a conversion without deprivation of property, as where one withholds from the owner a certificate of shares in a corporation, which is in the name of the owner so that the wrong-doer does not nor can make any use of it, Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548. A tortious taking or an assertion of title in hostility to the true owner, Haines *v.* Cochran, 26 W. Va. 719;—a denial by bailee of the right of those who succeed to the title of the original bailor, Adams *v.* Mizell, 11 Ga. 106;— assuming possession with intent to convert, and all who assist or co-operate, are liable, Clark *v.* Whitaker, 19 Conn. 319;—but merely borrowing a chattel from one supposed to be the owner, and for a temporary purpose, and using for a short space the chattel of another, is not a conversion, Frome *v.* Dennis, 45 N. J. L. 515. Plaintiff leases sheep to defendant, defendant agreeing to market the wool crop and pay over one-half the gross proceeds; he in fact pledges the wool and retains the proceeds to his own use; held, conversion, Nichols *v.* Gage, 10 Ore. 82.]

[19] Pickering *v.* Busk, 15 East, 39; Hicks *v.* Hankin, 4 Esp. 114; Stanley *v.* Gaylord, 1 Cush. 544.

[20] Sarjeant *v.* Blunt, 16 Johns. 74; Moore *v.* McKibbin, 33 Barb. 246; McMorris *v.* Simpson, 21 Wend. 610.

[21] East India Co. *v.* Hensley, 1 Esp. 112; Johnson *v.* Willey, 46 N. H. 75; Fenn *v.* Harrison, 3 D. & E. 754; Sanborn *v.* Colman, 6 N. H. 14; Lovejoy *v.* Jones, 10 Foster, 165; Sargeant *v.* Gill, 8 N. H. 325; Jefferson *v.* Chase, 1 Houst. (Del.) 219. Compare Stanley *v.* Gaylord, 1 Cush. 544.

his goods to an agent to be sold on his account, and the latter sell them to his creditor for the payment of his own debt, the title of the owner is not thereby divested, and replevin will lie even against a subsequent purchaser, without notice.[22] But where one obtain goods fraudulently, and bail them to another, the bailee may surrender to the true owner, and may show such facts as a bar to any suit against himself by the bailor.[23] When A. con-

[22] Galvin *v.* Bacon, 11 Me. 28; Parsons *v.* Webb, 8 Gr. (Me.) 38; Herron *v.* Hughes, 25 Cal. 556; Loeschman *v.* Machin, 2 Stark. 311; Hyde *v.* Noble, 13 N. H. 494.

[23] Bates *v.* Stanton, 1 Duer. (N. Y.) 79. NOTE XVIII. *Bailee.*—The following cases support the text: Perry *v.* Williams, 39 Wis. 339; Gray's Admr. *v.* Allen, 14 Ohio, 59. The bailee cannot refuse to deliver to the true owner, Rogers *v.* Weir, 34 N. Y. 463; Hart *v.* Boston Co., 72 N. H. 410, 56 Atl. 920; but he may, acting in good faith, postpone a response to the demand until he can make inquiry as to the title, Rogers *v.* Weir, *supra.* Delivery to the true owner is a complete defense to the action of the bailor or those who claim under him, Hentz *v.* The Idaho, 93 U. S. 575, 23 L. Ed. 978. But when a bank executed its certificate to the plaintiff, attesting that T. had deposited with it certain negotiable bonds as security to the plaintiff for a loan, —held that from that time the bank's possession was the possession of the plaintiff, and the receiver of the bank could not resist his demand on the ground of a prior pledge of the same bonds by T. to another, Gibson *v.* Lenhart, 111 Pa. St. 624, 5 Atl. 52. The bailee, who with notice of the rights of the real owner aids and abets the bailor in wrongfully converting the goods is liable to the true owner, Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409; but this does not apply as against a mere servant acting innocently; or a broker who merely sends bought and sold notes, between the parties; to a carrier who transports the goods from place to place; to a packer who packs them for shipment; to a watchmaker who repairs a watch and restores it to one who left it; to the smith who shoes the horse for a thief; nor to the broker who merely negotiates the contract of sale, Mohr *v.* Langan, *supra.* Bailee who delivers stolen goods to the one from whom he received them is not guilty of conversion, Spooner *v.* Holmes, 102 Mass. 503. And if bailee deliver the goods to his bailor, before notice of the rights of another, he is not liable to such other, Jarvis *v.* Rogers, 15 Mass. 389. And one who accepts stolen coupons, in good faith, without gross negligence and before any demand or notice from the rightful owner, sells them and pays the amount to his employer, is acquitted, Spooner *v.* Holmes, supra. Bailee is bound to return the goods to his bailor on demand, and he cannot set up that another is tenant in common with the bailor and that he holds under such other as his trustee. Pullian *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229. And a bailee against whom replevin is instituted for the goods bailed to him must

tracted for a boiler and engine of certain power, and paid seven hundred dollars on it, the maker to take it back and refund the money if it did not prove sufficient; it proved insufficient, and the maker refused to receive it; but some months afterwards asked A. to let him take it, promising to pay for the use of it. Soon after obtaining it, he mortgaged it to one who had no notice. A. brought replevin, and recovered. Even if the bailee had a right, as he claimed, to sell it, he had no right to mortgage.[24] This rule is based upon the assumption that the title of the original owner remains unimpaired by any fraudulent act of the

[24] Stevens *v.* Cunningham, 3 Allen, (Mass.) 492. See, also, Nash *v.* Mosher, 19 Wend. 431; Trudo *v.* Anderson, 10 Mich. 357; Ballou *v.* O'Brien, 20 Mich. 304; Legal News, April 7, 1877, 237.

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notify his bailor, in order that he may have opportunity to protect his title, Whitman *v.* Kleimann, 53 N. Y. Sup. 1088. Wheat deposited with a miller to be stored for a certain time, but with liberty in the party making the deposit to sell it any time, and agreement by the miller that the wheat should be retained until called for; the wheat was in fact ground and the flour sold; it was held to be a bailment and not a sale, and that upon the expiration of the period of deposit the bailor was entitled to the wheat in the mill, up to the amount deposited by him, by a title superior to one to whom, subsequent to the bailment, the miller has executed a mortgage, Schindler *v.* Westover, 99 Ind. 395. Property wagered upon a horse race may be recovered if delivered up by the stakeholder without a decision of the judges upon the race, Jackson *v.* Nelson, Tex. Civ. Ap. 39 S. W. 315. As against a stranger bailee is entitled to the goods, and as against one who brings a wrongful replevin may recover the full value, Hall *v.* So. Pac. Co., Ariz. 57 Pac. 617. And though the plaintiff claims under a bill of sale from the bailee himself he may nevertheless assert the title of his bailor, and establishing it, is entitled to a judgment for return, Delaney *v.* Canning, 52 Wis. 266, 8 N. W. 897. A carrier who delivers goods to the buyer without authority of the seller is guilty of a conversion, Jellett *v.* St. Paul Co., 30 Minn. 265, 15 N. W. 237. A carrier garnisheed in respect of goods in his hands which he has delivered to the sheriff pursuant to the garnishment, is not liable for a failure to deliver to the consignee, Stiles *v.* Davis, 1 Black, 101, 17 L. Ed. 33. A carrier is liable if he deliver baggage to the wrong party; the loss of the check does not bar the plaintiff's action; no presumption will be indulged that the trunk was delivered to some person who had found and held the check, Cass *v.* New York Co., 1 E. D. Smith, 522;—and a demand upon the baggage-master, is sufficient, *Id.* The death of the bailee terminates the bailment, no trust attends the goods in the hands of one who succeeds to his position, Morris *v.* Lowe, 97 Tenn. 243, 36 S. W. 1098.]

bailee; that the bailee, having no title, cannot convey any by sale or transfer, and that a purchaser from such bailee takes no title, but simply a possession, without other right.[25]

§ 315. **Replevin lies against a carrier for goods wrongfully taken and committed to his care. Such carrier has no lien on the goods for freight.** A common carrier, who receives goods from a wrongful taker, without knowledge of the wrong, cannot resist the action by the true owner.[26] Neither can he assert a lien for his services as such carrier.[27] Where an innkeeper was sued in replevin for a horse, and the defendant claimed a lien for his keeping, and plaintiff contended that the horse had been stolen, Lord Holt said the innkeeper is not bound to consider who is the owner of the horse, but whether he who brings him is his guest.[28] This latter ruling, however, was disregarded in the cases before cited. There may be a distinction between an innkeeper who feeds a horse, which is necessary to save the animal, and is for the owner's benefit, and a carrier who transports goods, which may be to the injury of the owner. But the cases are tolerably clear that a carrier cannot set up a lien against the true owner for his carriage of such goods, since he may demand his charges in advance, if he be so minded. The action, however, would not lie without demand.[29]

§ 316. **Replevin lies where a bailee pledges goods without authority.** When the owner of pork in a warehouse entrusted the warehouse receipts to a party to repack it, and the latter pledged the receipts as collateral for a loan of money, and in default of payment the lender sold the pork, the real owner was permitted to sustain replevin, although an innocent party purchased for value.[30]

[25] Ingersoll *v.* Emmerson, 1 Carter, (Ind.) 79.

[26] Fitch *v.* Newberry, 1 Doug. (Mich.) 1; Robinson *v.* Baker, 5 Cush. 137; Van Buskirk *v.* Purinton, 2 Hall, (N. Y.) 561; Collmon *v.* Collins, 2 Hall, (N. Y.) 569.

[27] Kinsey *v.* Leggett, 71 N. Y. 387.

[28] Yorke *v.* Grenaugh, 2 Ld. Raym. 866.

[29] Fitch *v.* Newberry, 1 Doug. (Mich.) 1.

[30] Burton *v.* Curyea, 40 Ill. 324. (Rumpf *v.* Barto, 10 Wash. 382, 38 Pac. 1129.) As before stated, replevin lies for personal chattels only. Where one hires chattel property and fixes it to real estate, and sells it so fixed to one who has no notice, the owner cannot recover from the innocent purchaser, because it has become part of the realty. Fryatt *v.* The Sullivan Co., 5 Hill, (N. Y.) 117.

§ 317. **The rule when an agent or bailee with authority sells at a less price than his instructions warrant.** When an agent or bailee, with authority to sell, does sell at a less price than his instructions warrant, he is not guilty of conversion; nor would a purchase from him, unless fraudulent, render the purchaser liable to the owner either for the value or for the goods.[31] In such case the sale is in pursuance of the authority delegated, and the law does not hold a purchaser responsible that the agent observes the details of his instructions. It is enough that the purchaser assure himself that the agent has authority to sell and receive payment, and in such case, if the agent abscond with the proceeds, the principal by whose authority he acted must assume the loss.

§ 318. **Fraudulent purchaser takes a title voidable at the election of the defrauded vendor.** A sale and delivery of goods, procured through the fraudulent representations of the buyer, with intent to cheat the seller, may be avoided by the latter. In such case, as between the vendor and purchaser, a voidable title to the property passes.[32] The fraud practiced is regarded as sufficient to avoid the contract, if the innocent party so elect. The fraudulent purchaser, however, cannot avoid it on the ground of his own fraud. The real owner may prefer to treat him as a purchaser and recover value, or he may elect to rescind the sale and recover his goods in replevin.[33] The rule may be regarded as settled that where goods are obtained from the owner by fraudulent purchase, he can sustain replevin

[31] Dufrense *v.* Hutchinson, 3 Taunt. 117; Sarjeant *v.* Blunt, 16 John. 74; Laverty *v.* Snethan, Cent. Law J. April 1877, 330; Scott *v.* Rogers, 31 N. Y. 676.

[32] Ayres *v.* Hewitt, 19 Me. 281; Hunter *v.* Hudson River Iron Co., 20 Barb. 494; Nichols *v.* Michael, 23 N. Y. 266; Nichols *v.* Pinner, 18 N. Y. 295; Sarjent *v.* Sturm, 23 Cal. 359.

[33] Rowley *v.* Bigelow, 12 Pick. 307; Lloyd *v.* Brewster, 4 Paige, 541; Gray *v.* St. Johns, 35 Ill. 239; Titcomb *v.* Wood, 38 Me. 563; Hall *v.* Naylor, 18 N. Y. 588; Cary *v.* Hotailing, 1 Hill, 311; Ash *v.* Putnam, 1 Hill, 302; Olmstead *v.* Hotailing, 1 Hill, 317; Matteawan Co. *v.* Bentley, 13 Barb. 641; Hall *v.* Gilmore, 40 Me. 581; Seaver *v.* Dingley, 4 Gr. (Me.) 307; Gray *v.* St. John, 35 Ill. 239. Consult Bristol *v.* Wilsmore, 1 B. & C. 514; Kilby *v.* Wilson, 1 R. & Moody, 187; Van Cleef *v.* Fleet, 15 Johns. 149; Hill *v.* Freeman, 3 Cush. 259; Hussey *v.* Thornton, 4 Mass. 405; Marston *v.* Baldwin, 17 Mass. 606; Smith *v.* Dennis, 6 Pick. 262; Bowen *v.* Schuler, 41 Ill. 193; Mackinley *v.* M'Gregor, 3 Whart. (Pa.) 368.

against the fraudulent purchaser so long as the goods are in his possession.[34]

[34] Acker *v.* Campbell, 23 Wend. 372; Abbotts *v.* Barry, (2 Brod. & Bing.) 6 E. C. L. 370; Browning *v.* Bancroft, 8 Met. 278; Coghill *v.* Boring, 15 Cal. 217; Weed *v.* Page, 7 Wis. 503; Welker *v.* Wolverkuehler, 49 Mo. 36; Andrew *v.* Dieterich, 14 Wend. 32; Malcom *v.* Loveridge, 13 Barb. 372; Allison *v.* Matthieu, 3 Johns. 235; Keyser *v.* Harbeck, 3 Duer. 373; Williams *v.* Given, 6 Gratt. 268; Jennings *v.* Gage, 13 Ill. 610; Titcomb *v.* Wood, 38 Me. 561; Caldwell *v.* Bartlett, 3 Duer. 341; Stephenson *v.* Hart, 4 Bing. 476; Bristol *v.* Wilsmore, 1 B. & Cress. 514; Manning *v.* Albee, 14 Allen, 8; Noble *v.* Adams, 7 Taunt. 59.

NOTE XIX. *Fraudulent Purchaser.*—If an insolvent person purchases goods upon credit, concealing his insolvency, vendor may rescind, and replevy the goods, unless the right of third persons has intervened, Tennessee Co. *v.* Sargent, 2 Ind. Ap. 458, 28 N. E. 215. Phœnix Iron Works *v.* McEvony, 47 Neb. 228, 66 N. W. 290. So where goods are obtained without consideration upon false suggestion that creditors are about to attach, Hays *v.* Windsor, 130 Calif. 230, 62 Pac. 395; and where goods are obtained in exchange for a promissory note, which, as the buyer knows, the seller believes to be the note of one person, whereas it is in fact the note of a different person of the same name, Parrish *v.* Thurston, 87 Ind. 437; and where a promissory note, the property of the wife, is obtained from the husband while in a state of intoxication, induced by defendant, though the note was expressed to be payable to the husband, was negotiable, and was not yet due, More *v.* Finger, 128 Calif. 313, 60 Pac. 933. And false representation may be by words or acts, or mere suppression of facts, Faulkner *v.* Klamp, 16 Neb. 174, 20 N. W. 220; *e. g.*, the sale of mortgaged chattels without informing the buyer of the encumbrance, entitles the buyer to rescind, Merritt *v.* Robinson, 35 Ark. 483; and procuring a release of the mortgage after replevin brought does not defeat the action. Whether an innocent misrepresentation be ground to rescind a sale of chattels has never been authoritatively adjudicated in this country. Enright *v.* Felheimer, 25 Misc. 664, 56 N. Y. Sup. 366. In this case it was said that the intent to deceive must be proven. False representations to a third person, intended to be communicated, to wit, a commercial agency, relied upon by the vendor, is ground to rescind, Farwell *v.* Boyce, 17 Mont. 83, 42 Pac. 98, Soper Co. *v.* Halstead Co., 73 Conn. 547, 48 Atl. 425; or like representation of a corporation in its annual report of condition filed in a public office, Steel *v.* Webster, 188 Mass. 478, 74 N. E. 686, distinguishing Hunnewell *v.* Duxbury, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733. The purchase of goods by an insolvent upon credit is not fraudulent, even although he knows of his insolvency and fails to declare it, unless there be an intent not to pay the price, Pinckney *v.* Darling, 3 App. Div. 553, 38 N. Y. Sup. 411, Stein *v.* Hill, 100 Mo. Ap. 38, 71 S. W. 1107, Hacker *v.*

§ 319. **Observations on the rule.** An exceedingly plausible distinction was taken in a New York case, where it was

Monroe, 56 Ills. Ap. 420, Bell *v.* Ellis, 33 Calif. 620, Powell *v.* Bradlee, 9 G. & J. 220, Adler & Sons Co. *v.* Tharp, 102 Wis. 70, 78 N. W. 184; and fraud is not to be inferred merely from the fact that the purchaser was in debt at the time, Feder *v.* Abrahams, 28 Mo. Ap. 454; or embarrassed in his circumstances and not able to pay his debts, Hacker *v.* Monroe, *supra*. Fisher *v.* Conant, 3 E. D. Sm. 199. And a merchant is not insolvent merely because he has not on hand money to pay his current demands as they mature, Noble *v.* Worthy, 1 Ind. Ter. 458, 45 S. W. 137. But if an insolvent purchase goods with intent not to pay for them, and concealing his insolvency, he commits a fraud which entitles the seller to reclaim the goods unless the rights of innocent third parties have intervened, Thompson *v.* Rose, 16 Conn. 71, Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174; Goodman *v.* Sampliner, 23 Ind. Ap. 72, 54 N. E. 823; Huthmacher *v.* Lowman, 66 Ills. Ap. 448; England *v.* Forbes, 7 Houst. 301, 31 Atl. 895; Bradley Co. *v.* Fuller, 58 Vt. 315, 2 Atl. 162. And such fraudulent intent vitiates the purchase, though no misrepresentations are made and the seller's agent has in fact heard of the buyer's embarrassment immediately prior to the sale, Joslin *v.* Cowie, 60 Barb. 49. Upon sale for cash, payment of the price is an implied condition precedent; and if the purchaser obtain possession without payment it is an act of fraud rendering the whole transaction a nullity and entitling the seller instantly to reclaim, Matthews *v.* Cowan, 59 Ills. 341; as if the buyer pays by check which is dishonored, *Id.* American Co. *v.* Willsie, 79 Ills. 92; or obtains possession by pretending an intention to pay cash, and then offers a promissory note of the seller. The court said that the law would not recognize this method of collecting debts, and replevin was allowed, Blake *v.* Blackley, 109 N. C. 257, 13 S. E. 786. Subsequent participation in a fraud by which goods are obtained, is as effective to charge the one so participating, as pre-concert and combination, Lincoln *v.* Claflin, 6 Wall. 132, 19 L. Ed. 106. As if one knowing of a contrived fraud aids in its execution and shares the proceeds, *Id.* And all who assist in disposing of stolen goods or goods obtained by a trespass, though acting innocently, are liable, Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409. But as to a bona fide purchaser from the fraudulent vendee the title passes, notwithstanding the fraud. In Perkins *v.* Anderson, 65 Ia. 398, 21 N. W. 696, Anderson, who was notoriously insolvent, by assuming the name of Swede, who was in good credit, obtained goods of the plaintiff; they were shipped to Swede's address, and Anderson, by representing himself to the carrier's agent as Swede, obtained the goods. Held, that inasmuch as Anderson was the identical person to whom the goods were sold and shipped, plaintiff had authorized the carrier to deliver them to him; that the title passed, and that as against a bona fide purchaser the plaintiff could not recover. And in Moore *v.* Watson, 20 R. I. 495, 40 Atl. 345, the plaintiffs sold goods to

said that the goods having been sold and delivered to the defendant, the plaintiff had voluntarily parted with his actual as well

the defendants on the credit of a third person, the agent of plaintiffs; the purchasers failed to pay; the agent paid a portion of the amount, which was accepted in full, plaintiffs agreeing to refund if the defendant should arrange the bill. It was held that the plaintiffs having parted with the goods solely on the credit of their agent, were not defrauded and could not maintain an action for the benefit of the agent. A representation however false, if not relied upon, in the sale, does not entitle the vendor to rescind. Schoeneman *v.* Chamberlin, 37 App. Div. 628, 55 N. Y. Sup. 845; *e. g.*, a fraudulent representation of which the vendor had no knowledge at the time of dealing, Brackett *v.* Griswold, 112 N. Y. 454; or where the party complaining knew or was bound in law to know the fact, in spite of the representation, Burkle *v.* Levy, 70 Calif. 250, 11 Pac. 643. Plaintiff has the burden of proving his reliance upon the false statements, Beacon Falls Co. *v.* Pratte, Mass. 76 N. E. 285; and where the representations were made many months prior to the sale, the jury may find that the seller was not entitled to rely upon them, Beacon Falls Co. *v.* Pratte, *supra.* And one not party to the fraud, nor holding under the one defrauded, cannot avail himself thereof; *e. g.*, a mere general creditor of one whose goods have been procured by fraud, Kingsley *v.* McGrew, 48 Neb. 812, 67 N. W. 787. A minor may during his minority, avoid a sale of his goods on tender of what he has received, Towle *v.* Dresser, 73 Me. 252. One who obtains goods by fraud may confer a title on a bona fide purchaser at any time while the goods remain in his possession, Peninsula Co. *v.* Ellis, 20 Ind. Ap. 491, 151 N. E. 105. Plaintiff, residing in Dakota, sold a quantity of flour to one representing himself to be doing a business at a particular number in New York, when in fact no such person ever was in business at that place or known there; the defendant purchased in good faith of an unknown person who gave reference to a reputable house. Held, the plaintiff's transaction was a sale, that the goods were obtained by fraud and not by theft, and defendants were entitled to retain them. McPherren *v.* Homan, 2 Ap. Div. 264, 37 N. Y. Sup. 706. A mortgage to an attorney to secure his fee for defending an assignment for creditors, taken without knowledge that the stock assigned was obtained by fraud, is preferred to the claim of the vendor, to the extent of the value of the services rendered previous to obtaining notice of the fraud, Meyers *v.* Bloon, 20 Tex. Civ. Ap. 554, 50 S. W. 217. But if the assignee has on hand other goods subject to such mortgage those must be first disposed of before resort to the goods fraudulently obtained, *Id.* And one who comes into possession of goods through a purchase from a former purchaser in fraud, even with notice, is responsible only for the goods which he received and not for other goods bought at the time, which never came into his possession, Cowen *v.* Bloomberg, 66 N. J. L. 385, 49 Atl. 451. Vendor whose goods were obtained by fraud, must, if he would rescind,

as his constructive possession, that as the taker had acquired possession by delivery from the owner, trespass would not lie, and

offer to do so at the earliest possible moment, Poor *v.* Woodburn, 25 Vt. 234; and must return what he has received. The Matteawan Co. *v.* Bentley, 13 Barb. 641; Fisher *v.* Conant, 3 E. D. Sm. 199; Merrill Co. *v.* Nickells, 66 Mo. Ap. 678; Kellogg *v.* Turpie, 93 Ills. 265; even though worthless, Merrill Co. *v.* Nickells, *supra*. *Contra*, Fitz *v.* Bynum, 55 Calif. 459. But if the fraud consisted in making the agent of the plaintiff drunk and obtaining the thing in that manner, the owner need not refund what was paid to the agent, More *v.* Finger, 128 Calif. 313, 60 Pac. 933. And the vendor need not return what he received on account of the purchase price if the goods have been damaged to an equal amount. Phœnix Iron Works *v.* McEvony, 47 Neb. 228, 66 N. W. 290. And where an exchange of animals was induced by fraudulent representations as to age, health and condition, and the party defrauded was prevented from making prompt return of the animal which he had received, by the departure of the other party to another county, and before his return was known, one of the animals received died from a disease with which he was infected at the time of the exchange, the return was held excused. Faulkner *v.* Klamp, 16 Neb. 174, 20 N. W. 220. And the defrauded vendor is under no duty to reimburse to the fraudulent vendee the expenses which the latter has incurred in getting possession of the goods, Soper Co. *v.* Halsted Co., 73 Conn. 547, 48 Atl. 425. Plaintiff sold lumber to Russell; the sale was induced by the fraudulent misrepresentations of Russell as to his financial condition; one of the terms of the sale was that Russell should pay the freight charges and deduct the same from the price; Russell sold the lumber to defendants, and defendants paid the freight. It was held that plaintiff, recovering the lumber from defendants, was under no duty to repay the freight charges. The reasoning of the court is that the plaintiff received nothing from the defendants, and Russell did not assign to defendants the contract or his rights under it, but the lumber merely, Soper Co. *v.* Halsted Co., *supra*. And if the vendee maintains the validity of the sale and insists upon retaining the goods, he is not entitled to demand a surrender of a promissory note given for the price, Poor *v.* Woodburn, 25 Vt. 234. And it is held in some cases that a surrender of a promissory note given for the price of the goods, upon the trial, is sufficient, Poor *v.* Woodburn, *supra*; Coghill *v.* Boring, 15 Calif. 213; Cowen *v.* Bloomberg, 66 N. J. L. 385, 49 Atl. 451. If the notes given for the price have been once tendered to the buyer and refused, the fact that they are not surrendered at the trial of an action on a replevin bond given by the seller, in replevying goods, will not bar the sureties of their right to have the recovery abated by the amount remaining unpaid thereon, Seldner *v.* Smith, 40 Md. 602. If the vendor disaffirm the sale as induced by fraud and bring replevin for the goods, he cannot afterwards sue for the price, even though he fails to obtain the goods or any of them by

that as replevin was strictly concurrent with trespass, replevin

his replevin. Thompson *v.* Fuller, 62 Hun. 618, 16 N. Y. Sup. 486. And the vendor who sues for the price with knowledge of the fraud thereby affirms the sale and cannot thereafter rescind, Hanchett *v.* Riverdale Co., 15 Ills. Ap. 57. Any affirmation of the sale has the same effect, Soper Co. *v.* Halsted Co., *supra*. But an action for the price instituted without knowledge of the fraud, has no such effect, Pekin Co. *v.* Wilson, 66 Neb. 115, 92 N. W. 176; nor has an attachment suit in which the goods fraudulently obtained are levied upon, and which is afterwards dismissed, Stanley *v.* Neale, 98 Mass. 344. Horner brought replevin against Hanchett, sheriff, to recover goods fraudulently obtained of him by one Laughlin, only part of the goods were replevied; Horner thereupon dismissed his action against the sheriff and took judgment against Laughlin for the value of the goods, obtaining judgment for the whole bill; later he remitted the value of the goods replevied. Held, that he had affirmed the sale and was left without any defense to an action on the replevin bond. Horner *v.* Boyden, 27 Ills. Ap. 573. Where fraud is alleged a wide range is allowed in the examination of the parties connected with the transaction, Armagost *v.* Rising, 54 Neb. 763, 75 N. W. 534. Evidence of other frauds of like character by the same parties near the same time, is admissible, Bradley Co. *v.* Fuller, 58 Vt. 315, 2 Atl. 162. And an unusually large purchase attempted, Katzenberger *v.* Leedom, 103 Tenn. 144, 52 S. W. 35. Fraudulent intent may be inferred from circumstances, *Id.* Gowing *v.* Warner, *supra*. Insolvency of the purchaser tends to show an intent never to pay; the more hopeless the insolvency, the stronger the inference, Stein *v.* Hill, 100 Mo. Ap. 38, 71 S. W. 1107. The value of the good will of the purchaser's business is admissible upon the question of his solvency, Bell *v.* Ellis, 33 Calif. 620. Declarations of each party to a fraudulent combination, made while the two are engaged in carrying it out, are admissible against the other, though made in his absence, Bradley Co. *v.* Fuller, *supra*. One examined to support a sale alleged to have been fraudulent may be cross-examined as to statements made by him to third persons, tending to impeach it. Armogast *v.* Rising, *supra;* Gowing *v.* Warner, 30 Misc. 593, 62 N. Y. Sup. 797. In Hanchett *v.* Riverdale Co., 15 Ills. Ap. 57, and Griswold *v.* Nichols, 117 Wis. 267, 94 N. W. 33, it was held that where goods obtained by fraud had been sold for a valuable consideration by the fraudulent purchaser, the original vendor seeking to reclaim them must prove that the last purchaser had notice of the fraud; but the true rule seems to cast the burden of proving all the elements of bona fide purchase upon the one claiming in that character, Gowing *v.* Warner, *supra*, Grossman *v.* Walters, 58 Hun. 603, 11 N. Y. Sup. 471. And it seems that if there were several interested in the second purchase the testimony of one of these, that he had no knowledge of the original fraud, will not suffice. Gowing *v.* Warner, *supra*. In Wise *v.* Grant, 140 N. Y. 593, 35 N. E. 1078, goods had

would not lie;[35] but the correctness of this ruling has been doubted,[36] the error lying in the assumption that trespass and replevin are strictly concurrent. And upon the same point being presented again, the court held squarely that trespass, trover, or replevin in the *cepit* or detinet would be proper in such case.[37] In this case the court says that *M'Carty* v. *Vickery* stands alone, all the other cases on this subject being the other way.[38]

§ 320. **The same.** When consent of the vendor is urged as

[35] M'Carty *v.* Vickery, 12 John. 348. Compare Nash *v.* Mosher, 19 Wend. 431; Marshall *v.* Davis, 1 Wend. 109. These cases only hold that trespass does not lie against one who lawfully acquires possession, even though the original taker was a wrong-doer.

[36] Butler *v.* Collins, 12 Cal. 457; Ash *v.* Putnam, 1 Hill, 307; Barrett *v.* Warren, 3 Hill, 348.

[37] Cary *v.* Hotailing, 1 Hill, 312.

[38] See Olmsted *v.* Hotailing, 1 Hill, 317. In Trapnall *v.* Hattier, 1 Eng. (Ark.) 23, where a very similar course of argument with M'Carty *v.* Vickery was pursued, but the question presented in Arkansas involved an innocent purchaser.

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been obtained by fraud of the purchaser and while in his possession, were attached by his creditors; the vendor brought replevin; the statute provided that no action to recover a chattel can be had "when it was seized by virtue of an execution or warrant of attachment against a person other than the plaintiff, who at the time of the seizure had not the right to reduce it into his possession." The vendor of the goods was ignorant of the fraud perpetrated upon him until after the attachment, and had neither made nor attempted a rescission. The court gave judgment for the defendant upon the exceedingly refined and technical ground that because there had been no rescission prior to the attachment levied, the plaintiff had *then* no right to reduce the property into possession. This was followed in Borgfeldt *v.* Wood, 92 Hun. 260, 36 N. Y. Sup. 612. But it was held in Depew *v.* Beakes, 16 Ap. Div. 631, 44 N. Y. Sup. 774, that trover would lie against the sheriff; and in Desbecker *v.* McFarline, 42 Ap. Div. 455, 166 N. Y. 625, 60 N. E. 1110, the plaintiffs were permitted to recover from the sheriff goods of which they had been defrauded, the sheriff holding them under execution against the fraudulent purchaser, though there had been no rescission until after the levy; and this seems to accord with the authorities elsewhere to wit, that the institution of replevin is, of itself, a rescission of a sale induced by fraud, Soper Co. *v.* Halsted Co., 73 Conn. 547, 48 Atl. 425; Bradley Co. *v.* Fuller, 58 Vt. 315, 2 Atl. 162. It seems that the officer who is made defendant in an action of replevin by the vendor, has the burden of showing affirmatively the fact and time of his levy and his authority in the premises, Schwabeland *v.* Buchler, 58 N. Y. St. 831, 28 N. Y. Sup. 523.

an element to be weighed, it must be remembered that consent of a person to the sale of his goods means something more than the simple utterance of the words of assent, and something more than a manual relinquishment of them. It must be an act of the mind, unclouded by fraud, falsehood or duress at the hands of the purchaser. Whether the degree of fraud is sufficient to warrant the finding of an indictment or not, is of no consequence in a civil action.[39] In such case the law holds that the goods did not lawfully come into the possession of the defendant.[40]

§ 321. **Illustrations of the rule.** When the defendant recommended L. as a man of means, and induced the plaintiff to sell him furniture, L. soon after absconded, after having transferred the furniture and other goods to the defendant. The plaintiff was permitted to prove that the defendant had recommended L. in like manner to others, and that the goods so obtained were transferred to the defendant, as a circumstance to show knowledge on his part.[41] Defendant by forged letters of recommendation, and other false representations, bought goods, and paid in bills which he represented to be accepted by a wealthy business man, but which were in fact accepted by an accomplice for fraudulent purposes. The goods were delivered, and shortly after levied on by the sheriff with an execution. In trover against the sheriff, it was held no property passed and that the owner could recover.[42] Where one represents himself or his firm to be solvent, when he knows it to be insolvent, and purchases with intent not to pay, such fraud will avoid the sale, and the owner may sustain replevin;[43] and the administrator of the defrauded vendor may sustain the action, as well as the deceased seller.[44]

§ 322. **Not material at what time the fraudulent representations were made.** It is not material whether the fraudulent representations were made at the exact time of the pur-

[39] Irving *v.* Motly, 7 Bing. 543; Poor *v.* Woodburn, 25 Vt. 234; Acker *v.* Campbell, 23 Wend. 373.

[40] Seaver *v.* Dingley, 4 Gr. (Me.) 307; Thurston *v.* Blanchard, 22 Pick. 20; Hall *v.* Gilmore, 40 Me. 581; Gray *v.* St. John, 35 Ill. 239.

[41] Allison *v.* Matthieu, 3 Johns. 235.

[42] Tamplin *v.* Addy, in note to Mowry *v.* Welsh, 8 Cow. 238.

[43] Ash *v.* Putnam, 1 Hill, (N. Y.) 308; Bristol *v.* Wilsmore, 1 Barn. & Cress. 515; Kilby *v.* Wilson, Ry. & Moody, (N. P.) 178; Atkin *v.* Barwick, 1 Stra. 165; Johnson *v.* Peck, 1 Wood & Minot. C. C. 334; Powell *v.* Bardlee, 9 Gill. & J. (Md.) 220.

[44] McKnight *v.* Morgan, 2 Barb. 171.

chase or some time previous. It is sufficient if the goods were obtained through their influence;[45] or the fraudulent intent may be gathered from the acts of the purchaser after the sale.[46]

§ 323. **Goods paid for with worthless note, counterfeit money, or stolen goods.** When the vendor was induced by the fraudulent representations of the buyer, to sell goods and take the notes of a worthless third party in payment, it would not deprive the defrauded vendor of his right to his goods, even when he had negotiated the note for value, and not reclaimed it, unless he had knowledge of the fraud at the time he parted with it.[47] So where one purchase goods and pays for them with counterfeit money,[48] or with other goods which he has stolen.[49] In these and similar cases the defrauded vendor may recover his goods from the fraudulent purchaser, though not from a *bona fide* purchaser from such party for value.

§ 324. **Replevin against attaching creditors in such cases.** It seems to be the law that when one, through fraudulent representations as to his solvency, purchases and obtains goods on credit, and they are subsequently attached by his creditors, that the defrauded vendor can sustain replevin as against the creditors. Of course, as against the debtor the right of the attaching creditors is paramount, but they can only sustain their claim on the ground that the goods belong to the fraudulent purchaser. The purchaser's only title to them, however, being fraudulent, and having been rescinded by the original and prior owner, the attaching creditors cannot resist the suit of the defrauded vendor.[50]

§ 325. **Or against an assignee for the benefit of creditors.** So in case of a voluntary assignment for the benefit of creditors of goods fraudulently purchased, the assignment passed no title and conferred no rights, for the obvious reason that the party making it had no right or title (as against the plaintiff's), which he could confer on anybody. Therefore, the defendant's act in taking possession was an interference with the plaintiff's constructive possession. The defendant's act in assuming do-

[45] Seaver *v.* Dingley, 4 Greenleaf, (Me.) 307.
[46] Bowen *v.* Schuler, 41 Ill. 194; Allison *v.* Matthieu, 3 Johns. 235.
[47] Manning *v.* Albee, 11 Allen, 520; S. C., 14 Allen, 8.
[48] Green *v.* Humphrey, 50 Pa. St. 213.
[49] Tilcomb *v.* Wood, 38 Me. 563; Lee *v.* Portwood, 41 Miss. 111.
[50] Buffington *v.* Gerrish, 15 Mass. 158.

minion over the property was none the less an invasion of the plaintiff's rights because he did not intend a wrong, or know that he was committing one. The law gives the plaintiff compensation for the injury he sustains, whether the defendant intended it or not.[51]

§ 326. **Does not lie for goods sold to enable the purchaser to violate the law, even though there may have been fraud in the purchase.** Where a party sought to recover intoxicating liquors from the possession of the sheriff, who had seized them on process of attachment against the goods of the purchaser, on the ground that he purchased them from the plaintiff by fraudulent representations, the court refused to sustain the action, saying that the liquors were sold to enable the purchaser to evade the law, and the court would not give him its aid.[52]

§ 327. **For goods sold to an infant, when he avoids payment.** When goods are sold to an infant and he avoids payment on the ground of infancy, the seller may rescind the sale and replevy the goods.[53]

§ 328. **For goods obtained by duress.** When a party falsely and maliciously, without probable cause, sue out a warrant regular in form and cause the arrest of another, and thereby induce him to deliver goods to obtain his release, the party so defrauded may sustain replevin for his goods,[54] as the law will not permit the use of its process to aid in the perpetration of a fraud.[55] The law, however, will not aid a party to enforce a contract made to defraud others. When the property is sold without consideration for the purpose to defraud creditors, the purchaser cannot sustain replevin.[56]

§ 329. **The general rule stated.** The rule is concisely stated in a Pennsylvania case. "When an apparent state of

[51] Farley *v.* Lincoln, 51 N. H. 579; Barrett *v.* Warren, 3 Hill, 350; Poor *v.* Woodburn, 25 Vt. 240. Where the sale is procured through fraudulent representations, if the vendee holds nothing of any value he may sustain replevin or trover without demand, because the taking was tortious. Thayer *v.* Turner, 8 Met. 550.

[52] Marienthal *v.* Shafer, 6 Iowa, 226.

[53] Badger *v.* Phinney, 15 Mass. 359.

[54] Foshay *v.* Ferguson, 5 Hill, 156.

[55] Watkins *v.* Baird, 6 Mass. 506.

[56] Payne *v.* Bruton, 5 Eng. (10 Ark.) 53.

ownership of property produced by the consent or collusion is the means of deceiving third persons, the owner cannot enforce his rights against such persons in replevin."[57]

§ 330. **Fraudulent intention of purchaser must exist to avoid a sale.** Where a party, believing himself to be solvent, orders goods on credit, which are shipped and delivered to him, his subsequent insolvency or inability to pay will not be ground for rescinding the contract of sale. In such case, if the purchaser receives the goods and executes a note, or accepts draft in compliance with the terms of the contract, the vendors cannot in the absence of fraud at the time of the purchase, annul the contract and sustain replevin, even though the purchaser knew himself to be insolvent at the time of receiving the goods and accepting the draft.[58] If the purchaser, at the time of the arrival of the goods, knowing himself to be insolvent, should refuse to accept them, and direct their return to the vendor, the sale would be incomplete, and the vendor might maintain replevin as against any creditor who should attempt to seize upon them. Such a course met the approval of Lord Mansfield.[59] Or perhaps the receiving of the goods by the vendee and placing them in his warehouse, separate and apart from his goods, with a view to their return intact, with the intent only to protect them from loss or injury until they could be returned, would be sufficient to entitle the vendors to reclaim them against creditors who might seize them.[60] Mere omission to disclose insolvency will not avoid a sale, a purchase made during an honest though hopeless attempt to continue business, where no questions are asked of the purchaser, is not fraudulent. There must be some positive fraudulent representation.[61]

§ 331. **Diligence required of one who would rescind a sale for fraud, return or tender of the consideration.** The party who would assert his title to property which has been obtained from him by fraud must exercise a certain degree of diligence to ascertain and protect his rights or he will be held to have waived or lost them. When the plaintiff claimed that a

[57] Dannels *v.* Fitch, 8 Pa. St. 497.

[58] Greaner *v.* Mullen, 15 Pa. St. 206.

[59] Harman *v.* Fishar, 1 Cowper, 117.

[60] James *v.* Griffin, 2 Mees. & W. 622.

[61] Nichols *v.* Pinner, 18 N. Y. 295; Conyers *v.* Ennis, 2 Mason, 237; Powell *v.* Bradlee, 9 Gill & J. (Md.) 220.

horse was stolen from him by R. in a suit against one who claimed to be a *bona fide* purchaser from R., the fact that the plaintiff had neglected for several years to proceed against R. who was responsible, and who lived in the same county, was held proper defense.[62] Where a party seeking to rescind a sale on the ground of fraud has received any valuable consideration for the property, he must put the other party in as good condition as he was before by restoring to him whatever he has paid on the contract. Thus, where the vendor charges fraud, and seeks to set aside a sale for which the purchaser has given his note, he must return the note.[63] The party seeking to rescind is not required, however, to deliver the note or other consideration in advance of obtaining the goods sold.[64] And the current of authorities hold it is sufficient if the offer to surrender be made on the trial.[65] Where the fraudulent party has so complicated the transaction that the others cannot restore, the law will only require him to restore as far as he can;[66] but unless the tender be made before verdict it will be too late, and the defendant may have a new trial.[67]

§ 332. **What amounts to a return of property.** A party claiming to be damaged by false representations in a horse trade, must return the horse he received. Merely leaving it in the defendant's yard without any notice of his purpose to rescind the contract, although he sued the defendant at the time, is not a rescission within the meaning of the rule. Had he tendered the horse to defendant, or taken reasonable means to do so, and the defendant had avoided him, it might have been sufficient.[68] He

[62] Welker *v.* Wolverkuehler, 49 Mo. 35; Smith *v.* Field, 5 Term R. 403, (211); Furniss *v.* Hone, 8 Wend. 248; Mackinley *v.* M'Gregor, 3 Whart. (Pa.) 368; Coghill *v.* Boring, 15 Cal. 213. Compare Marston *v.* Baldwin, 17 Mass. 611.

[63] Nichols *v.* Michael, 23 N. Y. 264; Wilbur *v.* Flood, 16 Mich. 40.

[64] Poor *v.* Woodburn, 25 Vt. 239.

[65] Weed *v.* Page, 7 Wis. 511; Nichols *v.* Michael, 23 N. Y. 264; Jennings *v.* Gage, 13 Ill. 611; Nellis *v.* Bradley, 1 Sandf. (N. Y.) 560; Thurston *v.* Blanchard, 22 Pick. 20; Coghill *v.* Boring, 15 Cal. 217; Kimball *v.* Cunningham, 4 Mass. 502; Poor *v.* Woodburn, 25 Vt. 235; Voorhees *v.* Earl, 2 Hill, 288; Buchenau *v.* Horney, 12 Ill. 337; Ryan *v.* Brant, 42 Ill. 79; Smith *v.* Doty, 24 Ill. 163; Matteawan Co. *v.* Bentley, 13 Barb. 641.

[66] Masson *v.* Bovet, 1 Denio, 73.

[67] Ayres *v.* Hewett, 19 Me. 286; Manning *v.* Albee, 11 Allen, 520.

[68] Thayer *v.* Turner, 8 Met. 553; Perley *v.* Balch, 23 Pick. 283.

must put the other party in the same condition he was before, *i. e.*, he must restore what he received before he can sustain replevin.[69]

§ 333. **Does not lie against an innocent purchaser from a fraudulent purchaser.** The right of a vendor to recover from one who fraudulently purchases his goods with the intent not to pay for them, is clear and well settled, but when the fraudulent purchaser has sold and transferred the goods to another, who has no notice of the fraud and who has paid value for them, the question as to the respective rights of the deceived vendor and the innocent purchaser, presents more difficulty.[70]

§ 334. **The distinction between acquiring goods by theft or trespass, or by fraudulent purchase.** Where goods are acquired by theft or robbery, the taker, as we have seen, acquires no title and can convey none, but where goods are bought, and the vendor of his own act delivers them to the purchaser with bill of sale or other evidences of ownership, no matter what fraudulent practices have induced the sale and delivery, the purchaser takes a title, voidable it is true, at the pleasure of the defrauded vendor, but until declared void by him, it is perfectly good as against all others. If, therefore, while the property is so in the hands of the purchaser, and before the original owner knows of or has time to rescind the sale, the goods are sold and delivered to an innocent third party who pays full value for them, the latter is not regarded as a wrongful taker or detainer, and the current of authorities is that as against him, replevin will not lie.[71]

[69] Conner *v.* Henderson, 15 Mass. 320; Kimball *v.* Cunningham, 4 Mass. 502; Thayer *v.* Turner, 8 Met. 552; Thurston *v.* Blanchard, 22 Pick. 18.

[70] Consult Mitchell *v.* Worden, 20 Barb. 253; Nichols *v.* Pinner, 18 N. Y. 295; Malcom *v.* Loveridge, 13 Barb. 372; Jennings *v.* Gage, 13 Ill. 611; Ohio & Miss. R. R. Co. *v.* Kerr, 49 Ill. 458; Powell *v.* Bradlee, 9 Gill. & J. (Md.) 220; Shufeldt *v.* Pease, 16 Wis. 659. *Bona fide* purchaser holds. Butters *v.* Haughwout, 42 Ill. 18; Kranert *v.* Simon, 65 Ill. 344; Brundage *v.* Camp, 21 Ill. 330; Burton *v.* Curyea, 40 Ill. 320; Powell *v.* Bradlee, 9 Gill. & J. (Md.) 220.

[71] Saltus *v.* Everett, 20 Wend. 267; Sargent *v.* Sturm, 23 Cal. 362; Covill *v.* Hill, 4 Denio, 323; Johnson *v.* Peck, 1 Woodbury & M. C. C. 334; Ingersoll *v.* Emmerson, Carter, (Ind.) 771; Nash *v.* Mosher, 19 Wend. 433; Hyde *v.* Noble, 13 N. H. 494; Hurst *v.* Gwennap, 2 Starkie, 306; Root *v.* French, 13 Wend. 570; Mowrey *v.* Walsh, 8 Cow. 238; Neal

§ 335. **The same. Observations upon this rule.** There have been decisions which hold, that he who purchases from one who acquired possession of the goods by fraudulent purchase from the owner, is in all respects treated as a trespasser; that he cannot avail himself of the conveyance to justify or excuse the taking.[72] In *Saltus* v. *Everett*, 20 Wend. 275, Senator Verplank said: "An honest purchaser under a defective title cannot hold against the true owner." There is no general principle of law or equity that the right of a *bona fide* purchaser shall be regarded as superior to the prior right of the legal owner. To say that of two innocent men, he should suffer most who trusts most, would authorize anyone to purchase from a fraudulent bailee if this rule be taken in the generally received acceptation of the doctrine. But does he trust more who delivers possession of his goods to a bailee when the goods themselves are easily identified, or he who parts with his money for goods upon the simple fact that the vendor has possession of them. The rule should be, that as between two equally innocent men, his right should prevail which is prior in point of time.[73] He who has been led to part with his goods by fraud has not committed a fault, but suffered a misfortune.

§ 336. **The same.** The same question was presented in Arkansas, where it was said: "It has been contended that the owner has consented to the taking; and if that were so, it would be a sufficient reply in replevin, at least for taking. In an action against an innocent purchaser of chattels without notice, and with no agency in the trespass, we can find no authority which would authorize a recovery in an action of trespass, and therefore conclude that replevin for an unlawful taking is not supported by such proof."[74] Notwithstanding the preceding cases to the contrary, the rule is supported by a large preponderance of the authorities that, as against an innocent purchaser of a chattel from a fraudulent purchaser, without notice of any adverse claim, and with no agency in the fraud by which they were obtained,

v. Williams, 18 Me. 391; Farley *v.* Lincoln, 51 N. H. 576; Cobb *v.* Dows, 10 N. Y. 339; Williams *v.* Merle, 11 Wend. 80; Covill *v.* Hill, 4 Denio, 323; Deshon *v.* Bigelow, 8 Gray, (Mass.) 159.

[72] McKnight *v.* Morgan, 2 Barb. 171; Galvin *v.* Bacon, 11 Me. 28; Lee *v.* Portwood, 41 Miss. 109.

[73] Ash *v.* Putnam, 1 Hill, 302.

[74] Trapnall *v.* Hattier, 1 Eng. (Ark.) 23.

there is no authority to authorize a recovery.[75] The loss must fall on him who was foolish enough to part with his goods before he had security.[76]

§ 337. **The same.** A contract originating in fraud may be rescinded at the option of the injured party, and the seller may reclaim the goods, provided the rights of a third party, as a *bona fide* purchaser, have not intervened. But the right of the seller to rescind exists only so long as the goods are in the hands of the fraudulent purchaser. Until the seller has made use of his option to rescind the sale, the purchaser, no matter what fraud has been practiced, takes a title which may or may not be ratified by the vendor; and if, while so holding, he sells to a *bona fide* purchaser for value, it will pass title.[77] In *Chicago Dock Co.* v. *Foster*, 48 Ill. 507, the court lays down the law without qualification, that an innocent purchaser for value, from one who has fraudulently obtained the goods from the owner, will be protected in replevin by the original owner. Where certain warrants against the State of California were paid into the State treasury, and afterwards stolen, and sold by the thief to an innocent holder, who again presented them to the State officer, who, in ignorance of the fact that they had once been paid, issued other bonds for them, the State was held liable on the bonds so issued, and in an action in the nature of detinet, by the State, recovery was denied.[78]

§ 338. **Rule, where goods fraudulently purchased are taken in payment of a pre-existing debt.** But where goods obtained by fraud are used in payment of a pre-existing debt of the wrongdoer,[79] or where they have been mortgaged or pledged,

[75] Harrison *v.* M'Intosh, 1 Johns. 384; Ditson *v.* Randall, 33 Me. 202; Bristol *v.* Wilsmore, 1 Bar. & C. 515; Kilby *v.* Wilson, Ry. & Moody, (N. P.) 178-181.

[76] Jennings *v.* Gage, 13 Ill. 610; Harris *v.* Smith, 3 S. & R. (Pa.) 21; Brundage *v.* Camp, 21 Ill. 331; Powell *v.* Bradlee, 9 Gill & J. (Md.) 220; Butters *v.* Houghwout, 42 Ill. 18; Burton *v.* Curyea, 40 Ill. 320; Arendale *v.* Morgan, 5 Sneed, (Tenn.) 704; Malcolm *v.* Loveridge, 13 Barb. 372; Keyser *v.* Harbeck, 3 Duer, 373; Williams *v.* Given, 6 Gratt. 268; Jennings *v.* Gage, 13 Ill. 610; Caldwell *v.* Bartlett, 3 Duer. 341; Smith *v.* Lynes, 1 Seld. 41; Kingsford *v.* Merry, 34 E. L. & Eq. 607.

[77] Meers *v.* Waples, 3 Houst. (Del.) 581; Hoffman *v.* Noble, 6 Met. 75; Root *v.* French, 13 Wend. 570; Smith *v.* Lynes, 1 Seld. (N. Y.) 47.

[78] State of California *v.* Wells, Fargo & Co., 15 Cal. 340.

[79] Sargent *v.* Sturm, 23 Cal. 360; Root *v.* French, 13 Wend. 570; Coddington *v.* Bay, 20 Johns. 637; Butters *v.* Haughwout, 42 Ill. 18; Durell *v.* Haley, 1 Paige, 492.

or assigned to trustees to pay the debts of the fraudulent purchaser, the owner may pursue and recover, as a purchaser for a pre-existing debt, or a pledgee or mortgagee is not regarded in the same light as a purchaser for value;[80] and the same rule applies where goods so obtained are seized on legal process by a creditor of the fraudulent purchaser;[81] one of the reasons being, that the only consideration in these latter cases is the extinguishment of a debt which can be revived by setting aside or rescinding the transfer; and in such case the party is no worse than he was before. He is not in the situation of one who has parted with his money.[82]

§ 339. **Sale of goods upon condition.** Sales upon condition, express or implied, as to delivery, payment or security, are of daily occurrence. These conditions are sometimes broken by accident or design, and the effect of the breach is a question which frequently demands adjustment in the action of replevin.

§ 340. **Non-payment for goods sold on credit does not warrant a rescission of the contract.** In the absence of fraud or deceit on the part of the purchaser, simple non-payment for goods bought on credit is not sufficient to warrant a recision of the contract. The vendor has parted with his goods under a full knowledge of all the facts, and the neglect of the purchaser to pay the stipulated price is one of the contingencies which he is presumed to have estimated, and in the absence of fraud, or the reservation of a special lien, the seller cannot recover his goods.[83]

§ 341. **Rule where the vendor stipulates to retain title or possession until payment.** Where, however, the vendor stipulates to retain possession until the purchase price is paid, he may sustain replevin against anyone who wrongfully takes or detains the goods from his possession in violation of the conditions of the sale.[84] When the plaintiffs sold and delivered a safe, with the express agreement that it should remain their property until paid for, and the purchaser made no payments, but the safe was

[80] Parker *v.* Patrick, 5 D. & E. 102, 175; Somes *v.* Brewer, 2 Pick. 184; Rowley *v.* Bigelow, 12 Pick. 307; Lloyd *v.* Brewester, 4 Paige, 537.

[81] Durell *v.* Haley, 1 Paige, 492; Adams *v.* Smith, 5 Cow. 280; Wiggin *v.* Day, 9 Gray, (Mass.) 97.

[82] Farley *v.* Lincoln, 51 N. H. 577.

[83] McNail *v.* Ziegler, 68 Ill. 224.

[84] Wills *v.* Barrister, 36 Vt. 220; Jessop *v.* Miller, 1 Keyes, (N. Y.) 321.

levied on under execution and sold, the plaintiffs were regarded as the owners and permitted to sustain replevin;[85] and the rule is tolerably well established, that in such case sale by the conditional vendee to an innocent purchaser for value, would not debar the owner from pursuing and receiving his goods. The rule is, that when the vendor retains title, the vendee takes none, and, of course, can convey none by any sale he may make.[86]

§ 342. **The same. Illustrations.** Goods were sold at auction, to be paid for by note of a third party, at six months, after the goods were delivered, but before the condition had been complied with, they were seized on attachment by creditors of the buyer. The seller was allowed to sustain replevin. The delivery was not regarded as a waiver of the condition in this case.[87]

§ 343. **Waiver of conditions of sale.** Goods sold on condition and delivered without insisting on the condition, *held*, *prima facie* a waiver of the condition, liable to be explained or rebutted by proof.[88] A firm in Omaha bought cigars in New York, for which they were to give their note at four months. Before the goods arrived the purchaser went into bankruptcy; some days thereafter the expressman brought the goods to the store of the buyer, and the U. S. Marshal then in possession took them, the vendors were permitted to sustain replevin. The condition of the sale had not been complied with, the note of the purchaser had not been given, and the contract impliedly required the note of the defendants when solvent, not bankrupt.[89] Where goods are sold for cash on delivery, and the proof tends to show a

[85] Bradshaw *v.* Warner, 54 Ind. 58; Hodson *v.* Warner, 60 Ind. 214; Leven *v.* Smith, 1 Denio, 571; Jennings *v.* Gage, 13 Ill. 610; Harris *v.* Smith, 3 S. & R. (Pa.) 21; Tully *v.* Fairly, 51 Ind. 311.

[86] Deshon *v.* Bigelow, 8 Gray, 159; Hotchkiss *v.* Hunt, 49 Me. 213; Rowe *v.* Sharp, 51 Pa. St. 27; Coghill *v.* Hartford & N. H. R. R., 3 Gray, 545; Sargent *v.* Metcalf, 5 Gray, 306; Burbank *v.* Crooker, 7 Gray, 158; Holmark *v.* Molin, 5 Cold. (Tenn.) 482; Eaton *v.* Munroe, 52 Me. 63; Meldrum *v.* Snow, 9 Pick. 441.

[87] Hill *v.* Freeman, 3 Cush. 257; Keeler *v.* Field, 1 Paige, (Ch.) 312; Hussey *v.* Thornton, 4 Mass. 405; Marston *v.* Baldwin, 17 Mass. 606; Smith v. Dennie, 6 Pick. 262; Coplan *v.* Bosquet, 4 Wash. C. C. 588; Harris *v.* Smith, 3 S. & R. (Pa.) 20.

[88] Pitt *v.* Owen, 9 Wis. 152; Lupin *v.* Marie, 6 Wend. 77; Smith *v.* Lynes, 1 Seld. 43; Kinsey *v.* Leggett, 71 N. Y. 387; Ives *v.* Humphreys, 1 E. D. Smith, 196; Leven *v.* Smith, 1 Denio, 571.

[89] Sutro *v.* Holle, 2 Neb. 190. See Farley *v.* Lincoln, 51 N. H. 579.

usage or custom of delivering the goods without demanding instant payment, and goods so sold are actually delivered without payment at the time of delivery, the court may leave it to the jury to determine whether the delivery was made in reference to the usage, and no waiver of the cash payment, or whether the delivery was unconditional. If the delivery was with reference to the usage, and without intention to pass title, replevin will lie.[90] From these and kindred cases the general rule may be gathered, that a sale of goods upon condition does not vest the title in the purchaser until the condition shall have been complied with: That in the keeping of conditions even where they are express, some latitude is allowed, and the seller does not forfeit his right by reasonable confidence in the integrity of the purchaser and his ability to keep his contract; and if in such case the buyer refuse to perform the conditions, the seller may rescind the bargain and retake his goods. If, however, the seller do any act amounting to a waiver of the conditions, he forfeits his right to pursue his goods.

[90] Powell *v.* Bardlee, 9 Gill. & J. (Md.) 220.

NOTE XX. *Bona Fide Purchaser Protected.*—Bona fide purchaser from one to whom the plaintiff has actually sold the goods and caused them to be delivered, is protected, though the first purchaser obtained them by fraud, Singer Co. *v.* Sammons, 49 Wis. 316, 5 N. W. 788; Hochberger *v.* Baum, 85 N. Y. Sup. 385; Sadler *v.* Lewers, 42 Ark. 149; Pinkerton *v.* Bromley, 128 Mich. 236, 87 N. W. 200; Perkins *v.* Anderson, 65 Ia. 398, 21 N. W. 696. And one who in good faith advances money and accepts a mortgage from the fraudulent purchaser, is protected, Aultman *v.* Steinan, 8 Neb. 109. An attorney who accepts a mortgage to secure his fees for framing a deed of assignment for the benefit of creditors, and defending the same, and who takes without notice of any fraud in the purchase of the goods is, to the value of the services rendered before he has notice of the fraud, preferred to the vendor who has been induced to part with his goods by the fraud of the assignor, Meyers *v.* Bloon, 20 Tex. Civ. Ap. 554, 50 S. W. 217. And fraud in procuring a mortgage cannot be set up by the mortgagor against one who, in good faith, purchased at the foreclosure sale, Jumiska *v.* Andrews, 87 Minn. 515, 92 N. W. 470. One who attaches goods at the request of the person actually in custody, believing in good faith that such custodian is the true owner, is excused if the act is such as would be excused in case the custodian was the finder of the goods or was lawfully entrusted with their custody, Mohr *v.* Laurgan, 162 Mo. 474, 63 S. W. 409. In Gillilan *v.* Kendall, 26 Neb. 82, 42 N. W. 281, it was held that a mortgage upon a growing crop can-

not be asserted against one who after the harvest purchases the grain at his elevator, without actual notice of the mortgage. The rule is otherwise if the purchaser has notice of the identity of the grain with the mortgaged crop, Fines *v.* Bolin, 36 Neb. 621, 54 N. W. 990.

Equity will not enforce an equitable right or lien as against an intervening purchaser for value without notice, Anchor Co. *v.* Burns, 32 Ap. Div. 272, 52 N. Y. Sup. 1005. Where a statute provides that a sale by any insolvent intended to defraud is void, an exception in favor of one who purchases in good faith will be implied. Bobilya *v.* Priddy, 68 O. St. 373, 67 N. E. 736.

Bona Fide Purchaser Not Protected.—Bona fide purchaser from a thief, or one who has no title or right to dispose of the goods, is not protected, Knox *v.* Hellums, 38 Ark. 413; Rosum *v.* Hodges, 1 S. D. 308, 47 N. W. 340, 9 L. R. A. 817; Spooner *v.* Holmes, 102 Mass. 503; Gassner *v.* Marquardt, 76 Wis. 579, 45 N. W. 674; Prime *v.* Cobb, 63 Me. 200; Kerfoot *v.* State Bank, 14 Okl. 104, 77 Pac. 46; McKinnis *v.* Little Rock Co., 44 Ark. 210; Milligan *v.* Brooklyn Co., 34 Misc. 55, 68 N. Y. Sup. 744; Mann *v.* Arkansas Co., 24 Fed. 261; Nelson *v.* Graff, 12 Fed. 389; Hentz *v.* The Idaho, 3 Otto, (93 U. S.) 575, 23 L. Ed. 978: *e. g.*, one who has previously sold and delivered the same goods to another, Bright *v.* Miller, 95 Mo. Ap. 270, 68 S. W. 1061. Nor is one who purchases from a person having no right to sell the goods, even though in possession with the owner's consent under an agreement for purchase, Couse *v.* Tregent, 11 Mich. 65; nor where the title never passed from the owner, Jennings *v.* Gage, 13 Ills. 610; *e. g.*, as where the sale was upon condition, the vendor reserving the title, Roof *v.* Chattanooga Co., 36 Fla. 284, 18 So. 597; or where the goods were sold and delivered to M, the seller supposing the purchase to be for account of and by authority of S, and the buyer, knowing this, made no effort to undeceive him, Mayhew *v.* Mather, 82 Wis. 355, 52 N. W. 436. A purchaser of a mere equity is not entitled to protection, California Association *v.* Stelling, 141 Calif. 713, 74 Pac. 320. And one whose goods have been taken by a robbery, does not lose title by failing to prosecute the wrong-doer, even for several years and even though they reside in the same county, and the robber is pecuniarily responsible, Welker *v.* Woolverkuehler, 49 Mo. 35. The state does not lose title to logs cut upon the public land by failing to assert it, State *v.* Patten, 49 Me. 383.

Where one purchases an unfinished railway, knowing that the seller is embarrassed, and that a portion of the equipment is not yet installed, and omits to make inquiry, upon the assumption that liens may exist, a jury may find that he is not a *bona fide* purchaser. Hogan *v.* Detroit Company, Mich 103 N. W. 542.

Negotiable Paper, Corporate Stocks, etc.—Coupon bonds like a bank note pass by delivery, and one who lends money on deposit thereof as collateral security, is not affected by want of title in the borrower, Gibson *v.* Lenhart, 111 Pa. St. 624, 5 Atl. 52. The depositary who has received the bonds for the lender cannot retain them on the ground

of a prior pledge to another, *Id.* The rule is the same, although the lender may know of suspicious circumstances attending the possession, Spooner *v.* Holmes, 102 Mass. 503. And one who, in the usual course of business buys, in good faith and for value, a stolen promissory note payable to bearer and which is endorsed in blank, obtains a good title, Walters *v.* Tielkemeyer, 72 Mo. Ap. 371. The transfer of a negotiable note by mere delivery gives no right as against a prior assignee, Moore *v.* Finger, 128 Calif. 313, 60 Pac. 933. But one who carelessly leaves in possession of another such a promissory note, cannot recover it from one to whom the bailee has assigned it in the usual course of business for value without notice, *Id.* And one who, in good faith, lends money on pledge of a warehouse receipt, will be protected even though, as between the former owner of the goods and the one who deposited them in the warehouse, the title never passed, and the delivery of the goods was obtained by fraud, Chicago Co. *v.* Foster, 48 Ills. 507; but see Canadian Bank *v.* McRea, 106 Ills. 281.

If a bill of lading is once assigned or endorsed generally by the original holder, upon or with a view to the sale of the goods, a subsequent transfer to a *bona fide* purchaser may give him title as against the owner; but so long as the bill of lading remains in the hands of the original holder or an agent entrusted with it for a special purpose and not authorized to sell or pledge the goods, one who acquires possession without the authority of the owner, though with the assent of the agent, has no title as against the principal, Stollenwerck *v.* Thatcher, 115 Mass. 224. Corporate stock is not negotiable, even though bearing a blank power of attorney to transfer, Anderson *v.* Nicholas, 28 N. Y. 600; Morton *v.* Preston, 18 Mich. 60.

Plaintiff took a promissory note in the name of her son for moneys actually advanced by her and belonging to her; she always retained possession of the note. After its maturity the son surreptitiously obtained the note and endorsed it to the defendant, who relied upon his apparent title and paid value. Held, that defendant took no title and plaintiff might recover the note in replevin, Merrell *v.* Springer, 123 Ind. 485, 24 N. E. 258. But see Clow *v.* Yount, 93 Ills. Ap. 112.

Who is a Bona Fide Purchaser.—One who buys in payment of a precedent debt is not a *bona fide* purchaser, Fines *v.* Bolin, 36 Neb. 621, 54 N. W. 990; Grever *v.* Taylor, 53 O. St. 621, 42 N. E. 829; but see Feder *v.* Abrahams, 28 Mo. Ap. 454; nor one who purchases at his own sale, and credits the amount of his bid on the execution, Avery *v.* Popper, Tex. Civ. Ap. 45 S. W. 951; nor one who accepts a transfer of the goods, or a mortgage, as security for a precedent debt, Gulledge *v.* Slayden Co., 75 Miss. 297, 22 So. 952; National Bank *v.* Rogers, 166 N. Y. 380, 59 N. E. 922; Gafford *v.* Stearns, 51 Ala. 434; nor is the sheriff who levies an execution upon goods which have been obtained by the defendant in the execution, by fraud practiced upon the owner, Desbecker *v.* McFarline, 42 Ap. Div. 455, 59 N. Y. Sup. 439; affirmed, 166 N. Y. 625, 60 N. E. 1110; nor is the attaching creditor nor the sheriff who levies the attachment, Wise *v.* Grant, 140 N. Y. 593, 35 N. E. 1078;

nor an assignee for creditors. Joslin *v.* Cowee, 60 Barb. 49; Campbell Co. *v.* Walker, 22 Fla. 412; State *v.* Patten, 49 Me. 383; Kratzenberger *v.* Leedom, Tenn. 52 S. W. 35; Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174; Peninsula Co. *v.* Ellis, 20 Ind. Ap. 491, 51 N. E. 105; nor is one who at the time of payment of the price has notice of the prior rights of a third person, although he bargained for the goods without such notice, Western Stage Co. *v.* Walker, 2 Ia. 504; Maddox *v.* Reynolds, Ark. 81 S. W. 603; nor one who buys from a tenant in common, with notice that the vendor has pledged his interest to his co-tenant, Harkey *v.* Tillman, 40 Ark. 551. Wilful ignorance is equivalent to notice, Jones *v.* Glathart, 100 Ills. Ap. 630. And purchase at a grossly inadequate price may raise a presumption of notice. One who buys for five dollars the promissory note of a solvent person in good credit, for the principal sum of three hundred dollars, is not a *bona fide* holder, DeWitt *v.* Perkins, 22 Wis. 473. Actual payment must be shown; giving a promissory note is not payment, *Id.* The question as to whether one is a *bona fide* purchaser or not, so far as depends upon matter of fact, is for the jury, Cass *v.* Gunnison, 58 Mich. 108, 25 N. W. 52.

Burden of Proof.—Defendant claiming under a purchase from one who obtained the goods by fraud has the burden of proving that he purchased in good faith, and payment of value, Clemmons *v.* Brinn, 36 Misc. 157, 72 N. Y. Sup. 1066; California Association *v.* Stelling, 141 Calif. 713, 75 Pac. 320; Hopkins *v.* Davis, 23 Ap. Div. 235, 48 N. Y. Sup. 745. He must show an absence of knowledge of any fact which would arouse the suspicions of a reasonably prudent man, Salisbury *v.* Barton, 63 Kans. 552, 66 Pac. 618. But where one was put in possession of goods with authority or liberty to sell them, replevin cannot be maintained against one who holds under him, without proof that such person is not a *bona fide* purchaser, Frischman *v.* Mandel, 26 Misc. 820; 56 N. Y. Sup. 1029.

CHAPTER XIII.

THE DEMAND.

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§ 344. **Demand; general principles of the law requiring it.** There are many cases where it is necessary, before commencing suit, to make a demand upon the defendant for the delivery of the property, and the question whether such demand is necessary or not ought always to be fully considered. The effect of a failure to make and prove a demand in cases where the defendant is entitled to it, may be to lose an otherwise good case. The fact that the defendant has the possession of goods raises no presumption that he came wrongfully by them, nor does it raise any inference that he will detain them against the owner's demand.[1] The primary object of a demand, independent of the legal rights of the other party, is to obtain the goods without suit, and it should be made in all cases where there is a reasonable belief that it will result in a delivery of the goods, with few probabilities that their possessor will remove or secrete them. A demand is necessary in many cases to afford the defendant an opportunity to restore the goods to the rightful owner, or to make satisfaction if he desires to do so. In all cases where a party is in the possession of the goods of another the law presumes that he will at once deliver them to the owner on request; and this presumption is so strong that it will not allow such possessor to be put to the expense of defending a suit until the opportunity has been offered him to save costs and avoid litigation by a surrender.[2]

§ 345. **Demand not necessary when the defendant's possession is wrongful; otherwise it is necessary.** The general rule may be stated that when the defendant's possession has been acquired through force or fraud, or though rightful in its incep-

[1] Amos *v.* Sinnott, 4 Scam. 441.

[2] Thompson *v.* Shirley, 1 Esp. N. P. C. 31; Stanchfield *v.* Palmer, 4 Greene, (Iowa), 21; Homan *v.* Laboo, 1 Neb. 208; Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157. [The sole purpose of the demand is to terminate defendant's right of possession, Lamping *v.* Keenan, 9 Colo. 390, 12 Pac. 434; that costs shall not be incurred unnecessarily, Satterthwaite *v.* Ellis, 129 N. C. 67, 36 S. E. 727; to afford defendant opportunity to surrender the goods without the expense or annoyance of litigation, Guthrie *v.* Oleson, 44 Minn. 404, 46 N. W. 853.]

tion, the defendant has subsequently done any act amounting to a conversion of the property to his own use, or intended to deprive the rightful owner of his goods, demand is not necessary.[3] But where the defendant's possession was rightfully acquired, and where he has been guilty of no wrongful act towards the plaintiff's rights, a demand is usually necessary before suit can be sustained.[4] Thus, where the defendant acquires possession by means

[3] Bussing *v.* Rice, 2 Cush. 48; Thurston *v.* Blanchard, 22 Pick. 18; Ayres *v.* Hewett, 19 Me. 281; Foshay *v.* Ferguson, 5 Hill, 158; Stillman *v.* Squire, 1 Denio, 328; Cummings *v.* Vorce, 3 Hill, 282; Pierce v. VanDyke, 6 Hill, 613; Trudo *v.* Anderson, 10 Mich. 358; Ballou *v.* O'Brien, 20 Mich. 304; Le Roy *v.* East Sag. R. R., 18 Mich. 239; Clark *v.* Lewis, 35 Ill. 417; Bruner *v.* Dyball, 42 Ill. 36; Gibbs *v.* Jones, 46 Ill. 320; Seaver *v.* Dingley, 4 Green. (Me.) 314; Griswold *v.* Boley, 1 Blake, (Montana), 546; Hicks *v.* Britt, 21 Ark. 422; Farrington *v.* Payne, 15 Johns. 432; White *v.* Brown, 5 Lans. 78; Connah *v.* Hale, 23 Wend. 462; Bates *v.* Conkling, 10 Wend. 390; Lewis *v.* Masters, 8 Blackf. 246; Delancey *v.* Holcomb, 26 Iowa, 96; Smith *v.* McLean, 24 Iowa, 322; Stanchfield *v.* Palmer, 4 Greene, (Iowa), 25; Lawson *v.* Lay, 24 Ala. 188; Gardner *v.* Boothe, 31 Ala. 190; Oleson *v.* Merrill, 20 Wis. 462; Whitney *v.* McConnell, 29 Mich. 13; Gilmore *v.* Newton, 9 Allen, 171; Stanly *v.* Gaylord, 1 Cush. 549; Riley *v.* Boston Water P. Co., 11 Cush. 11; Henry *v.* Fine, 23 Ark. 419; Courtis *v.* Cane, 32 Vt. 232; Boise *v.* Knox, 10 Met. 41; Fernald *v.* Chase, 37 Me. 292; Parsons *v.* Webb, 8 Me. 39; Baldwin *v.* Cole, 6 Mod. 212; Partridge *v.* Swazey, 46 Me. 414.

[4] Brown *v.* Cook, 9 Johns. 361; Boughton *v.* Bruce, 20 Wend. 234; Pierce *v.* Van Dyke, 6 Hill, 613; Stanchfield *v.* Palmer, 4 Greene, (Iowa), 25; Smith *v.* McLean, 24 Iowa, 323; Gilchrist *v.* Moore, 7 Iowa, 11; Sluyter *v.* Williams, 1 Sweney, (N. Y.) 215; Stapleford *v.* White, 1 Houston, (Del.) 238; Windsor *v.* Boyce, 1 Houst. (Del.) 605; Johnson *v.* Johnson, 4 Har. (Del.) 171; Sopris *v.* Truax, 1 Colorado, 90; Roach *v.* Binder, 1 Colorado, 322; Newman *v.* Jenne, 47 Me. 520; Seaver *v.* Dingley, 4 Green. (Me.) 307; Pirani *v.* Barden, (5 Ark.) Pike, 81; Burr *v.* Daugherty, 21 Ark. 564; Hudson *v.* Maze, 3 Scam. 582; Ingalls *v.* Bulkley, 13 Ill. 317; Smith *v.* Welch, 10 Wis. 91; Stratton *v.* Allen, 7 Minn. 502; Root *v.* Bonnema, 22 Wis. 539; Walpole *v.* Smith, 4 Blackf. 306; Litterel *v.* St. John, Ib. 327; Conner *v.* Comstock, 17 Harrison, (Ind.) 90; Bond *v.* Ward, 7 Mass. 127; Sawyer *v.* Merrill, 6 Pick. 478.

Note XXI. *In What Cases Demand is Necessary.*—Replevin cannot be maintained against mortgagee in possession even after default made, until the goods are demanded, Cadwell *v.* Pray, 41 Mich. 307, 2 N. W. 52; Roberts *v.* Norris, 67 Ind. 386; Moore *v.* Ray, 108 N. C. 252, 12 S. E. 1035.

And sales by the mortgageor, where this is contemplated by the mortgage, or even a general sale by the mortgageor of his interest, affords no

of a lease from the owner, he is entitled to a demand before being subjected to a suit. Ordinarily this is the case after the lease has expired.[5] But a servant who quits his master, taking with

[5] White *v.* Brown, 5 Lans. (N. Y.) 78.

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ground to assert a wrongful detention in the absence of demand, Cadwell *v.* Pray, *supra.*

An officer who levies upon mortgaged goods, while in possession of the mortgageor, is not liable in replevin until demand made, Keller *v.* Robinson, 153 Ills. 458, 38 N. E. 1072; Schemerhorn *v.* Mitchell, 15 Ills. Ap. 418; Holliday *v.* Bartholomae, 11 Ills. Ap. 206; Gilbert *v.* Murray, 69 Ills. Ap. 664;—so in any case where the officer levies upon goods found in possession of defendant named in his writ, Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792. Purchaser in a conditional sale, cannot even after default, be made liable in replevin without a demand, Kimball *v.* Farnum, 61 N. H. 348; Heinrich *v.* Van Wrickler, 80 Ap. Div. 250, 80 N. Y. Sup. 226; Wheeler, etc., Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155; Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788. But see Contra Norman Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499; Proctor *v.* Tilton, 65 N. H. 3, 17 Atl. 638.

Nor can purchaser from the vendee in a conditional sale, without notice of the infirmities in his vendor's title, Torian *v.* McClure, 83 Ind. 310;—nor, it seems, even though he has notice of the condition, Payne *v.* June, 92 Ind. 252. Nor one who comes into possession of goods pursuant to a sale contemplated but not consummated, Darling *v.* Tegler, 30 Mich. 53. Nor a *bona fide* purchaser of goods tortiously taken, Gillet *v.* Roberts, 57 N. Y. 28; Wood *v.* Cohen, 6 Ind. 455. Nor a *bona fide* purchaser from one who has procured goods by fraudulent misrepresentation, Wolff *v.* Zeller, 27 Misc. 646, 58 N. Y. Sup. 608. Nor bailee at the suit of a purchaser from his bailor, Wilson *v.* Cook, 3 E. D. Sm. 252. Nor mortgagee in possession under a mortgage which the mortgageor asserts to have been executed while he was *non compos*, Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142. Nor a carrier who has received goods for transportation, even though he has delayed in performing his duty, Wabash Co. *v.* House, 101 Ills. Ap. 397. Nor any one in lawful possession, Harris *v.* McCasland, 29 Ills. Ap. 430; Hall *v.* Bassler, 96 Ap. Div. 96, 88 N. Y. Sup. 1039. Even though the party in possession has, without authority, temporarily loaned the thing to another, not asserting ownership, Becker *v.* Vandercook, 54 Mich. 114, 19 N. W. 771. Nor in any case where the plaintiff's right to possession depends, by express words, upon a prior demand, Bowman *v.* Roberts, 58 Miss. 126. Nor where the defendant's possession and use of the plaintiff's property was originally tortious, but plaintiff by accepting compensation for the use at the regular and customary rate, has waived the tort, Toledo, etc., Co. *v.* The American Co., 41 Ills. Ap. 625. And defendant cannot be charged in replevin where he came lawfully into possession and is entitled to retain the goods until demand, Woodward *v.* Edmunds, 20 Utah, 118, 57 Pac. 848.

him his master's goods, is liable without demand.[6] And where a machine was delivered to one through mistake of an expressman, and he encouraged the delivery and afterwards made repairs upon it, the taking was wrongful and no demand was necessary.[7] Or where one acquire possession of property, and without legal right assert a claim inconsistent with the owner's rights, the possession from that moment is wrongful, and no demand is necessary.[8]

[6] Pilsbury *v.* Webb, 33 Barb. 214.
[7] Purvis *v.* Moltz, 5 Robts. (N. Y.) 653.
[8] Shoemaker *v.* Simpson, 16 Kan. 43.

NOTE XXII. *In What Cases Demand not Necessary.*—No demand is required where the possession was obtained by force or fraud, Yeager *v.* Wallace, 57 Pa. St. 365; California, etc., Assn. *v.* Stelling, 141 Calif. 713, 75 Pac. 320. Nor in any case where the defendant obtained the possession wrongfully, Lewis *v.* Masters, 8 Blf. 244; Deeter *v.* Sellers, 102 Ind. 458, 1 N. E. 854; Perkins *v.* Best, 94 Wis. 168, 68 N. W. 762; Cottrell *v.* Carter, 173 Mass. 155, 53 N. E. 375; Schwamb Co. *v.* Schaar, 94 Ills. Ap. 544;—as where an officer levies on mortgaged goods in defiance of the right of the mortgagee, Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823; Ashcroft *v.* Simmons, 159 Mass. 203, 34 N. E. 188; Greenberg *v.* Stevens, 212 Ills. 606, 72 N. E. 722; nor where purchaser on condition has not complied with the terms of his purchase, Proctor *v.* Tilton, 65 N. H. 3, 17 Atl. 638, Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528; Norman Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499; or the goods are levied upon in possession of one not named in the execution, Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792; Burgwald *v.* Donelsen, 2 Kans. Ap. 301, 43 Pac. 100; Forbes *v.* Martin, 7 Houst. 375, 32 Atl. 327;—even although the officer acts in good faith; if the levy is unlawful as to the plaintiff he is under no duty to make a demand, Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902; Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330. Nor is a demand necessary where the officer seizes the goods under a writ issued upon a void affidavit, Aspell *v.* Hosbein, 98 Mich. 117, 57 N. W. 27; nor where the goods were seized for a tax for which they are not liable, Coie *v.* Carl, 82 Hun, 360, 31 N. Y. Sup. 565; nor where the defendant took possession by force, denying the owner's right, Hyland *v.* Bohn Co., 92 Wis. 157, 65 N. W. 170;—or the defendant wrongfully took up and impounded cattle grazing on the highway in front of his premises, to his great annoyance, Bertwhistle *v.* Goodrich, 53 Mich. 457, 19 N. W. 143; nor where the defendant obtained plaintiff's goods by replevying them from a stranger, Kelleher *v.* Clark, 135 Mass. 45; or under execution sale against a third person, Edmunds *v.* Hill, 133 Mass. 445;—nor where a trespasser wrongfully attached plaintiff's rails to defendant's land, and defendant severed them and laid claim to them, Shoemaker *v.* Simpson, 16 Kans. 43; nor where one seizes possession of logs claiming them under a stranger, Log-Owners Co. *v.* Hubbell, 135 Mich. 65, 97 N. W. 157; nor where de-

§ 346. **The reasons for the rule.** The reasons for this general rule are plain. If the original taking was lawful, then the possession under that taking must be rightful until some other person with a better right has asserted his claim by asking that the goods be delivered to him. The law presumes that the defendant who rightfully acquired possession will respect the rights of the true owner on being informed of them, and deliver the possession at once on request. At least he must have an opportunity

fendant obtained possession from a thief or mere trespasser, Eldred *v.* Oconto Co., 33 Wis. 133; Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788; Rosum *v.* Hodges, 1 S. D. 308, 47 N. W. 140, 9 L. A. R. 817; even though the defendant received the goods in ignorance of the previous theft or wrong and acted in good faith, Harpending *v.* Meyer, 55 Calif. 555; nor where vendee under a contract of sale procures delivery by fraud without payment of the price, Schroeppel *v.* Corning, 6 N. Y. 107; Oswego Co. *v.* Lendrum, 57 Ia. 573, 10 N. W. 900; nor where the goods are obtained by fraud without intention to pay for them, Carl *v.* McGonigal, 58 Mich. 567, 25 N. W. 516; Reeder *v.* Moore, 95 Mich. 594, 55 N. W. 436; Farwell *v.* Hanchett, 120 Ills. 573, 11 N. E. 875; nor where the defendant has converted or sold the goods, Howitt *v.* Estelle, 92 Ills. 219; Breintenwischer *v.* Clough, 111 Mich. 6, 69 N. W. 88; Cox *v.* Albert, 78 Ind. 241; nor where the defendant has put the goods out of his possession, Torres *v.* Rogers, 28 Misc. 176, 58 N. Y. Sup. 1104;—nor where the defendant received the goods from a trespasser, Milligan *v.* Brooklyn Co., 68 N. Y. Sup. 744; or received the goods from one who obtained them from the owner by fraudulent misrepresentation, Farley *v.* Lincoln, 51 N. H. 577; Tallman *v.* Turck, 26 Barb. 167; or from one who had no title, nor any right to dispose of the goods, Prime *v.* Cobb, 63 Me. 200; Surles *v.* Sweeney, 11 Ore. 21, 4 Pac. 469; even though the defendant received possession as an assignee in insolvency and was not intending any wrong or conscious that he was committing one, Farley *v.* Lincoln, *supra;* the good faith of the defendant's action is immaterial, Schwamb Co. *v.* Schaar, 94 Ills. Ap. 544; nor where a warehouseman, being interrogated about the goods, refuses to give the information desired, and refuses an examination of his books, Milligan *v.* Brooklyn Co., *supra;* nor where the defendant asserts title to the goods and denies the right of the plaintiff, Howard *v.* Braun, 14 S. D. 579, 86 N. W. 635; Newell *v.* Newell, 34 Miss. 385; Heath *v.* Morgan, 117 N. C. 504, 23 S. E. 489; Hayes Woolen Co. *v.* McKinnon, 114 N. C. 661, 19 S. E. 761; Chapin *v.* Jenkins, 50 Kans. 385, 31 Pac. 1084; Barton *v.* Mulvane, 59 Kans. 313, 52 Pac. 883; Kellogg *v.* Olson, 34 Minn. 105, 24 N. W. 364; Seattle National Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763; Latta *v.* Tutton, 122 Calif. 279, 54 Pac. 844; Leek *v.* Chesley, 98 Ia. 593, 67 N. W. 580; Tilden *v.* Stilson, 49 Neb. 382, 68 N. W. 478; Ogden *v.* Warren, 36 Neb. 715, 55 N. W. 221; Bennett *v.* Tam, 24 Mont. 457, 62 Pac. 780; Lewis *v.* Smart, 67 Me. 206; Herman *v.* Knelp, 59 Neb. 208,

to do so before he is put to cost of a suit. If, however, he refuses to comply with the demand, or if, after knowledge of the plaintiff's right, he does any act which amounts to a conversion of the property to his own use, his possession from that moment becomes wrongful as against the true owner.[9] Again, where the defendant's possession was rightfully acquired, his subsequent possession continues to be rightful until he shall have done some act inconsistent with the owner's rights; and while his possession so continues to be rightful no action which requires for its support

[9] Pringle *v.* Phillips, 5 Sandf. (N. Y.) 161; Woodward *v.* Woodward, 14 Ill. 466; Poole *v.* Adkisson, 1 Dana, (Ky.) 110; Hosmer *v.* Clarke, 2 Green. (Me.) 308.

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80 N. W. 816; but a mere denial of plaintiff's right to the possession does not waive a demand, Peters *v.* Parsons, 18 Neb. 191, 24 N. W. 687; nor is a demand necessary where conversion can be shown otherwise than by demand, as where defendant asserted title to an animal, as won in a wager with a son of the plaintiff, who was a mere bailee in possession, Brown *v.* Beason, 24 Ala. 436; or where the defendant averred that if plaintiff meddled with the goods he "would break every bone in his body," University *v.* State Bank, 96 N. C. 280, 3 S. E. 359; nor where one to whom bonds have been unlawfully delivered in pledge by one without authority, announces a purpose to retain them nevertheless, University *v.* State Bank, *supra;* nor where defendant received the goods, under a contract void as against public policy, Sellers *v.* Catron, Ind. T. 82 S. W. 742.

Nor is demand necessary where it appears that it would have been unavailing, California, etc., Association *v.* Stelling, 141 Calif. 713, 75 Pac. 320; Wood *v.* McDonald, 66 Calif. 546, 6 Pac. 452; Richey *v.* Ford, 84 Ills. Ap. 121; Kidd *v.* Johnson, 49 Mo. Ap. 486; and a refusal to deliver upon demand made after issuance of the writ, is convincing proof that, even if seasonably made, it would have been unavailing, Rodgers *v.* Graham, 36 Neb. 730, 55 N. W. 243. Nor is demand necessary where the defendant gives bond and retains the goods, Miller *v.* Adamson, 45 Minn. 99, 47 N. W. 452; nor where the defendant by his answer asserts title to the goods, Flynn *v.* Jordan, 17 Neb. 518, 23 N. W. 519; Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853; Fuller *v.* Torson, 8 Kans. Ap. 652, 56 Pac. 512; nor where on the trial, the defendant contests the plaintiff's right, Hennessey *v.* Barnett, 12 Colo. Ap. 254, 55 Pac. 197; Thompson *v.* Thompson, 11 N. D. 208, 91 N. W. 44; State Bank *v.* Norduff, 2 Kans. Ap. 55, 43 Pac. 312; Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268; Lamping *v.* Keenan, 9 Colo. 390, 12 Pac. 434; Webster *v.* Brunswick Co., 37 Fla. 433, 20 So. 536; Jordan *v.* Johnson, 1 Kans. Ap. 656, 42 Pac. 415; George *v.* Hewlett, 70 Miss. 1, 12 So. 855; nor is a demand necessary where the defendant secretes himself or leaves the jurisdiction to avoid a demand, Wall *v.* De Mitkiewicz, 9 Ap. D. C. 109.

proof of a wrongful detention, can lie; so when a demand is required the defendant's possession continues to be rightful up to the time of demand, and until he can have a reasonable opportunity to comply with it. Therefore, when a demand is necessary, it must be made before the suit is begun.[10]

§ 347. **The same.** So careful is the law of the rights of innocent holders, that in many cases it will not permit the owner to recover his property even when wrongfully taken from him, until after he shall have made demand for it. Thus, when the owner of a chattel wrongfully taken from him finds it in the possession of one who acquired it in good faith, by purchase, and in ignorance of the owner's right, a demand is necessary before bringing the action.[11] But this rule does not apply to stolen goods, nor can it be said to be the law in all the States.[12]

§ 348. **Proof of a wrongful taking sufficient.** While the foregoing is perhaps accurate as a general statement, yet the decisions vary so widely in the different States, that statement of a rule applicable to all cases is impossible. General principles, however, can be stated, which it is hoped will be a sufficient guide. The difference between the action for the wrongful taking, *i. e.* in the *cepit*, and for the wrongful detention, *i. e.* in the *detinet*, has been stated.[13] When the action is for a wrongful taking, proof of an actual or constructive wrongful taking by the defendant will be sufficient, without proof of a demand. This rule also holds when the form of the action is for the detention. The plaintiff may, if he so elect, sue in the latter form of action, when his goods have been wrested from him, and may sustain his action without proof of a demand, proof of the wrongful taking being sufficient,[14] as the law will presume from proof of a

[10] Brown *v.* Holmes, 13 Kan. 482; Windsor *v.* Boyce, 1 Houst. (Del.) 605; Alden *v.* Carver, 13 Iowa, 255.

[11] Stanchfield *v.* Palmer, 4 Gr. (Iowa,) 24; Wood *v.* Cohen, 6 Ind. 455; Ingalls *v.* Bulkley, 13 Ill. 315.

[12] Compare Lewis *v.* Masters, Blackf. 245; Riley *v.* Boston Water P. Co., 11 Cush. 11; Courtis *v.* Cane, 32 Vt. 232; Harding *v.* Coburn, 12 Met. 342; Hoare *v.* Parker, 2 T. R. 376; Hudson *v.* Maze, 3 Scam. 582; Kelsey *v.* Griswold, 6 Barb. 440; Hall *v.* Robinson, 2 Comst. (N. Y.) 295.

[13] See *ante*, § 53.

[14] Stillman *v.* Squire, 1 Denio, 328; Oleson *v.* Merrill, 20 Wis. 426; Cummings *v.* Vorce, 3 Hill, 282; Lewis *v.* Masters, 8 Blackf. 245; Pierce *v.* Van Dyke, 6 Hill, 613; Zachrissan *v.* Ahman, 2 Sandf. 68; Pringle *v.* Phillips, 5 Sandf. 157.

wrongful taking, that the goods continue in the taker's possession, and that he remains of the same purpose of mind in which he committed the wrong.[15] But such proof is not admissible for the purpose of affecting the question of damages.[16]

§ 349. **The legal effect of a demand and refusal.** A demand and refusal is not a conversion, nor does it produce a conversion.[17] The refusal is interpreted by the law as a declaration on the part of the person refusing, that he intends to make use of the property for his own benefit, and for this the law will hold him responsible as for an actual conversion. Proof of an actual conversion will always obviate the necessity of proving a demand and refusal.[18] When, therefore, the defendant has notice of the plaintiff's rights, any act done for the purpose of defeating them, will amount to a conversion; but where the defendant acts in ignorance of the claim of any other person and in the honest belief that the goods are his, an actual conversion, or a demand and refusal must be proved before the plaintiff can sustain an action. *Kennet* v. *Robinson*, 3 J. J. Marsh, (Ky.) 84, is one of the most interesting cases on the question of "what is a conversion," that is to be met with. The court there holds in substance, that to constitute conversion there must be a taking without the owner's consent, or an assumption of ownership, or an illegal use or abuse of the property, and that in the absence of such proof, there must be proof of a demand and refusal to deliver.

[15] Paul *v.* Luttrell, 1 Colo. 320.

[16] Eldred *v.* The Oconto Co., 30 Wis. 206.

[17] Morris *v.* Pugh, 3 Burr. 1241; Savage *v.* Perkins, 11 How. Pr. 17; Perkins *v.* Barnes, 3 Nev. 557; Bruner *v.* Dyball, 42 Ill. 35; Lockwood *v.* Bull, 1 Cow. 322; Hill *v.* Covell, 1 Comst. (N. Y.) 523; Jessop *v.* Miller, 1 Keyes, (N. Y.) 321. *Contra.* Baldwin *v.* Cole, 6 Mod. 212. Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548; Boyle *v.* Roach, 2 E. D. Sm. 335. And the allegation of a demand and refusal is not an allegation of conversion and does not transform the count into a count in trover, Balch *v.* Jones, 61 Calif, 234.

A demand and refusal is evidence of conversion, but not the only evidence, Bellknap Bank *v.* Robinson, 66 Conn. 542, 34 Atl. 495; Daggett *v.* Davis, 53 Mich. 35, 18 N. W. 548. A demand in violation of an injunction cannot be made the basis of an action, Smith *v.* Smith, 52 Mich. 539, 18 N. W. 347. The action is deemed to be commenced at the date of the demand, Dow *v.* Dempsey, 21 Wash. 86, 57 Pac. 355.

[18] Bristol *v.* Burt, 7 Johns. 257; Gilmore *v.* Newton, 9 Allen, (Mass.) 171.

§ 350. **Where possession is taken by a thief or trespasser from another thief or trespasser.** If goods be taken by a thief or trespasser from another thief or trespasser, the owner may have trespass or replevin against the last taker without demand.[19]

§ 351. **Where goods are converted no demand necessary; meaning of the term "conversion" as here used.** The term "conversion" as here used does not imply a change of condition in the goods, but simply that they have been appropriated by the party to his own use. If one take corn and refuse to deliver it to the owner on demand, it is a conversion. If he manufacture whisky from it and deliver it on request, it is no conversion. Proof of a refusal simply raises a legal presumption that the defendant has converted the property.

§ 352. **What is a conversion.** The question then presents itself, what proof, aside from a demand, will be sufficient to convict the defendant of a conversion? As a general rule, to render the defendant guilty of conversion, he must have done some positive tortious act. Negligence, or a mere omission, is not usually sufficient.[20] When a carrier loses a box entrusted to him, such loss, however negligent, does not amount to a conversion.[21] But

[19] Barrett *v.* Warren, 3 Hill, (N. Y.) 348.

[20] Jones *v.* Allen, 1 Head. (Tenn.) 628; Lockwood *v.* Bull, 1 Cow. 322. Consult Gilmore *v.* Newton, 9 Allen, 171, and cases cited; Youl *v.* Harbottle, Peakes N. P. Cas. 49; Presley *v.* Powers, 82 Ill. 125. [Magnin *v.* Dinsmore, 70 N. Y. 410. Tenant's refusal to clean and divide the grain raised upon shares, as required by the lease, is not a conversion of the landlord's moiety, Thomas *v.* Williams, 32 Hun, 257.]

[21] Packard *v.* Getman, 4 Wend. 615; Ross *v.* Johnson, 5 Burr. 2827; Kirkham *v.* Hargraves, 1 Selw. N. P. 425; Dwight *v.* Brewster, 1 Pick. 50, 53. [Magnin *v.* Dinsmore, 70 N. Y. 410; a carrier is not chargeable with a conversion where the goods have been attached in his hands upon process against a third person, Stiles *v.* Davis, 1 Black, 101, 17 L. Ed. 33. But the carrier is guilty of a conversion, when, on demand and offer to pay his proper charge, he refuses and makes an exorbitant charge; the goods are thereafter at his risk, Northern Co. *v.* Sellick, 52 Ills. 249. Carrier is liable if he or his servant puts water into wine delivered to him for carriage, Dench *v.* Walker, 14 Mass. 500.

The casual loss of a bill of exchange is not a conversion, Salt Springs Bank *v.* Wheeler, 48 N. Y. 492. A creditor upon whose writ goods are attached, is not responsible for their loss by the negligence of the officer, Jenner *v.* Joliffe, 6 Johns. 9. Collector of the port is liable, if he detains the goods of an importer on pretence of a lien for

under ordinary circumstances, where property is under the control of the defendant, a willful neglect to deliver on request, or to point out the property or act in its delivery, will, if unexplained, amount to a conversion and excuse proof of a demand.[22] One having the right to exclusive possession of a building, in which another's goods are stored, may exclude the owner of the goods from the building, and such exclusion will not necessarily be a conversion of the goods;[23] and an action of replevin for the goods would require some further support than proof of a refusal to admit into the building.[24]

§ 353. **There can be no conversion without actual control over, or interference with, the property.** There can never be an actual conversion of property without an actual possession of it, or the exercise of some control or dominion over it. A mere declaration of ownership by one not in possession, or an assertion of intention to take possession, without any actual interference with it, will not amount to a conversion.[25] A levy by an officer upon goods which he does not see, or in anyway interfere with, is no conversion.[26] Neither will a conspiracy, however atrocious, to take or destroy property, confer a right of action, unless some act to the injury of the party be done under it.[27]

§ 354. **Illustrations of this rule.** When plaintiff's sheep broke out of his lot and mingled with those of defendant's, which

duties, when no duties are in fact due, or the duties due are tendered; and he cannot protect himself by the orders of his superior officer, Fiedler *v.* Maxwell, 2 Bl. C. C. 552.]

[22] Mitchell *v.* Williams, 4 Hill, (N. Y.) 16; Holbrook *v.* Wight, 24 Wend. 169. [Plaintiff's animals strayed upon defendant's lands and into his enclosure; plaintiff's servant called and inquired if they were there; defendant indicated that they were in the pasture, but gave no license to take them; he had previously forbidden plaintiff his premises; held guilty of a conversion, Kiefer *v.* Carrier, 53 Wis. 404, 10 N. W. 562. The purchase of mortgaged chattels by a third person and the assumption of possession thereof is a conversion. Woods *v.* Rose, 135 Ala. 297, 33 So. 41. So of any unlawful intermeddling with the goods of another or the exercise of dominion over them. Milner Co. *v.* De Loach Co., 139 Ala. 645, 6 So. 765.]

[23] Bent *v.* Bent, 44 Vt. 634.

[24] Bent *v.* Bent, 44 Vt. 634.

[25] Fernald *v.* Chase, 37 Me. 289; Fuller *v.* Tabor, 39 Me. 521; Simmons *v.* Lettystone, 4 Exch. 442; Rogers *v.* Huie, 2 Cal. 571; Heald *v.* Cary, 11 Com. B. 993; Presley *v.* Powers, 82 Ill. 125.

[26] Herron *v.* Hughes, 25 Cal. 556.

[27] Hutchins *v.* Hutchins, 7 Hill, (N. Y.) 104.

were being driven along the highway, although the latter allowed them to go with his sheep to his lot, where they were separated and driven back toward the direction from whence they came, it was held no conversion.[28] When cattle break into the field of another, and destroy corn, it cannot be said that their owner converted the corn, because his cattle ate it.[29] When a horse was conveyed as security for a debt, the debtor to retain possession, castration of the horse, pending the time, is a conversion, and the lender may retake possession in replevin.[30] So, when a horse had been leased for a term, upon an agreement to divide the profits of his services, and the lessee permitted it to be sold on execution, *held* a conversion.[31]

§ 355. **The same.** It is not every taking that amounts to a conversion. A simple taking, without any intention to use property, or to injure or damage it, or delay or affect its owner's rights, would not be a conversion.[32] A trespass, however gross, is not necessarily a conversion. Under the law, generally, in this

[28] Van Valkenburgh *v.* Thayer, 57 Barb. 196. [Plaintiff's cow unlawfully upon the highway, got into defendant's herd, without his knowledge, and was driven to a great distance, out of the state, and grazed there during the summer season; on defendant's return he brought the animal with him and surrendered her; held not guilty of a conversion, Wellington *v.* Wentworth, 8 Mete. (Mass.) 548.

Defendant, purchasing a warehouse, found there a quantity of cotton and was told by the former occupant that it belonged to A.; having no information to the contrary he notified A. to take it away and A. complied with this direction; held, that defendant was not guilty of a conversion, Parker *v.* Lombard, 100 Mass. 405. Defendant temporarily had in possession a wagon of the plaintiff, which he obtained from the keeper of a livery stable, to use while his own wagon was being repaired; he had no knowledge of the rights of the plaintiff; on being informed that the plaintiff claimed the wagon he returned it to the person from whom he obtained it; held not guilty of a conversion, (but the verdict was the other way, why is not apparent, and the court affirmed a judgment for the plaintiff.) Rembaugh v. Phipps, 75 Mo. 422.]

[29] Smith *v.* Archer, 53 Ill. 244.

[30] Ripley *v.* Doibler, 18 Me. 382.

[31] Hutchinson *v.* Bobo, 1 Bailey, (S. C.) 546.

[32] Eldridge *v.* Adams, 54 Barb. 417. [If, after the conversion, the parties agree upon an adjustment, and the defendant in possession of the goods remains always ready and willing to keep his agreement, such detention is not conversion, Lander *v.* Bechtell, 55 Wis. 593, 13 N. W. 483; so if the finder of goods lay them by for the true owner until he can reasonably satisfy himself of the man, Holbrook *v.* Wright, 24 Wend. 169.]

country, a taking, unaccompanied by a detention, is not a conversion.[33] Plaintiff paid the fare for himself and two horses on a ferryboat; the ferryman told him to remove his horses he would not carry them. Plaintiff refused; thereupon the ferryman removed them, while plaintiff remained, and was carried over. *Held*, that it was not conversion, unless the taking was with the intent to convert to the taker's use. Trespass might lie, but not trover or replevin.[34] A neglect or refusal to deliver goods which are not in the defendant's possession at the time of the demand is not a conversion.[35]

[33] Bogan *v.* Stoutenburgh, 7 Ohio, Pt. 2, 213; State *v.* Jennings, 14 Ohio St. 77; Paul *v.* Luttrell, 1 Col. 317; Nelson *v.* Iverson, 17 Ala. 219.

[34] Fouldes *v.* Willoughby, 8 Mees. & W. 540; Eldridge *v.* Adams, 54 Barb. 417. [Defendant refused to permit his employees to rent of the plaintiff a certain dwelling situate entirely on the island owned by defendant and for which no other tenants could possibly be secured; held, not a conversion, Heywood *v.* Tillson, 75 Me. 225, 46 Am. Rep. 373.]

[35] Whitney *v.* Slauson, 30 Barb. 276; Hawkins *v.* Hoffman, 6 Hill, 586; Hall *v.* Robinson, 2 Comst. (N. Y.) 293; Hill *v.* Covell, 1 Comst. 522; Walker *v.* Fenner, 20 Ala. 198. [Neither is the retention of the property by the bailee, when demanded by a third person, where his mere purpose is to ascertain the right, Philpott *v.* Kelly, 3 Ad. & E. 106. So where the owner upon whose premises timbers were found, told the party demanding them he should have them if he would bring anyone to prove his property, Holbrook *v.* Wright, 24 Wend. 169; and where a mere servant in charge of a warehouse refuses to deliver goods without an order from his master, *Id.* An agent is not bound to deliver up the goods which he has received from his principal; and to refuse upon this ground is not a conversion, Cary *v.* Bright, 58 Pa. St. 70. A broker buying shares of corporate stock in his own name for account of another is not bound to deliver any particular shares; so that he deliver on demand the number of shares for which he is accountable, in the same stock, his contract is performed, Boylan *v.* Huguet, 8 Nev. 345. The wrongful use of the certificate is a conversion of the stock, Kuhn *v.* McAllister, 1 Utah, 273; S. C. 96 U. S. 87, 24 L. Ed. 615. And an averment that the defendant "wrongfully took and converted," etc., admits evidence of the conversion without any averment of the particular manner in which it was accomplished, *Id.*

Plaintiff delivered two promissory notes to K. for discount for plaintiff's use; K. delivered them to defendant in exchange for defendant's check, and discounted this check with C. D. & Co., depositing the notes as collateral security; the check was dishonored, and K. demanded payment of defendant; defendant agreed to pay the check if K. would direct C. D. & Co. to surrender the notes, promising to presently return the notes; K. consenting to this the defendant paid the check

§ 356. **Purchaser at sheriff's sale.** A mere purchaser at a sheriff's sale, who does nothing more than purchase, is not a trespasser, even though the seizure and sale by the officer may have been wrongful, and the sale convey no title. If, upon such sale, the sheriff delivers the property to the purchaser, a demand must be made of him before suit[36] When, however, one obtains goods by trespass, and they are subsequently sold by the officer on execution against the trespasser, and bought by the plaintiff in execution, a want of demand will not defeat the suit.[37] The purchase in such case, was only the extinguishment of a prior debt, and not a purchase for cash.[38]

§ 357. **Possession taken simply as an act of charity, or to preserve property, not a conversion.** Where one takes possession of property as an act of charity or kindness, or for the purpose of preserving what would otherwise suffer damage, it is no conversion. There is no wrongful act or intention, which is an essential ingredient in an action for wrongful taking or detention. Consequently a demand must be made.[39]

§ 358. **Borrower cannot set up title in himself as against his bailor.** A borrower or a bailee for hire, cannot set up title in himself against his bailor. He must first restore the property. And while a demand is necessary in such cases, when the defendant has done no act amounting to a conversion, a claim of owner-

with money of his wife, took the notes and delivered them to his wife; he refused to surrender the notes on demand of the plaintiff; held, that defendant might be liable for the breach of his promise to return the notes, but not guilty of conversion of them, Hunt *v.* Kane, 40 Barb. 638.

A creditor to whom goods have been entrusted by his debtor to be sold and the proceeds applied to discharge the indebtedness, and other indebtedness, is not liable for a conversion, for conveying the goods to and selling them at a different place than that specified in the agreement, the debtor in violation of the agreement having wrongfully expelled the creditor's agent and resumed possession of the goods, putting the creditor to the necessity of replevin to recover them. Rousch *v.* Washburn, 88 Ills. 215.]

[36] Talmadge *v.* Scudder, 38 Pa. St. 518.

[37] Sargent *v.* Sturm, 23 Cal. 360. [One who placed a demand for collection in the hands of an attorney is liable for the sale of the plaintiff's goods instigated by the attorney in good faith, though the statute under which he proceeds is afterwards declared unconstitutional, Poucher *v.* Blanchard, 86 N. Y. 256.]

[38] See *ante*, § 383.

[39] Kennet *v.* Robinson, 2 J. J. Marsh. (Ky.) 84.

ship, in defiance of the rights of lender or hirer, is equivalent to a conversion, and renders a demand unnecessary.[40]

§ 359. **Finder of property entitled to a demand.** The finder of lost property is entitled to a demand before being subjected to a suit; but he has no lien for expenses gratuitously bestowed in taking care of it; and if he assert his intention to hold it for the purpose of enforcing such a lien, he will be guilty of conversion.[41] Salvage, as allowed in the maritime courts, stands on an entirely different basis, and is enforced only in respect to goods lost on the high seas.[42] When a raft broke loose from its fastenings on the bank of a river, and the defendant towed it to a place of safety, he was not permitted to set up a lien for his trouble, however meritorious his claim.[43] Where, however, a reward is offered for lost property, the finder is entitled to retain possession until the reward is paid.[44]

§ 360. **Taker up of stray animals.** The taker up of an estray, who fails to comply with the law with respect to such animals, has no lien for his trouble or expense. He is, in fact, a trespasser.[45] But when the defendant took up stray cattle, complying with the terms of the statute, he was entitled to a demand of possession and a tender of charges before he could be held liable in this action.[46]

§ 361. **Purchaser of property payable in installments entitled to a demand before forfeiture.** Where one bought a sewing machine, and was to pay for it in monthly installments,

[40] Simpson *v.* Wrenn, 50 Ill. 222; Loeschman *v.* Machin, 2 Starkie, 310. [A bill of exchange was delivered to defendant merely to secure an endorsement; he discounted it and deposited the proceeds to his own credit, held a conversion, Atkins *v.* Owen, 4 Ad. & E. 819. Doubted whether a promissory note made to another for his accommodation and actually paid by and surrendered to him, is the property of the maker; but if the payee asserts a right of action upon it, against the maker, trover lies; and he cannot defeat the action by surrendering the note, Park *v.* McDaniels, 37 Vt. 594. One entrusted with the promissory note of the plaintiff, for discount, delivers it without authority to another; he is guilty of a conversion, Laverty *v.* Snethen, 68 N. Y. 522.]

[41] Etter *v.* Edwards, 4 Watts. (Pa.) 66, citing Binsted *v.* Buck, 2 W. Blacks. 1117.

[42] Hartford *v.* Jones, 1 Ld. Raym. 393.

[43] Nicholas *v.* Chapman, 2 H. Bla. 254.

[44] Cummings *v.* Gann, 52 Pa. St. 484.

[45] Bayless *v.* Lefaivre, 37 Mo. 119.

[46] Holcomb *v.* Davis, 56 Ill. 416.

and paid first installment, and refused to pay the next, alleging the machine was not such as she had bought, the seller brought replevin. *Held*, it could not be sustained without proof of a demand, and an offer to refund the part of the purchase money which had been paid.[47]

§ 362. **Unauthorized interference with the goods of another.** A forcible seizure is not necessary to constitute a wrongful taking ;[48] but any unlawful or unauthorized intermeddling with or exercise of authority over the property of another is an act of trespass, and if accompanied by taking and detention, will amount to a conversion.[49]

§ 363. **One who hires property for a special purpose cannot use it for another.** When a person hired a horse for a specified journey, and drove it beyond, it was held a conversion. So, if the defendant wrongfully set up a claim for a lien on the property, in reply to a demand for it, it is sufficient evidence of a conversion.[50] When the owner demanded his machinery from defendants, who refused to allow him to take it until they had got other in its place. *Held*, to be an unlawful intermeddling with the plaintiff's property, without any pretense of right, and sufficient to sustain an action.[51]

§ 364. **Innocent receiver of stolen goods may be liable for conversion.** This rule has been carried so far, that a person who receives stolen goods in ignorance of the owner's rights, has been held liable for them. Thus, an auctioneer who receives goods from a thief in the ordinary course of business, and sells them, and pays the proceeds to the thief, without any notice or knowledge, was held liable for conversion.[52] The case of *Hoff-*

[47] Hamilton *v.* Singer Sewing Machine Co., 54 Ill. 370.

[48] Lee *v.* Gould, 47 Pa. St. 398; Haythorn *v.* Rushforth, 4 Har. 160; Kerley *v.* Hume, 3 T. B. Mon. (Ky.) 181; Marchman *v.* Todd, 15 Geo. 25; Skinner *v.* Stouse, 4 Mo. 93.

[49] Ralston *v.* Black, 15 Iowa, 48; Squires *v.* Smith, 10 B. Mon. (Ky.) 33; Ely *v.* Ehle, 3 Comst. 506; Hardy *v.* Clendening, 25 Ark. 436; Gibbs *v.* Chase, 10 Mass. 125; Robinson *v.* Mansfield, 13 Pick. 139; Phillips *v.* Hall, 8 Wend. 610; Allen *v.* Crary, 10 Wend. 349; Fonda *v.* Van Horne, 15 Wend. 631; Neff *v.* Thompson, 8 Barb. 213; Miller *v.* Baker, 1 Met. 27; Wilson *v.* Barker, 4 B. & Adolph. 614.

[50] Jacoby *v.* Laussatt, 6 S. & R. 300.

[51] Haythorn *v.* Rushforth, 4 Har. (19 N. J.) 160.

[52] Hoffman *v.* Carow, 22 Wend. 285. *Contra*, Rogers *v.* Hule, 2 Cal. 572.

man v. *Carow* was cited approvingly in a Vermont case, and the court says that probably no case can be found in conflict with it.[53] But where one took goods in pledge for a debt, not knowing they were the goods of a third party, and afterwards re-delivered them to his debtor, upon his promise to sell them and pay the proceeds to him, he was not liable to the owner.[54] When defendant, a jeweler, sold jewelry for A., and paid him proceeds, without notice of any other claim, he was held liable to the true owner for the value.[55] This rule, at first blush, may seem harsh; but an auctioneer or commission man of known responsibility ought not to lend the credit of his name to sell goods unless he knows the title will pass. If, through ignorance or carelessness, he sells stolen goods, and his customer be dispossessed, he ought to answer; and if the goods be consumed, or cannot be had by the true owner, it is by no means unjust that he make good to the owner their value, which he has lost.[56]

§ 365. **What is rightful possession.** It has been frequently held, that when the defendant's possession was rightfully acquired in the first instance, that the owner of the goods could not sustain an action for them without proof of demand and refusal.[57] The application of this general rule requires the solution of the question. What is regarded as a rightful possession? The defendant may have purchased the goods from one who, to all appearances, had a lawful and perfect right to sell and deliver, although in fact the goods may have been taken from the owner by robbery or theft; or, the vendor may have acquired them from the owner by some fraudulent practice, or as bailee for some special purpose. A jeweler may sell a watch left in his hands for repair, or a carrier dispose of the goods committed to him for transportation. An officer of the law, armed with legal process against A., may seize upon the goods of B. and sell them, or deliver them to a custodian until the day of sale. In these and a multi-

[53] Courtis *v.* Cane, 32 Vt. 233. Consult, also, Spraights *v.* Hawley, 39 N. Y. 441.

[54] Leonard *v.* Tidd, 3 Met. 6.

[55] Bowen *v.* Tenner, 40 Barb. 383.

[56] See Spencer *v.* Blackman, 9 Wend. 167; Everett *v.* Coffin, 6 Wend. 605; M'Combie *v.* Davies, 6 East, 538; Thorp *v.* Burling, 11 Johns. 285; Farrar *v.* Chauffetete, 5 Denio, 527; Pearson *v.* Graham, 6 Ad. & Ell. 899; Williams *v.* Merle, 11 Wend. 80.

[57] Gilchrist *v.* Moore, 7 Clark, (Iowa,) 11; Newman *v.* Jenne, 47 Me. 520; Stanchfield *v.* Palmer, 4 Greene, (Iowa,) 25.

tude of kindred cases, the possession, apparently rightful, is really wrongful, and the true owner can recover, and usually without demand. The rules are different in different courts It has been held that where the defendant acquired possession by purchase from one apparently the owner, such possession was so far rightful that the real owner must make demand before bringing suit;[58] but it has also been held that where one purchased property from one who had no right to sell, it was a conversion, and the owner could sustain replevin without demand, the good faith of the buyer being no defense.[59]

§ 366. **Fraudulent purchaser, or attaching creditor of same not entitled to demand.** When merchandise was purchased on credit, through fraudulent representations by the buyer as to his responsibility, and after delivery to him was attached by his creditors, the vendor was allowed to maintain replevin without demand.[60] In a subsequent case, the right of the deceived vendor was distinctly put upon the ground of his right to rescind an otherwise valid sale; and it was held he could enforce his claim only while the goods were in the hands of the vendor, or some person with notice of his rights.[61] In Michigan, when property is disposed of without authority by a person having it in charge, the owner may bring replevin without demand, even against an innocent purchaser.[62] So, in Maine, the defendant, though a *bona fide* purchaser from one who had no title or right to sell, is not entitled to hold the property; the owner may recover it in replevin without demand.[63] A fraudulent purchaser acquires a

[58] Stanchfield *v.* Palmer, 4 Greene, (Iowa,) 24; Ingalls *v.* Bulkley, 13 Ill. 315; Hudson *v.* Maze, 3 Scam. 578; Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157; Hall *v.* Robinson, 2 Comst. 295; Wood *v.* Cohen, 6 Ind. 455; Conner *v.* Comstock, 17 Ind. 90. *Contra*, Lewis *v.* Masters, 8 Blackf. 245; Bussing *v.* Rice, 2 Cush. 48; Thurston *v.* Blanchard, 22 Pick. 18; Buffington *v.* Gerrish, 15 Mass. 156; Acker *v.* Campbell, 23 Wend. 372.

[59] Gilmore *v.* Newton, 9 Allen, 171; Riley *v.* Boston Water P. Co., 11 Cush. 11; Farley *v.* Lincoln, 51 N. H. 577; Williams *v.* Merle, 11 Wend 80. See Rilford *v.* Montgomery, 7 Vt. 418; Doty *v.* Hawkins, 6 N. H. 248; Courtis *v.* Cane, 32 Vt. 232; Bloxam *v.* Hubbard, 5 East, 407; Cooper *v.* Newman, 45 N. H. 339; Galvin *v.* Bacon, 11 Me. 28; Soames *v.* Watts, 1 C. & Payne, 400; Stanley *v.* Gaylord, 1 Cush. 536; Hyde *v.* Noble, 13 N. H. 494.

[60] Buffington *v.* Gerrish, 15 Mass. 158; Bussing *v.* Rice, 2 Cush. 48; Acker *v.* Campbell, 23 Wend 372.

[61] Hoffman *v.* Noble, 6 Met. (Mass.) 75.

[62] Trudo *v.* Anderson, 10 Mich. 357.

[63] Prime *v.* Cobb, 63 Maine, 202.

voidable title. The fraud may justify the vendor in rescinding the sale and suing for the goods; but until rescinded, the sale is valid, and it is optional with the vendor to affirm it. So, when goods obtained through fraudulent purchase have been sold to a *bona fida* purchaser, without notice, replevin does not lie. The distinction is, that a fraudulent purchaser takes a title, voidable, nevertheless, but perfectly valid until rescinded; and if, while holding a valid title, he makes sale to one without notice, the sale is binding on the owner; but a thief or trespasser takes no title, and can convey none by any sale or delivery he may make.

§ 367. **Fraudulent taking confers no right on the taker.** While the forcible seizure of goods of another is always regarded as wrongful, it is no more so than the use of fraudulent means by which to obtain possession. He, who by successful fraud obtains the goods of another, is equally guilty of wrongfully taking with him who seizes them by superior force. It follows that in cases where the defendant fraudulently obtains possession no demand is necessary.[64] When one professed to have a warrant for the arrest of another, and under that pretense made an arrest and obtained the delivery of cattle in settlement, replevin would lie for the cattle or trover for their value, without demand.[65]

§ 368. **Demand necessary where an officer seizes goods from defendant named in his process.** Where an officer holding proper legal process takes goods from the possession of the defendant named in his writ, he is but doing his duty and his possession is lawful, so that replevin cannot be maintained against him without demand.[66]

[64] Bussing *v.* Rice, 2 Cush. 48; Acker *v.* Campbell, 23 Wend. 372.

[65] Foshay *v.* Ferguson, 5 Hill, 158. Where the defendant derives his possession by purchase for value, and without any notice of any right or claim by any other person, his detention is usually regarded as rightful until an opportunity has been offered him to restore the goods. Priam *v.* Barden, 5 Ark. 81; McNeill *v.* Arnold, 17 Ark. 173; Trapnall *v.* Hattier, 6 Ark. 18; O'Neill *v.* Henderson, 15 Ark. 235. Where the original possession was acquired by fraud, and under circumstances which did not transfer the title from the owner, and where the goods were seized and sold on execution against the fraudulent purchaser, and purchased by the plaintiff in the execution, it would seem that the purchaser acquired no better title than the original taker had. In such a case the defendant could not claim title to the goods and resist the plaintiff in the replevin suit on the ground of a want of a demand before suit. Sargent *v.* Sturm, 23 Cal. 360.

[66] Vose *v.* Stickney, 8 Minn. 75; Daumiel *v.* Gorham, 6 Cal. 43; Taylor

§ 369. **Contra; when he seizes goods from another.** When the property is seized from one not named in the process, the latter may sustain replevin upon showing that the goods belong to him, without proof of a demand.[67] The taking in such case is wrongful.[68]

§ 370. **Innkeeper or carrier; when entitled to demand.** A carrier has a lien on goods which he has transported, though he might have demanded his charges in advance, and replevin by the consignor or owner would not lie against him without demand and payment of charges. So of an innkeeper with respect to the goods of his guest. If a thief, however, take goods and deposit them with a carrier for transportation, or become a guest at an inn, the carrier or innkeeper cannot resist the true owner nor can either assert a lien, though the action cannot in such case be sustained without demand.[69]

§ 371. **At what time demand must be made.** The demand must be made before suit is begun.[70] When demand was made by an officer after the issuing, but before service of the writ, while he held the writ in his hands, it was held too late; the issuance

v. Seymour, 6 Cal. 512; Killey *v.* Scannell, 12 Cal. 73; Bond *v.* Ward, 7 Mass. 123; Shumway *v.* Rutter, 8 Pick. 443; Bancroft *v.* Blizzard, 13 Ohio, 30.

[67] Ledley *v.* Hays, 1 Cal. 160; Tuttle *v.* Robinson, 78 Ill. 332.

[68] Gimble *v.* Ackley, 12 Iowa, 27; Chinn *v.* Russell, 2 Blackf. (Ind.) 172; Buck *v.* Colbath, 3 Wall. (U. S.) 334.

[69] Robinson *v.* Baker, 5 Cush. 137; Fitch *v.* Newberry, 1 Doug. (Mich.) 1.

[70] Chenyworth *v.* Daily, 7 Porter, (Ind.) 284; Brown *v.* Holmes, 13 Kan. 482. [Demand after the writ issues and before service, and which is refused, is sufficient, because convincing evidence that if made in the first instance it would have been unavailing, Rodgers *v.* Graham, 36 Neb. 730, 55 N. W. 243; O'Neill *v.* Bailey, 68 Me. 429; but otherwise where the statute requires an affidavit of the wrongful withholding as a condition precedent to the issuance of the writ, Darling *v.* Tegler, 30 Mich. 54; McCarthy *v.* Hetzner, 70 Ills. Ap. 481. A demand made after the institution of the suit, but before service upon a new party subsequently added, is good as to such party; until served, the suit is not commenced as to him, McCarthy *v.* Hetzner, *supra*. Plaintiff conveyed a house to defendant; nothing was said as to the gas fixtures, chandeliers, gas logs and like appliances; at five o'clock on Saturday afternoon of October 29th the plaintiff demanded them; defendant replied that she could not be left in darkness Saturday and Sunday nights, that he could have them on Monday morning. Held for the jury to decide whether the demand was a reasonable one, Kane *v.* Reid, 33 Misc. 802; 68 N. Y. Sup. 623.]

of the writ is the beginning of the suit.[71] In *Badger* v. *Phinney*, 15 Mass 364, (one of the leading cases on the law of replevin,) this question arose, and the court said: "It is a sufficient answer to this, that if the defendant had delivered the goods on demand, there would have been no necessity to serve the writ." But the general rule is undoubted that where goods came lawfully into possession of defendant, there must be a demand and refusal, or proof of conversion, before suit is brought; proof of a conversion, or refusal to deliver after suit, will not avail.[72] The demand must be made upon defendant at a time when he has it in his power to comply; his ability to comply is essential. Demand on one who did not have the property would be useless.[73] But proof that the defendant had parted with the goods fraudulently for the purpose of avoiding the demand, has been held sufficient to excuse demand.[74] If the defendant have the goods at another place and offer to go with the plaintiff and deliver them, it will be sufficient. A refusal to deliver at the place of demand in such case, is no evidence of conversion.[75]

§ 372. **The effect of failure to prove demand.** One of the most important, and in some respects one of the most difficult questions arising in the action, is as to the effect of a failure to prove a demand. A very common opinion is, that such failure defeats the plaintiff, and that a return of the goods will necessarily follow. Decisions are not wanting which seem to sustain this view,[76] though its correctness may well be doubted. Demand and refusal, it must be remembered, are evidence of a conversion; that is, of a conversion at some time *prior* to the refusal.[77] The presumption as to when the conversion was actually made, ought in all cases to be such as will protect the real equities of the parties.

[71] Alden *v.* Carver, 13 Iowa, 254; Darling *v.* Tegler, 30 Mich. 54; Boughton *v.* Bruce, 20 Wend. 234; Cummings *v.* Vorce, 3 Hill, (N. Y.) 285.

[72] Storm *v.* Livingston, 6 John. 44; Powers *v.* Bassford, 19 How. Pr. 309; Purves *v.* Moltz, 5 Robt. (N. Y.) 653.

[73] Whitney *v.* Slauson, 30 Barb. 276; Bowman *v.* Eaton, 24 Barb. 528; Hawkins *v.* Hoffman, 6 Hill, 586; Whitwell *v.* Wells, 24 Pick. 29; McArthur *v.* Carrie's Admr., 32 Ala. 87; Harris v. Hillman, 26 Ala. 380.

[74] Andrews *v.* Shattuck, 32 Barb. 397; Fenner *v.* Kirkman, 2[illegible] Ala. 653.

[75] O'Connell *v.* Jacobs, 115 Mass. 21.

[76] See cases cited in notes to preceding section.

[77] Jessop *v.* Miller, 1 Keyes, (N. Y.) 321. See Purves *v.* Moltz, 5 Robts. (N. Y.) 653.

Lord Mansfield once allowed proof of a demand after bill filed, holding that it was before suit was brought, (that is before service,) saying in substance, that the courts ought to make use of every presumption possible, rather than that a meritorious party should be defeated by objections which do not relate to the real merits of the controversy.[78] Applying these rules where a demand is made shortly after the writ issued, the refusal ought, ordinarily, to be evidence of a conversion before the writ issued.[79] If the defendant had actually been willing to surrender, he could have said so, and saved all further litigation. Where the defendant sets up and insists on a want of proper demand, he ought in fairness to be confined to that defense, or to be required to abandon it. If he claims any lien or interest in the property, he ought not to be permitted to set it up and then recover under pretense that he would have surrendered the property if he had been requested to do so. When the defendant succeeded because of a want of a demand, he ought never to have return, unless on the clearest showing that he is entitled to such a judgment; for a defendant to recover under pretense that he would have surrendered the goods had they been demanded, and then ask that they be returned to him would seem absurd. The utmost he can ask would seem to be his costs. In cases where the plaintiff shows himself to be the owner and entitled to possession of goods had he demanded

[78] Morris *v.* Pugh, 3 Burr. 1241.

[79] Badger *v.* Phinney, 15 Mass. 364. See chapter entitled Return, *post.* 3. [The omission of demand should, if the plaintiff is entitled to the goods, subject him to no other consequences than the payment of the costs, Webster *v.* Brunswick, etc., Co., 37 Fla. 433, 20 So. 536; Aultman *v.* Stelnan, 8 Neb. 109; and see Howard *v.* Braun, 14 S. D. 579, 86 N. W. 635. Where mortgagee replevies from one in peaceable possession without demand, and such party by his answer tenders a surrender of the goods, no judgment can be taken against him for the value; the plaintiff should accept the goods, discontinue as to such defendant and proceed as to the other parties if there are any, Nichols *v.* Sheldon Bank, 98 Ia. 603, 67 N. W. 582. In Connecticut the statute provides that if, under plea of the general issue, defendant proposes to deny detention, he must file an express disclaimer of right in which case he shall not be entitled to return. Held under this that defendant, omitting to file his disclaimer, may be found guilty of the unlawful detention of the goods without any proof of demand, McNamara *v.* Lyon, 69 Conn. 447, 37 Atl. 981. The court has discretion to allow plaintiff to re-open his case and prove a demand after once resting, Wyatt *v.* Freeman, 4 Colo. 14]

them, a mere oversight or neglect to prove demand ought not to be punished by taking his goods and handing them over to one who asserts no title. The only reason why demand is necessary in any case, is to give the defendant an opportunity to surrender without being put to costs; and while this is eminently proper, the object of the rule is fully accomplished, and the plaintiff sufficiently punished for his neglect by judgment against him for costs, without being compelled to surrender his goods.

§ 373. **Waiver of demand by defendant.** Cases often arise when the defendant would be entitled to a demand, but has done some act or made some declaration which excuses the plaintiff from making it. Proof of any circumstance which would satisfy a jury that a demand would have been unavailing (as a refusal by the defendant to listen to one, or a statement in advance that he will not deliver,) will be sufficient to excuse this proof.[80] If a bailee sets up ownership of the goods in himself, such claim is equivalent to a conversion, and the action will lie without demand.[81] The plaintiff offered to prove that the defendants gave a general order to all their hands not to deliver the horse in dispute to him, or any one for him; *held*, proper to go to the jury as tending to prove a conversion by defendants.[82] Where parties stipulated that the goods should be sold and the proceeds paid over to the party who was entitled to them, this obviated the necessity for proof of a demand.[83] When the defendant, by his pleading, admits a demand, proof of one is unnecessary.[84]

§ 374. **The same. Claim of ownership by defendant.** Where the defendant sets up a claim of ownership and demands a return of the goods, this claim is inconsistent with any hypotheses that he would surrender them on demand, and will obviate the necessity of proving demand.[85] And the rule may be stated as general, that when the defendant contests the case all through the trial upon a claim of superior right to the property, he can-

[80] Johnson *v.* Howe, 2 Gilm, 344; Cranz *v.* Kroger, 22 Ill. 74; La Place *v.* Aupoix, 1 Johns. Ca. 407; Appleton *v.* Barrett, 29 Wis. 221; Lutz *v.* Yount, Phill. (N. C. L.) 367.

[81] Simpson *v.* Wrenn, 50 Ill. 224.

[82] Johnson *v.* Howe, 2 Gilm, 344.

[83] Butters *v.* Haughwout, 42 Ill. 24.

[84] Jones *v.* Spears, 47 Cal. 20.

[85] Seaver *v.* Dingley, 4 Green. (Me.) 307; Smith *v.* McLean, 24 Iowa, 337; Newell *v.* Newell, 34 Miss. 385; Cranz *v.* Kroger, 22 Ill. 74; Perkins *v.* Barnes, 3 Nev. 557; Pierce *v.* Van Dyke, 6 Hill, 613.

not afterwards set up a want of demand as a reason for his failure to surrender. When he desires to rely on a want of demand he should show a willingness to deliver the goods upon a proper one, and that none had been made.[7]

§ 375. **Upon whom the demand must be made.** As before stated, the demand must be made upon one who has possession of the goods and is able to deliver them in compliance with such demand.[87] It should usually be made personally upon the party who is expected to comply with it. A demand on defendant's wife or servant is not sufficient evidence of a conversion by the husband or master.[88] But if the party pretends he has the goods when the demand is made, and induces the plaintiff to sue him, he cannot defend on the ground that he did not have them.[89] When goods are bailed to the defendant a demand at the house of the bailee in his absence is not evidence of a conversion, unless it be shown by circumstances, or otherwise, that he had actual notice of the demand before the suit was begun.[90] But if the bailee should be guilty of any actual conversion he is answerable. When one was entrusted with a package of money for safe keeping and broke the package and appropriated the money, he was

[86] Homan *v.* Laboo, 1 Neb. 207.

[87] Whitney *v.* Slauson, 30 Barb. 276; Andrews *v.* Shattuck, 32 Barb. 397; McArthur *v.* Carrire's Admr., 32 Ala. 87; Whitwell *v.* Wells, 24 Pick. 29; Lill, etc., *v.* Russell, 22 Wis. 178. [Demand upon one having no control of the goods amounts to nothing, Barnes *v.* Gardner, 60 Mich. 133, 26 N. W. 858. So demand upon a mere custodian who has no authority and announces this when the demand is made, Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364. A demand for livestock upon defendant's agent in charge of his herds, is sufficient, Mann *v.* Arkansas Co., 24 Fed. 261; Deeter *v.* Sellers, 102 Ind. 458, 1 N. E. 854. Where a husband and wife are in joint possession, no demand of the wife is required to sustain the action against the husband, McGregor *v.* Cole, 100 Mich. 262, 58 N. W. 1008. A demand of household goods from the wife, she having them in the house, is, where the husband cannot be found, sufficient, Goldsmith *v.* Bryant, 26 Wis. 34, Wheeler Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155. Stock left with a partnership, afterwards dissolved; a demand upon the continuing member after the dissolution, will not warrant a verdict against the retired members, Sturges *v.* Keith, 57 Ills. 451.]

[88] Storm *v.* Livingston, 6 John. 44; Mount *v.* Derick, 5 Hill, 456; Pothonier *v.* Dawson, Holt, N. P. 383.

[89] Hall *v.* White, 3 Car. & P. 136.

[90] White *v.* Demary, 2 N. H. 546.

liable without demand.[91] When goods were in the actual custody of the defendant's wife and daughter, and he absented himself from home, the wife was held his agent for purposes of demand and refusal.[92] When the property is held by two or more defendants acting severally the demand should be upon both; but if they be partners, or acting jointly, a demand on one would be held to extend to both.[93]

§ 376. **No particular form necessary.** There is no particular form to be observed in making a demand, provided the defendant is distinctly notified what goods are wanted.[7] A demand for B.'s stock, if not objected to, and no claim that the demand should be more specific, is sufficient.[95] When the plaintiff said, "I have come to demand my property, here is a list of it." *Held*, sufficient. A written demand left at the defendant's house may be good.[96] It is not necessary that the plaintiff compel the defendant to go with him to point out the several articles demanded, or

[91] Shelden *v.* Robinson, 7 N. H. 157. See Graves *v.* Ticknor, 6 N. H. 537; Poole *v.* Adkisson, 1 Dana, 110; Hosmer *v.* Clarke, 2 Gr. (Me.) 308.

[92] Goldsmith *v.* Bryant, 26 Wis. 34. In this case, however, there was evidence to show a fraudulent purpose on the part of the defendant in absenting himself, with collusion on the part of the wife.

[93] Nisbet *v.* Patton, 4 Rawle, 119; Newman *v.* Bennett, 23 Ill. 427; Mitchell *v.* Williams, 4 Hill, 13; Holbrook *v.* Wight, 24 Wend. 169.

[94] Colegrave *v.* Dias Santos, 2 B. & C. 76; La Place *v.* Aupoix, 1 John. Ca. 407; Thompson *v.* Shirley, 1 Esp. N. P. C. 31; Smith *v.* Young, 1 Camp. 440. [It is sufficient to demand live stock by the brands, Mann *v.* Arkansas Co., 24 Fed. 261. Inquiry by a hired man for his master's horses, stating "I am after them," is sufficient, Kiefer *v.* Carrier, 53 Wis. 404, 10 N. W. 562. Vendor's agent went to defendant's mill where there were logs belonging to the vendor, assumed possession of the lumber on hand, placing it in possession of certain employees of the vendor, and forbade further shipments. Held this was equivalent to a demand, Hyland *v.* Bohn Co., 91 Wis. 574, 65 N. W. 369. If an officer who has attached goods gives an unqualified refusal on demand therefor, plaintiff is under no duty to explain his title, Thompson *v.* Rose, 16 Conn. 71; Schoolcraft *v.* Simpson, 123 Mich 215, 81 N. W. 1076. When the refusal of a demand is relied upon as evidence of a conversion, it must not be left doubtful at what date it was made, Swartout *v.* Evans, 37 Ills. 442.

Plaintiff is not under any duty to give the defendant opportunity to satisfy himself of the rightfulness of the demand; he may immediately replevy, Parker *v.* Palmer, 13 R. I. 359.]

[95] Newman *v.* Bennett, 23 Ill. 428.

[96] Logan *v.* Houlditch, 1 Esp. N. P. C. 22; 1 Chitty Pl. 159.

that he compel him to listen to a description of them. It is enough that the defendant refuses to comply, or evades the hearing of demand.[97]

§ 377. **General rules governing the demand.** Cases arise where the defendant comes lawfully into possession, and is in ignorance of plaintiff's rights. In such case the demand ought to be accompanied by some explanation or statement, so that the plaintiff can act advisedly. For example, goods taken by trespass may have come to the defendant's possession through unquestioned sources, and for full value. An unexplained demand for such property by a stranger would be properly refused. The demand ought to be accompanied by a statement of the claim, and, under ordinary circumstances, a reasonable opportunity allowed the defendant to satisfy himself of the truth of the claimant's title.

§ 378. **The same; illustrations.** If, after demand is made for goods, the possessor answer that he is not satisfied that the person demanding is the owner, but that he is ready to deliver on reasonable proof thereof, this will not be regarded as a conversion. It is the answer of a prudent man. So, where one claims to be an agent, and demand goods for his principal, the party upon whom the demand is made may require proof of agency.[98] When demand was made upon the retiring deacon of a church, that he surrender the communion service, he replied, he "would take the advice of counsel." *Held*, right and prudent.[99]

§ 379. **Demand by father or guardian.** A demand made by a father, or one who stands *in loco parentis*, is sufficient for property of his minor children.[100] So, also, demand may be made by

[97] Appleton *v.* Barrett, 29 Wis. 221.

[98] Jacoby *v.* Laussatt, 6 S. & R. 305; Green *v.* Dunn, 4 Camb. 215; Solomons *v.* Dawes, 1 Esp. 83; Watt *v.* Potter, 2 Mason C. C. 77; Ingalls *v.* Bulkley, 13 Ill. 316.

[99] Page *v.* Crosby, 24 Pick. 216.

[100] Newman *v.* Bennett, 23 Ill. 428; Smith *v.* Williamson, 1 Har. & J. (Md.) 147. [A minor may effectually demand chattels to which he is entitled; no subsequent demand by the next friend, is required, Bush *v.* Groomes, 125 Ind. 14, 24 N. E. 81. A mere servant sent for the purpose may make the demand, Kiefer *v.* Carrier, 53 Wis. 404, 10 N. W. 562. One who has assigned his estate as an insolvent cannot, thereafter, make any demand for the goods except in the assignee's name, and accompanying it with evidence of his authority, Griffin *v.* Alsop, 4 Calif. 406. The authority of an agent to make a demand must, it

an agent or any one duly authorized to act for the owner. When an agent is charged with the whole duty of receiving, receipting for and delivering property, as is the case with railroad and express agents, a demand upon the agent is a demand upon the corporation.[101]

§ 380. **Refusal to deliver. The true grounds thereiore must be stated.** When the defendant refuse to deliver to the agent of the plaintiff, for the reason that the agent had no authority, his refusal must rest distinctly upon that ground. The agent will then be bound to produce his authority, or show that the defendant's refusal is captious. If he does not, defendant's refusal will be only an act of proper caution. To an unqualified refusal, however, the agent is not required to produce any authority.[102]

seems, be in writing and must be exhibited if demanded, Watt *v.* Potter, 2 Mason, 77; but this is doubted in Ingalls *v.* Buckley, 13 Ills. 315. If defendant reasonably doubts the authority of the agent he is not guilty of an unlawful detention; the question is one for the jury, Ingalls *v.* Buckley, *supra.* A demand made by one without any authority from the plaintiff, is nothing, Holiday *v.* Bartholomae, 11 Ills Ap. 206. The demand cannot be effectually made while the plaintiff himself has the goods in possession, or a material part thereof; *e. g.*, the "head" of a sewing machine, which is the subject matter of the action, Wheeler etc., Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155.]

[101] Cass *v.* N. Y. & N. H. R. R., 1 E. D. Smith, 522.

[102] St John *v.* O'Connell, 7 Porter, (Ala.) 466; Zachary *v.* Pace, 4 Eng. (Ark.) 212; Connah *v.* Hale, 23 Wend. 463; Solomons *v.* Dawes, 1 Esp. 83; Jacoby *v.* Laussatt, 6 Serg. & R. 300; Watt *v.* Potter, 2 Mason, 77-81. [One who gives an unqualified refusal to the demand of the true owner cannot afterwards set up a lien upon the goods, Thompson *v.* Rose, 16 Conn. 71; so if he refuse under claim of right, Keep Co. *v.* Moore, 11 Lea. 285. And one who, upon demand for goods in his possession asserts title, refuses the demand and bids the party to take the law, will not be permitted afterwards to assert that he held as a servant merely, Alexander *v.* Boyle, 68 Ills. Ap. 139. There may be reasons to excuse or justify a non-delivery, without any denial of the owner's right; *e. g.*, if the party upon whom demand is made honestly doubts the identity of the party making the demand or the authority of one claiming to be the agent of the owner, or where the refusal is upon a proper condition which he has the right to impose. Plaintiff's corn was stored in defendant's crib, solely for plaintiff's accommodation, and plaintiff refused to remove it after repeated requests, so that defendant in order to have the use of the crib was compelled to bury the plaintiff's corn under his own, and was unable to comply with a demand for it without great inconvenience; such inconvenience might excuse the refusal of the demand, Kime *v.* Dale, 14 Ills. Ap. 308; so a qualified and reasonable refusal; *e. g.*, "let some one who knows the

§ 381. **The same. What is a sufficient excuse for non-delivery.** When a party claims a lien on goods in his possession, he should state the amount of his lien, and the grounds upon which he bases it when the demand is made. Retention on other grounds, without such statement, will be a waiver of the lien. When work was done on a boiler, for which the defendant had a lien, as also a general account against the owner, if, at the time of the demand, he insisted on detaining it until the balance of the account was paid, he could not afterward, on trial, set up the particular lien to defeat the plaintiff's suit. If, however, he had specifically mentioned the amount for which the lien was, and asserted his right to detain for that amount, and for the general balance of the account, the plaintiff would have been required to tender the amount of the particular lien before he could sustain replevin.[103] Neither can a bailee of goods base his refusal to deliver on demand on his desire to consult his bailor, and then at the trial set up a lien for storage.[104] The law, in such case, requires the defendant to act in good faith, and to put his refusal on the true ground, which he will rely upon at the trial.[105] He cannot make one excuse when the demand is made, and then, when suit is brought, defend on another and different ground. The defendant, in answer to a demand, cannot pretend he has the goods, and induce the plaintiff to sue him, and then resist the suit on the grounds that he did not have them.[106] When goods

things come and get them," is no evidence of a conversion, Butler *v.* Jones, 80 Ala. 436, citing Green *v.* Dunn, 3 Camp. 216. If defendant, who was an innocent purchaser and ignorant of the rights of the true owner, ask time to investigate the title, replevin will not lie during the time reasonably required for the investigation, Partridge *v.* Philbrick, 60 N. H. 556. The wife cannot charge the husband by her refusal to deliver even such an article as a sewing machine which she uses exclusively, Wheeler, etc., Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155. Demand of a mere bailee after the goods have passed out of his possession, is ineffectual, Haines *v.* Cochran, 26 W. Va. 719; and a refusal in order to charge the defendant, must be in some proximity to the property, and under circumstances showing a determination to exercise dominion and exclude the owner, Gillet *v.* Roberts, 57 N. Y. 28.]

[103] Thatcher *v.* Harlan, 2 Houst. (Del.) 194; Thompson *v.* Trail, 6 B. & C. 36; White *v.* Gainer, 2 Bing. 23; Jacoby *v.* Laussatt, 6 S. & R. (Pa.) 304.

[104] Holbrook *v.* Wight, 24 Wend. 169.

[105] Isaack *v.* Clark, 2 Bulst. 312; Jacoby *v.* Laussatt, 6 S. & R. (Pa.) 304.

[106] Hall *v.* White, 3 Car. & P. 136.

are entrusted to a servant, and he refuses to deliver them to a stranger, because he had no authority to do so, such refusal is not evidence of conversion in an action against the servant. Nor is a demand on the servant sufficient to charge the master, unless he acted under orders. If the servant refuse, and the master afterward approve of the refusal, for the reason that the servant had no authority, it is no evidence of conversion by the master.[107]

§ 382. **The same.** It is proper for the master, when entrusting property to his servant, for which he is responsible to another, to direct that it shall not be delivered to any one, except upon the master's written or personal order, and a demand on the servant, under such circumstances, would avail nothing until he could communicate with and take the order of the master.[108] When W. and R. hired cows, and W. took them to his farm, some miles from R.'s, and at the end of the time the owner demanded them from R., who said he would have nothing to do with the cows: *Held*, it was for the jury to determine whether, by the reply, he intended to withdraw from a dispute about the property, (and if so, it was no conversion,) or to collude with W. to hinder the owner from recovering his property, which latter would be equivalent to a positive refusal.[109]

§ 383. **The same.** The defendant rightfully took certain property, and with it a stone. Plaintiff demanded its return. Defendant said he could have it by going to his (defendant's) locker. Plaintiff refused to go, but demanded its return to the place whence it was taken. Defendant refused to comply. *Held*, no conversion.[110]

[107] Mount *v.* Derick, 5 Hill, 456; Mires *v.* Solebay, 2 Mod. 242; Alexander *v.* Southey, 5 B. & Ald. 247; Storm *v.* Livingston, 6 John. 44; 4 Inst. 317.

[108] Page *v.* Crosby, 24 Pick. 215.

[109] Mitchell *v.* Williams, 4 Hill, 16.

[110] O'Connell v. Jacobs, 115 Mass. 21.

CHAPTER XIV.

THE BOND.

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§ 384. **No bond required by the common law.** By the common law no bond was required, the only security being the pledges to prosecute the suit, or answer to the King for false clamor.[1]

§ 385. **The English statute.** By statute 11 George II., Ch. 19, § 23, the sheriff was required to take from the plaintiff a bond, with two securities, in double the value of the goods about to be replevied, conditioned to prosecute the suit with effect and without delay, and for a return of the goods if return should be awarded by the court. The sheriff was liable as a trespasser if he served the writ which commanded a delivery of the goods without first taking bond. He was also liable for the sufficiency of the securities,[2] even up to the time they were called upon to make good their obligation. The harshness of this rule has been

[1] *Ante*, § 26; Caldwell *v.* West, 1 Zab. (21 N. J.) 420.

[2] Pearce *v.* Humphreys, 14 S. & R. (Pa.) 25; Oxley *v.* Cowperthwaite, 1 Dall. 350; Myers *v.* Clark, 3 W. & S. (Pa.) 539. The sheriff was required to take security at his peril. Gibbs *v.* Bull, 18 Johns. 437.

modified somewhat,[3] and where one of the securities is solvent the fact that others may have been insolvent does not render the officer liable.[4] The statute also provided that the sheriff might assign the bond to the avowant, or to the person making cognizance, either of whom might bring suit thereon in his own name if the conditions were broken.[5] This form of proceeding was the common practice in this country, and still prevails in many of the States. In others the bond is made directly to the defendant. Upon this question the statute of the State where the suit is pending will, of course, govern. The statute 17 Car. 2, Ch. 7, A. D. 1665, provided that when the plaintiff was defeated the avowant should have judgment against the plaintiff for the rent in arrear, in case the value of the cattle distrained amounted to so much, or for an amount equal to the value of the goods. In case the value of the goods did not equal the rent, then for the value of the goods with execution thereon, and the right to distrain again for any further sum due for rent. Prior to the case of *Perreau* v. *Bevan*, 5 Barn. & Cress. 284, it had been a question as to whether the landlord who elected to proceed under this statute had any remedy upon the bond. Since that case, however, such right has not been seriously questioned. The Statute 11 George II., Ch. 19, A. D. 1738, was held to confer an additional remedy, and to be in aid of the proceeding pointed out in the Statute of 17 Car. 2.[6]

§ 386. **The English statute the basis of the law concerning bond in this country.** The Statute 11 George II., Ch. 19, is the basis upon which a large proportion of the statutes in this country are framed. Its provisions and the decisions under it have been the foundation on which no inconsiderable part of the cases in this country rest.[7]

§ 387. **Assignment of the bond to defendant.** The usual proceeding, under that statute, and generally under statutes when the bond is to the sheriff, is for the sheriff, (in case the bond is forfeited,) to assign it to the defendant in the replevin suit, who

[3] Hindle *v.* Blades, 5 Taunt. 225.

[4] Lord *v.* Bicknell, 35 Me. 53.

[5] Acker *v.* Finn, 5 Hill, 293; Knapp *v.* Colburn, 4 Wend. 618. See Waples *v.* Adkins, Admr., etc., 5 Har. (Del.) 381.

[6] Consult Perreau *v.* Bevan, 5 Barn. & Cress. 284, and the cases there cited.

[7] Knapp *v.* Colburn, 4 Wend. 618.

may sue the maker and his security in his own name as assignee. Without the clause authorizing the assignment, the defendant was driven to intricate proceedings against the sheriff, or in the name of the sheriff against the bondsmen.[8] The taking of an assignment of the bond from the sheriff is no waiver of a right to proceed subsequently against him for taking insufficient securities, in case they should prove to be so. A return of *nulla bona* to an execution upon a judgment against the securities in a replevin bond is not conclusive so as to render the sheriff liable. Proof of their solvency or insolvency may be made by the parties and determined as other issues.[9] A release of the security is equivalent to a release of the sheriff,[10] and pending a suit upon the bond the suit against the sheriff is suspended.[11]

§ 388. **The bond a prerequisite.** The proper execution of the bond in this action is a statutory prerequisite to the delivery of the property upon the writ.[12] This was the rule not only under the English law, but governs in States where the rules of the English law prevail. The officer cannot deliver the property without first taking bond. The command of the writ, as usually framed, is conditional, viz.: "If the plaintiff shall give you security," etc. The prior execution of the bond is as essential as the affidavit; without it, the writ will be quashed, and the judgment will order a return of the goods to the defendant with damages for the wrongful taking.[13]

[8] Gould *v.* Warner, 3 Wend. 60.

[9] Myers *v.* Clark, 3 W. & S. (Pa.) 539.

[10] Ib.

[11] Commonwealth *v.* Rees, 3 Whart. (Pa.) 124; Myers *v.* Clark, 3 W. & S. (Pa.) 539; Hallett *v.* Mountstephen, 2 Dowl. & Ryl. 343.

[12] Pool *v.* Loomis, 5 Ark. 110. Bond precedes the execution of the writ. Luther *v.* Arnold, 7 Rich. (S. C.) 397. Whitney *v.* Jenkinson, 3 Wis. 407; Smith *v.* McFall, 18 Wend. 521; Milliken *v.* Seyle, 6 Hill. 623. [The United States is not required to give bond, U. S. *v.* Bryant, 111 U. S. 499, 28 L. Ed., 496.]

[13] Bond must be furnished before writ can be served. Kendall *v.* Fitts, 2 Fost. (N. H.) 8; Greeley *v.* Currier, 39 Me. 518; Thomas *v.* Spofford, 46 Me. 408. Sheriff liable in case he fails to take bond as required by this statute. State *v.* Stephens, 14 Ark. 266; State *v.* Boisliniere, 40 Mo. 568; Harriman *v.* Wilkins, 20 Me. 96; Kessler *v.* Haynes, 6 Wend. 547; Nunn *v.* Goodlett, 5 Eng. (Ark.) 100. "Bond for cost is not sufficient; it must be in compliance with the statute, or the suit will be dismissed." Creamer *v.* Ford, 1 Heisk. (Tenn.) 307. "Failing to give bond works a discontinuance." Weathersby *v.* Sleeper,

§ 389. **Permission to prosecute as a pauper does not excuse giving bond.** The action cannot be prosecuted *in forma pauperis;* that is, the taking of the pauper's oath will not do away with the necessity of the bond. Plaintiff may obtain the services of the officers without cost by taking the necessary oath and obtaining permission of the court, but this will not entitle him to a seizure of the goods, nor justify the officer in making such seizure, without bond.[14]

§ 390. **Wealth of the plaintiff no excuse.** Neither will the fact that the plaintiff is a man of abundant means furnish an excuse for not taking the formal bond, with securities required by the statute;[15] nor will a deposit of money answer in place of the bond.[16] The statutory bond being in all cases indispensable before the delivery of the property by the officer, he is guilty of trespass if he make the delivery without it,[17] and the defendant may at once bring suit against the officer, or may elect to abide the result of the replevin suit, as he chooses.[18]

§ 391. **Delivery cannot be made without bond given.** The officer may commence to execute the writ before taking bond; that is, where the statute requires an appraisal, he may have the goods appraised, and for that purpose may take the property, if necessary, from the defendant;[19] but he cannot lawfully deliver it to the plaintiff until he shall first have taken bond as the law provides. When the goods are so taken for appraisement, unless

42 Miss. 738; Deardorff *v.* Ulmer, 34 Ind. 353; Graves *v.* Sittig, 5 Wis. 219. And the judgment is for a return, and damages follow. Morris *v.* Baker, 5 Wis. 389; Parker *v.* Hall, 55 Me. 364. "The bond is as essential as the affidavit." Smith *v.* McFall, 18 Wend. 521; Wilson *v.* Williams, 18 Wend. 581; Whaling *v.* Shales, 20 Wend. 673; Morris *v.* Van Voast, 19 Wend. 283; Graves *v.* Sittig, 5 Wis. 219. If the sheriff has taken the property without first taking bond with proper security, he ought at once to return it to the defendant. State *v.* Stephens, 14 Ark. 264; Pirani *v.* Barden, Pike, (5 Ark.) 81.

[14] Horton *v.* Vowel, 4 Helsk. (Tenn.) 622.

[15] Smith *v.* Trawl, 1 Root, (Conn.) 165; Harriman *v.* Wilkins, 20 Me. 96.

[16] Cummings *v.* Gann, 52 Pa. St. 488.

[17] Dearborn *v.* Kelley, 3 Allen, (Mass.) 426; Armstrong *v.* Burrell, 12 Wend. 303.

[18] Whitney *v.* Jenkinson, 3 Wis. 408; O'Grady *v.* Keyes, 1 Allen, (Mass.) 284.

[19] Smith *v.* Whiting, 97 Mass. 316; Wolcott *v.* Mead, 12 Met. (Mass.) 516.

the plaintiff promptly executes the bond demanded, the sheriff ought to return them.[20] From the cases cited, it is clear that when the sheriff serves the writ by delivering the property without first taking bond, or where the bond taken is defective under the statute, the defendant may abate the writ on motion, and compel a return of the goods, or he may regard the taker as a trespasser and recover damages as in other cases of trespass to personal property; but he cannot have trespass with the other actions for the value or for the goods.[21]

§ 392. **The bond must conform to the statute.** The bond must conform to the statutory requirements in all essential particulars. It must be in double the value of the property about to be replevied, but if it be in excess of that amount the fact will not render it defective.[22] Defects in the form of the bond may be taken advantage of by plea in abatement or by motion to dismiss,[23] or the defendant may, if he prefer such course, obtain a rule of court upon the plaintiff, requiring him to furnish a bond in proper form. Defects in the bond should be taken advantage of in the first instance, and such objection comes too late after verdict and judgment.[24] In case the sheriff take bond in an insufficient amount, the defendant may object and move to dismiss the suit, or he may have an action against the sheriff for his neglect.[25]

§ 393. **The bond not necessary to the trial.** The bond, when in form and sufficient, is not necessary to the trial; the case proceeds without reference to it. It is only after judgment, and a failure on the part of the plaintiff to keep the conditions, that

[20] State *v.* Stephens, 14 Ark. 264. The statute of Wisconsin allows the officer to take the property and hold it a reasonable time to permit the plaintiff to give bond. Graves *v.* Sittig, 5 Wis. 219. But unless there are statutory exceptions, the officer cannot serve the writ until the bond is furnished.

[21] Parker *v.* Hall, 55 Me. 364; Cady *v.* Eggleston, 11 Mass. 285.

[22] Owen *v.* Nail, 6 T. R. 702 and 339; Clap *v.* Guild, 8 Mass. 154; Freeman *v.* Davis, 7 Mass. 200; Bugle *v.* Myers, 59 Ind. 73; Whitney *v.* Jenkinson, 3 Wis. 407; Smith *v.* McFall, 18 Wend. 521.

[23] Houghton *v.* Ware, 113 Mass. 49; Hicks *v.* Stull, 11 B. Mon. 53; Douglass *v.* Gardner, 63 Me. 462.

[24] Bugle *v.* Myers, 59 Ind. 73.

[25] Deardoff *v.* Ulmer, 34 Ind. 353; O'Grady *v.* Keyes, 1 Allen, (Mass.) 284. So, when a deputy sheriff, acting for his superior, take insufficient security, the sheriff is responsible. Harriman *v.* Wilkins, 20 Me. 96.

resort can be had to it.[26] Its absence, therefore, at the trial, would in no way affect the jurisdiction or proceeding of the court.[27] The neglect of the sheriff to take bond is not a contempt of court for which an attachment will be issued.[28]

§ 394. **Where the sheriff is a party.** Where the sheriff is interested in the replevin suit, the writ is directed to the coroner, who must take the bond. The statute means that the bond shall be taken by the officer who executes the writ.[29] So a bond to the deputy sheriff who signed the return, when he as such deputy assigned the bond to the party, was held sufficient under a statute which required the bond to run to the officer serving the writ, designating him as "such officer."[30]

§ 395. **Defendant may give bond and retain the property.** In many of the States, provisions exist by statute, which allow the defendant claiming the property a reasonable time within which to give bond to the plaintiff, and by so doing he has the right to retain possession of the goods pending the suit. In such case no liability attaches to the makers of the plaintiff's bond.

[26] Tuck *v.* Moses, 58 Me. 463; Pirani *v.* Barden, 5 Ark. 81.
[27] Tripp *v.* Howe, 45 Vt. 524; Kesler *v.* Haynes, 6 Wend. (N. Y.) 547.
[28] Rex *v.* Lewis, 2 Term. R. 617; Twells *v.* Coldville, Willes, 375.
[29] Speer *v.* Skinner, 35 Ill. 284.
[30] Wheeler *v.* Wilkins, 19 Mich. 80.

NOTE XXIII. *Who may Retain the Goods under Forthcoming Bond:*—Where several are named defendants, either of them having possession of the chattels may, where retention is allowed by this means, give the bond and retain the goods, Rich *v.* Lowenthal, 99 Ala. 488, 13 So. 220. Doubted if the defendants not in possession can avail of the statute, *Id.* The defendant may give forthcoming bond without connecting himself with a third person who is entitled to the goods, Lange *v.* Lewi, 58 N. Y. Sup. Ct. 265, 11 N. Y. Sup. 202.

Defendant's Right to Retain the Goods:—Failure of the officer to cause an appraisment within the period allowed to defendant to give the bond, is no ground to quash the writ; defendant may on motion, notwithstanding the officer's delinquency, have the property restored to him upon executing the bond; and, moreover, may have his action against the officer. Parlin *v.* Austin, 3 Colo. 337; Robinson *v.* Austin, 3 Colo. 377.

Execution and Frame of the Bond:—If the property, return of which is sought, is not in fact that described in the affidavit in replevin, defendant is not required to assert this in his bond, Rouse *v.* Haas, 26 Ap. Div. 171, 49 N. Y. Sup. 867. In another case it is said that a counter-bond is, in such case, void. Klinkowstein *v.* Greenberg, 15

Misc. 479, 37 N. Y. Sup. 206. One who affixes his mark by way of subscription is bound, Terry *v.* Johnson, 22 Ky. L. Rep. 1210, 60 S. W. 300. The bond need not be signed in the presence of the officer, *Id.* The signature of the principal is not required where the statute merely requires that the bond be "executed by sufficient sureties," Polite *v.* Bero, 63 S. C. 209, 41 S. E. 305. The bond may be effectual though no penalty be inserted, Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251. A bond executed by "N. R. E. attorney for R. & Co." N. R. B., is principal, is personally liable as such, and bound to indemnify the surety. The recitation of his attorneyship affects nothing. Hayes *v.* Bronson, Conn. 61 Atl. 549.

Duty and Liability of the Officer:—If the officer fail to cause an appraisement to be made within the time required by the statute, he is liable to an action by the defendant. Parlin *v.* Austin, 3 Colo. 337. If the sureties are sufficient when accepted, their credit good, and insolvency improbable, the officer has performed his duty, Watterson *v.* Fuellhart, 169 Pa. St. 612, 32 Atl. 597.

Construction of the Bond:—If the bond omit the provision that "defendant shall abide the judgment of the court," but contain the condition that "if the defendant shall make good his claim," etc., the omission is unimportant, and the liability of the sureties the same as if the condition omitted had been inserted, Watterson *v.* Fuellhart, *supra.* Statute requiring the forthcoming bond to be conditioned "to answer such judgment as may be rendered in the cause" and providing that the sureties "shall be bound for the judgment of the eventual condemnation money," is sufficiently complied with by a bond conditioned "to deliver to the said plaintiffs . . . the notes described in their petition . . . or produce the same to answer any judgment that may be entered in the said cause or pay the eventual condemnation money," Holmes *v.* Langston, *supra.* The condition of the bond was to deliver the goods to the plaintiff "if the same be adjudged to the plaintiff;" but the statute did not permit this judgment in favor of the plaintiff, but only a judgment for the value; therefore, inasmuch as to interpret the statute as requiring such a judgment as a condition precedent, would render the bond nugatory, the court concluded that the surety must be held liable for the return of the goods, and might discharge himself by an offer to return them in as good condition as when replevied, Johnson *v.* Mason, 64 N. J. L. 258, 45 Atl. 618. The condition of the bond was to have the goods attached forthcoming to answer any judgment which might be rendered; but judgment had already been rendered. Held, the sureties' liability already accrued, and they were liable at once. Ward *v.* Hood, 124 Ala. 570, 27 So. 245. The surety is liable only according to his contract as set out in the bond, Johnson *v.* Mason, *supra;* Gerlaugh *v.* Ryan, Iowa, 103 N. W. 128. The surety cannot be charged in an action of assumpsit for money had and received except upon proof that the surety received the proceeds of the goods, Ward *v.* Hood, *supra.*

Effect of the Bond.—When two are made defendants, the execution

of the bond by both will not estop one of them from asserting his own separate title to the goods or denying the title of the plaintiff. Strahorn *v.* Heffner, Ark. 85 S. W. 784.

Amendment of the Bond:—Defendant, who has given a forthcoming bond admitting receipt of the goods, will not be allowed to file a new bond retracting this admission, Dale *v.* Gilbert, 59 Hun, 615, 12 N. Y. Sup. 370.

Pleadings:—The complaint upon the forth-coming bond need not adopt the allegation of the code that the judgment in replevin was "duly rendered," but may aver the facts. Terry *v.* Johnson, 22 Ky. L. Rep. 1210, 60 S. W. 300. The allegation that the judgment remains in full force and effect, is sufficient to show a breach of the forth-coming bond, *Id.* The complaint must aver that the goods were delivered to the defendant in replevin, Nickerson *v.* Chatterton, 7 Calif. 568.

Liability and Rights of Surety, Defenses:—The surety in the forthcoming bond is entitled to come in and defend the replevin in order to protect himself, Boessneck *v.* Bab, 27 Misc. 379, 58 N. Y. Sup. 849. Where the condition is "that defendant shall defend, etc., and deliver the property to the plaintiff if he recover judgment therefor in as good condition as when said action was commenced," plaintiff is not entitled to judgment against the sureties for the value, where they tender the property, in compliance with this condition. Gerlaugh *v.* Ryan, Ia. 103 N. W. 128. A forthcoming bond was conditioned to perform the judgment in the action; plaintiff recovered, but the judgment was reversed upon appeal; the cause being remanded, the plaintiff dismissed his action. The sureties in forthcoming bond are not liable for the costs of the appeal. Spencer *v.* Davidson, Ind. Ter. 82 S. W. 731.

Defects in Bond.—An omission from the bond of certain articles of those sued for, or the insertion therein of things not sued for, does not affect its validity, Rich *v.* Lowenthal, 99 Ala. 488, 13 So. 220; nor does the circumstance that the bond was not signed in presence of the officer or attested by him, Terry *v.* Johnson, 22 Ky. L. Rep. 1210, 60 S. W. 300.

Irregularities in the Replevin.—Plaintiff in the replevin and the sureties will not be permitted to question the regularity of the proceedings in the replevin suit, McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. 120; nor in the return of the bond, Jones *v.* Findley, 84 Ga. 52, 10 S. E. 541; nor that the bond was not approved by the sheriff; the mere acceptance of the bond and delivery of the goods to defendant, constitutes an approval, Hartlep *v.* Cole, 120 Ind. 247, 22 N. E. 130; nor can defendants raise any question as to whether the writ in replevin was directed to the officer at request of the plaintiff therein, Terry *v.* Johnson, 22 Ky. L. Rep. 1210, 60 S. W. 300; nor allege that the officer before executing the writ had not taken bond from the plaintiff, *Id.*—nor that no execution issued upon the judgment of *retorno*, Hartlep *v.* Cole, 120 Ind. 247, 22 N. E. 130; nor that the sheriff might have taken the goods on execution. It is the duty of the surety to put the plaintiff in possession, Arthur *v.* Sherman, 11 Wash. 254, 39 Pac. 670. The sureties are bound for the delivery of the identical goods, Union Stove Works *v.*

Breidenstein, 50 Kans. 53, 31 Pac. 703; McRae *v.* Kansas City Co., 69 Kans. 457, 77 Pac. 94. But they are not bound for the return of the goods not demanded in the replevin, Rich *v.* Lowenthal, 99 Ala. 488, 13 So. 220. If the plaintiff accept other goods in lieu of those adjudged to him, in satisfaction of the bond, this is a discharge. Union Stove Works *v.* Breidenstein, *supra*. Where the goods are valued separately in the bond, a return of any of them is a satisfaction of the bond *pro tanto*, and to the amount therein set down as the value of such goods, Larabee *v.* Cook, 8 Kans. Ap. 776, 61 Pac. 815. That the suit was compromised and judgment entered by confession for damages, without the knowledge of the sureties, is no defense. Bradford *v.* Frederick, 101 Pa. St. 445. The surety is bound by a verdict given by consent if there was no legal ground to resist it, Jones *v.* Findley, 84 Ga. 52, 10 S. E. 541. The bond estops the parties thereto to deny possession of the goods at the institution of the action, Nye *v.* Weiss, 7 Kans. Ap. 627, 53 Pac. 152; and estops them to deny the return of the goods by the sheriff, to the defendant in replevin, Martin *v.* Gilbert, 119 N. Y. 298, 23 N. E. 813, 24 N. E. 460. An answer by the sureties in a forthcoming bond that the principal obligee was solvent at the time of the giving of the bond, and so continued for a time reasonably sufficient to enable plaintiff in replevin to recover judgment, but that plaintiff wrongfully delayed the prosecution of that suit for an unreasonable time, and by a "valid agreement" with the principal obligor, without cause, and in furtherance of their fraudulent purpose (to charge the sureties with the value of the goods), the action was continued for long and definite periods, and during such delay the principal obligor became embarrassed and the property wasted and lost. Held that inasmuch as it failed to set forth any consideration for the alleged agreement or that any order of the court was ever made continuing the cause, the plea was bad. Smith *v.* Stubbs, 16 Colo. Ap. 130, 63 Pac. 955. The fact that the property which the defendant retained by giving the bond, belongs to others, is no ground to refuse judgment upon the bond, to the successful plaintiff, Staples *v.* Word, Tex. Civ. Ap. 48 S. W. 751. That defendants executed the forthcoming bond at request of one of three defendants in the replevin, who was then in sole possession of the goods, and as to whom this suit was afterwards discontinued, and judgment for return entered against the others, is no plea, because in contradiction of the recitals of the bond; the sureties are bound for the conduct of each and all of the defendants, Auerbach *v.* Marks, 10 Daly 171. But in Tyler *v.* Davis, 63 Miss. 345, where the replevin was against two, and both gave the forthcoming bond, and plaintiff discontinued as against one, it was held that sureties were discharged; their agreement was to respond to any judgment entered in the suit in which the two were parties. The judgment is conclusive as to all matters which might, with reasonable diligence have been litigated therein, Boyd *v.* Huffaker, 40 Kans. 634, 20 Pac. 459. And where the judgment in replevin assumes to determine the ownership, it will be presumed, the contrary not appearing, that it was in issue. McFadden

v. Fritz, 110 Ind. 1, 10 N. E. 120. And the sureties are concluded by the judgment in replevin as to all questions litigated in that suit, *Id.* An injunction obtained by a stranger after breach of the bond by failure to return the goods, is not a defense, Arthur *v.* Sherman, 11 Wash. 254, 39 Pac. 670. Nor is the destruction of the goods while in defendant's possession, though without his fault, George *v.* Hewlett, 70 Miss. 1, 12 So. 855; Hazlett *v.* Witherspoon, Miss. 25 So. 150; Hinkson *v.* Morrison, 47 Ia. 167. That defendant in replevin has been required to surrender the goods to a receiver appointed in an action to which the plaintiff was not a party, does not discharge the forthcoming bond; plaintiff is not compelled to pursue the receiver. Cohen *v.* Adams, 13 Tex. Civ. Ap. 118, 35 S. W. 303. Plaintiff in replevin tendered the goods and defendant filed a conditional acceptance; plaintiff then asked leave to withdraw his tender. The court's denial of the leave asked did not discharge the sureties. Eickoff *v.* Eikenbary, 52 Neb. 332; 72 N. W. 308. But an offer to return, not made in good faith, but merely to lay the foundation of future litigation or defense, is nothing, *Id.* Plaintiff in replevin prevailed and obtained judgment for the value of the goods. He afterwards pleaded this judgment in set-off to an action of assumpsit by the defendant in replevin, and obtained judgment for a balance. In an action on the forthcoming bond the sureties were permitted to show this; but plaintiff was allowed to recover against them the balance allowed him upon the plea of set-off, Jennings *v.* Hare, 104 Pa. St. 489. Where the condition of the bond is to perform the judgment, the mere return of the goods is not a satisfaction, if costs were also awarded, Morrill *v.* Daniel, 47 Ark. 316, 1 S. W. 702. Where the bond is conditioned to pay all costs and deliver the goods to the plaintiff, if return shall be awarded, and pay all damages that may accrue to the plaintiff by reason of the unlawful detention of the goods, there can be no recovery for non-return of the goods if return was not awarded, nor damages for the detention; because in such case the detention is not unlawful, Colorado Springs Co. *v.* Hopkins, 5 Colo. 206; Nickerson *v.* Chatterton, 7 Calif. 568. And where the law requires an alternative judgment for the goods, or their value, the sureties are not liable where the judgment is for restitution merely, Nickerson *v.* Chatterton, *supra.* The liability of the sureties in the forthcoming bond does not become fixed, so long as a perfected appeal from the judgment in favor of plaintiff in replevin, is pending. Corn Exchange Bank *v.* Blye, 102 N. Y. 306, 7 N. E. 49. But the appeal does not release the sureties, Swartz *v.* English, 4 Kans. Ap. 509, 44 Pac. 1004. The sureties in the forthcoming bond are liable only for the value of the goods at the time of the seizure, not exceeding the mortgage debt for which they were replevied, Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620. Where it appears that defendants purchased the goods of the plaintiff, the measure of recovery is the purchase price, with interest, less all payments which have been made on account, with interest; such recovery is within the condition of the bond that "plaintiff shall be paid such sum as shall for any cause be recovered against the defendants," Hall *v.* Tillman, 115 N. C. 500, 20 S. E. 726.

§ 396. **Bond not necessary where the plaintiff does not ask delivery.** Statutes also exist in many States, by which the plaintiff may have the writ without the command to deliver the goods. In such case the property remains in the defendant's possession during the suit, and a delivery to plaintiff only follows a judgment of the court in his favor; consequently, in such case no bond is required.[31]

§ 397. **Description of the bond.** The bond, in modern practice, is an obligation for the payment of the sum named therein, upon certain conditions. The principal conditions are, that the plaintiff shall prosecute his suit with effect and without delay, or in case of failure to do so, shall make return of the goods, (if return be awarded,) and shall pay such damages as shall be awarded in case of failure to do so—in some States a condition is inserted that the party shall save and keep harmless the sheriff, in making the replevin—with a proviso that if the conditions are kept and fulfilled, the obligation shall be void.

§ 398. **Objects and purposes of the bond.** Originally the bond was designed to furnish indemnity to the sheriff in taking the goods from the defendant.[32] In modern practice the bond is not only to indemnify the officer, but it is looked upon as furnishing additional security to the defendant as well, in case the action is not sustained;[33] the object of the bond being to compel the plaintiff to prosecute his suit with effect and without delay, and

[31] [Varner *v.* Bowling, 54 Kans. 380, 38 Pac. 481; McGuire *v.* Galligan, 57 Mich. 38, 23 N. W. 479; Dillard *v.* Samuels, 25 S. C. 319; Benjamin *v.* Smith, 43 Minn. 146, 44 N. W. 1083; Simpson Co. *v.* Marshal, 5 S. D. 528, 59 N. W. 728; Cook *v.* Hamilton, 67 Ia. 394, 25 N. W. 676. The action in such case is essentially an action to recover the value, and is controlled by the same principles as the action of trover, McArthur *v.* Oliver, 60 Mich. 605, 27 N. W. 689; Hudelson *v.* First National Bank, 56 Neb. 247, 76 N. W. 570; Philleo *v.* McDonald, 27 Neb. 142, 42 N. W. 904. But in Minnesota it is optional with the plaintiff to claim delivery at any time before answer, or only upon final judgment; the election to waive immediate delivery does not convert the action into trover, Benjamin *v.* Smith, 43 Minn. 146, 44 N. W. 1083.]

[32] Armstrong *v.* Burrell, 12 Wend. 302; Gordon *v.* Williamson, 1 Spence, (20 N. J.) 81; Barry *v.* Sinclair, Phill. (N. C.) 7.

[33] Langdoc *v.* Parkinson, 2 Bradw. (Ill.) 138; Petrie *v.* Fisher, 43 Ill. 443; Fahnestock *v.* Gilham, 77 Ill. 637; Nunn *v.* Goodlett, 5 Eng. (Ark.) 100; Smith *v.* Whiting, 97 Mass. 316; Doogan *v.* Tyson, 6 Gill. & J. (Md.) 453.

in case of failure to return the goods, if return be awarded;[34] or, to furnish the defendant with a sufficient indemnity in case its conditions are not complied with.[35]

§ 399. **The return of the bond with the writ.** The sheriff is required to return the bond with the writ, so that the defendant may inspect it, and object to its form or sufficiency, or to the solvency of the securities. In some States this is a statutory provision, in others a rule of practice.[36] Upon the return of the bond to the court, the defendant may file exceptions to its form, or to the sufficiency of the securities. In case the exceptions are sustained, plaintiff may be required to furnish a good bond, and if he neglect to do so, his suit may be dismissed and a return of the property awarded.[37]

[34] Badlam *v.* Tucker, 1 Pick. 287.

[35] Belt *v.* Worthington, 3 Gill. & J. (Md.) 247; Doogan *v.* Tyson, 6 Gill. & J. (Md.) 453.

[36] Petrie *v.* Fisher, 43 Ill. 443; Nunn *v.* Goodlett, 5 Eng. (Ark.) 100.

[37] Allen *v.* Judson, 71 N. Y. 77. [The "twenty-four hours," given by statute will not be construed as allowing one day. It begins at the end of the twenty-four hours allowed to the plaintiff from the taking of the goods, to give his bond,—even though the plaintiff's bond is given before the expiration of the twenty-four hours so allowed to him, Barton *v.* Shull, Neb. 97 N. W. 292;—but if defendant was induced not to take exceptions to the sureties in the bond by the fraud of the plaintiff, he may assail their sufficiency in an action against the officer, *Id.* But he is not at liberty to assail the motives of the officer in accepting them unless his exception is prevented fraudulently, *Id.* If the action is turned into trover, pursuant to the statute, the defendant will not be permitted to question the sufficiency of the surety, Reno *v.* Woodyatt, 81 Ills. Ap. 553. An exception after the time specified in the statute is without avail, Spencer *v.* Bell, 109 N. C. 39, 13 S. E. 704. The statute providing that when the defendant excepts, "the surety shall justify upon one day's notice, and the officer shall be responsible until they justify or until new sureties be substituted and they justify," if the sureties fail to justify they are at once exonerated, and it is the duty of the officer to return the goods, Rinear *v.* Skinner, 20 Wash. 541, 56 Pac. 24. But it seems this would not be so if the plaintiff offer other sufficient sureties. In New York the sureties are liable though they fail to justify, and the constable also is liable to defendant for the return of the goods if he secures a judgment for return, Webb *v.* Hecox, 58 N. Y. Sup. 382. The statute providing that "the sureties must justify or the plaintiff must give a new undertaking," makes it the duty of the plaintiff to see to it that the sureties justify; but if the sureties attend before the justice of the peace to justify, and defend-

§ 400. **Amount of penalty in the bond.** The mode of ascertaining the value of the property as a basis for fixing the penalty to be inserted in the bond, varies in different States. By the English law the sheriff was required to take bond in double the value of the property, and also to see that the bond was sufficient not only in respect to the solvency of the security, but in the amount for which it was taken. In States where the law does not require an appraisement, the practice has become general to accept the statement in the affidavit as the value of the property; and the officer is usually governed by it. In some States this is a statutory provision,[38] in others a rule adopted by general consent. The sheriff, however, unless the statute requires it, is not bound by the value stated in the affidavit. Where there is no statutory method provided for fixing that value, as by appraisement or otherwise, it is his duty to see that the penalty in the bond is large enough, up to double the value, to fully indemnify him in making the replevin, and to protect the defendant from loss.[39] In other States the statute requires that the property shall be appraised by disinterested parties, who fix the value after an inspection. In such case the amount of the bond is based upon the amount of such appraisement.[40] The parties may agree and so fix the value, and that will be sufficient and binding on both.[41]

§ 401. **Sheriff may take the property for purpose of appraisement.** Although the officer has no right to deliver the property to plaintiff until the bond is executed and delivered to him, yet, for the purposes of appraisement, he may take the property into his possession,[42] and upon that being done, if the bond is

ant is advised of it and makes no request that they justify, and proceeds to trial, this is a waiver of the justification, *Id.*]

[38] Deardoff *v.* Ulmer, 34 Ind. 353; See Pomeroy *v.* Timper, 8 Allen, 401.

[39] Murdoch *v.* Will, 1 Dall. 341; Kimball *v.* True, 34 Me. 88; Plunket *v.* Moore, 4 Har. (Del.) 379; Jeffery *v.* Bastard, 4 Adol. & 823; Roach *v.* Moulton, 1 Chand. (Wis.) 187; Thomas *v.* Spofford, 46 Me. 408; Gibbs *v.* Bull, 18 Johns. 435; Harriman *v.* Wilkins, 20 Me. 93; People, etc., *v.* Core, 85 Ill. 248.

[40] Look at Aulick *v.* Adams, 12 B. Mon. 104.

[41] Wolcott *v.* Mead, 12 Met. 516.

[42] Smith *v.* Whiting, 97 Mass. 316. [The officer in determining the value of the goods acts for both parties and must avail himself of the best means at hand for forming a judgment; his good faith does not avail him if he fails in this, People *v.* Core, 85 Ills. 248; Shull *v.* Barton,

not promptly forthcoming, the sheriff must return the goods to the defendant.[43]

[43] State *v.* Stephens, 14 Ark. 264; Smith *v.* Whiting, 97 Mass. 316; Wolcott *v.* Mead, 12 Met. (Mass.) 516.

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56 Neb. 716, 77 N. W. 132. If the goods are contained in boxes he may open them and cause an appraisement to be made by indifferent parties; it is his duty to see to it that the bond is not given at an insufficient valuation, Hall *v.* Monroe, 73 Me. 123. He may require the surety offered to schedule his assets and liabilities, and with this in his hand examine the public records; he should make such inquiry and investigation as a reasonably prudent man would make; he is not governed by the plaintiff's affidavit as to the value, *Id.* In Watterson *v.* Fuellhart, 169 Pa. St. 612, 32 Atl. 597, it is said the officer is absolutely liable that the surety shall be responsible at the entry of judgment in the replevin suit, but the court exclaimed against the hardship of the rule; and see *contra*, Larney *v.* The People, 82 Ills. Ap. 564; Busch *v.* Moline Co., 52 Neb. 83, 71 N. W. 947; Robinson *v.* The people, 8 Ills. Ap. 279. People *v.* Robinson, 89 Ills. 159. If the surety is solvent and sufficient when the bond is approved, the officer is not liable by reason of his subsequent insolvency, Shull *v.* Barton, *supra;* People *v.* Robinson, *supra.* If the officer executes the writ without accepting a bond with sureties where the statute requires sureties, he is a trespasser, Wilson *v.* Williams, 52 Ark. 360, 12 S. W. 780; McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985;—so if he takes a bond with only one surety when the statute requires "sureties," Greely *v.* Currier, 39 Me. 516.

Until bond is taken the officer has no protection from his precept, Bettinson *v.* Lowery, 86 Me. 218, 29 Atl. 1003. But the sheriff does not become a trespasser by taking an insufficient bond; the remedy is not trespass but a special action on the case, Gilbert *v.* Buffalo Bill Co., 70 Ills. Ap. 326. And the officer having taken a sufficient bond is liable if he fails to return it, when this is required by the statute, People *v.* Robinson, 89 Ills. 159. The injured party has his action against the sheriff and the sureties in his official bond without the aid of any statute, *Id.* He recovers whatever damages are sustained by the failure, *Id.* An imperfect bond rejected by the officer, but returned with his writ, does not render him liable, if, before executing the writ, he obtains a sufficient bond, which is also returned, Roderick *v.* The People, 81 Ills. Ap. 121. If the sureties become insufficient the court may require new bond, and if the plaintiff fail to comply with the order, direct return of the goods to the defendant, Varner *v.* Bowling, 54 Kans. 380, 38 Pac. 481:—but the action is not discontinued by such default of the plaintiff; he may still proceed and secure a determination of his right, *Id.* In Shull *v.* Barton, 56 Neb. 716, 77 N. W. 132, it was held that the sheriff from whom personalty taken by him under execution has been replevied by the coroner, is not a proper plaintiff in an action against the coroner for taking an insufficient bond The creditor is

§ 402. **Sheriff not required to prepare bond; duty of the party.** The duty imposed upon the sheriff to take the bond does not require him to demand it from the plaintiff nor to prepare it to be executed. The obligation to "take bond," means that he must, when a sufficient bond is tendered him by the plaintiff or his attorney, accept it and execute the writ.[44] A delivery of the bond properly executed, to the sheriff, is a sufficient delivery for all purposes.[45]

§ 403. **To whom payable.** The common law required the sheriff to take the bond to himself. In many of the States, however, it is by statute to be made to the defendant. When the statute requires it to the defendant, the officer is a trespasser if he take the goods upon a bond to himself, and the instrument is void.[46] The statutory provisions upon this question must therefore be closely followed.

[44] State *v.* Stephens, 14 Ark. 266.

[45] Smith *v.* Whiting, 97 Mass. 317.

[46] Purple *v.* Purple, 5 Pick. 2226.

[A bond, blank as to the name of the obligee though attached to the writ against the plaintiff, will not sustain an action, Titus *v.* Berry, 73 Me. 127. The officer to whom such bond is delivered may insert the defendant's name and the defendant is entitled to have it so inserted; but if he procures the dismissal of the suit because of this defect he cannot then have leave to fill the blanks so as to make it a valid bond, *Id.*]

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the real party in interest, and if there are several creditors they cannot join;—but in the same case on rehearing, 58 Neb. 741, 79 N. W. 732, the opposite conclusion is announced; the sheriff is held to be the proper party plaintiff. The complaint must aver that the judgment of the creditor is still unpaid, Knott *v.* Sherman, 7 S. D. 522, 64 N. W. 542; Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763. If the same goods have been retaken by the sheriff under execution in the same case this is a complete defense, Shull *v.* Barton, *supra; sed quaere*, it seems it should be received only in mitigation of damages. The plaintiff recovers such damages as he has sustained by the particular breach of duty assigned, he may recover nominal damages for the mere failure to return the bond by the first day of the term; but he will not for this violation of duty be entitled to recover the value of the goods, or the costs of the action of replevin, Robinson *v.* The People, 8 Ills. Ap. 279. Where the statute entitled plaintiff to a bond conditioned for delivery of the goods, if delivery be adjudged, and that the sheriff failing to take such bond shall "be liable as the sureties would have been if a proper undertaking had been given," and the plaintiff proceeds to judgment in the action of replevin, not for delivery of the goods but

§ 404. **Though defective as a statutory bond, it may be good at common law.** While the bond may be faulty under the statute, and insufficient to sustain the plaintiff's suit if objections are properly interposed, yet, when the plaintiff has had the goods delivered to him, and he is defeated, and for any reason the judgment is against him, the fact that the bond does not conform to the statute is no defense to a suit thereon. It may be entirely inadequate as a statutory bond to sustain replevin on, but may, nevertheless, be good as a common law bond,[47] and as such, must receive such construction as will most effectually accomplish the intent of the parties to it.[48]

§ 405. **The same. Construction.** In *Morse* v. *Hodsdon*, 5 Mass. 318, PARSONS, J., said: "The condition of the bond was variant from the statute, but the statute does not prohibit the taking of bond in any other form, or declare such bond void. The plaintiff, under color of the bond given, has obtained possession of the goods, and it would be unreasonable to allow the makers of the bond to dispute it, after their principal has had the benefit of it." And the rule may be regarded as general, that a bond, though irregular under the statutes, is not for that reason void. The party may treat it as a voluntary bond, and recover upon it, provided its terms are sufficient to sustain his claim;[49] and unless it so widely departs from the requirements of the statute as to defeat the objects, it may still be sufficient to support an action against its makers.[50] Whether a bond, good as a common law

[47] Claggett *v.* Richards, 45 N. H. 360; Tuck *v.* Moses, 54 Me. 115; Persse *v.* Watrous, 30 Conn. 140; Bell *v.* Thomas, 8 Ala. 527; Barry *v.* Sinclair, Phill. (N. C.) 7; Florrance *v.* Goodin, 5 B. Mon. (Ky.) 111; Lambden *v.* Conoway, 5 Har. (Del.) 1.

[48] Tuck *v.* Moses, 58 Me. 472; Livingston *v.* Superior Ct. N. Y., 10 Wend. 547.

[49] Branch *v.* Branch, 6 Fla. 315; Stansfeld *v.* Hellawell, 11 E. L. & Eq. 559; Claggett *v.* Richards, 45 N. H. 360.

[50] Stevenson *v.* Miller, 2 Litt. Rep. (Ky.) 307; Cobb *v.* Curts, 4 Litt. Rep. 235; Fant *v.* Wilson, 3 Mon. (Ky.) 342; Hoy *v.* Rogers, 4 Mon. (Ky.) 225; Roman *v.* Stratton, 2 Bibb. (Ky.) 199; Nunn *v.* Goodlett, 5 Eng. (Ark.) 100; Fahnestock *v.* Gilham, 77 Ill. 637; Jennison *v.* Haire,

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for damages, the sheriff cannot be made liable for not taking the bond required, because the sureties would not have been liable, Gallaratl *v.* Orser, 27 N. Y. 324. Where the officer held the goods under civil process the measure of damages is not the value of the goods but the amount of the plaintiff's demand in the attachment or execution, Love *v.* The People, 94 Ills. Ap. 237. The officer sued in such action is not concluded by the judgment in replevin, Wilkins *v.* Dingley, 29 Me. 73.

bond, but defective as a statutory replevin bond, is assignable, under a statute which makes the statutory bond assignable, may be doubted. The party, in seeking to recover upon it, would doubtless be required to conform his proceeding to his common law rights.[51]

[51] Austen *v.* Howard, 7 Taunt. 327.

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29 Mich. 209. [Bond voluntarily entered into is good at common law though its conditions are more onerous than those prescribed by statute, Colorado Bank *v.* Lester, 73 Tex. 542, 11 S. W. 626; Whitaker *v.* Sanders, Tex. Civ. Ap., 52 S. W. 638;—unless it contravenes the policy of the law or is repugnant to some provision of the statute, Smith *v.* Stubbs, 16 Colo. Ap. 130, 63 Pac. 955. A bond describing a stranger as principal and the plaintiff as surety, is sufficient, inasmuch as each is liable. Dorus *v.* Somers, 57 Conn. 192, 17 Atl. 852. A forthcoming bond showing in what cause it is given is valid, though it undertakes for the return of the goods by the defendant and not by the sureties, as the statute requires, Hedderick *v.* Poutet, 6 Mont. 345, 12 Pac. 765. The omission of the words "without delay and with effect" does not invalidate the bond, Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763;—nor the omission of the condition to return, Hicklin *v.* Nebraska Bank, 8 Neb. 463; —nor the omission of the condition to pay costs and damages, Hotz *v.* Bollman, 47 Ills. Ap. 378. A bond in an amount exceeding that required by the statute if executed voluntarily binds the parties, Colorado Bank *v.* Lester, 73 Tex. 542, 11 S. W. 626. The sheriff instead of a bond to the defendant took indemnity to himself; he acted in good faith and supposed this was what the law required; held, that having been required to pay the value of the goods to the defendant in the replevin he might recover it from the sureties in the bond, Martin *v.* Bolenbaugh, 42). St. 508, Wolfe *v.* McClure, 79 Ills. 564. A forthcoming bond executed by only one of three defendants and payable to the sheriff instead of the plaintiff, but otherwise according to the statute, was held a good voluntary bond, Smith *v.* Stubbs, 16 Colo. Ap. 130, 63 Pac. 955, Eickhoff *v.* Eikenbary, 52 Neb. 332, 72 N. W. 308. The bond recited the issuance of the writ out of the court of St. Clair County, and gave a false date; held, a declaration averring the error, and from what court and on what date the writ in fact issued, was sufficient, Hotz *v.* Bollman, *supra.* Defects in the form of the bond will be disregarded if its conditions substantially accord with those prescribed by the statute, Clark *v.* Clinton, 61 Miss. 337. And the party may be liable independent of the bond, as, where the defendant having given a forthcoming bond sold the property and caused it to be sent beyond the limits of the state, he is liable to the owner for its value; and the fact that the sheriff collected on execution the amount awarded in the replevin as the value of the property and damages for detention does not bar the plaintiff's action, he having refused to accept the amount, Hanlon *v.* O'Keefe, 55 Mo. Ap. 528.]

§ 406. **By whom it must be executed.** The bond may be executed by the plaintiff in person, or by some one for him, who is duly authorized to sign his name to such an undertaking.[52]

§ 407. **Bond may be executed by a stranger to the suit.** Or it may sometimes be executed by a stranger to the suit, with proper securities in behalf of the plaintiff. In some of the States the statutes provide that the plaintiff, or some one in his behalf, shall execute the bond. Under this provision, it is not essential that the plaintiff should appear as a party to it in any way. A bond, in other respects formal and sufficient, made by his agent or friend, or even by a stranger, in his behalf, would be a compliance with such a statute.[53] When the statutes, however, require the plaintiff to execute the bond, it will be insufficient, unless made by him either personally or by his attorney duly authorized.

§ 408. **How executed.** It must be executed under seal. An instrument not under seal cannot be a valid replevin bond.[54] The securities may be released, and others substituted, by leave of the court; but the party giving the bond cannot, by a deposit of money, release the securities.[55]

[52] Howe *v.* Handley, 28 Me. 241; Greeley *v.* Currier, 39 Me. 516; Garlin *v.* Strickland, 27 Me. 443.

[53] Consult Branch *v.* Branch, 6 Fla. 315; Stats. of Ill. Title Replevin, § 10. See Frei *v.* Vogel, 40 Mo. 149; Statute of Michigan, § 504; Claflin *v.* Thayer, 13 Gray, (Mass.) 459; Kinney *v.* Mallory, 3 Ala. 626.

[54] Lovejoy *v.* Bright, 8 Blackf. (Ind.) 206. This has been changed by statute in many of the States. See Handley *v.* Hathaway, 4 T. B. Mon. (Ky.) 554.

[55] Cummings *v.* Gann, 52 Pa. St. 484.

NOTE XXIV. *Execution of the Bond.*—If the statute require bond from the plaintiff "or someone on his behalf" a bond subscribed by one plaintiff in behalf of all is sufficient, Dunbar *v.* Scott, 14 R. I. 152. The bond need not be subscribed by the plaintiff himself unless the statute requires it, Kimball *v.* Tosca, Conn. 59 Atl. 919; Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347. A bond subscribed in the name of the plaintiff without authority will not authorize the execution of the writ, and cannot be validated by ratification, Smith *v.* Fisher, 13 R. I. 624. It is not necessary that the sureties should subscribe with their own hands; if another subscribe in their presence or with their consent, or after being subscribed with their names and shown to them, they assent and declare it to be their act, they are bound, Rhode *v.* Louthain, 8 Blf. 413, Gardner *v.* Gardner, 5 Cush. 483; Frost *v.* Deering, 21 Me. 156. Signature to a blank sheet with intent that a

§ 409. **When it may be amended.** The court may allow amendment to the bond in such particulars as are amendable.

particular bond shall thereafter be written upon it imposes no liability, unless the maker after inspection of the bond acknowledge it as his deed, Byers *v.* McClanahan, 6 G. & J. 250; but if after such subscription the bond is over-written, and the party who has subscribed declare to the agent of the obligee that it is his seal and signature, meaning to be bound thereby, he is bound, *Id.* The omission of seal does not impair the obligation of those who subscribe the paper, Edwin *v.* Cox, 61 Ills. Ap. 567. A bond subscribed by the surety only, founds a claim against his estate, Cahills Appeal, 48 Mich. 616, 12 N. W. 877;—and it seems the plaintiff himself is bound, *Id.* Wolf *v.* Hahn, 28 Kans. 588; Hoskins *v.* White, 13 Mont. 70, 32 Pac. 163; *contra*, Storz *v.* Finkelstein, 50 Neb. 177, 69 N. W. 856. A bond naming in the body two sureties, subscribed by one only, and delivered without any express condition, binds that surety, Johnson *v.* Weatherwax, 9 Kans. 75;—otherwise if he direct that it be not delivered until executed by the second surety, *Id.* The condition of the bond merely, without the obligatory part, does not satisfy the statute, Love *v.* The People, 94 Ills. Ap. 237. A bond beginning with * * * "N. C. Brower, agent for and acting on behalf of Carlisle Shoe Co., incorporated, as principal," concluding "Witness our hands and seals this, etc., N. C. Brower L. S."; held that an action thereon against the shoe company could not be maintained, that it was the individual act of Brower, and the receipt by the company of benefits from the action of Brower did not ratify the act because not done in their name, Carlisle Co. *v.* Bailey, 69 Ills. Ap. 349. The omission of the name of one of the sureties from the body of the bond is not ground to quash the writ, it being apparent that both sureties intended to be bound, and are bound, Wheeler *v.* Paterson, 64 Minn. 231, 66 N. W. 964. If the surety make his mark, the sheriff attesting, it is sufficient, Hester v. Ballard, 96 Ala. 410, 11 So. 427.

The bond need not be dated, Kimball Co. *v.* Tasca, 59 Atl. 919.

A bond in the name of a corporation, "by" its manager, signed by the manager, without the corporate name or seal, is not the bond of the corporation, *Id.*

In Newland *v.* Willitts, 1 Barb. 20, it was held that on motion to quash the writ for defects in the bond, the court may allow a new bond to be filed;—and where no competent surety is given an amended, or a new bond, should be ordered, and reasonable time given to file it, and if the order is not obeyed the writ should be quashed, Hopkins *v.* Green, 93 Mich. 394, 53 N. W. 537;—and where an additional bond is required, the surety in the first bond is not discharged; he may be made liable without impleading the surety in the second bond, Smith *v.* Whitten, 117 N. C. 389, 23 S. E. 320. In the absence of statutory authority the court cannot require a new bond where one of the sureties becomes insufficient, Hohenstein *v.* Westminster Co., 31 Ap. Div. 11, 52 N. Y. Sup. 235. The bond providing for

When it was not in double the amount, the court permitted a new bond to be filed.[56] When the statute required two securities, and the bond was signed by but one, the court permitted another bond, with proper security to be given.[57] So, when it appears necessary to use one of the securities as a witness, the court may permit a new bond, with other securities, to be substituted.[58] When the securities are insolvent at the time of the commencement of the suit, the court may make order requiring good security to be furnished, and may hold the defendant in custody until he shall have complied with the order.[59] A bond executed on Sunday is void,[60] under a statute which prohibits common labor. But where the statute required the execution of a bond within twenty-four hours, and the replevin was on Saturday, Sunday was not included in the estimate of time.[61] One partner

[56] Where the appraisement was $320.20, and the sheriff made oath the 20 cents was a mistake, and the bond was in double $320, an amendment of the recital was in order. Hammond *v.* Eaton, 15 Gray, (Mass.) 186.

[57] Whaling *v.* Shales, 20 Wend. 673; Smith *v.* McFall, 18 Wend. 523; Hawley *v.* Bates, 19 Wend. 632; Smith *v.* Howard, 23 Ark. 203.

[58] Kendall *v.* Fitts, 2 Fost. (N. H.) 9. [A surety once accepted cannot be discharged except upon notice to the parties and to all the other sureties, Quarch *v.* Metz, 15 Misc. 622, 37 N. Y. Sup. 218.]

One of several plaintiffs is not a competent surety, Hopkins *v.* Green, 93 Mich. 394, 53 N. W. 537;—nor is a non-resident, though not expressly excluded by statute, Wilkins *v.* Dingley, 29 Me. 73.]

[59] Cash *v.* Quenichett, 5 Heisk. (Tenn.) 738.

[60] Link *v.* Clemmens, 7 Blackf. 480.

[61] Link *v.* Clemmens, 7 Blackf. 480.

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the return of only part of the goods is valid as to these; as to the residue return should be ordered; the bond cannot be amended, Eastman *v.* Barnes, 58 Vt. 329, 1 Atl. 569. In Rhode Island it seems the bond is not amendable, Whitford *v.* Goodwin, 13 R. I. 145, Simpson *v.* Wilcox, 18 R. I. 40, 25 Atl. 391. The court has no power by its own action to amend the undertaking in replevin, Taylor *v.* Jackson, 35 Misc. 300, 71 N. Y. Sup. 745; but where the law allows an amendment, an amended bond filed and approved, cures all defects in the original, Moore *v.* Lewis, 76 Mich. 300, 43 N. W. 1. A new bond may be given in any proper case, Sherron *v.* Hall, 4 Lea 498. The court may permit the amendment of a forthcoming bond by striking out an admission inadvertently made therein that the principal has certain goods in possession, Dale *v.* Gilbert, 128 N. Y. 625, 28 N. E. 512; but such amendment should not be allowed unless the other party can be placed substantially in the same position as before the mistake; if, by relying upon it, he has failed to make an examination and secure evidence of the facts it should not be allowed at all, *Id.*]

cannot bind his co-partner by signing and sealing bond in partnership name.[62]

§ 410. **Defect in the bond—when and how taken advantage of.** As has been shown, the officer executing a writ of replevin must see that the bond is properly executed and delivered, as required by the statute, or he will be liable as a trespasser;[63] but the failure of the sheriff to take bond, or the acceptance of an informal or insufficient one, must be taken advantage of by the defendant at the earliest practicable opportunity,[64] as such defective bond will not deprive the court of jurisdiction, nor in any way interfere with or avoid the proceeding;[65] and by omitting to take advantage of such defect, and by pleading to the merits, the defendant will be presumed to have waived his objection, and will not usually be permitted to assert and take advantage of them afterwards.[66] When the bond did not name the security in the body of it, and being "I" promise to pay, signed by the principal and security, it was held valid as against the signers.[67]

§ 411. **Requisites of the bond.** The bond should correctly describe the suit in which it is given; it should name the parties, especially is it important to correctly name the defendant from whom the goods are to be taken; otherwise it cannot be told for whose benefit the bond is given. An omission in this respect is fatal, and the bond void.[68] It ought also to state the court in which the suit is brought, and the date or term at which the suit is begun; but error in this respect is not fatal when the suit and

[62] Butterfield *v.* Hemsley, 12 Gray, 226. Compare Judson *v.* Adams, 8 Cush. 556.

[63] Dearborn *v.* Kelley, 3 Allen, (Mass.) 426; Nunn *v.* Goodlett, 5 Eng. (Ark.) 89; Parker *v.* Hall, 55 Me. 363.

[64] Houghton *v.* Ware, 113 Mass. 49.

[65] Tuck *v.* Moses, 58 Me. 473; Tripp *v.* Howe, 45 Vt. 524.

[66] Tripp. *v.* Howe, 45 Vt. 524; Spencer v. Dickerson, 15 Ind. 368. Where bond was with a single security, and an objection to it therefore would have been valid if made in apt time, yet, being allowed to run to a subsequent term, it was too late. Claflin *v.* Thayer, 13 Gray, 459; Simonds *v.* Parker, 1 Met. 508. It is too late after a verdict. Rich *v.* Ryder, 105 Mass. 308. Absence of the bond is waived by going to trial, Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836, Kimball Co. *v.* Tasca, Conn., 59 Atl. 919; Bublitz *v.* Trombley, 113 Mich. 413, 71 N. W. 840.

[67] Clarke *v.* Bell, 2 Litt. (Ky.) 164.

[68] Arter *v.* The People, 54 Ill. 228; Matthews *v.* Storms, 72 Ill. 321.

property are so described that they can readily be identified.[69] Where the condition was to appear at the next term of the county court, and it was objected that there was no such court, it was held that the objection was too technical, and the words were held to mean court of common pleas.[70]

§ 412. **The same.** It ought also to describe the goods to be replevied, and to state their value. An omission in this last respect may not be serious, but a failure to describe the goods would lead to great embarrassments, and probably render the bond objectionable.[71] It must be for a definite sum, stated in dollars or some denomination of money; a bond in "double the value of the goods about to be replevied" is not sufficient.[72] The value may be agreed upon by the parties, and such agreement returned by the officer.[73]

§ 413. **The conditions separate and independent of each other.** The bond is for the payment of the penalty mentioned therein upon conditions which have already been stated. Each of these conditions is a separate obligation, distinct from all the others, and for a failure to keep any one of them, an action may be sustained for the full penalty of the bond, even though the obligors should keep all the others.[74] The rule is also well settled

[69] Branch *v.* Branch, 6 Fla. 315; Graves *v.* Shoefelt, 60 Ill. 464; Chadwick *v.* Badger, 9 N. H. 450.

[70] Arnold *v.* Allen, 8 Mass. 147.

[71] McDermott *v.* Doyle, 11 Mo. 443. *Contra*, Branch *v.* Branch, 6 Fla. 315. [An undertaking entitled in the cause and in these words "we undertake that plaintiff shall duly prosecute the action with effect and without delay and return the property in controversy to defendants, if return be adjudged by the court, and pay defendants all such sums of money as they may recover against plaintiff for any cause whatever, without any description of the goods or any recitations whatsoever, is, it seems, a valid undertaking, Story *v.* O'Dea, 23 Ind. 327.]

[72] Bennett *v.* Allen, 30 Vt. 684; Case *v.* Pettee, 5 Gray, 27; Clark *v.* Conn. Riv. R. R., 6 Gray, 363.

[73] Wolcott *v.* Mead, 12 Met. 516.

[74] Perreau *v.* Bevan, 5 B. & C. (11 E. C. L.) 284; Brown *v.* Parker, 5 Blackf. 292; Sopris *v.* Lilley, 2 Colorado, 498; Clark *v.* Norton, 6 Minn. 417; Hall *v.* Smith, 10 Iowa, 47; Fullerton *v.* Miller, 22 Md. 5; Persse *v.* Watrous, 30 Conn. 146; Pettygrove *v.* Hoyt, 2 Fairfield, (Me.) 66; Lambden *v.* Conoway, 5 Har. (Del.) 1. [Pittsburgh Bank *v.* Hall, 107 Pa. St. 583, Jones *v.* Smith, 79 Me. 452, 10 Atl. 256; Gardiner *v.* McDermott, 12 R. I. 206; Imel *v.* Van Deren, 8 Colo. 91, 5 Pac. 803; Pure Oil Co. *v.* Terry, 209 Pa. St. 403, 58 Atl. 814; Fisse *v.* Katzentine, 93 Ind. 490.]

that where the conditions of the bond are severable, part may be void, while the remainder may be valid. If the valid and void portions were incapable of severance, the bond would be wholly void. But when the conditions are distinct, the obligor is not so injured by what is merely void that he can make use of it to protect him against what is valid.[75]

§ 414. **The condition to prosecute without delay.** If the plaintiff delay to prosecute his suit for any unusual or unreasonable time, without the defendant's consent, the condition to prosecute without delay will be broken.[76] Thus, a failure to prosecute for two years, without good cause shown, was regarded as a forfeiture of this condition, though no judgment of *nol pros.* was entered.[77] But when the breach assigned was for a failure to prosecute with effect, a plea that the suit was still pending was good, as the condition to prosecute with effect is not broken by delay, however prolonged. The breach should in such case be upon the condition to prosecute without delay.[78]

§ 415. **To prosecute with effect.** The condition to prosecute with effect is separate and absolute, and requires the plaintiff to prosecute the suit to a successful issue.[79] And if, for any

[75] Newman *v.* Newman, 4 Maul. & Selw. 70. This question is considered in United States *v.* Brown, Gilpin C. C. 155. See Vroom *v.* Exrs. of Smith, 2 Gr. (14 N. J. L.) 480; Anderson *v.* Foster, 2 Bailey, (S. C.) 501; Erlinger *v.* The People, 36 Ill. 458; Balsley *v.* Hoffman, 13 Pa. St. 607. "The conditions of the bond are disjunctive. Each depends only on itself, and the breach of any one of the separate conditions occasions a forfeiture of the penalty, notwithstanding all the others may have been kept." Berghoff *v.* Heckwolf, 26 Mo. 513; Persse *v.* Watrous, 30 Conn. 146; Kimmel *v.* Kint, 2 Watts, (Pa.) 432; Humphrey *v.* Taggart, 38 Ill. 228; Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 33. "Where one of the conditions is void, it does not affect the others." Chaffee *v.* Sangston, 10 Watts, (Pa.) 266. This has been the rule ever since the bond has been used in replevin. Pigot's Case, 11 Co. Rep. 27; Vaughn *v.* Norris, Ca. t. H. 139; Turnor *v.* Turner, 2 Brod. & Bing. 112; Harrison *v.* Wardle, 5 Barn. & Adolph, 146; Badlam *v.* Tucker, 1 Pick. 286; Brown *v.* Parker, 5 Blackf. (Ind.) 292. See Dugan *v.* England, Harper, (S. C.) 214.

[76] Daniels *v.* Patterson, 3 Comst. (N. Y.) 51.

[77] Axford *v.* Perrett, 4 Bing. 586. See Moore *v.* Bowmaker, 7 Taunt. 97.

[78] Brackenbury *v.* Pell, 12 East. 586; Harrison *v.* Wardle, 5 B. & Adolph, 146.

[79] Persse *v.* Watrous, 30 Conn. 144; Tummons *v.* Ogle, 37 E. L. & Eq. 15; Humphrey *v.* Taggart, 38 Ill. 228; Balsley *v.* Hoffman, 13 Pa. St. 603.

cause, the plaintiff fails in his suit, or suffers a non-suit, or judgment, or verdict, against him, it is a breach of this condition for which an action may be sustained for the full penalty of the bond.[80] If the action be dismissed, even with the consent of the defendant, it is a clear failure to prosecute with effect;[81] but consent of the defendant to waive any of his rights to damages, or to return, would change the case.[82] So when the defendant pleaded *non cepit*, and the plaintiff afterward was non-suited, there was no failure to prosecute with success.[83] Failure to prosecute with effect constitutes a breach of condition of the bond, without judgment for a return,[84] and such a judgment is not necessary to entitle the defendant to sustain an action for a failure to keep this condition.[85]

[Boom *v.* St. Paul Co., 33 Minn. 253, 22 N. W. 538; Pittsburgh Bank *v.* Hall, 107 Pa. St. 583. The condition to "duly prosecute" does not import that plaintiff shall prosecute successfully, Citizens Bank *v.* Morse, 60 Kans. 526, 57 Pac. 115. Plaintiff recovers only nominal damages for the breach of this condition unless further actual damage is shown, Imel *v.* Van Deren, 8 Colo. 90, 5 Pac. 803, Felheimer *v.* Hainline, 65 Ills. Ap. 384. But if the replevin be discontinued the plaintiff in the action on the bond is entitled to at least nominal damages, Franks *v.* Matson, 211 Ill. 338, 71 N. E. 1011.]

[80] M'Farland *v.* McNitt, 10 Wend. 330; Langdoc *v.* Parkinson, 2 Bradw. (Ill.) 136; Morgan *v.* Griffiths, 7 Mod. 380; Turnor *v.* Turner, 2 Brod. & Bing. 107; Perreau *v.* Bevan, 5 B. & C. 284; Phillip *v.* Pierce, 3 Maul. & Selw. 182; Gould *v.* Warner, 3 Wend. 54; Dias *v.* Freeman, 5 T. R. 195 and 104; Humphrey *v.* Taggart, 38 Ill. 228; Doogan *v.* Tyson, 6 Gill. & J. (Md.) 453; Hansard *v.* Reed, 29 Mo. 473; Berghoff *v.* Heckwolf, 26 Mo. 511.

[81] Stevison *v.* Earnest, 80 Ill. 513.

[82] Hall *v.* Smith, 10 Iowa, 46.

[83] Cooper *v.* Brown, 7 Dana, (Ky.) 333.

[84] Elliott *v.* Black, 45 Mo. 373; Brown *v.* Parker, 5 Blackf. (Ind.) 292; Dias *v.* Freeman, 5 Term. R. 195 and 104.

[85] Sopris *v.* Lilley, 2 Colorado, 498. Where the bond is conditioned 'o prosecute with effect a dismissal of the replevin renders the surety in the bond liable for a return of the goods. Rauh *v.* Waterman, 29 Ind. Ap. 344, 61 N. E. 743.

Bond in replevin conditioned for due prosecution, return of the goods if adjudged, and "payment of such sums of money as may be adjudged in this action against plaintiff, not exceeding, etc.," and the costs of the action, binds the plaintiff to pay in addition to the costs only such sums as are adjudged against him in the replevin. But if he discontinues his action the defendant, under the condition for due prosecution, recovers the value of the goods with interest. Kentucky Co. *v.* Crabtree, Ky., 80 S. W. 1161.

§ 416. **The same. What is prosecution with effect.** Where the defendant pleads *non cepit* only, and succeeds upon the issue that he did not take the goods, such a verdict in his favor does not constitute a breach of the condition of the plaintiff's bond to prosecute with effect. Instead of entitling him to a judgment for a return, such a result only ratifies his renunciation of the property.[86] The statutory form of the bond under discussion differed slightly from the ordinary replevin bond, the conditions of the former being, "that in case the plaintiff failed to make good his claim to the property," etc. The court says, "the primary condition of the bond, that which is the basis of liability on it, is, that in case the plaintiff shall fail to make good his claim to the property, he will re-deliver the goods. Whatever absolves him from this condition discharges him from every liability on his bond." Success by the defendant on the simple issue of *non cepit*, instead of a breach of the bond, is an effectual defense against all his claims under it.[87]

§ 417. **Prosecution in inferior court not sufficient when the case is appealed.** Prosecution with effect in the inferior court does not satisfy this condition when the suit is removed to a superior court. The plaintiff is bound to follow and prosecute it to a successful issue. This was the common law in cases where the action was removed by a writ of *recordari*, or by *pone*,[88] and is the rule in this country when the removal is by appeal from an inferior to a superior court.[89] Where the parties stipulated that the replevin suit should be dismissed, and that the plaintiff should pay the defendant, who was the plaintiff's landlord, a certain sum, and that each should pay his own cost, this stipulation was held sufficient evidence of a failure to prosecute with effect.[90]

[86] Ladd *v.* Prentice, 14 Conn. 116.

[87] See, also, Persse v. Watrouse, 30 Conn. 147.

[88] Lane *v.* Foulk, Comb. 228; Gwillim *v.* Holbrook, 1 Bos. & Pul. 410; Vaughn *v.* Norris, c. t. H. 137; Blacket *v.* Cressop, 1 Lutw. 688; Butcher *v.* Porter, 1 Show, 400.

[89] Balsley *v.* Hoffman, 13 Pa. St. 603; Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 34.

[90] Hallett *v.* Mountstephen, 2 Dow. & Ry. 343. [When plaintiff recovers part of the goods and defendant the residue, separate judgments are entered; appeal by one party does not reopen the judgment given in his favor, Vinal *v.* Spofford, 139 Mass. 126, 29 N. E. 288, Bates *v.* Stanley, 51 Neb. 252, 70 N. W. 972. The value of the goods is the amount in controversy in a suit on the bond, though the plaintiff's only claim

§ 418. **Death of party pending suit.** But if the plaintiff die pending suit the condition to prosecute with effect is not broken, the reason assigned being that the death of the party renders the prosecution of the replevin suit impossible, and the performance of the condition rendered impossible by the act of God.[91] So when the plaintiff prosecutes his suit until abated by the death of the defendant, it will be regarded as a compliance with the conditions to prosecute with effect.[92]

§ 419. **The condition to return.** The condition to return the goods, if return be awarded, is one of the principal—perhaps the principal—condition of the bond. The obligation imposed upon the makers of the bond by this condition is an active, not a passive, duty. It requires a return of the goods. The object is to secure a prompt restoration to the defendant of the goods which have been taken from him upon the writ. It is not simply a condition to surrender the goods to an officer upon a writ of return, or that the property may be extorted from the makers of the bond on such process. To a suit for a failure to keep this condition it is no defense to say that the sheriff did not take the property when he could.[93] A judgment for a return not complied

is that of an execution creditor for a very much less amount, Eidson *v.* Woolery, 10 Wash. 225, 38 Pac. 1025. Where the goods increase in value pending an appeal to the district court, that court in ascertaining the value should allow for this increase, and may give judgment accordingly even for an amount in excess of the jurisdiction of the justice in which the suit was commenced, Deck *v.* Smith, 12 Neb. 389, 11 N. W. 852. In justice court plaintiff was defeated and return was awarded; the defendant, an officer, seized the goods accordingly; plaintiff in due season perfected an appeal; nevertheless the defendant sold the goods under his process;—held, that he became liable for the value; that his duty on the perfection of the appeal was to return the goods, Deck *v.* Smith, *supra*.

By statute, in suits commenced before a justice, the inquiry was limited to the property and right of possession in the goods seized under the writ. In an appeal in such case, the court of its own motion limited the inquiry accordingly, Burket *v.* Pheister, 114 Ind. 503, 16 N. E. 813.]

[91] Persse *v.* Watrous, 30 Conn. 147; Green *v.* Barker, 14 Conn. 431; Parsons *v.* Williams, 9 Conn. 236; Burkle *v.* Luce, 1 Comst. (N. Y.) 163; Burkle *v.* Luce, 6 Hill, (N. Y.) 558; Morris *v.* Mathews, 2 Ad. & El. (N. S.) 297.

[92] Badlam *v.* Tucker, 1 Pick. 284. Such was the law in England. Ormand *v.* Brierly, Carth. 519; Bacon Ab. title Replevin, D.

[93] Jennison *v.* Haire, 29 Mich. 209; Burkle *v.* Luce, 6 Hill, 558; Peck *v.*

with is a breach of this condition;[94] but where the condition is to make return if return be awarded the obligors are not guilty of a breach of this condition unless there be a judgment for a return.[95] The condition to make return is performed if the plaintiff in replevin restore the goods seasonably after the return is awarded;[96] or if the goods are taken on a writ of return by the officer, it is a compliance with the condition.[97] To an action on a bond the defendant pleaded that one of the defendants forcibly took the possession from him. *Held*, no defense, though it might be permitted to go in, in mitigation of damages.[98]

§ 420. **Offer to return unaccompanied by a tender not a performance.** An offer to return unaccompanied by any tender of the goods is not a performance of this condition. When the defendant in a suit on a bond attempted to show that he offered to return the goods to the sheriff, and that the latter refused to accept them because he had been directed not to do so by the attorney; *held*, no proof of a tender, and no defense to suit on the bond.[99] It would seem from this case that an actual tender of the goods was necessary to performance of the condition to return.

§ 421. **The condition to return requires the return of the identical goods.** This condition also requires the return of the identical goods taken; the substitution of other goods of like description and value is not a compliance with the bond.

§ 422. **And in as good order as when taken.** It is also an implied obligation that the goods shall be in as good order and condition as when taken. When an express provision of the statute to this effect was omitted in a revision by the legislature, it was not regarded as changing the law.[100] But if the property has in fact been injured while in the plaintiff's possession, that

Wilson, 22 Ill. 206. See Carrico *v.* Taylor, 3 Dana. (Ky.) 33; Cooper *v.* Brown, 7 Dana, (Ky.) 333; Cooper *v.* Peck, 22 Ala. 406; Cushenden *v.* Harman, 2 Tyler, (Vt.) 431.

[94] Smith *v.* Pries, 21 Ill. 656; Davis *v.* Harding, 3 Allen, 302. Compare Cowdin *v.* Stanton, 12 Wend. 120.

[95] Clark *v.* Norton, 6 Minn. 415; Ladd *v.* Prentice, 14 Conn. 117.

[96] Sopris *v.* Lilley, 2 Col. 498. See Way *v.* Barnard, 36 Vt. 370; Walbridge *v.* Shaw, 7 Cush. 560; Cook *v.* Lothrop, 18 Me. 260.

[97] Carrico *v.* Taylor, 3 Dana (Ky.) 33; Harrod *v.* Hill, 2 Ib. 165.

[98] Story *v.* O'Dea, 23 Ind. 326.

[99] Schrader *v.* Wolflin, 21 Ind. 238.

[100] Parker *v.* Simonds, 8 Met. 211; Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 34.

fact will not absolve the defendant from the duty of receiving it in its damaged condition. The judgment for a return does not leave it at the option of the defendant to accept or refuse and demand the value. The depreciation is, however, to be made good, and the party may receive full indemnity by suit on the bond.[101]

[101] Allen *v.* Fox, 51 N. Y. 562. But see Douglass *v.* Douglass, 21 Wall. 98.

NOTE XXV. *Duty to Return.*—It is the duty of the plaintiff to return the goods without waiting for process. If he fails the defendant may proceed to collect the judgment, Eickhoff *v.* Eikenbary, 52 Neb. 332, 72 N. W. 308; Douglas *v.* Douglas, 21 Wall. 98, 22 L. Ed. 479. It is his duty to take active measures to return the goods to defendant in a reasonable time in the same condition as when taken. He must seek the defendant and make tender to him if the goods are readily capable of delivery, Capital Co. *v.* Learned, 36 Ore. 544, 59 Pac. 454.

Duty to Accept.—The party to whom return is made cannot decline to receive the goods when tendered at a suitable time and place because some third person claims them. Reavis *v.* Horner, 11 Neb. 479, 9 N. W. 643. Where property levied upon by the sheriff is bulky and not easily removed, and is suffered to remain in the same place by one replevying it from the sheriff, his offer to the sheriff to return it is a performance of the judgment in favor of the sheriff in the replevin suit, and it is the duty of the sheriff to accept it. The fact that the plaintiff in the replevin is contemplating an appeal from the judgment or has taken the initiatory steps to review the judgment is no excuse for refusal to accept; execution for the value will be enjoined, Frey *v.* Drahos, 10 Neb. 594, 7 N. W. 319. The defendant is not bound to accept unless the goods are returned in reasonable time, Bradley *v.* Reynolds, 61 Conn. 272, 23 Atl. 928.

Time of Return.—The goods must be returned within a reasonable time after judgment of *retorno*, or defendant is not bound to accept them, Bradley *v.* Reynolds, 61 Conn. 272, 23 Atl. 928; June *v.* Payne, 107 Ind. 308, 7 N. E. 370, 8 Id. 556. A return at any time before the levy of the execution will satisfy the other alternative of the judgment, LaVie *v.* Crosby, 43 Ore. 612, 74 Pac. 220. The defendant may satisfy the judgment by surrendering the property and paying the costs "when presented with the execution," Drake *v.* Auerbach, 37 Minn. 506, 35 N. W. 367. In Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, it was held that if the defeated party prosecutes an appeal from the judgment, and is defeated therein, the successful party is not required to accept the goods; but see *contra*, Ormsby *v.* Nolan.

§ 423. Judgment for a return a breach of the condition. Judgment for a return having been given, a failure of the plaintiff

69 Ia. 130, 28 N. W. 569; Manker *v.* Sine, 47 Neb. 736, 66 N. W. 840. And see June *v.* Payne, *Supra.*

Manner of Return.—Return of the goods to the place from which they were taken, and a notice to the defendant in replevin that they are subject to his order, will not re-invest him with possession if he refuses to accept, Calnan *v.* Stern, 153 Mass. 413, 26 N. E. 994. The goods must be tendered to the party to whom return or delivery was adjudged; a tender to one beneficially interested in the judgment is of no avail, Capital Co. *v.* Learned, 36 Ore. 544, 59 Pac. 454. A tender on condition that it shall be accepted in full satisfaction of the judgment in replevin, is ill, Binkley *v.* Dewall, 9 Kans. Ap. 891, 58 Pac. 1028. Notice to the defendant that he may retain the goods and treat them as his own, when in fact the plaintiffs have an agent in charge and retain him in charge, is not a return. It is the duty of the plaintiff, although the goods remain upon the premises of the defendant throughout the litigation, to withdraw from the custody, Pittsburgh Bank *v.* Hall, 1007 Pa. St. 583. In Williams *v.* Eikenberry, 22 Neb. 210, 34 N. W. 373, it was assumed that an offer in writing filed in the clerk's office, returning to defendant the property in controversy, if assented to by the plaintiff was a satisfaction. The statute of Texas provides that the defendant shall have a right to deliver the property, within a time specified, "to the sheriff or constable of the court in which the judgment is rendered," and that if injured or damaged, etc., the officer shall not receive it unless a reasonable sum, to be judged by the officer, shall be tendered at the same time. It was held that a tender to the party himself would not suffice, Childs *v.* Wilkinson, 15 Tex. Civ. Ap. 687, 40 S. W. 749. The court in argument sustained the constitutionality of the provision which makes the sheriff judge of the damages or deterioration of the goods; *sed quere.* If the party accepts the tender he will be estopped by it, *Id.* A judgment for return in like good order and condition as when taken will not be construed as requiring plaintiff who has replevied the machinery of a manufacturer to put it in working order in its original place. The expense and trouble of such replacement, and the delay necessary, are to be estimated as damages, Stevens *v.* Tuite, 104 Mass. 328. A return to the sheriff where this is the condition of the bond, is sufficient, June *v.* Payne, 107 Ind. 308, 7 N. E. 370, 8 Id. 556.

Condition of the Goods at Time of Return.—Return must be made in the same good order as when taken, June *v.* Payne, 107 Ind. 308, 7 N. E. 370, 8 Id. 556. The defendant is not bound to accept the goods unless returned "in the same good order and condition" as when replevied, Johnson *v.* Mason, 70 N. J. L. 13, 56 Atl. 137; Nichols *v.* Paulson, 10 N. D. 440, 87 N. W. 977. Even though the depreciation

to make it is a breach of the condition, and suit may be brought at once, without demand.[102] Neither is it necessary, in the absence

[102] Wright *v.* Quirk, 105 Mass. 45; Cook *v.* Lothrop, 18 Me. 260; Parker *v.* Simonds, 8 Met. 205; Persse *v.* Watrous, 30 Conn. 148.

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be due to ordinary wear and tear, *Id.* The goods must be returned in substantially the same condition as when taken, Fair *v.* Citizens Bank, 69 Kans. 353, 76 Pac. 847, citing Washington Company *v.* Webster, 125 U. S. 426, 31 L. Ed. 799; George *v.* Hewlett, 70 Miss. 1, 12 So. 855, 35 Am. St. 626; McPherson *v.* Acme Co., 70 Miss. 649, 12 So. 857; Hazlett *v.* Witherspoon, Miss. 25 So. 150; Hinkson *v.* Morrison, 47 Ia. 167; Yelton *v.* Slinkhard, 85 Ind. 190. The defendant by taking judgment for damages for the detention of the goods is not estopped to object to the condition of them when return is tendered, Nichols *v.* Paulson, *supra.* Where the statute provides that the "sheriff or constable" to whom the same are tendered, shall not receive the goods if injured or damaged, unless the defendant at the same time tenders a reasonable amount for the injury, the officer is the judge of whether the goods are or are not in the same condition, Childs *v.* Wilkinson, 15 Tex. Civ. Ap. 687, 40 S. W. 749.

Option to Return.—Defendant, against whom judgment for return of the goods or for the value, is awarded, is entitled to deliver the goods if they are not taken and returned by the sheriff, Carson *v.* Applegarth, 6 Nev. 187. The party against whom the judgment is given in the alternative has the election whether he will return the goods or pay the value, Bates *v.* Stanley, 51 Neb. 252, 70 N. W. 972. If the defeated plaintiff offer to return the goods the defendant is bound to accept them, and the tender discharges the bond and satisfies the judgment, so far as relates to the value, Parker *v.* Oxendine, 85 Mo. Ap. 212. Under a statute that "in the execution for the delivery of personal property it must require the sheriff to deliver possession of the same to the person entitled thereto," held, that the defeated plaintiff has no election to pay for the goods; they must be returned in specie if it can be done, Johnson *v.* Fraser, 2 Idaho, 404, 18 Pac. 48.

Equivalent in other Goods.—The plaintiff if defeated must return the identical goods which were replevied, Union Stove Works *v.* Briedenstein, 50 Kans. 53, 31 Pac. 703. The defendant cannot be required to accept different articles, Irvin *v.* Smith, 68 Wis. 228, 31 N. W. 912. The identical goods taken upon the writ, and in substantially the same condition, must be returned, Eickhoff *v.* Elkenbary, 52 Neb. 332, 72 N. W. 308; Binkley *v.* Dewall, 9 Kans. Ap. 891, 58 Pac. 1028. But in Williams *v.* Eikenberry, 22 Neb. 210, 34 N. W. 373, the property replevied being a lumber yard it was said that "an equivalent number of feet of the same class and value" must

of statutory requirement, to have a writ of return before suit on the bond. It is sufficient that the return was adjudged and not made.[103]

[103] Peck *v.* Wilson, 22 Ill. 206. Plaintiff may prove it. Smith *v.* Pries, 21 Ill. 656. See Robertson *v.* Davidson, 14 Minn. 554; M'Farland *v.* M'Nitt, 10 Wend. 330; Gould *v.* Warner, 3 Wend. 54; Knapp *v.* Colburn, 4 Wend. 618; Hunter *v.* Sherman, 2 Scam. 544. *Contra*, suit on the bond for breach of the condition to return cannot be maintained without a writ of return unsatisfied. Cowden *v.* Pease, 10 Wend. 334; Cowdin *v.* Stanton, 12 Wend. 120; Pemble *v.* Clifford, 2 McCord, (S. C.) 31; Pemble *v.* Clifford, 3 McCord, (S. C.) 34; Shaw *v.* Tobias, 3 Comst. 188.

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be construed the same as that taken; and in Starke *v.* Payne, 85 Wis. 633, 55 N. W. 185, it was held that where lumber in the hands of an assignee for creditors is scattered about the yard, and to separate and distinguish plaintiff's lumber from the other is difficult, any deficiency is to be made up from other lumber pertaining to the insolvent's estate. In replevin for two hundred and twenty boys' coats, judgment was given for the plaintiff for possession of the goods "mentioned in the affidavit and complaint, etc." It appeared upon the trial that the defendant had received for the plaintiff three boxes of cloth cut into the shape of coats and ready to be made. Held the officer was bound to accept the cloth upon his execution if tendered by the defendant, Monness *v.* Livingstone, 84 N. Y. Supp. 124.

Partial Return.—The unsuccessful party is not entitled to retain any part of the goods. Black *v.* Hilliker, 130 Calif. 190, 62 Pac. 481. The successful defendant is entitled to return of all the goods replevied, or if all cannot be returned, the value of all, Whetmore *v.* Rupe, 65 Calif. 237, 3 Pac. 851. Where no provision is made by statute for delivery of part of the goods recovered or for the method of ascertaining the value of any part not delivered, the successful plaintiff is not bound to accept a part, and the court will not compel him to do so, Kingsley *v.* Sauer, 17 Misc. 544, 41 N. Y. Sup. 248. The defendant had judgment for the return of certain posts, poles and ties before that replevied by the plaintiff, and then lying in a certain slough, and a creek leading thereto. Execution was issued to the sheriff commanding him to take the goods from the plaintiff and deliver them to defendant, or if delivery could not be had, to satisfy the judgment for the value out of the lands, goods and chattels of the plaintiff. The sheriff returned upon this execution that he could not find the goods and that return thereof could not be had, and that he had therefore levied on certain lands of the plaintiff to satisfy the execution. The lands were accordingly advertised for sale. Plaintiff thereupon procured an order upon the defendant to show cause why he should not accept in satisfaction of the judgment

§ 424. The bond only relates to claims in the suit in which it is given. The bond is only for the indemnity of the

certain posts, ties and poles, "as then piled on the bank of the slough . . and in the creek . . and why said execution should not be recalled." On the report of a referee the court entered an order specifying that "of the ties, poles and posts mentioned in the order to show cause" a certain specified number were the same seized upon in the writ of replevin, and declared the judgment satisfied. It was held that this order could be granted only on satisfactory proof that *all the property seized* under the writ of replevin had been returned, or a return tendered to the plaintiff personally before the execution issued; that if such tender had been in fact made before execution issued, the plaintiff might have prevented the issue of execution; but having permitted the execution to issue the whole matter was with the sheriff, and plaintiff must treat with him; that the sheriff's return that the goods could not be had was conclusive upon all parties, and that plaintiff could not be permitted to show in falsification of it that the goods could have been had, Irvin *v.* Smith, 66 Wis. 113, 27 N. W. 35. A judgment for specific articles of machinery "or the value thereof in the event the same of any part thereof cannot be found," is not satisfied by tender of a part of the machinery and a sum of money in lieu of the residue, Pauls *v.* Mundine, Tex. Civ. Ap. 85 S. W. 42. But in other courts the rule is less strict. In Reavis *v.* Horner, 11 Neb. 479, 9 N. W. 643, a tender of the principal part of the goods, with the offer to pay for the value of the residue, was held sufficient, and the defendant was allowed an injunction to restrain the collection of the value. In Meixell *v.* Kirkpatrick, 33 Kans. 282, 6 Pac. 241, it was held that a defendant adjudged to deliver several articles may make delivery of part in satisfaction *pro tanto*, if unable to deliver the residue; see also Harts *v.* Wendell, 26 Ills. Ap. 274; Edwin *v.* Cox, 61 Ills. Ap. 567. But the machinery of a factory is to be considered as a whole; an offer to return a portion of it is not to be considered in an action on the bond, Stevens *v.* Tuite, 104 Mass. 328. In Reavis *v.* Horner, *supra*, there were among the articles replevied six hundred bushels of corn valued by the court at $90, one hundred and eighteen bushels of wheat valued at $88.50, and twenty hogs valued at $90; fifty bushels of corn, sixty-eight bushels of wheat, and five of the hogs were not returned. It was held that a tender of the value of the missing articles at the rate per bushel fixed by the court upon the wheat and the corn, as ascertained by computation, was sufficient, the court indulging the presumption that the value of each bushel was the same. As to the hogs, a similar method of ascertainment was pursued, and the defendant not objecting on this ground, was held to be concluded, and the tender sufficient.

Effect of Return.—Delivery of the goods before levy of the execution

party for damages occasioned by the replevin suit. A suit in replevin was begun and dismissed. The defendant then brought replevin for the property, and recovered judgment and damages to the amount of $270. To satisfy these damages, she brought suit on the bond given to her in the original suit. *Held*, the bond was for the special purpose of indemnifying her for such damages as might be adjudged in that suit; not for damages in a subsequent one. The suit in which the bond was given was dismissed, with no judgment in her favor, and upon such claim no recovery could be had.[104]

§ 425. **Actual delivery of the goods on the writ precedes liability on the bond.** The law in many States permits the defendant to retain the property, upon giving bond to abide the order of the court. In suit on a bond in such a case the plaintiff must allege and prove a delivery of the property to the plaintiff in replevin. The delivery must precede the liability on the bond.[105]

[104] Boyer *v.* Fowler, 1 Wash. Ter. 119.

[105] Nickerson *v.* Chatterton, 7 Cal. 570. See Clary *v.* Rolland, 24 Cal. 147.

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satisfies the alternative judgment, Johnson v. Gallegos, 10 N. M. 1, 60 Pac. 71. Where the plaintiff obtains the goods he must upon payment of costs enter satisfaction of the judgment, Oskaloosa Works *v.* Nelson, 54 Ia. 519, 6 N. W. 718. A return of the goods within a reasonable time after the judgment in as good condition as when the judgment was rendered, and payment of the costs, extinguishes the judgment, Archer *v.* Long, 47 S. C. 556, 25 S. E. 84. And a return of part, though not in like condition and not in reasonable time, works satisfaction of the judgment in the proportion which the value of the returned goods bears to the value of all as assessed by the jury; and the plaintiff may produce testimony as to this before the court or the referee, *Id.* The defendant has a right to discharge the judgment of *retorno* by return of the goods within a reasonable time. If the return is declined and a levy proposed he may have an injunction to restrain it, Marks *v.* Willis, 36 Ore. 1, 58 Pac. 526. The sureties themselves may make a return, Johnson *v.* Gallegos, *supra.* If the surety in the bond having a chattel mortgage on the goods, seize them and deliver them to the defendant in satisfaction of the judgment of return, he cannot afterwards assert his mortgage, Rich *v.* Savage, 12 Neb. 413, 11 N. W. 863. And the seizure of the goods under the writ of *retorno* satisfies the judgment, though the goods are damaged, Douglas *v.* Douglas, 21 Wall. 98, 22 L. Ed. 479.

§ 426. **Actual return in as good order a compliance with this condition.** An actual return of the goods in proper time and order is a compliance with this condition. So, also, when property is replevied from the sheriff and comes back into his hands by seizure on another execution, and the plaintiff in replevin requests him to hold it on the first. This is equivalent to a return; the condition for a return is fulfilled.[106] And there are many cases which recognize the continuing lien of an execution, (when goods seized on execution have been replevied,) in case the plaintiff in the replevin has failed in his suit.[107]

§ 427. **General principles governing the construction of the bond.** The principles which govern in the construction of a replevin bond are similar to those which apply to other bonds. When the terms of the instrument render it possible, the court will always adopt a construction which gives to the bond some effect, rather than one which annuls it.[108] The court will also look to the manifest intention of the parties, and carry it out, if that be possible, from the terms of the instrument.[109] Words used are to receive their ordinary popular meaning.[110] The object of the bond is to provide security to the officer and indemnity to the defendant. The action on the bond ought to be conducted with these ends in view, to best subserve the principles of justice, having due regard to the decision in the replevin suit, and the character and condition of the bond, and the breaches assigned. When the action of replevin was dismissed, and the defendants in the suit on the bond were defaulted, the court, on a writ of inquiry to assess damages, permitted them to show, in mitigation, that they were the owners of the property.[111] This rule has been

[106] Hunt *v.* Robinson, 11 Cal. 262.

[107] Caldwell *v.* Gans, 1 Blake, (Mon.) 581. See Cook *v.* Lothrop, 18 Me. 260; Burkle *v.* Luse, 1 Comst. 163; Evans *v.* King, 7 Mo. 411; Hagan *v.* Lucas, 10 Pet. (U. S.) 400; Lockwood *v.* Perry, 9 Met. 440; M'Rae *v.* M'Lean, 3 Port. (Ala.) 138.

[108] 2 Bla. Com. 179; Mitchell *v.* Ingram, 38 Ala. 395. So of deeds. Goodtitle *v.* Bailey, 2 Cowper, 600; Archibald *v.* Thomas, 2 Cowen, 284; Wolfe *v.* McClure, 79 Ill. 564.

[109] Ib.

[110] Hawes *v.* Smith, 3 Fairfield, (Me.) 429.

[111] Belt *v.* Worthington, 3 Gill. & J. (Md.) 247; Stockwell *v.* Byrne, 22 Ind. 9; Doogan *v.* Tyson, 6 Gill. & J. (Md.) 453; Davis *v.* Harding, 3 Allen, 302.

engrafted into the statutes of some States, and adopted by construction in others.[112]

§ 428. **Right of action accrues upon a failure to keep any of the conditions.** The right of action on the bond accrues whenever the plaintiff in the replevin suit fails to keep any of the conditions. Thus, when the conditions of the bond are that the plaintiff shall prosecute his suit with effect, and without delay, and return the goods, if return be awarded, the suit on the bond may be sustained when the plaintiff fails in his action, even though there be no award of a return.[113]

§ 429. **Rights of the securities.** The securities may, in all cases, stand upon the exact terms of their contract.[114] They are liable for their express covenants, and no more. They are responsible for the performance of what their principal is lawfully bound to do, according to the condition of the bond. The court cannot enlarge or vary the conditions of the contract. Thus, where the condition was to prosecute the suit to final judgment, and to pay such damages and costs as the defendant should recover, and also restore the property in case that should be the judgment of the court, the defendant omitted to pray for a return, and had judgment for costs only, he afterwards brought suit on the bond for a failure to return, and it was held he could not recover, no return having been adjudged, that condition was not broken.[115] Where a return of the property is awarded, the securities have a right to make it, if they see fit, in the discharge of their obligation.[116] Where the suit was dismissed before the defendant had an opportunity to claim a return, the fact that one had not been claimed could not be made use of to defeat the suit on the bond.[117] The suit, in such case would properly have been on the failure to prosecute with effect.

[112] Statutes of Ill.

[113] Brown *v.* Parker, 5 Blackf. (Ind.) 291; Potter *v.* James, 7 R. I. 312; Roman *v.* Stratton. 2 Bibb. (Ky.) 199.

[114] Fullerton *v.* Miller, 22 Md. 5; Tarpey *v.* Shillenberger, 10 Cal. 390; Clary *v.* Rolland, 24 Cal. 147; Clark *v.* Norton, 6 Minn. 412.

[115] Pettygrove *v.* Hoyt, 11 Maine, 66; Clark *v.* Norton, 6 Minn. 413. See Branscombe *v.* Scarbrough, 6 Adol. & E. (N. S.) 13; Chambers *v.* Waters, 7 Cal. 390; Mitchum v. Stanton, 49 Cal. 304; Collins *v.* Hough, 26 Mo. 150; Balsley *v.* Hoffman, 13 Pa. St. 606; Miller *v.* Foutz, 2 Yeates, (Pa.) 418; Nickerson *v.* Chatterton, 7 Cal. 568.

[116] Kimmel *v.* Kint, 2 Watts, 432.

[117] Mills *v.* Gleason, 21 Cal. 275.

§ 430. **The same. Illustrations.** Where the condition was to pay such damages as should be adjudged, the bondsmen were not liable for those which accrued prior to judgment for a return, unless they were adjudged against their principal in the replevin suit.[118] The principles which govern in such cases find apt illustrations in cases other than in those on replevin bonds.[119] When the statute under which an appeal was taken required a bond to pay whatever judgment might be rendered upon the dismissal or trial of the appeal, and the bond sued on omitted the words "*or trial*," the court said: "The point is, can the obligors be held responsible by implication beyond the express terms of the bond?" *Held*, that though not conforming to the statutory form, the bond was good, as a voluntary one; that the obligor could not be bound for anything beyond the letter of the contract.[120] When the bond was given in a justice court, and the condition was for a return of the property, if return be adjudged by *said* court, etc.: *Held*, that under this form the securities had limited their liability, and that unless the return was awarded by the justice, the securities were not liable, even though a return had been awarded by the county court.[121]

§ 431. **The same.** A judgment irregularly entered for the value of the property replevied, without an order for a return, does not change or affect the liability of the securities upon the condition for a return, though an order for a return may not be essential to entitle the party to an action upon the bond for a breach of other conditions.[122]

[118] Sopris *v.* Lilley, 2 Col. 498; Kenley *v.* Commonwealth, 6 B. Mon. (Ky.) 583. [The condition to pay "such sums as for any cause may be recovered," covers the value of the goods if they are not returned, Katz *v.* Hlavac, 88 Minn. 56, 92 N. W. 506. Defendant gives a bond conditioned to deliver the property if delivery shall be adjudged, and for the payment to plaintiff of such sums as may be recovered against defendant; no action can be had upon this bond until the replevin proceed to judgment in favor of the plaintiff, Cheatham *v.* Morrison, 31 S. C. 326, 9 S. E. 964. The condition to restore the property "if return shall be adjudged", construed to import if return be adjudged by a court of competent jurisdiction, Elder *v.* Greene, 34 S. C. 154, 13 S. E. 323.]

[119] Wolfe *v.* McClure, 79 Ill. 564.

[120] Young *v.* Mason, 3 Gilm. (Ill.) 57.

[121] Mitchum *v.* Stanton, 49 Cal. 304.

[122] Mason *v.* Richards, 12 Iowa, 74.

§ 432. **Any material alteration in the bond avoids it.** Any material alteration of the bond without the consent of the securities, will avoid it. Thus, when the principal erased his name from a bond to a United States Marshal without the consent of his securities, but with the consent of the marshal, it operated as a release of the securities.[123] In case a new defendant is substituted in the suit, the securities are under no obligation to him;[124] but the substitution by the court of the real defendant (a corporation,) in place of one of its agents, will not release the securities.[125] The securities are not liable for a greater sum than the penalty of the bond and costs, even if the damages should exceed that amount,[126] neither are they liable for costs of the replevin suit unless the bond expressly so provides, or some statutory liability attaches.[127]

§ 433. **The same. Security bound by acts of the principal.** Nevertheless, the securities are bound by all the steps which their principal may take in good faith for the success of his suit in court, and are bound by the result of that suit. If the court have jurisdiction, the securities are bound by such order as it may make in the case, it being the essence of the contract that the security is answerable for his principal's conduct in the suit before judgment, and for his action afterwards within the scope of the bond.[128]

§ 434. **But a settlement does not bind nor discharge**

[123] Martin *v.* Thomas, 24 How. (U. S.) 316.

[124] Smith *v.* Roby, 6 Heisk. (Tenn.) 547.

[125] Hanna *v.* International Petroleum Co., 23 O. St. 625.

[126] Fraser *v.* Little, 13 Misc. 195; Nickerson *v.* Chatterton, 7 Cal. 571.

[127] Morrow *v.* Shepherd, 9 Mo. 216.

[128] Pirkins *v.* Rudolph, 36 Ill. 310; Burrall *v.* Vanderbilt, 1 Bos. (N. Y.) 637. [The bond was conditioned to prosecute, etc., make return, etc., and pay defendant "such sums as for any cause may be recovered against plaintiff;" there was a compromise and judgment given that plaintiff pay defendant six hundred dollars and costs, and the judgment was entered against the sureties in the bond;—held the sureties were bound and the judgment was affirmed. "The sureties assume responsibility for whatever may be legitimately and bona fide adjudged against their principal who alone is the manager of his action and by whose judgment they must abide," Council *v.* Averett, 90 N. C. 168.]

them. A settlement or adjustment of the suit by agreement of the parties, without the consent of the securities, will not bind them, nor will it necessarily release them from their obligations.[129] Where it was stipulated of record that all proceedings in replevin should cease, that the plaintiff should pay a certain sum, and that the bond should stand for security; *held*, that this was sufficient evidence of a failure to prosecute, and that the securities were liable though not bound by the stipulation.[130]

§ 435. **Submission to arbitration does not bind security.** So a submission to arbitration by consent of the parties and without the consent of the securities, will release them; they were bound that the plaintiff should abide all orders of the court properly made, but they were not bound by the orders of another tribunal to which the case is submitted by agreement.[131]

§ 436 **Technical defenses to bond not favored.** The general rule is well settled that the plaintiff in replevin who has had the property delivered to him on his writ, cannot dispute the validity of the bond on any mere technical grounds, or for any failure to comply with the statutory process as to the manner of its execution. The rule in all such cases seems to be based on the idea that the party who has obtained delivery of the property by virtue of his suit, and by filing his bond, has had all the benefit which would accrue if the bond had been formal, and is estopped from questioning its validity on the ground of formal or technical defects. The defendant cannot be allowed to plead that the bond was for ease and favor, and unconstitutional.[132] In *Morse* v. *Hodsdon*, 5 Mass. 314, and in *Simonds* v. *Parker*, 1 Met. 514, the rule is strongly laid down that when the bond, under which he

[129] Moore *v.* Bowmaker, (E. C. L.) 6 Taunt. 379; Same *v.* Same, 7 Taunt. 97; Aldridge *v.* Harper, 10 Bing. 118; Harrison *v.* Wilkin, 69 N. Y. 413; Coleman *v.* Wade, 2 Seld. (N. Y.) 44.

[130] Hallett *v.* Mountstephen, 2 Dow. & Ry. 343.

[131] Pirkins *v.* Rudolph, 36 Ill. 307. Compare Leighton *v.* Brown, 98 Mass. 516.

[132] Compare Weaver *v.* Field, 1 Blackf. 335; Magruder *v.* Marshall, 1 Blackf. 333; Strong *v.* Daniel, 5 Ind. 348. See, also, Parker *v.* Simonds, 8 Met. 211; Wolfe *v.* McClure, 79 Ill. 564; Gordon *v.* Jenney, 16 Mass. 465. Objection that the condition was to appear at county court, when there was no such court, was overruled; the judges holding that the court of common pleas was intended. Arnold *v.* Allen, 8 Mass. 143.

has obtained the property, has been voluntarily executed by the plaintiff, he can not avoid it, on the ground that it does not conform to the statutory requirements.[133] So, error in recital of the date of the commencement of the suit in replevin is immaterial, when the suit and the property are sufficiently described to indicate the suit which was intended. Where the recital was that the suit was commenced on or about the 3d day of August, while the transcript showed that it was commenced on the 20th day of August, held immaterial.[134]

§ 437. **The same.** The courts have ever been inclined to hold the obligors on the bond to a strict liability. When it has been given and the property taken, no technical defects not going to the substance of the contract will be permitted to excuse the makers, neither will a failure of the defendant to take advantage of such defects in the replevin suit necessarily prevent him from having his remedy upon the bond.[135] When the bond is given with one security, and the statute requires two, it may, nevertheless, be enforced, though not such a bond as the plaintiff had a right to demand.[136] Where the signature of one of the securities was a forgery, the bond was not for that reason void against the other;[137] but perhaps he might have shown that the bond was delivered in escrow to be signed by the others if such was the fact. When the bond is for less than double the value of the property, (as required by the statute,) it is not therefore void; defendant may waive the defects and accept it.[138] When the securities were excepted to by the defendant under a statute authorizing such exception, and they failed to justify; that fact does not relieve them of their liability, though perhaps the substitution of new securities under such circumstances would.[139] Where the prin-

[133] But, see Purple *v.* Purple, 5 Pick. 226.

[134] Graves *v.* Shoefelt, 60 Ill. 464. Bond adjudged void is no bar to an action on the case for the value of the goods. Magill *v.* Casey, 1 Day, (Conn.) 13.

[135] O'Grady *v.* Keyes, 1 Allen, (Mass.) 284.

[136] Wolcott *v.* Mead, 12 Met. 518; Shaw *v.* Tobias, 3 Comst. (N. Y.) 192.

[137] Bigelow *v.* Comegys, 5 Ohio St. 256.

[138] Rodesbaugh *v.* Cady, 1 West L. M. (Ohio,) 599.

[139] Van Duyne *v.* Coope, 1 Hill, 557; Decker *v.* Anderson, 39 Barb. 347.

cipal agreed to give time or to stay execution, such agreement did not release the securities unless the agreement created an absolute disability on the part of the payee to proceed.[140] Where the plaintiff in the replevin suit has obtained possession of the property under the writ, neither he nor his securities can be permitted to allege in an action on the bond that no suit in replevin was pending, because no summons was issued.[141]

§ 438. **The liability of a guardian personal.** Where a guardian sued out a writ of replevin for goods belonging to his ward, and gave bond in his own name, he was held individually liable, and could not set up his guardianship to defeat the suit.[142]

§ 439. **Where the words are ambiguous, the intent will govern.** When the words of the bond are not explicit, or, if construed literally, would mean nothing, they must be construed with reference to the intent of the parties,[143] and if such intent can be gathered from the terms of the bond and the situation of the parties, it will control. When the bond was that if *North*, (plaintiff,) prosecute, etc., or in case of failure shall pay such damages as the said *North* shall recover, etc., *held*, that this must be regarded as a clerical error, the presumption being that the bond was given in good faith, and such a construction should be given as would render it available for the purpose for which it was intended.[144] When the condition of the bond was that it should be void if the obligor should "*not*" pay, etc., the palpable error in the introduction of this word was not permitted to defeat what must have been the true intent of the parties.[145] So when the word "pounds" was omitted, Lord Tenterton said: "The bond was intended to secure various sums stated in the recitals, in pounds sterling, so I cannot doubt the obliger should be held to pay pounds sterling on this bond."[146] When the bond was signed by plaintiff in replevin after the writ was served, he will

[140] Tousey *v.* Bishop, 22 Iowa, 178.

[141] Reeves *v.* Reeves, 33 Mo. 28; Sammons *v.* Newman, 27 Ind. 508.

[142] Oliver *v.* Townsend, 16 Iowa, 430.

[143] Teall *v.* Van Wyck, 10 Barb. 377.

[144] Green *v.* Walker, 37 Me. 27. See Butler *v.* Wigge, 1 Saund. 65; Waugh *v.* Bussel, 5 Taunt. 707.

[145] Bache *v.* Proctor, Doug. (Eng.) 367.

[146] Coles *v.* Hulme, 8 Barn. & Cress. 568.

not be permitted to set that up to defeat his own bond.[147] All these cases proceed upon the ground that the plaintiff ought not to be suffered to avail himself of the writ to obtain the goods, and then be relieved of the obligation to respond, unless the error be fundamental.[148] But when the bond did not contain the name of the defendant in the suit, it was void, and the defect could not be cured by averment or proof. Thus, when suit was brought against the sheriff for a failure to take bond as required by the statute, the defendant pleaded that he did take bond, which he set out at length, but the bond set out failed to show that the defendant's name was inserted therein, or that any language was used from which it could be ascertained in what suit the bond was given. Demurrer to the plea was properly sustained.[149]

§ 440. **Proceedings on the bond governed by statute.** Provision is made in some of the States for a summary proceeding[150] on the bond. In Wisconsin, the securities are so far regarded as parties to the suit as to authorize judgment against them in the replevin proceedings;[151] and the obligee may sue in the name of the sheriff for his use.[152] These proceedings are governed by the local law, and can only be resorted to when the bond is in strict conformity thereto.[153]

[147] Cady *v.* Eggleston, 11 Mass. 285; Nunn *v.* Goodlett, 5 Eng. (Ark.) 100; Reeves *v.* Reeves, 33 Mo. 28.

[148] Buck *v.* Lewis, 9 Minn. 317; Jennison *v.* Haire, 29 Mich. 214; Decker *v.* Judson, 16 N. Y. 439; Shaw *v.* Tobias, 3 Comst. 192; Moors *v.* Parker, 3 Mass. 310. [Where the plaintiff in replevin representing that the replevin bond has been lost, files a copy thereof under leave granted by the court, the surety not objecting, an action lies thereon as upon the original. Fleet *v.* Hertz, 201 Ill. 594, 66 N. E. 858.]

[149] Arter *v.* The People, etc., 54 Ill. 228. This case was subsequently cited and approved in Matthews *v.* Storms, 72 Ill. 321. See Smith *v.* Roby, 6 Heisk. 549.

[150] Stat. Missouri. *Contra*, see Gay *v.* Morgan, 4 Bush. (Ky.) 606; Hurd *v.* Gallaher, 14 Iowa, 394.

[151] Manning *v.* Pierce, 2 Scam. 6. See Gould *v.* Warner, 3 Wend. 54. *Contra*, in North Carolina, where the remedy is by *sci. fa.* Summers *v.* Parker, Taylor's N. C. Term Rep. 147.

[152] Hunter *v.* Sherman, 2 Scam. 544; 2 Ch. Plead. 464. See Keyes *v.* McNulty, 14 Iowa, 484.

[153] Hunter *v.* Sherman, 2 Scam. 544; 2 Chit. Plead. 460; Perreau *v.* Bevan, 5 B. & Cress. 284; Axford *v.* Perrett, 4 Bing. 586; Harvy *v.* Stokes, Willes, 6; Peck *v.* Wilson, 22 Ill. 205; Hopkins *v.* Ladd, 35 Ill. 180.

§ 441. **Debt a proper form of action thereon.** Debt is a proper form of action on a replevin bond in States where the distinction between actions is preserved.[154] The usual form of declaration in debt upon a penal bond will be sufficient with the assignment of such breaches of the conditions as the pleader desires and expects to sustain by proof. The assignment of the breaches is simply a statement that the defendant has not performed the conditions which were essential to be kept to excuse the obligors from the payment of the penal sum named in the bond. The breaches need not be assigned in broader terms than the conditions.[155]

§ 442. **Assignment of the breaches.** Neither is the assignment of the breach required to be in any formal or technical manner. An assignment which sufficiently shows that the obligors have not kept one or more of the conditions is sufficient. Thus, when the condition was to prosecute the suit with effect an assignment that the defendant did not prosecute the replevin suit with effect, but failed so to do, in the words of the condition will be sufficient.[156]

§ 443. **Proceedings in the replevin essential to sustain suit upon the bond.** The proceedings in the replevin suit are essential to sustain suit upon the bond. The records of the replevin suit need not be set out in the declaration on the bond, but the proceeding should be recited,[157] and the judgment in that suit stated,[158] the record in the replevin suit is proper evidence to sustain the averment in the declaration.[159]

§ 444. **The material facts to be set up.** The material facts to be alleged in a suit on the replevin bond are manifestly the termination of the replevin suit, judgment for the defendant, and an order for a return of the property, if that be the fact. When the declaration upon the bond alleged concerning the replevin

[154] Pratt *v.* Donovan, 10 Wis. 378. See Hershler *v.* Reynolds, 22 Iowa, 152; Crites *v.* Littleton, 23 Iowa, 205.

[155] Humphrey *v.* Taggart, 38 Ill. 228.

[156] Wooldridge *v.* Quinn, 49 Mo. 427; Miller *v.* Commissioners of Montgomery Co., 1 Ohio, 271; Humphrey *v.* Taggart, 38 Ill. 228.

[157] Gould *v.* Warner, 3 Wend. 57; Eldred *v.* Bennett, 33 Pa. St. 183; Sand. Pl. and Ev. 769; McGinnis *v.* Hart, 6 Iowa, 204; Dias *v.* Freeman, 5 T. R. 195 and 104.

[158] Nunn *v.* Goodlett, 5 Eng. (Ark.) 89.

[159] McGinnis *v.* Hart, 6 Iowa, 208.

suit, that "said cause coming for trial," it was considered and adjudged by said circuit court, that "the said Stevison take nothing by his said writ, but that he and his pledge to prosecute be in mercy," and further, at the same time the court awarded a return of said goods, etc., and gave judgment for the defendants for one cent damages and costs of suit—the record read in evidence to sustain the averment, after reciting that a previous order had been made requiring the plaintiff to give security for costs, and that a motion to dismiss for non-compliance with that order had been made, proceeded: "It is ordered by the court that said motion be sustained, and that this suit be dismissed at plaintiff's costs, and that a writ of *retorno habendo* issue herein, and judgment for costs"—it was *held*, no substantial variation from the declaration.[160] When the law permits the defendant to give bond and retain the property, it is essential to aver that the property was delivered, delivery necessarily preceding liability upon the bond;[161] even when there is no evidence that any bond was given, it must be presumed that property remained with the defendant, and a finding in his favor will not authorize a judgment for a return without proof that the property was delivered on the writ.[162] It need not be averred that the writ was directed to the coroner. If it show that the coroner took the goods upon the writ, it is *prima facie* that the writ was directed to him;[163] neither is it necessary to aver that the bond was taken in compliance with the statute,[164] but the declaration must state the plaintiff's damages.[165]

§ 445. **When bond is lost from the files.** Where the bond has been lost from the files, it cannot be replaced by a substitute without the approval of the court; neither the party nor the clerk, without the sanction of the court, can substitute a paper purporting to be a copy, unless in compliance with an order for that purpose.[166]

§ 446. **Defenses to suit on bond.** In an action upon the

[160] Stevison *v.* Earnest, 80 Ill. 517.

[161] Nickerson *v.* Chatterton, 7 Cal. 570. See, also, Bolander *v.* Gentry, 36 Cal. 110.

[162] McKeal *v.* Freeman, 25 Ind. 151.

[163] Shaw *v.* Tobias, 3 Comst. (N. Y.) 191.

[164] Shaw *v.* Tobias, 3 Comst. (N. Y.) 191.

[165] Arnold *v.* Allen, 8 Mass. 149.

[166] Farrow *v.* Orear, 2 Duv. (Ky.) 261.

bond, the defendant who has availed himself of its benefits by obtaining property under it, cannot defeat his liability by plea that the bond was given for ease and favor, or that the law was unconstitutional;[167] neither can he be permitted to plead that he was not indebted,[168] nor show a want of jurisdiction in the court before whom the replevin suit was tried.[169] In *Roman* v. *Stratton*, 2 Bibb, (Ky.) 199, the court held that irregularities of the plaintiff in the procurement of the writ or the prosecution of the replevin suit, would not excuse him from liability on his bond; and this case was cited with approval in a leading case in Arkansas.[170] To permit the party to avail himself of this objection would be to allow him to take advantage of his own wrong. The bond was the plaintiff's voluntary bond, delivered to the officer, upon which he obtained possession of the goods, and he and his securities must abide it;[171] and this rule applies generally to the defense of instruments of this character.[172] The defendant in replevin may waive all defects in the bond which do not go to the substance or defeat his right of action, and enforce the bond against the principal and securities.[173] So where the securities are excepted to and fail to justify, it will not defeat the plaintiff's right to recover, as though exceptions had not been taken.[174] The defendant in replevin is in all cases liable to the judgment authorized by law, without any reference to the conditions of the bond. The bond fixes the liability of the securities.[175] When the securities are excepted to and fail to justify, such failure does not discharge them. Query, as to whether the substitution of a new bond would be a discharge of the securities on the old.[176]

§ 447. **When ownership of property is settled in the replevin suit.** When the ownership of the property has been determined in the replevin suit, it is regarded as settled; and in

[167] Magruder *v.* Marshall, 1 Blackf. 333.

[168] Warner *v.* Matthews, 18 Ill. 83.

[169] McDermott *v.* Isbell, 4 Cal. 113.

[170] Nunn *v.* Goodlett, 5 Eng. (Ark.) 90.

[171] Roman *v.* Stratton, 2 Bibb, (Ky.) 199; Morse *v.* Hodsdon, 5 Mass. 314.

[172] Fant *v.* Wilson, 3 Mon. (Ky.) 342.

[173] Shaw *v.* Toblas, 3 Comst. (N. Y.) 188; Wolcott *v.* Mead, 12 Met. (Mass.) 517.

[174] Decker *v.* Anderson, 39 Barb. 347.

[175] Creamer *v.* Ford, 1 Helsk. 308.

[176] Van Duyne *v.* Coope, 1 Hill, 559.

a suit upon the bond in such a case, a plea that the defendant, the plaintiff in the replevin suit, is the owner of the property, is bad.[177] So, also, of a plea of property in a third person;[178] and in fact all questions determined in the replevin suit are regarded as *res adjudicata*, and cannot be inquired into in suit upon the bond.[179]

§ 448. **When not so settled, it may be set up in suit on the bond.** But when the title and right of possession are not settled in the replevin suit, defendant to suit on bond may plead that fact, and that the ownership and right of possession are in him, and a plea to all but nominal damages would be sufficient.[180] Under the statutes of Illinois, the defendant pleaded to an action upon the bond that the property in the replevin suit was his, and that the merits of the case were not tried there, but that the return was awarded only because the plaintiff failed to prove a demand.[181] Such a plea, however, must affirmatively show that the case is within the provisions of the statute by clear and distinct averments; also, that the merits were not determined in the replevin suit; and such a plea, it seems, should admit nominal damages.[182]

§ 449. **Defenses which should be made in the replevin suit.** Plea that one of the defendants had carried away the property and converted it to his use, is bad. The defense should have been made in the replevin suit, and then no return would have been awarded; or, perhaps the same facts might sustain a plea that the property was returned.[183] So, also, plea that the judgment in the replevin was obtained by fraud;[184] or, that the

[177] Sherry *v.* Foresman, 6 Blackf. 56; Davis *v.* Crow, 7 Blackf. 130; Williams *v.* Vail, 9 Mich. 162; Cushenden *v.* Harman, 2 Tyler, (Vt.) 431.

[178] Smith *v.* Lisher, 23 Ind. 504.

[179] Denny *v.* Reynolds, 24 Ind. 248; Wallace *v.* Clark, 7 Blackf. 298.

[180] Stockwell *v.* Byrne, 22 Ind. 9. See Wiseman *v.* Lynn, 39 Ind. 250; Davis *v.* Harding, 3 Allen, 302; Belt *v.* Worthington, 3 Gill. & J. (Md.) 247; Hawley *v.* Warner, 12 Iowa, 42.

[181] The plea is set out in full in Chinn *v.* McCoy, 19 Ill. 606. See Laws Ill., 1847, p. 62; Rev. Stat. Ill. 1874, 853; Warner *v.* Matthews, 18 Ill. 83.

[182] King *v.* Ramsay, 13 Ill. 622.

[183] Buckmaster *v.* Beames, 4 Gilm. (Ill.) 443; Sherry *v.* Foresman, 6 Blackf. 58.

[184] Hutton *v.* Denton, 2 Carter, (Ind.) 644.

suit in replevin was dismissed by agreement, is bad.[185] A plea which sets up a return to the sheriff, and does not answer the part which charges failure to prosecute with effect, is bad,[186] though a return may be pleaded in mitigation of damages.

§ 450. **Miscellaneous rules in suits on bond.** It is a general rule that the defendants to suit on bond cannot set up any irregularities in the replevin suit in order to defeat suit on the bond.[187] When the practice act required an affidavit of merits to a plea in an action upon a contract for payment of money, a plea to suit on a replevin bond was properly filed without affidavit.[188] Where the issues in the replevin suit involved title to the property, and a verdict was given for the defendant in a suit upon the bond, the defendant could not set up a new title acquired after the bond was given ;[189] but may show that since the judgment for the return, the interest of the plaintiff has ceased in mitigation, but not in bar of damages ; or, that the property will at once revert to the defendant ;[190] or, he may plead set off, the suit upon the bond being an action on a contract, subject to set off like other actions, though replevin is not subject to set off ;[191] or, may plead performance of the condition of the bond, and require the plaintiff to state the breaches of the condition upon which he expects to rely ;[192] or, a release of all demands executed by the plaintiff in the suit on the bond, to the principal obligor thereon, is a release of the bond.[193] A judgment for costs only in the replevin suit, and return of execution thereon satisfied, is a discharge of the securities.[194] To suit on bond the defendant pleaded : 1. *Non damificatus.* 2. If the plaintiff was injured it was by his own wrong. 3 and 4. That the goods belonged to the

[185] O'Neal *v.* Wade, 3 Porter, (Ind.) 410.

[186] Gould *v.* Warner, 3 Wend. 61.

[187] Jennison *v.* Haire, 29 Mich. 207; Decker *v.* Judson, 16 N. Y. 439; Shaw *v.* Tobias, 3 Comst. 192; Moors *v.* Parker, 3 Mass. 310; Buck *v.* Lewis, 9 Minn. 317.

[188] Peck *v.* Wilson, 22 Ill. 206.

[189] Carr *v.* Ellis, 37 Ind. 465.

[190] Tuck *v.* Moses, 58 Maine, 461.

[191] Balsley *v.* Hoffman, 13 Pa. St. 612; Miller *v.* Foutz, 2 Yeates, 418.

[192] Doogan *v.* Tyson, 6 Gill. & J. (Md.) 453.

[193] Thomas *v.* Wilson, 6 Blackf. (Ind.) 203; Cocks *v.* Nash, 9 Bing. 341; Tuttle *v.* Cooper, 10 Pick. 281.

[194] Millett *v.* Hayford, 1 Wis. 401.

principal obligor. 5. That the principal obligor was ready and willing to prosecute his suit with effect, but that the court at the instance of the plaintiff dismissed the suit for want of jurisdiction on account of defects apparent in the affidavit and the writ, and that no damages were recovered in the replevin suit; nor was a return of property awarded. 6. That the bond was executed without consideration. 7. That the consideration was illegal. 8. No record of the replevin suit. On demurrer the court held these pleas, except the last, were bad.[195]

§ 451. **Variation between the bond and affidavit in description, no defense.** A variation in description between the property in the affidavit and the bond, will be no defense to suit on bond. That should have been pleaded in the replevin;[196] neither can the defendant to suit on bond be permitted to object to the judgment in the replevin suit, on the ground that the writ issued without an affidavit; that the court would in the absence of the affidavit from the record, presume that it was properly filed; or, if not, will not permit a plaintiff in replevin, who managed the case and who obtained the property, to reap all the benefits of his suit and then escape liability in a suit on his bond, on the ground that he procured the writ and obtained delivery of the property without affidavit, or committed other irregularities to defeat it;[197] neither will the fact that the defendant has collected his costs in the replevin suit. The conditions of the bond are separate, and the collection of costs is not a surrender of his right of action.[198]

§ 452. **Submission of the replevin suit to arbitration, a defense.** But a submission of the replevin to an arbitration by agreement of the parties without the consent of the securities, will discharge the latter. Had the suit been prosecuted, the court might have awarded a return. This would have enabled the securities to take steps for a deliverance. They did not agree to return without an investigation, and were entitled to have that investigation under the forms of trial by the court and jury.[199]

[195] Sherry *v.* Foresman, 6 Blackf. 56.

[196] McDermott *v.* Doyle, 11 Mo. 443.

[197] Jennison *v.* Haire, 29 Misc. 208.

[198] Kafer *v.* Harlow, 5 Allen, 348.

[199] Pirkins *v.* Rudolph, 36 Ill. 312; Moore *v.* Bowmaker, 6 Taunt. 379; Aldridge *v.* Harper, 10 Bing. 118; Coleman *v.* Wade, 2 Seld. (N. Y.), 44; Bowmaker *v.* Moore, 1 Exch. R. 355.

§ 453. **Value of the property stated in bond; how far binding.** The plaintiff in replevin who fixed the value of the property as stated in the bond, is bound by that value, and estopped from questioning it, when sued on the bond;[200] and as a usual thing, such value also concludes the sureties who sign the bond, but the defendant, in replevin, had no concern in fixing the value,[201] and is not bound by any of the recitals in the bond; neither will an appraisement of the value under a statute authorizing it, be binding on the parties.[202]

§ 454. **Where the value of a number of articles is stated at a gross sum.** When, as is sometimes the case, a number of articles are replevied, and the bond sets out the aggregate value, and some are returned and some are not, the recital of the aggregate value in the bond affords no information as to the value of separate articles; the plaintiff in the suit must show the actual value, or he can have but nominal damages.[203]

§ 455. **Effect of the destruction of the property.** The conditions of the bond sometimes become impossible to perform by the death or destruction of the chattel. When domestic animals are the subject of the action, they are liable to die; in fact, all chattels are liable to be destroyed pending the suit.[204] If the possession of the defendant be wrongfully acquired, in violation of a trust, or by fraud or force; or, where the claim is characterized by tort and injustice, he cannot shield himself from payment of value, even though the property may have been destroyed.[205]

[200] Wiseman *v.* Lynn, 39 Ind. 259; Trimble *v.* State, 4 Blackf. 435; May *v.* Johnson, 3 Ind. 449; Guard *v.* Bradley, 7 Ind. 600; Sammons *v.* Newman, 27 Ind. 508; German Ins. Co. *v.* Grim, 32 Ind. 249; Mattoon *v.* Pearce, 12 Mass. 406; Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 34; Clap *v.* Guild, 8 Mass. 153.

[201] Howe *v.* Handley, 28 Me. 251; Melvin *v.* Winslow, 10 Me. 397; Parker *v.* Simonds, 8 Met. 205; Thomas *v.* Spofford, 46 Me. 410; Tuck *v.* Moses, 58 Me. 477. See in this connection, Leonard *v.* Whitney, 109 Mass. 265; Wright *v.* Quirk, 105 Mass. 48; Stevens *v.* Tuite, 104 Mass. 328. "The sum named in the bond as the value of the goods, is sufficient evidence, though not absolutely conclusive on the makers." Clap *v.* Guild, 8 Mass. 153; Mattoon *v.* Pearce, 12 Mass. 406; Wright *v.* Quirk, 105 Mass. 48.

[202] Kafer *v.* Harlow, 5 Allen, (Mass.) 348; Leighton *v.* Brown, 98 Mass. 515.

[203] Sopris *v.* Lilley, 2 Col. 498.

[204] Carpenter *v.* Stevens, 12 Wend. 589.

[205] Porter *v.* Miller, 7 Tex. 480. See title, Damages; *post*. As to

§ 456. **Parties to suit on bond cannot discharge it to the injury of the sheriff.** In suit on bond, by the sheriff, he sues for his own protection; and, if this be pending, the defendant cannot release the bond, the sheriff having become responsible for costs. A release of the bond before suit would extinguish it; the sheriff would have no further interest in it, and would stand discharged from his liability.[206] If the suit, however, has been begun by the defendant in replevin in his own name, he may release the bond, as in that case he alone is liable for costs.[207] The judgment for return cannot be impeached upon the ground of fraud on the part of the plaintiff in letting the judgment go.[208]

§ 457. **Damages on bond; how assessed.** In an action on the bond, the damages are assessed on the principle of compensation. The sum named in the bond is usually regarded as a penalty, and upon payment of a sum sufficient to compensate the obligor for the loss he has sustained, the bond will be discharged. By the common law the makers of the bond were liable for the full amount of the penalty named, but in case of hardship chancery frequently interposed relief; and at length, by the statute,[209] it was provided that in actions on bonds with penalties, the defendant might pay the principal debt, with interest and costs, and the penalty might be discharged.[210] The judgment is for the full penalty of the bond, but the judgment is usually accompanied by an order that it be satisfied by the payment of a less sum, which is fixed at the amount of damages the plaintiff has sustained.[211]

damages for breach of contract occasioned by the act of God, see Sedgwick on Dam., 6 Ed., p. 255, note 2.

[206] Armstrong *v.* Burrell, 12 Wend. 302.

[207] Armstrong *v.* Burrell, 12 Wend. 302.

[208] Walls *v.* Johnson, 16 Ind. 374.

[209] 4 Anne, Chap. 16, §§ 12 and 13.

[210] See Stat. 8 and 9 Will. 3, Ch. 11, § 8. When the judges refused to grant relief at law, after forfeiture of bonds, upon payment of the principal, interest and costs, Sir Thomas Moore swore by the body of God he would grant an injunction. Wyllie *v.* Wilkes, Doug. (Eng.) 523, (505.) The statutes in several of the States limit the recovery on the bond to compensation for such damages as have been sustained in consequence of the breach of the conditions. R. S. Ill. 1874, p. 853, § 25.

[211] Gould *v.* Warner, 3 Wend. 54; Hunter *v.* Sherman, 2 Scam. 544; Odell v. Hole, 25 Ill. 208; Frazier *v.* Laughlin, 1 Gilm. 347; March *v.* Wright, 14 Ill. 248; Toles *v.* Cole, 11 Ill. 562.

The bond in replevin is statutory, and is properly classed with other statutory bonds given to secure the defendant against damages resulting from the wrongful use of a provisional remedy. As such, the remedy upon the bond is governed by the same principles substantially as those which govern in the case of injunction and attachment bonds. The sum named as the penalty is for the purpose of indemnity only, not the measure of the injured party's right of recovery, when his actual damage is less than that sum. The value of the goods which have been ordered to be returned, and have not been restored in compliance with the order, with interest, will usually be the measure of damages in such cases.[212]

§ 458. **The same; amount of.** The amount of damages in an action on a replevin bond must depend materially on the right of the plaintiff (defendant in replevin) to the property. If it is determined in the replevin suit that the property belonged to him, then in suit on the bond he ought to have a right to recover its value; but if it appear that he had no right to the property, he has sustained no damage by the refusal of the obligor to deliver it to him, and in such case, unless other actual damages are shown, the plaintiff's should be nominal.[213]

§ 459. **The same, in case of joint owners.** When a landlord was joint owner with his tenant, and so defeated the action of replevin, and had judgment for a return, yet in a suit on the bond for a failure to comply with the order, the landlord was permitted to recover only the value of his interest in the property;[214] and in this case the defendants in the suit on the bond were permitted, notwithstanding the judgment in replevin, to show the character of the possession upon which the plaintiff recovered.[215] When the defendants in the replevin had a verdict and judgment, but it appeared that the goods taken had never been paid for by them, and that they could not be liable for their price, in suit on the bond they could not recover the value of the goods, but only the value of their interest.[216]

§ 460. **Release of bond by seizure on another writ pend-**

[212] Ormsbee *v.* Davis, 18 Conn. 555.

[213] Wallace *v.* Clark, 7 Blackf. 299; Belt *v.* Worthington, 3 Gill. & J. (Md.) 247.

[214] Mason *v.* Sumner, 22 Md. 312.

[215] Ib.

[216] Seldner *v.* Smith, 40 Md. 603.

ing suit. When the property is delivered to the plaintiff on the writ, and pending the suit it is taken from him by the order of the court, the securities may set up that fact as a discharge.[217] The foundation for the rule seems to rest on the theory that property seized on a writ of replevin is in the custody of the court. Though in the plaintiff's possession, it is always within the power and control of the court, and if taken subsequently upon process from the same court, the seizure by the officer is equivalent to a return of the property to him,[218] and the securities on the bond ought not to be held responsible for property which has been taken from them by order of the court in whose control it was. To what length this doctrine may be carried is a question as yet undecided, so far as the cases examined disclose.[219].

§ 461. **Limitations to suit on bond.** The statute of limitations to a suit on bond does not begin to run until a judgment for return. A simple delay to prosecute the security for a shorter period than the time limited by law, will not discharge them.[220]

§ 462. **Suit on by sheriff may be in his individual name.** Suit by sheriff need not be in the name of his office; his individual name, with proper words of description, will be sufficient.[221]

[217] Caldwell *v.* Gans, 1 Blake, (Mon.) 578. Compare Ackerman *v.* King, 29 Tex. 291; Kercheval *v.* Harney, Meigs, (Tenn.) 403.

[218] Hunt *v.* Robinson, 11 Cal. 262.

[219] Consult Burkle *v.* Luce, 1 Comst. (N. Y.) 163; Lockwood *v.* Perry, 9 Met. 444; McRea *v.* McLean, 3 Port, (Ala.) 138; Evans *v.* King, 7 Mo. 411; Hagan *v.* Lucas, 10 Peters, (U. S.) 400; Lovejoy *v.* Bright, 8 Blackf. 206.

[220] Daniels *v.* Patterson, 3 Comst. 51.

[221] Caldwell *v.* West, 1 Zab. (21 N. J.) 411.

NOTE XXVI. *Action on the Bond. Parties.*—The several creditors in behalf of whom the sheriff levied upon the goods, and to whom he has assigned the bond, may sustain an action thereon, Kaufman *v.* Wessel, 14 Neb. 161, 15 N. W. 219; McCormick Co. *v.* Fisher, 63 Kans. 199, 65 Pac. 223; Capitol Co. *v.* Learned, 36 Ore. 544, 59 Pac. 454. In some jurisdictions it is held that the officer takes as trustee for the creditor whom he represents, and that such creditor may have an action on the bond in his own name without assignment, Hedderick *v.* Poutet, 6 Mont. 345, 12 Pac. 765, citing Lomme *v.* Sweeney, 1 Mont. 584, 22 Wall. 208, 22 L. Ed. 727; —and that parties severally interested as creditors may unite in the same action, Thomas *v.* Irwin, 90 Ind. 557; that any person injured by the breach of the bond may sue thereon in the name of the sheriff to his own use, Hanchett *v.* Buckley, 27 Ills. Ap. 159.

But it seems that the sheriff to whom the bond is payable is the proper plaintiff, Hicklin *v.* Nebraska Bank, 8 Neb. 463; Lomme *v.* Sweeney, 1 Mont. 584. And if neither the judgment nor the bond have been assigned and the sheriff has not refused to enforce the bond or assign the bond or the judgment in the replevin, he is the only proper plaintiff, Greer *v.* Howard, 41 O. St. 591—even although he should have gone out of office; and even though the bond be payable to him and his "successors in office;" these words are surplusage and must be rejected, Schott *v.* Youree, 142 Ills. 233, 31 N. E. 591. And the sheriff suing upon the bond represents all parties beneficially interested, and it is his duty to distribute the proceeds of the litigation to the proper parties, no matter who may be named as beneficiaries, Schott *v.* Youree, *supra.* The name of the party or parties for whose use the officer sues, is immaterial, Atkins *v.* Moore, 82 Ills. 240. If the officer is made liable for his proceedings under the writ, he may call upon the sureties to defend the suit, and if they fail therein may have his action on the replevin bond and recover the amount for which he was made accountable, Smith *v.* Brown, 60 Ills. Ap. 771. The attaching creditor is properly joined with the officer in a suit upon the bond, though the officer is the sole defendant in the replevin, Quinnipiac Co. *v.* Hackbarth, 74 Conn. 392, 50 Atl. 1023. The assignee of a judgment may have an action in his own name upon the replevin bond given to the sheriff, in replevying goods levied upon under execution issued on such judgment, Kahn *v.* Gavit, 23 Ind. Ap. 274, 55 N. E. 268, Schleiman *v.* Bowlin, 36 Minn. 199, 30 N. W. 879. The bond is payable to several defendants, the goods are awarded to part of them; these may have their action on the bond without joining the others, Pilger *v.* Marder, 55 Neb. 113, 75 N. W. 559. Where the bond is payable to two, one of these cannot sustain an action, thereon, alone, upon allegation that the other party has no interest, without making him party, Kellar *v.* Carr, 119 Ind. 127, 21 N. E. 463. In like case it was held that both defendants having recovered judgment for costs, might unite in an action on the bond, averring non-return and non-payment of the costs, although the complaint averred that the property was in one of them, and the judgment was for return to him, Story *v.* O'Dea, 23 Ind. 326. The bond named the defendants "Dennis O'Dea *et al;*" the writ named "O'Dea and Dunfe;" these two joined in an action on the bond; a complaint alleging that judgment was given in favor of O'Dea for return, and in favor of both plaintiffs for their costs, was held sufficient, Story *v.* O'Dea, *supra.* A stranger to the action in which the bond is given cannot maintain an action thereon, even though by the replevying of the goods, their sale, and the subsequent adjustment of the replevin by the parties to that action he is prevented from having satisfaction of a debt against the real owner of the goods, Pipher *v.* Johnson, 108 Ind. 401, 9 N. E. 376.

In an action in one state upon the replevin bond given in another, the breach assigned being non-payment of the judgment for the value, given in the courts of the latter state, it will be presumed in the absence

of evidence that the laws of the latter state are identical with those of the former, Osborn *v.* Blackburn, 78 Wis. 209, 47 N. W. 175, 10 L. R. A. 367.

Pleadings of the Plaintiff.—Under the code provision that the action shall be in the name of the real party in interest, the creditor upon whose writ the sheriff levied, suing upon the bond need not aver an assignment of it, Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763; but the complaint must aver nonpayment of the judgment in favor of the creditor, judgment in favor of the officer in the replevin suit, and non-return of the goods, or some other breach of the bond, *Id.* Not necessary to aver that the plaintiff in an attachment writ, under which the goods were levied upon by the officer from whom they were replevied, recovered judgment in that suit, or that the demand of the plaintiff in that suit remains unsatisfied, Eickoff *v.* Eikenbary, 52 Neb. 332, 72 N. W. 308. It is sufficient to describe the goods replevied as "a certain stock of goods, liquors, cigars, the property of, etc.," Keenan *v.* Washington Co., 8 Idaho, 383, 69 Pac. 112. Averment that the replevin was instituted in Lawrence Circuit Court, a bond given in that suit, that the venue was changed to Greene Circuit Court, and that such proceedings were then and there had that it was adjudged that "plaintiffs recover, etc.,"—held to import that the judgment mentioned was recovered in the replevin suit, Blackburn *v.* Crowder, 108 Ind. 238, 9 N. E. 108. It is sufficient to set up in the complaint so much of the bond as is necessary to show a right of action, Dorrington *v.* Meyer, 8 Neb. 211. The plaintiff must show the judgment given in the action of replevin, Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763; McGary *v.* Barr, Pa. St. 19 Atl. 45. If the judgment in the replevin is set forth with substantial accuracy this is sufficient, the phraseology of the record or what led up to the judgment is unimportant, Stevison *v.* Ernest, 80 Ills. 513.

Pleadings of Defendant.—The surety may plead in an action on the bond that the judgment in the replevin was obtained by fraud and collusion; plea that defendant in replevin procured plaintiff to leave the state by a promise that the suit should not be prosecuted and afterwards took judgment in violation of his agreement,—held, bad, for failing to aver that the plaintiff was induced to leave the state for any purpose connected with that suit, or that he left the state by reason of the agreement, or that the defendant in replevin took advantage of his absence to procure the judgment without his knowledge, or that plaintiff was absent or was ignorant of the judgment when it was taken, Wright *v.* Card, 16 R. I. 719, 19 Atl. 709. Plea, to the whole of the action, of matter which is an answer to only part, is bad, Fisse *v.* Katzantine, 93 Ind. 490; so matters which go in mitigation of damages merely, Wright *v.* Card, *supra;* Morehead *v.* Yeasel, 10 Ills. Ap. 263. Under plea of the general issue to a declaration upon a replevin bond the defendant cannot put in evidence the record of the sale of the chattels, under foreclosure of a chattel mortgage thereof, Stafford *v.* Baker, Mich. 104 N. W. 321. Plea of the general

issue to a declaration upon a replevin bond admits the execution and delivery of the bond, and that the property was taken by virtue of that bond, Stafford *v.* Baker, Mich. 104 N. W. 321. Sureties in the bond plead property in the goods, not in the plaintiff in replevin, but "in these defendants;" the defense fails, Chapin *v* Matson, 37 Ills. Ap. 257. *Nul tiel record* of the writ of replevin is not a good plea, Tedrick *v.* Wells, 59 Ills. Ap. 657. Defendant may plead that by an agreement of the parties a different bond was substituted for that sued upon, Busch *v.* Fisher, 73 Mich. 370, 41 N. W. 325. Cross-suits were pending involving title to a quantity of logs; Busch was plaintiff in the first suit; and Fisher and others defendant; in the second suit Fisher and others were plaintiffs, and Busch and others defendants; an injunction was awarded to restrain plaintiffs in the second suit from removing the logs; a bond was thereupon given by Fisher and others reciting the litigation and agreeing that this bond "should take the place of the lumber," and conditioned that if judgment was recovered by Busch in the last action the obligees should pay to Busch the value of the lumber "less any equitable defences" of Fisher and others; held, that this bond superseded the replevin bond, *Id.* If an officer be defendant in the replevin the sureties in the replevin bond may show the invalidity of the officer's levy, Quackenbush *v.* Henry, 42 Mich. 75, 3 N. W. 262. Where by agreement a different judgment is entered than that required by law the sureties are not bound, Lee *v.* Hastings, 13 Neb. 508, 14 N. W. 476; but see Council *v.* Averett, 90 N. C. 168. The surety makes plaintiff his agent to compromise the litigation, Nimocks *v.* Pope, 117 N. C. 316; 23 S. E. 269. The surety is to be regarded as a party to the litigation in the replevin and to the proceedings therein, Capital Co. *v.* Learned, 36 Ore. 544, 59 Pac. 454. The substitution of the creditor under whose process the goods were seized, for the officer who is named as defendant, does not affect the liability of the sureties in the replevin bond nor work their discharge, Elder *v.* Fielder, 9 Baxt. 272. Nor does any authorized amendment of the writ as by striking out the words "executors of the last will of," and inserting "heirs at law of" and adding the names of other heirs as plaintiffs, Jamieson *v.* Capron, 95 Pa. St. 15. The surety contracts with the implied understanding that the process shall be conducted according to law, and the statute allowing amendments is as much a part of his contract as if embodied therein, *Id.* But in replevin for a quantity of logs an amendment changing the description of the lands upon which the logs were alleged to have been wrongfully cut,—held to be such a material variation of the issues as discharged the sureties—Bolton *v.* Nitz, 88 Mich. 354, 50 N. W. 291. The sureties may show that judgment was entered by an agreement for an excessive amount, having no relation to the controversy, or that the defendant, by a second replevin, obtained the goods in the same condition as when taken from him, Rinker *v.* Lee, 29 Neb. 783, 46 N. W. 211, citing Demers *v.* Clemmens, 2 Mont. 385. Defendant cannot plead in the same plea matters which excuse performance, and *per-*

formavit omnia, Wright *v.* Card, *supra*. If the plea avers a tender of a part only of the goods with a sum of money "to cover all damages on account of any deficiency," it must show also that the amount was sufficient to cover all such damages, Bradley *v.* Reynolds, 61 Conn. 272, 23 Atl. 928.

Defenses to the Action.—It is no defense that the defendant in replevin failed to present a claim against the estate of the principal in the bond within the period of the statute of non-claim, Eickhoff *v.* Eikenbary, 52 Neb. 332; 72 N. W. 308;—nor that the plaintiff failed to give an indemnifying bond to the sheriff as required by the statute, Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763;—nor that no alternative judgment for the value of the property was given, Sweeney *v.* Lomme, 22 Wall. (89 U. S.) 208, 22 L. Ed. 727; Capital Co. *v.* Learned, 36 Ore. 544, 59 Pac. 454; Eisenhart *v.* McGarry, 15 Colo. Ap. 1, 61 Pac. 56;—nor is the failure to issue execution upon the judgment of *retorno*, *Id.* Douglas *v.* Douglas, 21 Wall. (88 U. S.) 98, 22 L. Ed. 479;—nor, to a single surety, that two sureties were required by the statute, Capital Co. *v.* Learned, *supra*;—nor that the distress warrant, where the replevin was for distress, was quashed, Corley *v.* Rountree, Tex. Civ. Ap. 37 S. W. 475;—nor that irregularities occurred in the action of replevin, Cox *v.* Sargent, 10 Colo. Ap. 1, 50 Pac. 201; Christiansen *v.* Mendham, 45 Ap. Div. 554, 61 N. Y. Sup. 326; McCarthy *v.* Strait, 7 Colo. Ap. 59, 42 Pac. 189; Central National Bank *v.* Brecheisen, 65 Kans. 807, 70 Pac. 895; McFadden *v.* Ross, 108 Ind. 512, 8 N. E. 161; Jones *v.* Findlay, 84 Ga. 52, 10 S. E. 541; Glenn *v.* Porter, 68 Ark. 320, 57 S. W. 1109;—provided the affidavit was in compliance with the statute, Carlon *v.* Dixon, 12 Ore. 144, 6 Pac. 500;—nor that no search was made by the officer upon the writ of *retorno*, Bradley *v.* Reynolds, 61 Conn. 272, 23 Atl. 928;—nor that the defendant in replevin has acquired a lien upon the lands sufficient to satisfy his judgment, *Id.*;—nor that the goods were tendered after a reasonable time, *Id.*;—even although the plea avers that the sureties were unable to find them sooner, Bradley *v.* Reynolds, *supra*;—nor that no writ of *retorno* was taken out nor demand made for the goods, Wright *v.* Quirk, 105 Mass. 44, Lomme *v.* Sweeney, 1 Mont. 584; Turnor *v.* Turner, 2 Bro. & B., 107;—nor that no affidavit was filed in the replevin suit, Stimer *v.* Allen, 88 Mich. 140, 50 N. W. 107;—nor that there was no judgment either for return or for damages, the complaint showing that the plaintiff in replevin was non-suited, Wright *v.* Card, 16 R. I. 715, 19 Atl. 709;—nor that the goods were surrendered by the plaintiff in the replevin, after the period for the satisfaction of the judgment according to a stipulation, had expired, Nimocks *v.* Pope, 117 N. C. 316, 23 S. E. 269;—nor that a part only of the goods were returned, or that all the goods were returned in damaged condition, Yelton *v.* Slinkard, 85 Ind. 191;—nor that the original judgment was for costs merely and that judgment of *retorno* or for the value was entered *nunc pro tunc* years afterwards, Clark *v.* LeHess, 9 Colo. Ap. 453, 48 Pac. 818;—nor that the venue in the action of replevin was changed to another county, Schott

v. Youree, 142 Ills. 233, 31 N. E. 591;—nor that the things replevied were not personal goods, *Id.* Gilbert *v.* Buffalo Bill Co., 70 Ills. Ap. 326;—or were destroyed after they were replevied, *Id.*, even though without fault of the plaintiff in replevin, Scott *v.* Rogers, 56 Ills. Ap. 571; Suppiger *v.* Gruaz, 137 Ills. 216, 27 N. E. 22; Three States Co. *v.* Blanks, C. C. A., 133 Fed. 479, rejecting the authority of Bobo *v.* Patton, 6 Heisk. 192, 19 Am. Rep. 593.

The question is one of general law, the decision of the state court does not control the federal court, *Id.* Plaintiff in possession of lumber taken under the writ, loaded upon a barge, is bound to protect it; and if it is sunk by any casualty, to raise it; and if after such salvage he conveys it to another jurisdiction and causes it to be libelled and sold for the cost of the salvage the judgment of condemnation, and the proceedings under it, afford him no protection. *Id.*

Nor can it be asserted in defence that the goods were placed beyond the control of plaintiff in the replevin without his fault, Harrison *v.* Wilkin, 78 N. Y. 390;—nor that the claim of the creditor for whose use the suit is brought has been proved against the assignees in insolvency of the plaintiff in replevin, Schott *v.* Youree, *supra;*—nor that the claim of the officer under the bond was not presented against such assignee, *Id.;*—nor that the name of the principal in the bond was subscribed by an attorney without authority, Arthur *v.* Sherman, 11 Wash. 254, 39 Pac. 670;—nor that the goods were exempt by law to a debtor who was a stranger to the replevin, Capen *v.* Bartlett, 153 Mass. 346, 26 N. E. 873;—nor, where the replevin was brought for certain sash, removed from the building in which they had been placed, that the defendant in that action afterwards attempted to establish a mechanic's lien upon the building, McMeekin *v.* Worcester, 99 Ia. 243, 68 N. W. 680;—nor, where the plaintiff in replevin had obtained the goods by his writ and converted them, that the defendant, an officer who claimed them under a levy, had failed to take a judgment for the return, Keenan *v.* Washington Co., 8 Idaho, 383, 69 Pac. 112;—nor that the writ under which the defendant in the replevin had levied upon the goods, was void, Stevison *v.* Earnest, 80 Ills. 513; Waddell *v.* Bradway, 84 Ind. 537;—nor that the bond recites three plaintiffs in the action when in fact there was only one, and he alone executed it, there being nothing to show that the sureties executed it upon condition that the others named should unite; —nor that the bond was delivered in violation of an agreement between the principal and any other party to the bond, unknown to the party for whose benefit it was executed, Richardson *v.* Peoples National Bank, 57 O. St. 299, 48 N. E. 1100;—nor error in the judgment in replevin, *Id.;*— nor that the principal in the bond was a married woman and so disqualified to contract, Coverdale *v.* Alexander, 82 Ind. 503;—nor that one of the principals in the bond was both an infant and a married woman; plaintiff may take judgment against as many of the obligors as are legally liable, Alexander *v.* Lydick, 80 Mo. 341;—nor that the action of replevin was dismissed because the value of the goods exceeded the jurisdiction of the justice before whom the action was insti-

tuted, *Id.*;—nor that the value of the goods was not ascertained in the replevin suit, even though the statute require it, Yelton *v.* Slinkard, 85 Ind. 191;—nor can the sureties set up a mortgage upon the goods held by one of them, though the averment is that the plaintiff obtained the goods subject to the mortgage, Woods *v.* Kessler, 93 Ind. 356;—nor is a mortgage held by plaintiff in the replevin suit a defense, Smith *v.* Mosby, 98 Ind. 446;—nor an injunction which does not restrain the plaintiff in replevin from prosecuting his action, nor from returning the goods pursuant to the judgment against him, Holler *v.* Colson, 23 Ills. Ap. 324;—nor that the plaintiff in the action on the bond has no beneficial interest, Smith *v.* Hertz, 37 Ills. Ap. 36;—nor that there was no judgment of *retorno*. The plaintiff may in the action on the bond recover his costs in the replevin suit, Myers *v.* Dixon, 106 Ills. Ap. 322;—and as it seems, he may recover the value of the goods, Gardiner *v.* McDermott, 12 R. I. 206; Pierce *v.* King, 14 R. I. 611. Where there is judgment, both for the return of the goods and for the payment of damages and costs, it is no defence to an action on the bond, that only one alternative has been performed, Douglas *v.* Galwey, 76 Conn. 683, 58 Atl. 2; Humphrey *v.* Taggart, 38 Ills. 228. And it is no defense that the bond was not entered into before the same magistrate who signed the writ, Douglass *v.* Unmack, 77 Conn. 181, 58 Atl. 710;—nor that there were formal defects in the judgment in replevin, Christiansen *v.* Mendham, 45 Ap. Div. 554, 61 N. Y. Sup. 326;—nor that the bond was given voluntarily after the institution of the replevin, and without any order of the court, Treman *v.* Morris, 9 Ills. Ap. 237;—nor are defects in the bond which the defendant in replevin has waived, a defense to an action thereon, Tuck *v.* Moses, 54 Me. 115;—nor is the giving of time by defendant to plaintiff in the replevin, Moore v. Bowmaker, 6 Taunt. 379;—nor an order made in the action of replevin, which was beyond the power of the court, Alderman *v.* Roesel, 52 S. C. 162, 29 S. E. 385;—nor that the bond was prepared for execution by other sureties whose names were not affixed, McLeod Co. *v.* Craig, Tex. Civ. Ap. 43 S. W. 934;—nor is an adjudication in another suit that the replevin bond was not a compliance with the statute, no breach of the bond having then occurred, Colorado Bank *v.* Lester, 73 Tex. 542;—nor is the failure of the sureties to acknowledge the bond or justify, as required by statute, Wheeler *v.* Paterson, 64 Minn. 231, 66 N. W. 964;—nor that the court by whose process the plaintiff in replevin obtained possession of the goods was without jurisdiction, McDermott *v.* Isbell, 4 Calif. 113; but a bond conditioned to perform the judgment of a court having no jurisdiction, is void, and no liability arises upon it even though the principal by means of the bond caused the litigation to be removed into such court, Mittnacht *v.* Kellerman, 105 N. Y. 461, 12 N. E. 28. In some courts it is held that if the action of replevin be dismissed for want of jurisdiction a judgment of *retorno* is void, and disobedience of it is not a breach of the bond, Elder *v.* Greene, 34 S. C. 154, 13 S. E. 323. It is no plea that the plaintiff in replevin was in fact the owner of the goods, *Id.*;—nor that the principal obligor in the bond had surrendered the goods

to a stranger in pursuance of an order made by the court in a cause to which the obligee in the bond was not a party, Levy *v.* Lee, 13 Tex. Civ. Ap. 510, 36 S. W. 309;—nor that the sheriff did not accept the bond, Jones *v.* Findley, 84 Ga. 52, 10 S. E. 541;—or did not approve it, Hartlep *v.* Cole, 120 Ind. 247, 22 N. E. 130; Parker *v.* Young, 188 Mass. 600, 75 N. E. 98;—nor that the goods were not delivered to the principal in the bond, where the surety knew that they had already been delivered to another, upon a bond upon which also he was surety, *Id.*;—nor that the verdict in the replevin was given by consent, where it accords with the substantial truth of the matter, Jones *v.* Findley *supra*;—nor that there were defects in the writ in the replevin suit, Goodell *v.* Bates, 14 R. I. 65;—nor can the surety object that the defendant omitted to give notice to him before proceeding to judgment on the bond; by execution of the bond he becomes party to the action and is bound by whatever is lawfully done therein, Glenn *v.* Porter, 68 Ark. 320, 57 S. W. 1109, Richardson *v.* Peoples Bank, 57 O. St. 299, 48 N. E. 1100;—nor is it a defense that the defendant in the replevin has taken execution upon the judgment given therein in his favor and is prosecuting said execution, Hartlep *v.* Cole, *supra*;—nor that there was no judgment for return and no assessment of damages in the replevin, where this was prevented by the plaintiff in that action procuring a change of venue illegally, Morrison *v.* Yancey, 23 Mo. Ap. 670;—nor that the name of the surety is not inserted in the body of the bond, Affeld *v.* The People, 12 Ills. Ap. 502;—nor that there is a misnomer of one of the parties, *Id.* Hibbard *v.* McKindley, 28 Ills. 240;—nor that the order for the delivery was signed by the plaintiff in the replevin instead of the justice before whom the proceedings were had, Carlon *v.* Dixon, 12 Ore. 144, 6 Pac. 500;—nor is the bankruptcy of the principal in the bond a defense to the surety, Robinson *v.* Soule, 56 Miss. 549;—nor is the fact that the bond is not in the penalty required by the statute, Trueblood *v.* Knox, 73 Ind. 310, Carver *v.* Carver, 77 Ind. 498;—nor that a third person intervened in the replevin suit, claiming the goods as against both the original parties, Katz *v.* American Co., 86 Minn. 168, 90 N. W. 376;—nor that the defendant in replevin forcibly recaptured the goods from the plaintiff, where in the action of replevin judgment was given for return, Story *v.* O'Dea, 23 Ind. 326, though it seems it may be shown in mitigation of damages, *Id.* And it is no defense to an action on the bond that the writ of replevin was not executed by the sheriff to whom the bond was made payable, but by his successor in office, Petrie *v.* Fisher, 43 Ills. 442;—nor can the defendants in an action on the bond contradict the recitations thereof, Central Bank *v.* Breckheisen, 65 Kans. 807, 70 Pac. 895. The sureties are liable, although the suit is dismissed for want of prosecution, or abates by the death of the plaintiff and is not revived, McCormick Co. *v.* Fisher, 63 Kans. 199, 65 Pac. 223;—or abates for any other cause, Rogers *v.* United States Co., 84 N. Y. Sup. 203; Verra *v.* Constantino, 84 N. Y. Sup. 222.

It is not necessary to sustain an action on the bond that there should have been any adjudication of the rights of the party in the replevin, Manning *v.* Manning, 26 Kans. 98. The obligees are estopped to say that

one of the defendants in the replevin had no interest in the goods, Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987.

But it may be shown that the plaintiff delivered the goods to the administrator of a decedent for whom the defendant was agent and to whom the defendant would have been under duty to deliver them, Simmons *v.* Robinson, 101 Mich. 240, 59 N. W. 623; or that the bond was superseded by another bond, Busch *v.* Fisher, 73 Mich. 370, 41 N. W. 325;—or that a different judgment was given in the replevin than that required by law, Lee *v.* Hastings, 13 Neb. 508, 14 N. W. 476; New England Co. *v.* Bryant, 64 Minn. 256, 66 N. W. 974; distinguishing Robertson *v.* Davidson, 14 Minn. 554; Clary *v.* Rolland, 24 Calif. 147. The sureties contract in contemplation of a judgment which may be satisfied by a return of the goods, and if the judgment is absolute for the value without any alternative they are not bound, Field *v.* Lumbard, 53 Neb. 397, 73 N. W. 703. If there is no judgment for return the surety cannot be made liable for a failure to return, Thomas *v.* Irwin, 90 Ind. 557, citing Clary *v.* Rolland, 24 Calif. 147, Mitchum *v.* Stanton, 49 Calif. 303, Ladd *v.* Prentice, 14 Conn. 109; Clark *v.* Norton, 6 Minn. 412; Gallarati *v.* Orser, 27 N. Y. 324; Cooper *v.* Brown, 7 Dana, 333; Ashley *v.* Peterson, 25 Wis. 621; Keno *v.* Woodyatt, 81 Ills. Ap. 553. And where there is no judgment for return the sureties are not responsible for the value of the goods, Foster *v.* Bringham, 99 Ind. 505; Myers *v.* Dixon, 106 Ills. Ap. 322; but only for costs, Hovey *v.* Coy, 17 Me. 266; Colorado Springs Co. *v.* Hopkins, 5 Colo. 206;—it is a defense that the goods were actually taken by the officer on the writ of *retorno*, although in damaged condition, Douglas *v.* Douglas, 21 Wall. (88 U. S.) 98, 22 L. Ed. 479. The sureties are not liable for the value of the goods unless there was a judgment of return, Citizens Bank *v.* Morse, 60 Kans. 526, 57 Pac. 115, citing Thomas *v.* Irwin, 90 Ind. 557, distinguishing Marix *v.* Franke, 9 Kans. 132, and rejecting what is said in Cobbey Rep., Sec. 1159. But if return was awarded it is not material that there was no trial in the action of replevin, plaintiff having dismissed his action, McKey *v.* Laufiin, 48 Kans. 581, 30 Pac. 16;—and where the judgment in replevin merely determined the right of possession, it may be shown that the property replevied was in fact the property of the plaintiff in that suit, and that under a change of circumstances he is entitled to retain it, Pearl *v.* Garlock, 61 Mich. 419, 28 N. W. 155. Sureties are not bound by judgment of return where the record shows that the goods were never taken on the writ of replevin, Gallup *v.* Wortman, 11 Colo, Ap. 308, 53 Pac. 247;—nor where the plaintiff in replevin obtained the goods, not under the writ but under a final judgment in his favor in the action of replevin, Rinear *v.* Skinner, 20 Wash. 541, 56 Pac. 24. And where the statute provides that in an action on the bond the defendants may plead that the merits of the case were not determined in the replevin, and that the goods were the property of the plaintiff in that suit, this defense avails, although the failure to investigate the merits was due to a defect of jurisdiction; and the goods need not be returned to entitle the parties

to interpose this plea, O'Donnell *v.* Colby, 153 Ills. 324, 38 N. E. 1065. The statute in question does not allow a plea of title in a stranger, Holler *v.* Colson, 23 Ills. Ap. 324. If the plaintiff's suit is discontinued he loses all right to contest the claim of the defendant to the goods, except that saved to him by the statute, Stevison *v.* Earnest, 80 Ills. 513. The defendants in the action on the bond cannot avail themselves of the statute, in mere mitigation of damages, without plea, Magerstadt *v.* Harder, 95 Ills. Ap. 270, S. C. 199 Ills. 271, 65 N. E. 225. The action on the bond, it is said, is a mere continuation of the replevin, Gilbert *v.* Sprague, 196 Ills. 444, 63 N. E. 993.

It is a good defense, so far as the value of the goods is concerned, that the goods were returned within a reasonable time and in the same condition as when taken, June *v.* Payne, 107 Ind. 308, 7 N. E. 370, 8 N. E. 556. The sureties may show, notwithstanding the return of the sheriff, that the instrument which they executed was not a replevin bond, but a forthcoming bond, Philman *v.* Marshal, 103 Ga. 82, 29 S. E. 598;—or that the defendant in the replevin suit has been paid for the property by the party from whom he purchased it, who was substituted as defendant in the replevin, Vinton *v.* Mansfield, 48 Conn. 474;—or that the action of replevin was discontinued by an agreement between plaintiff and defendant adjusting all differences, Gerard *v.* Dill, 96 Ind. 101;—or that the action of replevin is still pending upon an appeal from the judgment of the court of first instance, Boughton *v.* Omaha Co. 73 Mo. Ap. 597, Clemmons *v.* Gordon, 37 Misc. 835, 76 N. Y. Supp. 999;—or that the bond was never accepted, nor any replevy of the goods made, McTeer *v.* Briscoe, Tenn., 61 S. W. 564;—or that the record in the action of the replevin shows that the goods exceeded in value the jurisdiction of the justice by whom the bond was taken, Robinson *v.* Bonjour, 16 Colo. Ap. 458, 66 Pac. 451; Rosen *v.* Fischel, 44 Conn. 371;—or that the plaintiff in replevin never obtained the goods on the writ, Reno *v.* Woodyatt, 81 Ills. Ap. 553; Knott *v.* Sherman, 7 S. D. 522, 64 N. W. 542, though the allegation that the replevin was discontinued before the delivery of the chattels to the plaintiff, and that plaintiff still retains possession of the chattels, whether under the writ or otherwise not appearing, will not suffice, Pettit *v.* Allen, 64 App. Div. 579, 72 N. Y. Sup. 287; or that the plaintiff accepted other goods than those replevied in satisfaction of the judgment returned;—If accepted, in part satisfaction only, the sureties are released *pro tanto*, Union Stove Works *v.* Breidenstein, 50 Kans. 53, 31 Pac. 703;—or if a substantial portion of the goods are tendered in the same condition in which they were taken, the sureties are discharged *pro tanto*, Harts *v.* Wendell, 26 Ills. Ap. 274. But the machinery of a factory is to be considered as a whole and an offer to return a portion of it is properly rejected in the action on the bond, Stevens *v.* Tuite, 104 Mass. 328.

And the sureties may show that the goods, after being replevied, were taken under process of law, and held or sold, Caldwell *v.* Gans, 1 Mont. 570;—or that the plaintiff in replevin was in truth the owner, where the judgment of return was given upon mere abatement of the writ,

or discontinuance of the action; the judgment of return in such case is no adjudication of the title, Fielding *v.* Silverstein, 70 Conn. 605, 40 Atl. 454;—or that after the original action was dismissed the defendant therein brought replevin against the plaintiff therein and recovered the same goods, with damages for their detention, Boyer *v.* Fowler, 1 Wash. T., N. S. 101. And the defendants in the action on the bond may show that the return of the goods was prevented by the action of the defendant in the replevin in levying an execution thereon, Demers *v.* Clemens, 2 Mont. 385;—or that the goods were returned or tendered, Parker *v.* Oxendine, 85 Mo. Ap. 212. And the defendant may show that after replevy of the goods they were taken from the officer by superior right, Knott *v.* Sherman, 7 S. D. 522, 64 N. W. 542. Where the statute allows the defendants to show in mitigation of damages, in the action on the bond, that the obligee had only a special interest, and that the defendants or either of them had an interest in the same goods, in an action by an officer who held under several levies, the defendants may show that one of them is the owner of one of the executions, and such defendant may have an allowance for the amount of that execution, Henry *v.* Ferguson, 55 Mich. 399, 21 N. W. 381;—but, under the same statute, defendants are not allowed for the value of goods in which they show no interest, even although not the property of the defendant in the writ under which the levy was made, *Id.* Where the statute allows the successful defendant in replevin to waive return and take judgment for the value, all questions as to the damages must be determined in the replevin, and cannot be reopened in the action on the bond, Simmons *v.* Robinson, 101 Mich. 240, 59 N. W. 623. Return of the goods and payment of the damages and costs subsequent to the action on the bond, goes only in mitigation of damages, the plaintiff still recovers nominal damages, Douglas *v.* Galwey, 76 Conn. 683, 58 Atl. 2. The surety in the replevin bond is bound by a valid judgment against his principal, Christiansen *v.* Mendham, 45 Ap. Div. 554, 61 N. Y. Sup. 326. Error in the recitations of the bond may be cured by averment and proof in the action thereon, Hotz *v.* Bollman, 47 Ills. Ap. 378. The judgment in one action of replevin cannot be made the basis of an action upon the bond given in another cause, Boyer *v.* Fowler, 1 Wash. T., N. S. 101. Matters litigated in the replevin cannot be re-examined in the suit on the bond, Colorado Springs Co. *v.* Hopkins, 5 Colo. 206, Smith *v.* Bowers, 89 N. W. 596; Palmer *v.* Emery, 91 Ills. Ap. 207; Seldner *v.* Smith, 40 Md. 602. The recitals of the bond conclude the obligors therein, Carver *v.* Carver, 77 Ind. 498. The condition of the bond for the payment of "such sums as may for any cause be recovered, etc.," entitles the obligee to recover of the sureties his costs and damages in the replevin, although there was no judgment for return, Katz *v.* American Co., 86 Minn. 168, 90 N. W. 376. The judgment in replevin is conclusive as to the value, Smith *v.* Mosby, 98 Ind. 446. Two actions of replevin are instituted at the same time by the same plaintiff against the same defendant, and bond in the same terms, and with the same surety given, in each; the defendant

in replevin may recover upon both bonds if he prove breach of both, though it is impossible to determine in which of the two actions either bond was given. McManus *v.* Donohoe, 175 Mass. 308, 56 N. E. 291. Where the condition of the bond was to pay all moneys "adjudged against plaintiffs," damages for the unlawful taking and detention cannot be recovered in an action on the bond, unless ascertained and judgment given therefor in the replevin, Daniels *v.* Mansbridge, Ind. T., 69 S. W. 815. It seems that in the action on the bond any indebtedness of the plaintiff to the principal defendant, not litigated and determined in the replevin, may be set off, Foster *v.* Napier, 74 Ala. 393; but where the bond is to two, a set-off of a demand against one of them cannot be pleaded, even with the averment that the other obligee has no interest, Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987. Where the judgment directs the delivery of the goods to an intervenor, or an assignee of the plaintiff, the bond is answerable for this judgment, Grubbs *v.* Stephenson, 117 N. C. 66, 23 S. E. 97.

The obligation of the surety is determined by the statute, and if by the statute the condition of his liability is that judgment shall be rendered against the principal, the fact that circumstances, accidental or otherwise, render a judgment impossible, cannot enlarge the liability; *e. g.*, where the justice before whom the writ was returnable did not attend on that day and the writ abated, Scott *v.* Scott, 50 Mich. 372, 15 N. W. 515. The common law cannot be invoked to enlarge the liability of the sureties, *Id.* Where, after judgment of discontinuance, the defendant not having demanded the return of the goods by his answer, an action is brought upon the replevin bond, the surety may plead as a partial defense that in the replevin the now plaintiff merely denied possession or detention of the goods and never demanded their return, Freeman *v.* United States Co., 43 Misc. 364, 87 N. Y. Sup. 493.

Equitable Defenses.—The action of replevin was dismissed and judgment for the value given against plaintiff and his surety; pending this motion plaintiff returned the goods to the officer by whom they were seized, and brought a second action of replevin for the same goods; these circumstances and the insolvency of the defendant were held no ground to restrain the execution of the judgment upon equitable petition, Block *v.* Tinsley, 95 Ga. 436, 22 S. E. 672. The securing of a judgment lien upon lands of the principal obligor will not be entertained as an equitable defense to an action on the bond, Bradley *v.* Reynolds, 61 Conn. 272, 23 Atl. 928. After judgment of discontinuance and for return of the goods or payment of the value, with costs, the surety in the replevin bond may, on motion seasonably made, be permitted to proceed with the prosecution of the replevin, for his own protection, and the judgment will be vacated so far as to admit such prosecution; otherwise it is ordered to stand, and in such case, a pending action on the bond will be stayed until the final trial and determination of the replevin, Hoffman *v.* Steinau, 34 Hun, 239. And the surety in the forthcoming bond is permitted to come in and defend the action, Boessneck *v.* Bab., 27 Misc. 379, 58 N. Y. Sup. 849. If the

goods were purchased by defendant in the replevin, of the plaintiff in the action, upon credit, and the price remains unpaid, the surety in the replevin bond may have the amount of this indebtedness set off against the value of the goods. The surety is subrogated to all the rights of his principal, Seldner *v.* Smith, 40 Md. 602;—the fact that the plaintiff in replevin did not unite in the bond does not change the rule, *Id.* The fact that the notes given for the price of the goods are not delivered up, at the trial of the action on the bond does not deprive the surety of his right to this deduction, where it appears that the notes have previously been tendered to the plaintiff in the action on the bond, and refused. In such case the sureties cannot be required to produce them nor indemnify the plaintiff against liability thereon, *Id.*

Where by express statute a remedy is afforded to the sureties, by which they may obtain exoneration from a judgment impeachable for fraud, or irregularity, and this remedy is lost by their laches, equity will not grant relief, McBrayer *v.* Jordan, Neb. 103 N. W. 50.

Evidence.—The defendants cannot show that the goods have less value than stated in the return of the writ of replevin, Washington Co. *v.* Webster, 125 U. S. 426, 31 L. Ed. 799; but the plaintiff may prove a greater value, *Id.* The sureties are bound by the adjudications necessarily made in the replevin, *Id.* The bond is evidence of the value of the goods, and sufficient if not contradicted, Wright *v.* Quirk, 105 Mass. 44; but it may be contradicted, *Id.* In an action on the bond the officers' return and appraisal are no evidence against the plaintiff who had no part in procuring them, Wright *v.* Quirk, *supra*, Leighton *v.* Brown, 98 Mass. 515. The original files in the replevin suit are admissible as evidence in the action on the bond, Keenan *v.* Washington Co., 8 Idaho, 383, 69 Pac. 112. The affidavit in replevin is *prima facie* evidence of the value of the goods, Farson *v.* Gilbert, 85 Ills. Ap. 364. Neither party is bound by the valuation made by the sheriff for the purpose of fixing the amount of the bond, Peacock *v.* Haney, 37 N. J. L. 179. The value of the goods shown on a particular day will be presumed to be the value at a later day in the absence of evidence to the contrary, Norwood *v.* Interstate Bank, Tex. Civ. Ap. 45 S. W. 927. The clerk's fee book containing the taxation of the costs is admissible, Langdoc *v.* Parkinson, 26 Ills. Ap. 137. The plaintiff has the burden of proving a breach of the bond, Gallup *v.* Wortman, 11 Colo. Ap. 308, 53 Pac. 247. A copy of the record of the court in which the cause was finally determined, after a change of venue, certified by a deputy of the clerk of that court, is evidence in the action on the bond, Schott *v.* Youree, 142 Ills. 233, 31 N. E. 591.

The sheriff's return upon the execution that the goods cannot be found, is conclusive, and justifies a suit on the bond. The return binds parties and privies, Irvin *v.* Smith, 66 Wis. 113, 27 N. W. 35, 28 *Id.* 351.

Measure of Damages.—The plaintiff recovers the full value though no breach is shown, but a failure to prosecute the replevin, Manning *v.* Manning, 26 Kans. 98, McVey *v.* Burns, 14 Kans. 291. The defendant prevailing in the replevin will, where the plaintiff is without right,

recover not merely the value of a special interest which he has, but the full value, holding the excess for the general owner, Atkins *v.* Moore, 82 Ills. 240. If the defendant in replevin is the sheriff and holds the goods under execution, and plaintiff in the replevin is the general owner, the sheriff in the action on the bond recovers the debt, if less than the value of the property; if the debt and costs exceed the value then the same as any other successful defendant; if the replevin is by a mere stranger the sheriff recovers the full value, holding the surplus over the debt and costs, if any, for the true owner, Treman *v.* Morris, 9 Ills. Ap. 237. If the amount of the execution lien is not shown it will be presumed to exceed the value of the goods, *Id.* The obligee in the bond recovers the full value, whether he has any beneficial interest or not, Smith *v.* Hertz, 37 Ills. Ap. 36, Wheat *v.* Bower, 42 Ills. Ap. 600. The plaintiff recovers the value of his interest in the goods, with interest from the time they were replevied, Gould *v.* Hayes, 71 Conn. 86, 40 Atl. 930. The bond is in effect a contract of indemnity, the obligee is to be placed, so far as money can do so, in the position he would have occupied if there had been no replevin, Bradley *v.* Reynolds, 61 Conn. 272, 23 Atl. 928. And the value is to be estimated as of the time when the goods were replevied, and damages for the detention are to be added, *Id.* The value is to be estimated as of the date of the approval of the bond with legal interest, McLeod Co. *v.* Craig, Tex. Civ. Ap., 43 S. W. 934; but in Meyers *v.* Bloon, 20 Tex. Civ. Ap. 554, 50 S. W. 217, it was held that the value of the goods at the date of the trial is the basis of the judgment, with such special damages as may be alleged and proved, Talcott *v.* Rose, Tex. Civ. Ap. 64 S. W. 1009. In Illinois the court rejected the rule which gives the highest market value of the goods between the taking or conversion, and the trial, Treman *v.* Morris, 9 Ills. Ap. 237, citing M. & T. Bank *v.* F. & M. Bank, 60 N. Y. 40, Douglas *v.* Kraft, 6 Calif. 562; the rule in Illinois is the value at the time of the taking or conversion, Treman *v.* Morris, 9 Ills Ap. 237, citing Sturges *v.* Keith, 57 Ills. 451; in Maine, the value at the time of the conversion, with interest, Washington Co. *v.* Webster, 62 Me. 341; in New Jersey the value at the time of the recovery; with interest, Caldwell *v.* West, 21 N. J. L. 411; in Minnesota the value at the time of the replevin, Berthold *v.* Fox, 13 Minn. 501; in Tennessee the value at the time of the replevin, with any appreciation, to the time of the trial, and with any depreciation not by natural causes, added as damages, Mayberry *v.* Cliffe, 7 Cold. 117, cited, in Treman *v.* Morris, *supra.* If the goods are valuable in use the defendant recovers damages in this respect, and he may have the damages assessed, either in the replevin or in the action on the bond, *Id.* But see *contra*, they must be assessed, in the action of replevin, Simmons *v.* Robinson, 101 Mich. 240, 59 N. W. 623. In Davis *v.* Fenner, 12 R. I. 21, it was held that where recovery has been had, in an action on the bond, of damages for the taking and detention of the goods, the plaintiff in that action will not be allowed to recover in a second action, the value of the use while the goods were in possession of the plaintiff in replevin,

even though he in fact used the property as his own. If the value of the use is allowed, interest is precluded; but interest is allowed where the property is not valuable in use, Treman *v.* Morris, *supra.* And where the property has increased in value between the time of the replevin and the judgment for return, the defendant should be awarded such increase in addition to interest, *Id.*

In Texas it is held that the time when the value of the goods should be assessed in the action on the bond, will vary with the circumstances of the case; it seems it should be made either as of the date of the replevy, or as of the date of the trial, McLeod Co. *v.* Craig, Tex. Civ. Ap., 43 S. W. 934. By statute in Texas the mortgageor replevying the mortgaged goods is not required to account for the fruits, hire, or revenue thereof, and the sureties are not bound therefor, even though the condition of the bond so provides, *Id.* If there be a judgment for the return of the goods and the plaintiff in the action on the bond assigns as a breach the non-return thereof, he recovers the value of the goods with interest, Pace *v.* Neal, 92 Ills. Ap. 416; and a judgment that the cause be dismissed "and that a writ of *retorno habendo* be and is hereby awarded" is sufficient to entitle the defendant to recover in the action on the bond the value of the goods replevied and not returned, Tanton *v.* Slyder, 93 Ills. Ap. 455. The sheriff suing on the bond should be allowed a sum which will enable him to pay all liens upon the goods replevied, which he would have been required to discharge if he had retained and sold the goods under his process, *Id.* The plaintiff recovers interest on the value of the goods, Schott *v.* Youree, 41 Ills. Ap. 476. The plaintiff in the action on the bond recovers only the damage which he has sustained by the taking of the goods, Seldner *v.* Smith, 40 Md. 602. Where the goods were purchased by defendant in replevin of the plaintiff in that action, and have not been paid for, the measure of damages in the action on the bond is the costs of the replevin suit and the profits which might have been made upon the sale of the goods if they had not been taken, *Id.* Generally, the measure of damages is the value of the goods, with interest from the date of the judgment for return, and the costs of the action of replevin, Peacock *v.* Haney, 37 N. J. L. 179. The complaint described twenty thousand feet of lumber "loaded on four cars at Huntsville depot"; held, that in the action on the bond that plaintiff might recover the value of the whole amount of lumber upon the four cars though greatly exceeding twenty thousand feet, Story *v.* O'Dea, 23 Ind. 326. In Harmon *v.* Collins, 2 Penn. Del. 36, 45 Atl. 541, the court, on the authority of McIlvaine *v.* Holland, 5 Harr. 226, held that the measure of damages is the value of the chattels at the time of taking under the writ of replevin. There can be no recovery in excess of the penalty of the bond, Kaufman *v.* Wessel, 14 Neb. 162, 15 N. W. 219; Kellar *v.* Carr, 119 Ind. 127, 21 N. E. 463; but if after breach the sureties refuse payment they may be made liable for the penalty of the bond with interest from the breach, Carlon *v.* Dixon, 14 Ore. 293, 12 Pac. 394; Leighton *v.* Brown, 98 Mass. 515; Brainard *v.* Jones, 18 N. Y. 35; Wyman *v.* Robin-

son, 73 Me. 384. If the condition of the bond be to return the goods in like good order and condition, etc., and part only of the goods are returned, and the residue are not returned, or not returned in the same good condition, the sureties are liable for the value at the time of the taking, of what are not returned, and for the depreciation in value of what are returned, Washington Co. *v.* Webster, 125 U. S. 426, 31 L. Ed. 799; Franks *v.* Matson, 211 Ills. 338, 71 N. E. 1011. The judgment in the replevin is conclusive in the action on the bond, both as to the value and the plaintiff's interest, Cantril *v.* Babcock, 11 Colo. 142, 17 Pac. 296, 18 *Id.* 342. But if the title to the goods was not involved in the issues in the replevin, any judgment in that action attempting to settle the title will be ignored by the courts whenever an attempt is made to take advantage of it, Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; see Gallup *v.* Wortman, 11 Colo. Ap. 308, 53 Pac. 247. Damages for the non-return of the goods cannot be recovered unless there was a judgment for return, Myers *v.* Dixon, 106 Ills. Ap. 322; the costs of the replevin may be recovered though the goods have been returned, Humphreys *v.* Taggart, 38 Ills. 229. Where in the replevin the defendant fails to demand the return of the goods, by his answer, the sureties in the bond cannot be made liable, their liability is to be determined according to the case as it stands and not as it might be made by a possible amendment, Bown *v.* Weppner, 62 Hun, 579, 17 N. Y. Sup. 193.

The value of the goods may be recovered, though there was no judgment of return, but only for discontinuance, Kentucky Co. *v.* Crabtree, Ky., 26 Ky. L. Rep., 80 S. W. 1161.

Costs and Disbursements.—The costs made by the defendant in the replevin are allowed him in the action on the bond, Kellar *v.* Carr, 119 Ind. 127, 21 N. E. 463; Carlon *v.* Dixon, 14 Ore. 293, 12 Pac. 394. The attorney's bill in the replevin is not allowed, Edwards *v.* Bricker, 66 Kans. 241, 71 Pac. 587; nor the expenses of the preparation and conduct of the defense; nor damages to defendant's business, *Id.* In Illinois the plaintiff recovers in the action on the bond his attorney's bill in the replevin suit as part of his damages, Pace *v.* Neal, 92 Ills. Ap. 416; —and costs of printing necessarily expended in resisting the replevin, Harts *v.* Wendell, 26 Ills. Ap. 275.

The expense of the maintenance of live-stock taken in execution and replevied, is to be allowed in an action on the bond, even though tendered while the animals were held under execution; the bailment being not then terminated the party had no right to tender the expense, Davis *v.* Crow, 7 Blf. 129. The replevin bond does not secure costs or attorney's fees, the condition being merely to prosecute to effect without delay, to make return if return shall be awarded, and to indemnify the officer, Reno *v.* Woodyatt, 81 Ills. Ap. 553; but where the bond was conditioned to pay "costs and damages," etc., the fees of counsel of defendant in the replevin were allowed in the action on the bond, Siegel *v.* Hanchett, 33 Ills. Ap. 634. Attorney's fees may be recovered though they have not yet been paid by the client, *Id.*; but in Indiana it was held that the provision of the statute that the defendant shall recover

"such sum as shall be just and equitable" and that the plaintiff if he shall recover "shall in like manner recover damages for the detention of the goods," does not authorize the allowance of the fees of counsel, either in the replevin or in the suit on the bond; nor compensation for the parties' attendance at court, Davis *v.* Crow, 7 Blf. 129. Even though the property has been returned to the defendant in replevin, in an action on the bond, he will be allowed his costs and his attorney's bill in the replevin, Gilbert *v.* Sprague, 196 Ills. 444, 63 N. E. 993, reversing S. C., 88 Ills. Ap. 508. In Mississippi the surety is liable for the costs of the replevin, though the bond makes no mention of costs, Sparks *v.* Hopsen, 83 Miss. 124, 35 So. 446. The provision of the code that the successful party "may have his *distringas* to compel delivery of the property, together with a *fi. fa.* for the damages and costs" supplements the provisions of the replevin bond and makes the sureties therein liable for costs, Phillips *v.* Tooper, 59 Miss. 17. The sureties are liable for all the costs of the suit on the bond which they defend, that is, from the time they are made parties, McLeod *v.* Craig, Tex. Civ. Ap., 43 S. W. 934. The cost of procuring the return of the goods may be recovered in the action on the bond, Langdoc *v.* Parkinson, 2 Ills. Ap. 136. And the costs recovered in the replevin may be recovered under the condition of the bond to prosecute with effect, *Id.* The costs on the writ of replevin, as well as all other costs in the replevin, are recovered, *Id.*

Judgment on the Bond.—In Illinois the judgment on the bond is for the penalty as a debt, to be satisfied on payment of the damages; but the omission of judgment for the debt is not a fatal error, Myers *v.* Dixon, 106 Ills. Ap. 322. The statute provided that the defendant in an attachment may replevy the property by giving bond "in double the amount of plaintiff's demands, or, at defendant's option, in double the value of the property, conditioned to pay the debt, interest and costs or the value of the property attached, with interest, as the case may be," and that the judgment upon the bond be "for the penalty of the bond to be satisfied by delivery of the property or its value or payment of the recovery as the case may be;" it was held that the statute provides for two distinct classes of bonds, and a bond conditioned to "pay the debt and costs if the court shall adjudge the same against them or either of them, or shall adjudge the property subject to the payment of the same, they shall either pay the debt, interest and costs or return the property," not being distinctly of either class provided for in the statute, must be construed as of the second class; that the proper judgment was for the penalty of the bond to be satisfied by delivery of the property or its value, Chattanoga Co. *v.* Evans, 66 Fed. 809. The judgment against the sureties in the replevin bond in sequestration proceedings must describe the goods and show the value of the separate articles, Herder *v.* Schwab Co., Tex. Civ. Ap., 37 S. W. 784; but not if the record shows that the goods have been disposed of, *Id.*

Summary Judgment.—Summary judgment may be entered against the sureties without notice to them, Glenn *v.* Porter, 68 Ark. 320, 57

S. W. 1109; but where a writ of sequestration under which the goods have been taken, is quashed, judgment may not at the same time be entered against the sureties in the replevin bond by which defendants replevied the goods; quashing the sequestration terminates the liability of the sureties in the replevin bond, Mitchell *v.* Bloom, 91 Tex. 634, 45 S. W. 558. Where the action of replevin is dismissed, the defendant may, under the statute of Georgia, take judgment against plaintiff and the sureties for the value of the goods; no verdict is necessary, the discontinuance alone amounts to a judgment of restitution, Thomas *v.* Price, 88 Ga. 533, 15 S. E. 11; Block *v.* Tinsley, 95 Ga. 436, 22 S. E. 672.

The statute providing that if the plaintiff prevails "final judgment shall be entered against all the obligees therein * * * for the value of the property replevied" judgment may be entered against the sureties without notice to them; and if the principal's insolvency is shown judgment may be entered against the surety alone, Cabell *v.* Floyd, 21 Tex. Civ. Ap. 135, 50 S. W. 478. Summary judgment cannot be entered against plaintiff and his sureties where the bond is not a statutory bond, Mariany *v.* Lemaire, Tex. Civ. Ap., 83 S. W. 215.

Mitigation of Damages.—Where the title was not litigated in the replevin it may be shown in mitigation of damages in the action on the bond that the plaintiff in replevin failed because his suit was prematurely brought; or because the parties to the action were tenants in common; or plaintiff in replevin tenant in common with a debtor whose interest the defendant as sheriff, had attached; or that the defendant in the replevin has only a special property as against the plaintiff; or any other fact which the defendant is not estopped to assert by the judgment in replevin, Leonard *v.* Whitney, 109 Mass. 265. Where the statute allows the defendant in an action on the bond to show in mitigation of damages the extent of plaintiff's interest, the sureties may in such action show that the plaintiff had no interest except under a levy, which, as an officer, he had made upon the goods, and that the demand for which the levy was made has been paid; or that the defendant in the suit in which the levy was made was adjudged a bankrupt within four months after the attachment; because by the bankruptcy the attachment was dissolved, the sheriff's property terminated and he lost nothing by non-return of the goods, Lindner *v.* Brock, 40 Mich. 618; but the statute relied upon in this case applies only where the obligee in the bond has taken judgment for return; it has no application where he has waived return and his damages have been assessed in the action in replevin, Ryan *v.* Akeley, 42 Mich. 516, 4 N. W. 207. In Indiana the court has no power after discontinuance by the plaintiff to award return of the goods, Wiseman *v.* Lynn, 39 Ind. 250; and a plea that the judgment of return was given upon voluntary discontinuance of the replevin is a bar to so much of the action on the bond as demands the value of the goods; and, where no damages are alleged for a failure to prosecute, a bar to the whole action, Hulman *v.* Benighof, 125 Ind. 481, 25 N. E. 549. The defendants may show that the principal in the bond held a valid subsisting mortgage upon the goods,

Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987;—even if the mortgage was executed by only one of the obligees in the bond, if the interest of the other was subject to the mortgage, *Id.* By statute in Michigan the sureties in the bond may show in reduction of the damages a right in themselves or either of them, in the property, Henry *v.* Ferguson, 55 Mich. 399, 21 N. W. 381;—but as to any part of the goods which, in the suit in replevin, were adjudged to be the general property of the plaintiff in that suit, with a special property in the defendant, it is not permitted to show that in fact they are the property of a stranger, *Id.* The defendants in the action on the bond may, where there was no judgment for return, show that the defendant in the replevin was an officer claiming only by virtue of a levy, and that the plaintiff in replevin was the real owner, Jackson *v.* Emmons, 59 Conn. 493, 22 Atl. 296. Where the judgment of return is given upon mere abatement of the writ the plaintiff in the replevin may in an action on the bond show his title in mitigation of damages, Bettinson *v.* Lowery, 86 Me. 218, 29 Atl. 1003, citing Buck *v.* Collins, 69 Me. 445. Where the defendant's possession of the goods was not disturbed in fact, and the goods being afterwards sold by the plaintiff, the defendant purchased most of them, and the amount of its purchase was returned to it, the recovery in the action on the bond was limited to the value of the goods sold to other parties, as of the date of that sale, with interest from that date, Pure Oil Co. *v.* Terry, 209 Pa. St. 403, 58 Atl. 814. Depreciation pending the replevin is not to be shown in mitigation of damages where due to neglect or improper usage; the sureties are chargeable with this, Bradley *v.* Reynolds, 61 Conn. 272, 23 Atl. 928. The statute allowing the plaintiff in replevin to plead to an action on the bond, his own title, and that the merits were not determined in the replevin, cannot be availed of, without plea, in mitigation of damages, Magerstadt *v.* Harder, 95 Ills. Ap. 303;—and the same statute making an exception of the case "where the plaintiff shall have voluntarily dismissed his suit, or submitted to a non-suit," it was held that if the plaintiff had submitted to a voluntary non-suit he should not be allowed to prove his title in mitigation of damages, Clark *v.* Howell, 3 Colo. 564;—and the plaintiff in the action on the bond recovers nominal damages though the defendants prevail on the statutory plea, Schweer *v.* Schwabacher, 17 Ills. Ap. 78. Goods taken under an attachment were replevied and the action failed; in an action by the attaching officer on the bond, the defendant attempted to recoup damages for a false return in the attachment; it was held properly excluded, Wright *v.* Quirk, 105 Mass. 44.

Defendants in the action on the replevin bond may reduce the plaintiff's recovery to nominal damages by a proof of title in the plaintiff in replevin and his right to possession, Miller v. Cheney, 84 Ind. 466. In Connecticut, in an action on the replevin bond, where the replevin was discontinued, the defendants were allowed to show in mitigation of damages that the plaintiff in the action on the bond, defendant in the replevin, held the goods as an officer under execution against a third person, and that this person had no title to the goods, Jackson *v.*

Emmons, 59 Conn. 493, 22 Atl. 296. The sheriff under an attachment against William Coyne, seized his interest in a certain partnership; Coyne's wife and two others, claiming to be this company, replevied the goods; it was determined in the replevin that Coyne was the partner, and not his wife, and there was a judgment for return; held in an action on the bond that the defendants might show in mitigation of damages what the interest of Coyne in the firm was, Hannon *v.* O'Dell, 71 Conn. 698, 43 Atl. 147. Where the right of property was determined in the replevin it cannot be brought in question in the action upon the bond, even in mitigation of damages, Buck *v.* Collins, 69 Me. 445; but the defendants may show anything not necessarily inconsistent with the judgment in replevin which could not have been presented therein as a valid reason for denying the order of return, and which tends to show that full indemnity will be given by the payment of a less sum than the value of the goods and interest, *Id.*; but if the pleadings in the replevin are such that, if the testimony proposed in mitigation of damages in the action on the bond had been presented in the replevin, no order of return would have been made, the judgment of *retorno* must be regarded as conclusive and the evidence inadmissible, *Id.* Collins brought replevin against Buck, and Buck justified as the servant of Edson and prevailed. In an action on the bond evidence that with the privity and consent of Buck the goods were taken in a second replevin at the suit of Edson *v.* Collins, while the first replevin was pending, was held inadmissible, because such evidence would have defeated the judgment of *retorno*, *Id.* Material was delivered by a miller to a cooper to be manufactured into barrels; when a portion of it had been manufactured the miller demanded the residue; held that the cooper was entitled to a lien upon it for any balance due him for work already performed and for any damages which he might sustain by being prevented from completing his contract, and that these allowances must be made in an action on the replevin bond, McCrory *v.* Hamilton, 39 Ills. Ap. 490. Where in replevin, by one claiming under a sale from L. against an officer claiming under a levy upon execution against L, the defendant prevails, and it appears that pending the action the goods have been taken from plaintiff by another officer, under execution in favor of the same creditor, the defendant should recover costs only. Culver *v.* Randle, 45 Ore. 491, 78 Pac. 394.

The breach assigned being upon the condition for return of the goods if the action should abate or be discontinued, property in the plaintiff in replevin goes in mitigation of damages only; in New York it must be pleaded as a partial defense, Freeman *v.* United States Co., 87 N. Y. Sup. 493.

The value of the goods may be ascertained in an action on the bond; it is not essential that there should be an assessment of damages in the action of replevin, Pittsburgh Bank *v.* Hall, 107 Pa. St. 583.

The condition of the bond being to "prosecute the said replevin to final judgment and for such damages and costs as said defendant shall recover, and restore the same goods and chattels, etc., in case such

shall be the final judgment,"—it was held proper to assess in the replevin suit the damages sustained by the detention, and in the suit on the bond the value of the goods. It seems the plaintiff in the action on the bond may in that action recover the value of the goods if not returned, and damages for the detention thereof, and although interest upon the value of the goods has been allowed in the replevin, interest from the date of the verdict in that action may be allowed in the action on the bond, Washington Co. *v.* Webster, 125 U. S. 426, 31 L. Ed. 799. Damages occasioned by the detention of the property, *e. g.*, the machinery of a factory, from interruption in business, and the expense, delay and annoyance of replacement, must be estimated in the replevin and cannot be assessed in the action on the bond, Stevens *v.* Tuite, 104 Mass. 328.

Where, by his answer in the replevin, the defendant makes no claim for damages, the question is not in issue, and no damages can be awarded to him; and an allowance of damages and judgment thereon in his favor, does not preclude him from claiming additional damages in an action on the bond, Gould *v.* Hayes, 71 Conn. 86, 40 Atl. 930. And where the bond is conditioned to pay "all damages sustained, etc.", the defendant prevailing need not have his damages assessed in the replevin, but may demand them in an action on the bond, *Id.* Where the defendant in the replevin does not claim damages in that action he may have them assessed in the action on the bond, Quinnipiac Co. *v.* Hackbarth, 74 Conn. 392, 50 Atl. 1023. Substantial damages may be recovered for the period which a license to sell liquors, the subject of the replevin, had to run after the date of the judgment of *retorno*, *Id.* Exemplary damages are not recoverable on an action on the bond, but only the actual damages sustained by the wrongful suing out of the writ, Dalby *v.* Campbell, 26 Ills. Ap. 502.

CHAPTER XV.

THE WRIT.

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§ 463. **To whom addressed, and the mandate.** The writ is usually addressed to the sheriff; but if he is a party, it may be addressed to the coroner. When the writ was addressed to the sheriff, and was served by the coroner, the plaintiff was permitted to amend it by inserting the word coroner in the directory part.[1] In its usual form it contains a mandate to the officer to take and deliver the property described; though by statute, in many of the States, it may issue without the order for delivery. The mandate in the writ for the delivery of the goods is usually upon condition that the plaintiff shall first execute the bond, and upon the neglect of the plaintiff to do so, the sheriff cannot take the property. In other States the clerk takes the bond before

[1] Simcoke *v.* Frederick, 1 Ind. 54.

issuing the writ, and in such case the sheriff has no concern but to execute it. These matters depend entirely upon the local statutes.

§ 464. **Must contain summons to the defendant.** It must contain a summons to the defendant to appear in court and answer the plaintiff's claim; and the sheriff should serve it by summoning him; but if the defendant appears, an omission of the sheriff to serve it is waived.[2] It need not show that the affidavit required by the statute has been made,[3] nor that the bond has been filed; nor is it essential that it state the value of the property, though this is usual and proper. It may be issued for any property within the jurisdiction of the court at the time it is issued, and the subsequent removal of the goods to defeat the writ will not deprive the court of jurisdiction, if they are pursued and taken by the sheriff.[4]

§ 465. **Writ must describe the particular property.** The writ must describe the property to be seized and delivered, in such a manner that the sheriff, from the description, or from the description aided by inquiries, can find and deliver it. If, for any defect or uncertainty in the description, it is doubtful what property is to be taken, the sheriff may refuse to serve it;[5] and if the writ omit to describe the goods to be taken, it will be quashed, even after appearance;[6] but this is not necessary, unless the writ commands a delivery of the goods. When it is simply a summons, the articles need not be described.[7] The description ought to be as full and particular as the circumstances of the case will warrant, so that if the officer can take part, but cannot find, or for any reason cannot take the remainder, he may do so, and make return of his doing under the writ.[8]

§ 466. **Alias writ.** Where the property has been seized and delivered upon the command of the original writ, but the defendant has not been served or where the defendant was im-

[2] Swann *v.* Shemwell, 2 Har. & G. (Md.) 283.

[3] Magee *v.* Siggerson, 4 Blackf. 70.

[4] Craft *v.* Franks, 34 Iowa, 504.

[5] Smith *v.* McLean, 24 Iowa, 324; Snedeker *v.* Quick, 6 Halst. (N. J.) 179; Magee *v.* Siggerson, 4 Blackf. 70.

[6] Snedeker *v.* Quick, 6 Halst. (N. J.) 176; DeWitt *v.* Morris, 13 Wend. 495.

[7] Finehout *v.* Crain, 4 Hill, 537.

[8] Welch *v.* Smith, 45 Cal. 230. See *ante*, § 169, *et seq.*

properly served, an alias writ must issue.[9] So, when part or all of the goods embraced in the first writ were not obtained by the officer, an alias writ was allowed to issue for the purpose of obtaining them;[10] and in such case an alias writ may issue to any other county than that in which the suit was brought and defendant found, the same as in other cases where such writs are proper.[11] Any other rule would compel the plaintiff to dismiss his suit, and perhaps do great injustice.[12] The same practice has been recognized in New York[13] and in Florida.[14]

§ 467. **Writ lies for property in the jurisdiction of the court when it issued.** It seems that the writ will lie for property which was within the jurisdiction of the court when it was issued, and that the sheriff may pursue and take it in another county;[15] but upon this point the statutes of the different States, as to jurisdiction of the sheriff, may be at variance, and should be the guide to the officer.

§ 468. **The return of the writ.** The officer's return must show how he has executed the writ, set out, so that the court can see what has been done, and whether the mandate has been complied with. It ought to show, when such is the condition of the writ, that the sheriff has taken bond, and who the securities are.[16]

§ 469. **At common law, plaintiff took the property as his own, and might so dispose of it.** By the common law, the plaintiff took the goods delivered to him on his writ of replevin as his own property. He might sell or otherwise dispose of them pending the suit, as he saw fit. In the theory of that law the property was his, and had been distrained by the defendant. The distrainor set up no claim to the ownership of the property. All he claimed was a right to seize and hold it as a pledge or security for rent, which he insisted was due him.[17] Upon replevin, in such

[9] O'Brien *v.* Haynes, 61 Ill. 495.

[10] Maxon *v.* Perrott, 17 Mich. 335.

[11] Hiles *v.* McFarlane, 4 Chand. (Wis.) 89.

[12] O'Brien *v.* Haynes, 61 Ill. 495.

[13] *Ex parte* Johnson, 7 Cow. 424; Snow *v.* Roy, 22 Wend. 602.

[14] Branch *v.* Branch, 6 Fla. 315.

[15] Craft *v.* Franks, 34 Iowa, 504.

[16] Hays *v.* Bouthaller, 1 Mo. 345; Pool *v.* Loomis, 5 Ark. 110; Mattingly *v.* Crowley, 42 Ill. 306; Miller *v.* Moses, 56 Me. 134; Nashville, etc., *v.* Alexander, 10 Humph. 378.

[17] Gilbert on Replevin, 55.

cases, the plaintiff, by his writ, took his former title to the property, and gave security that he would show the distress to have been wrongful. The lien of the distrainor was gone, and its place supplied by the bond.[18]

§ 470. **Property now regarded as in the custody of the law.** In modern practice, cases of distress comprise but a small portion of the cases of replevin, and by the theory of the law in other cases, the ownership is determined by the result of the suit. Pending this, the property is regarded as in the custody of the law, though in the plaintiff's possession.[19] The writ does not confer title to the property;[20] but it seems, in many cases, that the plaintiff acquires such an interest in the property delivered to him on the writ as to entitle him to sell or dispose of it, the bond being regarded as sufficient to indemnify the other party for the value of the property in case latter succeeds.[21] To describe the rights of a plaintiff to property delivered to him pending the suit is one of the most obscure and difficult problems. No general statement can be made without involving numerous exceptions.[22]

§ 471. **Injuries to goods while in plaintiff's possession.** If the goods are injured or decay while in plaintiff's possession, it

[18] 3 Bla. Com. 146; Lowry *v. Hall*, 2 W. & S. (Pa.) 134; Speer *v.* Skinner, 35 Ill. 282; Woglam *v.* Cowperthwaite, 2 Dall. (Pa.) 68; Frey *v.* Leeper, 2 Dall. 131; Bruner *v.* Dyball, 42 Ill. 35.

[19] Bruner *v.* Dyball, 42 Ill. 34; Hardy *v.* Keeler, 56 Ill. 152; Stevens *v.* Tuite, 104 Mass. 332; Miller *v.* White, 14 Fla. 435; Milliken *v.* Selye, 6 Hill. 623. Compare Buckley *v.* Buckley, 9 Nev. 379.

[20] Lovett *v.* Burkhardt, 44 Pa. St. 174; Burkle *v.* Luce, 6 Hill, 558.

[21] Cary *v.* Hewitt, 26 Mich. 229.

[22] See *post*, § 479, *et seq.* [In Wall *v.* DeMitkiewicz, 9 Ap. D. C. 109, it was held that a sale of the goods by the plaintiff does not abate the action; such sale confers only such right as the plaintiff has, Caldwell *v.* Gans, 1 Mont. 570. After delivery of the property to either plaintiff or defendant it is no longer in the custody of the law; the bond takes the place of the goods and affords the exclusive remedy; the party in possession may dispose of them as his own and as if no suit were pending; he can make no claim against the other party for depreciation subsequent to that date, Katz *v.* Hlavac, 88 Minn. 56, 92 N. W. 506. But in Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409, it was held that one who has obtained possession of the goods by replevin and who, pending the suit, disposes of them, is liable to the other party as for a conversion, and those who assist him are also liable. The plaintiff may show a transfer of his right by the defendant pending the replevin, and thus defeat judgment for *retorno*, Campbell *v.* Quinton, 4 Kans. Ap. 317, 45 Pac. 914.]

must be at his risk; and in the case of fruit, fresh meat, vegetables, or perishable goods which are valuable only for immediate use or consumption, it would entirely defeat the object and purposes of the action if the plaintiff was obliged to keep them, (when from their nature they must perish,) and thus be responsible for their full value;[23] he cannot be allowed to return them in a damaged condition, without being liable for the damage.[24] When the property is valuable only for use, as, for example, a sewing machine or horse, the plaintiff is liable for the value of the use while it is in his possession,[25] and has an undoubted right to put the property to use without being liable for depreciation resulting from the use. So where the property was valuable only for consumption, the plaintiff in the nature of things must put them to use or bear the loss which their decay or depreciation occasions.

§ 472. **Rights of the plaintiff to property taken on the writ.** If the plaintiff is the general owner of property seized on execution or attachment, he may, after the execution of a bond and the delivery of the property to him, sell it and confer upon the purchaser a good title; if he was not such owner, he could not.[26] The restoration of the plaintiff's property to his possession invests him with full power to dispose of it. The execution of the bond, and delivery of the property under the writ, releases it from the lien of the execution, at least so far as that it may be sold and a good title conveyed to a *bona fide* purchaser.[27]

§ 473. **The same.** When the title and the possession both unite in one person, the fact that he acquired that possession by virtue of a writ of replevin will not debar him of the right to sell and convey a good title.[28] So, where goods are distrained, the

[23] Gordon *v.* Jenney, 16 Mass. 469; Lockwood *v.* Perry, 9 Met. 444; Mennie *v.* Blake, 6 E. & B. (88 E. C. L.) 843; Stevens *v.* Tuite, 104 Mass. 332.

[24] Allen *v.* Fox, 51 N. Y. 562.

[25] See Sec. 579, *et seq.*

[26] Bradyll *v.* Ball, 1 Bro. Ch. C. 428; Gimble *v.* Ackley, 12 Iowa, 31.

[27] Gimble *v.* Ackley, 12 Iowa, 31; Woglan *v.* Cowperthwaite, 2 Dall. (Pa.) 68; Frey *v.* Leeper, 2 Dall. (Pa.) 131; Burkle *v.* Luce, 6 Hill, 558; Jones *v.* Peasley, 3 Greene, (Iowa,) 52; Smith *v.* McGregor, 10 Ohio St. 467. *Contra*, Lockwood *v.* Perry, 9 Met. (Mass.) 440; Burkle *v.* Luce, 1 Comst. (N. Y.) 163; Hunt *v.* Robinson, 11 Cal. 262.

[28] Donohoe *v.* McAleer, 37 Mo. 312; Burkle *v.* Luce, 1 Comst. (N. Y.) 163.

tenant may pay the rent and take his goods, discharged from the landlord's claim, or he may give bond and replevy the goods under a proper offer to show that the distress was wrongful; in the latter case, the lien of the landlord is gone; he must look to the security.[29]

§ 474. **The same. Delivery on the writ does not confer title.** Delivery by virtue of the writ invests the plaintiff with the possession of the property, and pending the suit, the defendant, though he may be the owner, cannot disturb the plaintiff's right of possession. Such delivery, however, does not affect the question of ownership; it does not in any way tend to show title in the plaintiff; it is in fact but a temporary right which may terminate upon the discontinuance or abatement of the suit, or by judgment against the plaintiff.[30] So, where the plaintiff wrongfully sues out a writ of replevin and obtains possession of goods, and afterwards dismisses his suit, the defendant is not driven to a suit upon the bond, (unless it be in case of a distress,) but may sustain replevin for the property.[31] Where goods are replevied from the possession of an agent or bailee of the owner, the latter, if a stranger to the proceeding, may sustain replevin from the plaintiff in the first suit.[32]

§ 475. **The same. Where the action is for a distress.** By replevin of goods distrained the lien of the distrainor is suspended, but if a return be awarded, and upon the service of the writ of return they are found in the possession of the defendant, (the plaintiff in replevin,) they may be taken and returned to the defendant.[33]

§ 476. **The effect of the writ on the rights of the parties pending the suit.** Under the statutes in this country, generally the effect of the writ is not to divest the title or the lien of the defendant; this is affected only by the judgment of the court

[29] Bruner *v.* Dyball, 42 Ill. 35; Speer *v.* Skinner, 35 Ill. 282.

[30] Lovett *v.* Burkhardt, 44 Pa. St. 174; Speer *v.* Skinner, 35 Ill. 282; Brunner *v.* Dyball, 42 Ill. 34.

[31] Bruner *v.* Dyball, 42 Ill. 35.

[32] White *v.* Dolliver, 113 Mass. 402; Globe etc., *v.* Wright, 106 Mass. 207.

[33] Burkle *v.* Luce, 6 Hill, 559; Burkle *v.* Luce, 1 Comst. (1 N. Y.) 163 and 239; Bradyll *v.* Bal, Bro. Ch. Rep. 427; Woglam *v* Coperthwaite, 2 Dall. 68; Acker *v.* White, 25 Wend. 614; Frey *v.* Leeper, 2 Dall. 131; Anon. Dyer, 280*b*.

after a hearing. If the title could be divested by the execution of the replevin bond and delivery of the goods upon the writ, the primary object of the suit would be defeated—the unsuccessful party could always make his election to keep the goods or pay the value. This advantage was never intended by the statute to be given to a party clearly in the wrong. The effect of the replevin is simply to give the party the possession of the property pending the suit; the title is not changed. A sale made by the party so in possession, who afterwards turns out to have no title, cannot convey title to the purchaser against the real owner.[34] In California, it was said *in arg.* the real owner could in such case recover his property even from an innocent purchaser; that the property was in the custody of the law, and that all parties must take notice.[35] In the case of *Hagan* v. *Lucas*, 10 Peters, (U. S.) 400, Mr. Justice McLean said, on giving bond the property is placed in the possession of the claimant; his custody is the custody of the sheriff; the property is not withdrawn from the custody of the law. In the hands of a claimant under bonds to the sheriff for its delivery, it is as far from the reach of other process as it would have been in the hands of the officer.[36] When one replevied colts, and before the suit was determined sold them; afterwards the suit was decided against him and a return awarded, the defendant in the suit replevied them from the purchaser and was permitted to recover on his antecedent title.[37]

§ 477. **The same.** When the sheriff seizes property upon an execution or attachment, and it is replevied from him, and afterwards he levies on and takes possession of it by virtue of another execution or attachment, it is equivalent to a return of the goods, and operates as a revival of the lien of the first process; in other words, the lien or special property which the officer acquires by virtue of a levy of process and seizure of property, is not divested by a replevin of the property from him; he is so far regarded as the owner that the title which the first process conferred on him exists, notwithstanding the replevin. Should the property come again into his possession by the levy of another

[34] Lockwood v. Perry, 9 Met. 440.

[35] Hunt v. Robinson, 11 Cal. 262.

[36] Cited and followed in Rives v. Wilborne, 6 Ala. 46.

[37] Lockwood v. Perry, 9 Met. (Mass.) 440; White v. Dolliver, 113 Mass. 402.

execution or attachment, the lien of the first process revives, and the effect of this is to discharge the securities.[38]

§ 478. **The same. Illustrations of the rule.** Where an execution from the State Court was levied by the sheriff upon property which was afterwards claimed by a stranger to the writ, and he gave bond to try the title, (a statutory proceeding similar in principle to a suit in replevin,) and the goods, while so in the claimant's possession, were levied upon by an execution from the United States Court, the Supreme Court of the United States held that the property, though in the possession of the claimant, was in the custody of the State Court, and that the levy of the marshal was erroneous; that while the property was in the possession of the claimant who had given bond, his custody was the custody of the court where his claim was pending; that the marshal had no more right to levy upon it than if it had been in the actual possession of the sheriff on execution from the State Court.[39] A New York case held that where woods seized upon execution were replevied from the sheriff by a third person, that the lien of the sheriff was gone; or rather, that the plaintiff in replevin took all the property which the sheriff had by his *fi. fa.*, and that the property could not again be taken by the officer on an execution against the defendant in the first execution. But nothing in this case appears to conflict seriously with the doctrine in *Hunt* v. *Robinson*, or *Hagan* v. *Lucas*, *supra*, or the case of *Burkle* v. *Luce*, 1 Comst. (N. Y.) 163, which are authority for saying that the right acquired by the plaintiff in replevin is only a temporary right; that when that right has ceased the sheriff may retake the property and sell it, thus clearly recognizing the revival of the lien of the sheriff.[40] The doctrine in *Hagan* v. *Lucas*, *supra*, is clearly recognized in Alabama, where it is held that property taken upon a writ of replevin is in the custody of the law, and not subject to other process pending the suit.[41]

§ 479. **The same. Observations upon.** In attempting to

[38] Hunt *v.* Robinson, 11 Cal. 272. See and compare Goodheart *v.* Bowen, 2 Bradw. (Ill.) 578.

[39] Hagan *v.* Lucas, 10 Pet. (U. S.) 400. The principle is followed in Goodheart *v.* Bowen, 2 Bradw. (Ill.) 578. Acker *v.* White, 25 Wend. (N. Y.) 614.

[40] See M'Rae *v.* M'Lean, 3 Porter, (Ala.) 138; Evans *v.* King, 7 Mo. 411; Lockwood *v.* Perry, 9 Met. 444.

[41] Rives *v.* Wilborne, 6 Ala. 45.

draw a satisfactory conclusion from these cases the difficulty lies in the fact, that in the early cases the plaintiff in replevin was always regarded as the owner of the property. The writ did not lie to try title, but to enable a plaintiff whose goods had been wrongfully distrained to recover them. Of course, in all such cases, the owner then, as now, took his own property. The lien of the distrainer was gone.[42] The owner might sell and convey a good title as though they had never been taken from him. A large majority of the cases, however, now are brought, not for the purpose of recovering a pledge wrongfully distrained, but for the purpose of testing ownership; this is the principal, if not the only question in dispute; and it does not by any means follow that the plaintiff who acquires possession of goods by means of his writ of replevin has any title to the property,[43] and if he has no title he can convey none by sale. He is, however, invested with possession and the outward insignia of ownership, has given bond to his opponent, which in contemplation of law is sufficient to indemnify the latter against loss, whatever may be the result of the litigation, or whatever may become of the subject of the contest. The plaintiff is also under obligation to return the property if he fails in his suit, in as good order as when taken upon his writ, or to pay its value in case of failure to do so; with these responsibilities he has the right to use all reasonable means to protect himself from loss.[44]

§ 480. **The same.** It would, therefore, seem that in cases where the property is of a nature such as will be likely to perish or seriously diminish in value within the time which will probably be required for proper litigation, the plaintiff will be justified in selling, consuming or disposing of it. In case he does not do so the fact that the property has perished will not relieve him from his liability on the bond. So in cases where the property in dispute consists of merchandise valuable and useful only for purposes of sale, and is subject to constant fluctuations in value, or when it is valuable only for immediate consumption, the plaintiff will, without doubt, have the right to put it to the use for which it was properly and naturally adapted, even if it should involve

[42] Speer *v.* Skinner, 35 Ill. 290; Woglam *v.* Cowperthwaite, 2 Dall. 68; Acker *v.* White, 25 Wend. 614; Bradyll *v.* Ball, Bro. Ch. Ca. 427.

[43] Lovett *v.* Burkhardt, 44 Pa. St. 174.

[44] Gordon *v.* Jenney, 16 Mass. 469.

its sale or consumption. When the property is valuable chiefly for use, and will not be likely to diminish in value by being kept until the litigation can be concluded, the plaintiff ought to be ready to restore it to the defendant, if such be the judgment of the court. While there seems to be no direct authority to sustain this doctrine, it is in entire harmony with the general rules of law governing such questions; and unless the particular case should render some other rule more apparently just, this will doubtless be the holding of the court.[45]

[45] Mayberry *v.* Cliffe, 7 Cold. (Tenn.) 117; Gordon *v.* Jenney, 16 Mass. 469. In Ohio the statute formerly made no provision for a return; the plaintiff obtaining possession by means of the writ, took all the title the defendant had. The bond was supposed to protect the defendant from loss. Jennings *v.* Johnson, 17 Ohio, 154; Smith *v.* McGregor, 10 Ohio St. 470. This rule, however, is now changed by statute.

NOTE XXVII. *Writ. Duty to Issue.*—A justice of the peace to whom application is made for the writ, need not conduct any inquiry as to the verity of the complaint made to him, Watson *v.* Watson, 9 Conn. 141. It is the duty of the clerk of the court to issue the writ whenever the plaintiff has complied with the requirements of the statute; and this duty may be enforced by mandamus, Easter *v.* Traylor, 41 Kans. 493, 21 Pac. 606; the fact that the property demanded is intoxicating liquors, and that the defendant named in the action of replevin is the sheriff of the county and has seized the liquors in a criminal proceeding against the plaintiffs in replevin, is no answer to such mandamus, *Id.* Nor is an injunction awarded by the same court in which the writ of replevin is applied for, and which restrains the clerk from issuing any writ for the recovery of the goods in question, *Id.*

Frame of the Writ.—The writ must describe the goods; but if, with the aid of the plaintiff, or information, *aliunde* the writ, the officer can identify them, it is sufficient, Sexton *v.* McDowd, 38 Mich. 148. If the writ recite that the plaintiff "has given bond according to law," this is sufficient, Watson *v.* Watson, 9 Conn. 141. The statute prescribing the form of the writ and, among other things, that it shall direct the replevy of the goods "provided the same are not taken, attached or detained upon original process, mesne process, etc.," a writ omitting the words "original process," is bad; but it may be amended, Parker *v.* Palmer, 13 R. I. 359. A writ attested by the seal of the court and the signature of the clerk thereof, omitted to set forth or show in the body of it, from what court it issued. Held the omission was not fatal, State *v.* Wilson, 24 Kans. 50. A statute regulating the action of replevin is not controlled by differing provisions relating to actions upon money demands. The fact that the summons declares that in case return of the goods cannot be had judgment will be given for

the value, does not turn the action into an action for money, Kelly *v.* Kennemore, 47 S. C. 256, 25 S. E. 134. An alias writ of replevin may issue directed to any county, Hiles *v.* McFarlane, 4 Chandl. 89.

When Objections must be taken.—A motion to quash the writ for irregularity is too late after an appearance, Wyatt *v.* Freeman, 4 Colo. 14, Clark *v.* Dunlap, 50 Mich. 492, 15 N. W. 565, Tripp *v.* Howe, 45 Vt. 523. By pleading, a variance between the writ and declaration is waived, Reeder v. Moore, 95 Mich. 594, 55 N. W. 436. A motion to quash the writ will not be entertained after the defendant has appeared and assailed the declaration by demurrer, Kraemer *v.* Kraemer Co., 59 N. J. L. 9, 35 Atl. 791.

Amendment of the Writ.—A writ averring the taking in Boston, may be amended to aver the taking in Roxbury, Judson *v.* Adams, 8 Cush. 556. A married woman suing as sole plaintiff may be allowed to amend her writ, even upon an appeal, by joining with her as co-plaintiff her husband or next friend, Sherron *v.* Hall, 4 Lea. 498. The writ may be amended by striking out the words "executors of the will of," and inserting "heirs at law of," and by inserting the names of other heirs at law, Jamieson *v.* Capron, 95 Pa. St. 15; and variance between the writ and the affidavit may be cured by an amendment of the writ, McCourt *v.* Bond, 64 Wis. 596, 20 N. W. 532. Where the statute expressly allows amendments in replevin of the pleadings and proceedings, as in other actions, it is the duty of the court to allow amendments to cure variances between the affidavit and the writ; *e. g.*, where the writ omitted three out of six partners, plaintiff, and one of the defendants named in the affidavit, Roberts *v.* Gee, 39 Fla. 531, 22 So. 877. And where the affidavit and bond have been amended, the plaintiff is entitled to amend his writ accordingly, *Id.* Where defendant sued as John Doe, appeals in his proper name, the omission to amend the original record so as to show his real name, is immaterial, Moore *v.* Lewis, 76 Mich. 300, 43 N. W. 11. The date of issuance may be endorsed, by leave of the court *nunc pro tunc*, Whitaker *v.* Sanders, Tex. Civ. Ap., 52 S. W. 638. A summons from the justice court may be amended so as to state the value of the goods, Whitaker *v.* Dunn, 122 N. C. 103, 29 S. E. 54. In an action on the bond the writ was amended so as to read in the name of the sheriff, payee of the bond "for the use of" the defendant in the replevin, instead of in the name of the defendant in replevin, as assignee, Harmon v. Collins, 2 Penn. Del. 36, 45 Atl. 541.

Execution of the Writ.—It is the imperative duty of the sheriff to seize the goods and deliver them to the plaintiff, without reference to the wishes of the defendant, Yott *v.* The People, 91 Ills. 11. His first duty is to seize the goods, and if he fail in this duty and the property is lost by reason of his default, the officer and the sureties in his bond are responsible, People *v.* Wiltshire, 9 Ills. Ap. 375. Delay occasioned by looking for the defendant, is no excuse, *Id.*; nor irregularities in the foreclosure of a chattel mortgage under which the plaintiff claims, *Id.* The defendant is not bound to deliver the property to the officer, nor to assist him in executing his writ, and he is not in contempt for

merely refusing to deliver the goods, Horr *v.* The People, 95 Ills. 169. It is the duty of the plaintiff to point out to the officer the goods which he demands, and to know that he takes the goods described in the writ, Dewey *v.* Hastings, 79 Mich. 263, 44 N. W. 607. Plaintiff is not under any duty to accept and give bond for a part of the goods, the rest not being found, McBrian *v.* Morrison, 55 Mich. 352, 21 N. W. 368. Where the statute requires a replevy bond in double the value of the goods, to be ascertained by an appraisement, in a manner prescribed by the statute, the sheriff has no right to require the bond as a condition precedent to executing the writ; because, until appraisement, it cannot be known in what penalty the bond is required, Hamberger *v.* Seavey, 165 Mass. 505, 43 N. E. 297; Steur *v.* Maguire, 182 Mass. 575, 66 N. E. 706. But if the officer executes the writ and delivers the goods to plaintiff, without securing the bond, he is a trespasser *ab initio* and the defendant may bring either trespass or trover without awaiting the result of the replevin. No demand is necessary. Parker *v.* Young, 188 Mass. 600, 75 N. E. 98. If the goods are found in the possession of any person other than the defendant in the writ, the officer cannot be required to execute his writ without indemnity, Sexton *v.* McDowd, 38 Mich. 148. And the officer may require an indemnity wherever there is reasonable doubt as to the ownership, Hamberger *v.* Seavey, *supra.* The officer is entitled to hold the goods a reasonable time for the appraisement, and it is the duty of the plaintiff to furnish the bond promptly when the appraisement is made, Hamberger *v.* Seavey, *supra;* the officer is entitled to occupy defendant's premises, only during such reasonable time, Steur *v.* Maguire, *supra.* The officer is bound to obey his writ, even though he knows and sees that the goods named are not repleviable, Watson *v.* Watson, *supra;* and even though he knows the recitations of the writ to be false, *Id.* In New York it is said that a requisition to the sheriff only protects him in seizing the goods in possession of the defendant or his agent, Lehman *v.* Mayer, 8 Ap. Div. 311, 40 N. Y. Sup. 933. But in Alabama it was held that it is the duty of the sheriff to execute the writ though several are named as defendants and only one has possession of the chattels, Rich *v.* Lowenthal, 99 Ala. 488, 13 So. 220. The plaintiff is responsible for the acts of the officer in the execution of the writ; if the officer improperly surrender the goods to a stranger the plaintiff is liable, Adamson *v.* Sundby, 51 Minn. 460, 53 N. W. 761. But the plaintiff who sues for machinery is not liable for pulling down a shelter erected over it, if his conduct is not wanton, but merely incidental to the removal, Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745. Where the sheriff seizes a greater quantity of the commodity demanded in the writ, than is therein specified, the plaintiff may still prosecute for the less quantity, for which he has made demand, Horr *v.* Barker, 6 Calif. 489. Appearance is a waiver of the service of the writ, Miller *v.* Warden, 111 Pa. St. 300, 2 Atl. 90. Defects and irregularities in the execution of the writ are cured by defendants giving bond to retain the goods, Carraway *v.* Wallace,

Miss. 17 So. 930. The writ cannot be quashed after defendant's appearance, Kraemer *v.* Kraemer Co., 59 N. J. L. 9, 35 Atl. 791. A deputy sheriff may waive service in the name of his principal, Nipp *v.* Bower, 9 Kans. Ap. 854, 61 Pac. 448.

In Kelley *v.* Schuyler, 20 R. I. 432, 39 Atl. 893, it was held upon full consideration that the sheriff who breaks the outer door of a dwelling to execute a writ or replevin against the house-holder, is a trespasser; and if the officer takes other goods than those taken in the writ he is liable for their value. The court examine the cases cited in section 287 of this work and express the opinion that they fail to sustain the text. In Bruce *v.* Ulery, 79 Mo. 322, the court say the text is fully sustained by the cases cited in its support. In The State *v.* Beckner, 132 Ind. 371, 31 N. E. 950, it was held that in the absence of statute the officer has no power to break the outer door of a dwelling, to execute a writ of replevin, even though the house-holder be not defendant in the writ.

And if the door being opened to him, the house-holder on discovering who he is, attempts to close it and he enters by force, he is a trespasser, *Id.* citing State *v.* Armfield, 2 Hawks, 246, 11 Am. Dec. 762. But if the officer has made the levy or assumed possession of the goods under a writ of replevin, he may, returning, break the outer door to remove the goods, State *v.* Beckner, *supra.* The sheriff may seize the property before delivering any copy of his writ or order to the defendant, State *v.* Wilson, 24 Kans. 50. The sheriff of one county cannot execute a writ of replevin in another, Dederick *v.* Brandt, 16 Ind. Ap. 264, 44 N. E. 1010. Where the officer, after commencing the service of the process, is appointed guardian of the infant plaintiff, therein named, he cannot legally complete the service; an attachment thus began by such officer will be deemed in law abandoned, so that a later attachment will take precedence of it, Clark *v.* Patterson, 58 Vt. 677, 5 Atl. 564.

Return of the Writ.—The return of the writ without seizing all the goods, is premature; the court may allow the writ to be withdrawn for further execution, National Bank of Commerce *v.* Feeney, 9 S. D. 550, 70 N. W. 874. It is the duty of the plaintiff to know what has been done upon his writ, before he demands a plea, Lamey *v.* Remuson, 2 N. M. 245. The officer's return is conclusive upon the parties; it is error to allow the defendant to contradict it, Rowell *v.* Klein, 44 Ind. 290. The return is evidence only so far as responsive to the writ, Parker *v.* Palmer, 13 R. I. 359. "Served the within on John Stabler; Aultman, Taylor & Co. not found in the county, by delivering a true copy to John Stabler." Held a sufficient return, Aultman Co. *v.* Stelnan, 8 Neb. 109. The return of the officer is evidence, and it seems the only competent evidence, as to which of two like bonds is executed in the particular case, McManus *v.* Donohue, 175 Mass. 305, 56 N. E. 291.

Re Caption.—If after the goods are taken and delivered to the

plaintiff, the defendant forcibly retakes them he is guilty of a contempt, and should be punished accordingly, People *v.* Neill, 74 Ills. 68. And the offending party may be required to restore the goods, and fined and imprisoned if he disobey, Knott *v.* The People, 83 Ills. 532.

CHAPTER XVI.

THE RETURN.

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§ 481. **The return. General principles.** As has been stated, both parties in replevin are called actors or plaintiffs.[1]

[1] *Ante*, § 21.

When the action was for a distress, the defendant, by avowing and demanding a return, was looked upon as suing for the right to make the distress. In other cases, where he claimed the property and demanded a return, his claim was regarded as a kind of cross-action for the recovery of the property. Upon the decision of this question depended the possession of the property. It is therefore one of the most important arising in this proceeding.

§ 482. **The same. Return must be claimed.** The issue as to whether a return shall be made is not always presented in the pleading; but where it is, the action is not determined until the final judgment of the court upon it.[2] And to enable the court to determine the respective rights of parties, the plaintiff is not allowed to dismiss his suit, so as to prevent a hearing or a decision as to the propriety of a return, or as to the value of the property, or as to an assessment of damages.[3] When the plaintiff does so dismiss his suit, the defendant may retain it or have reinstated for the purpose of having these issues determined. In such case the plaintiff is regarded as in default.[4]

§ 483. **Plaintiff not liable for, unless so ordered by the court.** Whatever judgment the court may render, whether against the plaintiff, for costs, or costs and damages, he is under no obligation to return the goods delivered to him upon the writ, unless such be the order of the court.[5] But it does not follow

[2] Broom *v.* Fox, 2 Yeates, (Pa.) 530; Branch *v.* Branch, 5 Fla. 447; City of Bath *v.* Miller, 53 Me. 316.

[3] Berghoff *v.* Heckwoll, 26 Mo. 512; Raney, Admr., *v.* Thomas, 45 Mo. 112; Collins *v.* Hough, 26 Mo. 150; Broom *v.* Fox, 2 Yeates, (Pa.) 530; Waldman *v.* Broder, 10 Cal. 379; Studdert v. Hassell, 6 Humph. (Tenn.) 137; Mikesill *v.* Chaney, 6 Port. (Ind.) 52; Noble *v.* Epperly, 6 Port. (Ind.) 415; Hall *v.* Smith, 10 Iowa, 45.

[4] Wilkins *v.* Treynor, 14 Iowa, 393; Kimmel *v.* Kint, 2 Watts, (Pa.) 432. But, see Wiseman *v.* Lynn, 39 Ind. 254, where it is said, if the suit be dismissed before hearing, there can be no judgment for return. The bond, however, would be liable. See, also, Sanderson *v.* Lace, 1 Chand. (Wis.) 231. In Alabama, when the plaintiff consented to a nonsuit, the court said the remedy was upon the bond, it having no data from which to render judgment beyond the formal one for costs. Savage *v.* Gunter, 32 Ala. 469. If the suit be dismissed, the order for a return must be made at the same term; otherwise the court cannot, at a subsequent term, change its records and order a return to the defendant. Lill *v.* Stookey, 72 Ill. 495.

[5] Clark *v.* Norton, 6 Minn. 415; Ladd *v.* Prentice, 14 Conn. 117; Way *v.* Barnard, 36 Vt. 366.

that the plaintiff may not in some cases find it to his advantage to return them without the order of the court; as, for instance, the order for a return may not have been made, although the plaintiff has failed in his action, *i. e.*, has not prosecuted it with success, thus rendering him liable to an action upon the bond. In such case, unless the plaintiff is able to make good his defense to suit upon the bond, it may sometimes be advisable to restore the property, even though he at once replevy it again, as the restoration of the property, and its acceptance by the defendant, would go in mitigation of damages in suit upon the bond.

§ 484. **Duty of plaintiff when return is adjudged.** If the court renders judgment for a return, the duty is imposed upon the plaintiff to at once return the goods. This duty is not the passive one of permitting the defendant to take his goods, or to surrender them to the sheriff upon the writ of *retorno*, but he is required to redeliver them to the defendant,[6] and in as good order as when taken.[7]

§ 485. **Return ordered only where it appears just.** The power to order a return is exercised upon the idea that a wrongful taking of the goods from the defendant, even though under the authority of legal process, does not deprive the owner of his title or right of possession.[8] This power is always exercised by the court in the furtherance of justice, and to protect the rights of the parties;[9] otherwise, property might be taken, without any process to restore it,[10] or the plaintiff might be required to deliver his goods to the defendant, when the defendant really had no title

[6] Parker *v.* Simmonds, 8 Met. 207.

[7] Berry *v.* Hoeffner, 56 Me. 171; Washington Ice Co. v. Webster, 62 Me. 363; Allen *v.* Fox, 51 N. Y. 562. The writ of return cannot issue except to the sheriff of the county where judgment is rendered. Rathbun *v.* Ranney, 14 Mich. 382. The plaintiff cannot complain of the omission to award a return. If the jury find for the defendant, and a return is erroneously omitted, he is the only party injured, and he alone can complain. Branch *v.* Wiseman, 51 Ind. 1.

[8] See dissenting opinion of Scuttle, J., in Smith *v.* McGregor, 10 Ohio St. 470; Kerley *v.* Hume, 3 T. B. Mon. (Ky.) 181.

[9] Fowler *v.* Hoffman, 31 Mich. 221; Bartlett *v.* Kidder, 14 Gray, 450; Salkold *v.* Skelton, Cro. Jac. 519; Plant *v.* Crane, 7 Port. (Ind.) 486; Saffell *v.* Wash, 4 B. Mon. (Ky.) 92; City of Bath *v.* Miller, 53 Me. 317; Wheeler *v.* Train, 4 Pick. 168.

[10] Mikesill *v.* Chaney, 6 Port. (Ind.) 52; Lowe *v.* Brigham, 3 Allen, (Mass.) 430.

or right to possess them, when such delivery would, in fact, amount to a loss of his goods. Another suit in replevin might be permitted on antecedent title, but a right to another suit is but a meagre award to a suitor in the right. Even after a general verdict for defendant, or a judgment that the writ be abated, the order for return does not follow as a matter of course. Whether it be rendered or not involves an inquiry into and a decision upon the merits. It is rendered by the court only as the rights of the parties require.[11] Where the verdict is for defendant for a sum of money, such a finding does not entitle him to a judgment for return. All that can be inferred is, that the plaintiff is entitled to the property on paying the sum awarded.[12] When it appears that the defendant never had a right to the possession, a return will not be awarded. It would be absurd that one should acquire rights by successfully defending a suit, upon the ground that he has no interest in the matter in dispute.[13]

§ 486. **Return may be adjudged to one of several defendants.** Where there are several defendants, the court may adjudge a return to one of them, and refuse it to the others, or the judgment may be in favor of all;[14] or the court may award part of the property to one of the defendants, and part to another, or to the plaintiff, as the rights of the parties shall appear.

§ 487. **Adjudged only when the defendant claims it.** Without repeating what has been said elsewhere, and without discussing the question of pleadings, the reader will understand that a return cannot be awarded unless the pleadings are framed

[11] Tuck *v.* Moses, 58 Me. 474; Whitwell *v.* Wells, 24 Pick. 33; Lowe *v.* Brigham, 3 Allen, 430; Goodheart *v.* Bowen, 2 Bradw. (Ill.) 578; Bourk *v.* Riggs, 38 Ill. 320; Smith *v.* Aurand, 10 S. & R. (Pa.) 92; Saffell *v.* Wash, 4 B. Mon. 92.

[12] Hunt *v.* Bennett, 4 G. Greene, (Iowa,) 512. See Hanford *v.* Obrecht, 38 Ill. 492; Hanford *v.* Obrecht, 49 Ill. 146. Judgment may be simply for costs. Wheeler *v.* Train, 4 Pick. 168; Ingraham *v.* Martin, 15 Me. 373; Miller *v.* Moses, 56 Me. 128.

[13] Hall *v.* White, 106 Mass. 600; Whitwell *v.* Wells, 24 Pick. 33; Snelgar *v.* Hewston, Cro. Jac. 611. Goods cannot be returned to a person from whom they were never taken. Richardson *v.* Reed, 4 Gray, 441. "When plaintiff is *non*-suited because the defendant never had possession, the defendant is not entitled to return a judgment for value." Gallagher *v.* Bishop, 15 Wis. 277.

[14] Woodburn *v.* Chamberlain, 17 Barb. 446; Wells *v.* Johnson, 16 Barb. 375.

for that purpose. The defendant must set up some affirmative right upon his part to have the goods delivered to him, or a return will not be adjudged. Thus, if the defendant sets up as his only defense that he did not take the goods, this virtually admits the plaintiff's right to them, and upon a verdict for defendant in such case a return will not be awarded.[15] The prayer for a return is in the nature of a cross-action, in which the defendant is suing for a return of the goods and for damages.[16] The same principles govern the plea of *non detinet*, which puts in issue only the detention; upon such plea no return will be awarded.[17]

§ 488. **The same. Exceptions to the rule.** In Indiana it is held that an officer who files general denial only, may prove property in himself as an officer by showing that he holds the property under the levy of process, and that the property is owned by the defendant therein. This rule will probably be followed in States having a similar code of practice.[18] By statutory provisions in some of the States the plea of *non cepit* or *non detinet* puts in issue not only the taking and detention, but the right of property. In such case a verdict for the defendant ought to entitle him to a judgment for return.[19]

§ 489. **Formal prayer for return not essential.** A simple claim for a return in the answer is not sufficient. It should state

[15] Chambers *v.* Waters, 7 Cal. 390; Trotter *v.* Taylor, 5 Blackf. 431; Wright *v.* Mathews, 2 Blackf. 187; Douglass *v.* Garrett, 5 Wis. 88; Moulton *v.* Bird, 31 Me. 297; Ely *v.* Ehle, 3 Comst. (N. Y.) 510; Simpson *v.* M'Farland, 18 Pick. 427; Powell *v.* Hinsdale, 5 Mass. 343; Seymour *v.* Billings, 12 Wend. 286; Pratt *v.* Tucker, 67 Ill. 346; Bourk *v.* Riggs, 38 Ill. 321; Mills *v.* Gleason, 21 Cal. 274; Anstice *v.* Holmes, 3 Denio, 244; Harrison *v.* M'Intosh, 1 Johns. 380; Rogers *v.* Arnold, 12 Wend. 30; Prosser *v.* Woodward, 21 Wend. 205; Colts *v.* Waples, 1 Minn. 134; Finley *v.* Quirk, 9 Minn. 194; Cooper *v.* Brown, 7 Dana. (Ky.) 333.

[16] Gould *v.* Scannell, 31 Cal. 430; Bonner *v.* Coleman, 3 B. Mon. (Ky.) 464; Smith *v.* Snyder, 15 Wend. 324; Berghoff *v.* Heckwolf, 26 Mo. 512; Brown *v.* Stanford, 22 Ark. 78. But, see Matlock *v.* Straughn, 21 Ind. 128; Kerley *v.* Hume, 3 T. B. Mon. (Ky.) 181.

[17] See pleading *non cepit* and *non detinet*. Bemus *v.* Beekman, 3 Wend. 667; Smith *v.* Snyder, 15 Wend. 324; Pierce *v.* Van Dyke, 6 Hill, 613; Vose *v.* Hart, 12 Ill. 378; Conner *v.* Comstock, 17 Ind. 92; Hanford *v.* Obrecht, 38 Ill. 493.

[18] Branch *v.* Wiseman, 51 Ind. 1.

[19] Ford *v.* Ford, 3 Wis. 399; Sparks *v.* Heritage, 45 Ind. 66; Noble *v.* Epperly, 6 Ind. 414.

facts as to the ownership, or right of possession, which justify an award of return.[20] But a formal prayer for return is not essential. The averment of title by the defendant, or a plea setting up ownership in a third person averring a right of possession, with a formal traverse of the plaintiff's rights, will be sufficient.[21] When the pleas were: 1st, *non cepit;* 2d, *non detinet;* 3d, goods not the property of the plaintiff; 4th, property in the defendant; 5th, property in a third person; and where the verdict was, "We find the issues for the defendant," this was equivalent to finding all the issues for the defendant, and a return was properly awarded.[22] When the pleas were *non cepit*, plea of property in defendant, and in a third person; the verdict was, "Not guilty;" this was regarded as not responsive to any plea except *non cepit; held*, a return could not be awarded.[23]

§ 490. **The same. In justice court.** In an appeal from a justice court where the pleadings were oral, and where the jury found this verdict: "We, the jury, find the defendant guilty," it was held equivalent to a finding of property in the plaintiff.[24]

§ 491. **Judgment for value rendered only where a return would be proper.** When the property itself cannot be had, judgment for the value of the property is sometimes awarded. In such case, the judgment for value is never rendered to a defendant unless he show himself entitled to a return. Unless by his pleadings he has claimed the property, and asked a return, judgment for value would be erroneous.[25]

§ 492. **When the defendant pleads property in a third person.** The defendant in this action may, and frequently does, plead property in himself, and also in a third person, traversing the plaintiff's right. If the goods, in such case, belong to a third person, the plaintiff being unable to show title in himself, must fail. When the defendant succeeds upon the plea of property in himself, he is entitled to have the property restored to him; the

[20] Lewis *v.* Buck, 7 Minn. 105.

[21] King *v.* Ramsay, 13 Ill. 623; Underwood *v.* White, 45 Ill. 438; Chandler *v.* Lincoln, 52 Ill. 76.

[22] Underwood *v.* White, 45 Ill. 438.

[23] Hanford *v.* Obrecht, 38 Ill. 493.

[24] Jarrard *v.* Harper, 42 Ill. 457.

[25] Gould *v.* Scannell, 13 Cal. 430. See Bemus *v.* Beekman, 3 Wend. 667; Bourk *v.* Riggs, 38 Ill. 320; Vose *v.* Hart, 12 Ill. 378; Johnson *v.* Howe, 2 Gilm. 342; Mills *v.* Gleason, 21 Cal. 280.

judgment is *pro retorno habendo*.[26] But when he succeeds upon his plea of property in a third person, it is sometimes a question whether he has a right to have the property returned, without in some way connecting himself with the rights of that person. There are cases upon both sides of this question. A very large number hold that the defendant who is successful upon such a plea is entitled to a return of the property without in any way connecting himself with the title of such third person,[27] the theory being that the defendant, from whom the goods were wrongfully taken, ought, in justice, to be put in as good condition as he was before the taking.[28]

§ 493. **The same.** But a large number of cases hold that return will not be awarded to the defendant upon a plea of property in a stranger, unless he show he is in some way responsible to such stranger, or in some way connect himself with the title of the property.[29] A proper deduction from these conflicting cases seem to be, that when the defendant is a mere trespasser he cannot set up title in a third person to defeat the right of a plaintiff. The title in such third person which is necessary to defeat a

[26] Landers *v.* George, 40 Ind. 160; Easton *v.* Worthington, 5 S. & R. (Pa.) 132; Walpole *v.* Smith, 4 Blackf. 305; Constantine *v.* Foster, 57 Ill. 38; King *v.* Ramsay, 13 Ill. 619; Underwood *v.* White, 45 Ill. 438; Quincy *v.* Hall, 1 Pick. 357; Waldman *v.* Broder, 10 Cal. 379.

[27] Ingraham v. Hammond, 1 Hill, (N. Y.) 353, citing many cases; Prosser *v.* Woodward, 21 Wend. 209; Morss *v.* Stone, 5 Barb. 516; Anderson *v.* Talcott, 1 Gilm. 371; Quincy *v.* Hall, 1 Pick. 357; Hunt *v.* Chambers, 1 Zab. 627; Johnson *v.* Carnley, 6 Seld. (N. Y.) 576; Rickner *v.* Dixon, 2 G. Greene, (Iowa), 592; Hopkins *v.* Shrole, 1 Bos. & P. 382; Butcher *v.* Porter, 1 Salk. 94; Anon, 6 Mod. 103; Allen *v.* Darby, 1 Show, 97; Hoeffner *v.* Stratton, 57 Me. 360. See Tuley *v.* Mauzoy, 4 B. Mon. (Ky.) 5; [Pitts Works *v.* Young, 6 S. D. 557, 62 N. W. 432; La Mott *v.* Wisner, 51 Md. 543; Hoeffner *v.* Stratton, 57 Me. 360.]

[28] Butcher *v.* Porter, Carth. 242; Same *v.* Same, Show, 400; Salkold *v.* Skelton, Cro. Jac. 519; Harrison *v.* M'Intosh, 1 Johns. 384.

[29] Dozier *v.* Joyce, 8 Port. (Ala.) 303; Duncan *v.* Spear, 11 Wend. 54; Brown *v.* Webster, 4 N. H. 500; Wilkerson *v.* McDougal, 48 Ala. 518; Rogers *v.* Arnold, 12 Wend. 30. [Nichols *v.* Potts, 35 Misc. 273, 71 N. Y. Sup. 765. Where defendant pleads title in a third person, return should not be awarded; but the court of its own motion should order such third person to be made party; note that the third person in this case was the trustee for creditors, Wilkins *v.* Lee, 42 S. C. 31 19 S. E. 1016.]

plaintiff showing right to possession must be something that goes to destroy the plaintiff's right to recover, or such as would defeat an action of trespass if brought in place of replevin;[30] and this unquestionably was the law at a very early time.[31]

§ 494. **Judgment for return does not settle the question of title.** The action of replevin is frequently brought to try the question of the right to possession only, and in such cases a verdict and judgment are not evidence of title in the successful party. But when the title is in issue, and that question heard and determined, the judgment, of course, is conclusive on the parties, and all claiming under them.[32] The judgment for a return, therefore, does not settle the question of ownership, unless that question was presented and tried. When, therefore, the action is dismissed, or where, for any cause, except a decision upon the merits, a judgment for return is rendered, the plaintiff may return the goods, and may replevy again on his original title.[33] The statute of Marlbridge, which prevented such replevins, except upon a writ of second deliverance, is local to Great Britain, and does not apply in this country.[34]

§ 495. **Such judgment generally follows a verdict for the defendant.** The principles of the common law incline to favor a return in all cases when the plaintiff has obtained delivery of the goods upon his writ, and for any cause failed to prosecute his suit to a successful issue; and these principles obtain generally in all the States.[35] This was on the presumption that when the

[30] See Van Namee *v.* Bradley, 69 Ill. 300, a leading case on this subject.

[31] Butcher *v.* Porter, 1 Salk. 93; Bro. Abr. title Retorno Av., etc., 28; Mitchell *v.* Alestree, Vent. 249; Rast. Ent. 554.

[32] Seldner *v.* Smith, 40 Md. 603; Wallace *v.* Clark, 7 Blackf. 299.

[33] Walbridge *v.* Shaw, 7 Cush. 560; Warner *v.* Matthews, 18 Ill. 83; Child *v.* Child, 13 Wis. 20; [Bettinson *v.* Lowery, 86 Me. 218, 29 Atl. 1003.]

[34] Daggett *v.* Robins, 2 Blackf. 417.

[35] When the defendant claims property, and plaintiff takes a *nonsuit*, return will be awarded. Stat. Westm. 2 C. 2; Timp. *v.* Dockham, 32 Wis. 153. When a party brings replevin in a State court to recover property seized from him on execution from a federal court, the replevin should be dismissed, and an order given for a return of the goods. Booth *v.* Ableman, 16 Wis. 460; Freeman *v.* Howe, 24 How. (U. S.) 450; Taylor *v.* Carryl, 20 How. 584; Peck *v.* Jenness, 7 How. (U. S.) 612-621; Lowe *v.* Brigham, 3 Allen. 429.

plaintiff failed in his suit, the defendant was entitled to have the distress. The rule in this country may be stated, that when the plaintiff fails in his suit, the presumption is that the goods belong to the defendant, and ought to be returned to him. But the plaintiff may show cause, (if he is able,) why the return should not be made; and unless such cause be shown, the order for return usually follows, as a matter of course, the burden of proof being upon the plaintiff.[36] Even the insolvency of the defendant, occurring after suit brought, does not prevent him from having an order for a return. The fact that the title he once had has passed to his assignee cannot be set up by any other person to defeat his rights.[37] In Ohio, formerly, the defendant was never entitled to a return; but if successful, was entitled to judgment for the value. The writ of return was unknown to the laws in that State, the bond being supposed to represent the property, which was regarded as transferred by the writ.[38]

§ 496. **The rights of the parties at the time the return is asked, will govern.** Replevin differs somewhat from other actions, in this, that the court will inquire into the conditions of the title to the property, after the suit was begun, down to the time the judgment for possession is asked. This does not change the rule that the facts existing at the time the suit was begun govern the rights of the parties at the trial;[39] but when the property remains to be disposed of, the court will inquire into the state of facts existing at the time the order for a return is asked.

[36] Barry *v.* O'Brien, 103 Mass. 521; Anderson *v.* O'Laughlin, 1 Blake, (Mont.) 81; Dahler *v.* Steele, 1 Blake, (Mont.) 290; Salkold *v.* Skelton, Cro. Jac. 519; Presgrave *v.* Saunders, 2 Ld. Raym. 984; Clark *v.* Adair, 3 Har. (Del.) 116; Vernon *v.* Wyman, 1 H. Bla. 24; Mikesill *v.* Chaney, 6 Port. (Ind.) 52; Simpson *v.* McFarland, 18 Pick. 431; Mason *v.* Richards, 12 Iowa, 73; Chadwick *v.* Miller, 6 Iowa, 38; Jansen *v.* Effey, 10 Iowa, 227; Quincy *v.* Hall, 1 Pick. 357; Timp *v.* Dockham, 32 Wis. 154; Dawson *v.* Wetherbee, 2 Allen, 462; Wheeler *v.* Train, 4 Pick. 168; Allen *v.* Darby, 1 Show. 97; Smith *v.* Aurand, 10 S. & R. (Pa.) 92; Phillips *v.* Harriss, 3 J. J. Marsh. 122; 1 Ch. Plea. 162; Fleet *v.* Lockwood, 17 Conn. 233.

[37] Hallett *v.* Fowler, 10 Allen, 37; Hallett *v.* Fowler, 8 Allen, 93.

[38] Smith *v.* McGregor, 10 Ohio St. 470; Williams *v.* West, 2 Ohio St. 87. The statute, however, has changed this. As to the rule in Pennsylvania, see Gibbs *v.* Bartlett, 2 W. & S. 34. And in Alabama, see Savage *v.* Gunter, 32 Ala. 469.

[39] Johnson *v.* Neale, 6 Allen, (Mass.) 229.

If it appears that a change in ownership or right of possession has occurred since the beginning of the suit, as by the expiration of a lease, or the termination of some limited interest, so that the property or right of possession vests in the defendant, a return will not be awarded, notwithstanding the title, as it stood at the commencement of the suit, might have been otherwise.[40] As to whether a return will be ordered where the plaintiff fails to prove a demand for the goods before bringing suit, and for that reason judgment is against him, is discussed under the head of Demand-to which the reader is referred.[41]

§ 497. **The same. Illustration of the rule.** Where the defendant was successful, and moved for a return of the property, the plaintiff objected, upon the ground that since the commencement of the suit the defendant's title had expired, it appeared that the facts which the plaintiff relied upon to sustain his objection were known to him at the time of the trial of the replevin suit, the court said it was too late to interpose them for the purpose of defeating a return.[42]

§ 498. **The same.** The technical correctness of this ruling will not be questioned. The rule is very clear that if at the time the judgment for return is asked, the property has become vested in the plaintiff, even though the defendant had a right to the possession when the suit was begun, and though he have a verdict and judgment in his favor for costs, he cannot have a return.[43] When plaintiff had leased the property, and the lease had not expired when the suit was begun, but had expired at the time of the trial, the successful defendant was entitled to costs, but not to a return, as the title at the time the return was asked was in the plaintiff.[44]

§ 499. **Never ordered unless it appears that the plaintiff obtained deliverance upon the writ.** A return can never be adjudged unless it appear that the plaintiff has obtained deliverance

[40] Ingraham *v.* Martin, 15 Me. 373; Davis *v.* Harding, 3 Allen, 303; Martin *v.* Bayley, 1 Allen, 382; Whitwell *v.* Wells, 24 Pick. 33; Walpole *v.* Smith, 4 Blackf. 306; Dawson *v.* Wetherbee, 2 Allen, 461; Simpson *v.* M'Farland, 18 Pick. 430; Collins *v.* Evans, 15 Pick. 63.

[41] See § 372, *et seq.*

[42] McNeal *v.* Leonard, 3 Allen, (Mass.) 268.

[43] Simpson *v.* McFarland, 18 Pick. 431; O'Connor *v.* Blake, 29 Cal. 313; Wheeler *v.* Train, 4 Pick. 168.

[44] Collins *v.* Evans, 15 Pick. 65; Allen *v.* Darby, 1 Show. 99.

of the property by virtue of his writ. In States where the defendant is permitted by statute to retain possession of the goods upon giving bond, a return does not follow as a matter of course upon a finding of the issues in his favor as to ownership or possession; such a verdict is no evidence that the goods were delivered to the plaintiff. The presumption would be that they remained with the defendant; judgment upon these issues, therefore, should not include a return until it be shown that the plaintiff obtained deliverance of the goods upon his writ.[45] So, when the judgment was for a return of property described in the writ, and it appeared from the officer's return that all the property was not taken and delivered to the plaintiff upon the writ, the court reversed the judgment, saying plaintiff could not be required to return more than came into his possession upon the writ, and its increase.[46]

§ 500. **Return of the young of animals born after suit begun.** Where the property in dispute is living animals, the increase of such animals, born after delivery to the plaintiff, may be ordered to be returned;[47] but wool shorn from sheep, or butter made from the milk of cows, would be compensated for in damages, not ordered to be returned.[48] But the children of a slave might be recovered with the mother; the ownership of the mother carries with it the ownership of her children.[49]

§ 501. **Where defendant avoids trial upon the merits.** When the defendant has an opportunity to contest the plaintiff's

[45] Schofield *v.* Ferrers, 46 Pa. St. 439; Nickerson v. Chatterton, 7 Cal. 570; Brown *v.* Stanford, 22 Ark. 78; McKeal v. Freeman, 25 Ind. 151; McGinnis *v.* Hart, 6 Clark, (Iowa.) 210; Conner *v.* Comstock, 17 Ind. 90.

[46] Mattingly v. Crowley, 42 Ill. 300.

[47] Buckley *v.* Buckley, 12 Nev. 423; Jordan *v.* Thomas, 31 Miss. 558. [Morris *v.* Coburn, 71 Tex. 406, 9 S. W. 345; Mann *v.* Arkansas Co., 24 Fed. 261; Wade *v.* Gould, 8 Okla. 690, 559 Pac. 11. In ascertaining the increase during the period of defendant's possession, the average increase of like animals during the same period may be considered, Mann *v.* Arkansas Co., *supra;* a creditor levying upon live-stock more than three years after an alleged fraudulent sale is not entitled to the additions made by the alleged fraudulent purchaser in the meantime, or the increase produced by the purchaser's attention, labor and care, Wheeler *v.* Wallace, 53 Mich. 355, 19 N. W. 33.]

[48] Buckley *v.* Buckley, 12 Nev. 423.

[49] Seay *v.* Bacon, 4 Sneed. (Tenn.) 103.

claim upon the merits, and avoids doing so by technical objections which are sustained, for purely technical reasons, the judgment for a return does not necessarily follow.[50] If the writ abate for the mistake of the clerk, the defendant shall not have return.[51] When the defendant pleads in abatement for a variance between the writ and the declaration, and is successful, no return shall be awarded. If he is justly entitled to a return, he should plead and claim it; but when he avoids the issue upon the merits, and no fact appearing in the pleadings or the record showing his right to possession, a return will not be ordered.[52] But the plea may show that the defendant is entitled to a return; if so, it will be allowed.[53] So, where the action is defeated only because it is prematurely brought, there is authority for withholding the order for a return, though defendant be entitled to costs and damages.[54]

§ 502. **The same.** Although these cases by no means stand alone, they cannot be said to represent the current of authorities. When the defendant pleaded in abatement for want of a bond for costs (the plaintiff being a non-resident of the State), and the plea was sustained, a return of the property was adjudged.[55] So, in Maine, when the writ was abated because of a defect in the bond, the defendant had judgment for a return.[56] The same rule was announced in a well-considered case in Vermont, where the suit was brought in a county other than that in which the goods were detained. The court dismissed the case, but ordered a return of the goods to the defendant.[57] Where the plaintiff is defeated because of defect in his suit or proceeding, while the court will usually order a return of the property, the judgment is not conclusive as to title; that has not been tried, and the plaintiff may,

[50] McIlvain's Admr. *v.* Holland, 5 Har. (Del.) 228.

[51] Gilbert on Replevin, 175; Gould *v.* Barnard, 3 Mass. 199, 2 Inst. 340. See Parker *v.* Mellor, Carth. 398; Allen *v.* Darby, 1 Show. 99; Patter *v.* North, 1 Wm. Saund. 347; Cross *v.* Bilson, 6 Mod. 102.

[52] Hartgraves *v.* Duval, 1 Eng. (Ark.) 508; Dickinson *v.* Noland, 2 Eng. (Ark.) 26; Hill *v.* Bloomer, 1 Pinney, (Wis.) 463; Simpson *v.* McFarland, 18 Pick. 430; Gould *v.* Barnard, 3 Mass. 199.

[53] People *ex rel.*, etc., *v.* N. Y. Com. Plea, 2 Wend. 644.

[54] Martin *v.* Bayley, 1 Allen, (Mass.) 381.

[55] Fleet *v.* Lockwood, 17 Conn. 233.

[56] Greely *v.* Currier, 39 Me. 516; McArthur *v.* Lane, 15 Me. 245.

[57] Collamer *v.* Page, 35 Vt. 387.

if he elect, bring another suit for the same property, to determine that question.[58]

§ 503. **The general rule stated.** It is more probable, however, that the cases cited for and against the return for technical errors upon the part of the plaintiff, do not present the real principle which lies at the bottom of all such cases, which is, that the court will, in all cases where a return is demanded, rather favor an investigation of the right of the respective parties, at the time, and award or withhold the judgment for a return, as from such investigation seems proper. Such a course is much better calculated to do justice between the litigants than an arbitrary penalty inflicted upon the defendant for asserting and standing upon a legal right, or a substantial reward to a plaintiff who has at least been guilty of a technical error.[59]

§ 504. **The same.** When it appeared upon the trial that the plaintiff in replevin had but a limited interest in the goods, and that the defendant was the real owner, the question of return depended upon the nature of the interest shown by each party. Replevin of goods attached by defendant as deputy sheriff, etc.; trial; verdict for defendant, who moved for a return. Plaintiff offered to show that since the verdict the attachment had been dissolved, and that defendant's interest had ceased. On appeal Dewey, J., said the attaching officer may be liable to the debtor; the dissolution of the attachment may have been the effect of proceedings in insolvency, and the officer may be liable to the assignee. A return should be awarded.[60]

§ 505. **Liquors sold to enable vendee to violate the law.** Where parties sold liquors to enable their vendee to sell them in violation of the law, the vendors could not sustain replevin; having brought their suit against the sheriff who had attached them as the property of the vendee, they could not claim that they should, on dismissal of their suit, be left with them. The law found them in the hands of the sheriff, and whether they were

[58] Collamer *v.* Page, 35 Vt. 393; Thurber *v.* Richmond, 46 Vt. 398.

[59] Walbridge *v.* Shaw, 7 Cush. 561; Whitwell *v.* Wells, 24 Pick. 33. When the right of property and possession are put in issue, but not passed upon, a return cannot be awarded. Heeron *v.* Beckwith, 1 Wis. 18.

[60] Dawson *v.* Wetherbee, 2 Allen, 461; Kimball *v.* Thompson, 4 Cush. 441; Johnson *v.* Neale, 6 Allen, 228.

properly or not subject to sale or process in the sheriff's hands, they were to be returned to him.

§ 506. **When the parties are joint tenants.** When the property belonged to the plaintiff and defendant as co-tenants, and the jury so found, the action, of course, could not be sustained; in such case the defendant was entitled to judgment for a return; otherwise, the plaintiff, though not entitled to sue his co-tenant in this action, would derive the same benefit from his suit as if he had rightfully brought the action;[61] but damages, in case the property be not returned, can only be for the interest which the defendant has in it.[62]

§ 507. **Where the property is lost or destroyed.** When it appears that the property is hopelessly lost or destroyed, so that a judgment for its return can be of no avail, a failure to render judgment for the return will be at most a technical error, and for which the judgment for value will not be reversed.[63] When property taken is a living animal, and it dies before return, it is a good plea to say it is dead without fault of defendant;[64] and in such cases the court may render judgment for the value without ordering a return.

§ 508. **When the question of return should be determined.** The right to a return should be determined in the replevin suit.[65] In Missouri, upon a judgment of non-suit against the plaintiff, a writ of inquiry issues to ascertain the value of the property; also, whether the plaintiff has possession or not, and to assess the damages for the taking and detention.[66] The judgment for return must be rendered at the term at which the case is determined. If the fact that the court has at the time of disposing of the suit decided to award a return, but does not do so, does not authorize the entry of such judgment at a subsequent term.[67] The rules before stated, while they apply generally in practice, have a

[61] Mason *v.* Sumner, 22 Md. 312.

[62] Jones *v.* Lowell, 35 Me. 539; Witham *v.* Witham, 57 Me. 448; Bartlett *v.* Kidder, 14 Gray. 450.

[63] Brown *v.* Johnson, 45 Cal. 77; Boley *v.* Griswold, 20 Wall. 486.

[64] Carpenter *v.* Stevens, 12 Wend. 589, though this is disputed; see *post*, § 600, *et seq.*

[65] Harman *v.* Goodrich, 1 Greene, (Iowa,) 25, Mills *v.* Gleason, 21 Cal. 274. Unless in case of non-suit. Ginaca *v.* Atwood, 8 Cal. 446.

[66] Hohenthal *v.* Watson, 28 Mo. 360.

[67] Lill *v.* Stookey, 72 Ill. 495.

peculiar application in replevin where the action is in the nature of a tort, and where promptness and exactness are especially required.

§ 509. **Return or delivery in States adopting the code.** By legislative changes in many of the States this action has become simply one of "claim and delivery." The plaintiff claims the property, but frequently does not ask delivery until after trial. The judgment at the conclusion of the suit awards property to the party entitled to its possession; if it be to the defendant from whom the property has been taken, the judgment is for a return; if to the plaintiff who has not had delivery before the judgment, it is for a delivery. The judgments in such cases are controlled by very similar principles. The court, after due considerations of the rights of the parties, awards the property to the one entitled to it; if that party is not in possession, the court awards a delivery to him, and also a judgment for the value to be collected in case the order for delivery is not complied with. The judgment in such case is not absolute, but is in the alternative for the goods or for the value in case delivery cannot be had,[68] and in case delivery in compliance with such judgment is not made, execution issues against the party to collect the value.

§ 510. **The writ of return must describe the goods.** It was an old rule that the sheriff, upon a writ of *retorno*, is not obliged to deliver the goods unless they were "shown to him," or so clearly described in the writ that there can be no question about their identity.[69]

[68] This rule is general, though in some States the party may elect to take judgment for the value alone.

[69] Rast. Ent. p. 570*b*; Taylor *v.* Wells, 2 Saund. 74*b*. It is a good return to say that "none came to show the beasts." Bac. Abr. title Rep. H; Wilson *v.* Gray, 8 Watts, (Pa.) 34. It is also held that if the goods are described in the writ of return as they were described in the writ, it is sufficient, and a rule that the sheriff must make inquiry, if he cannot find the goods without. These rules are not intended to encourage looseness in description, which should in all writs be full and accurate.

CHAPTER XVII.

DAMAGES.

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§ 511. **By common law, damages allowed to plaintiff, not to defendant.** By the common law, the plaintiff in replevin, if successful, was entitled to damages; the defendant or avowant was not.[1] This was because the action would lie only in cases of distress for rent, where the lord distraining had no right to use the cattle,[2] and was not damaged[3] by the replevin while the tenant was always damaged by the taking and consequent loss of the use of his beasts. The statutes 7 H. VIII. c. 4, and 21 H. VIII. c. 19, gave the defendant a right to damages, the same as the plaintiff was entitled to before the statute was enacted. The governing principle of these statutes has obtained the force of law generally in this country—in some States by direct adoption of the common law and the statutes in aid thereof, and in others the courts have adopted the substantial principles of these statutes to the requirements of more modern jurisprudence. The common law to prevent vexatious suits, required the plaintiff to find pledges to prosecute; and he was amerced if he failed to sustain his claim. As that practice fell into disuse, costs were awarded

[1] Winnard *v.* Foster, Lutw. 374; Hopewell *v.* Price, 2 Har. & G. (Md.) 275.

[2] Anon. Dyer, 280.

[3] The sheriff, it seems, has no right to use cattle seized, Briggs *v.* Gleason, 29 Vt. 80; Lamb *v.* Day, 8 Vt. 407.

to the successful party, these not being sufficient in all cases to restrain frivolous or vexatious suits, the law gave the successful party damages.[4]

§ 512. **General rule now is that damages are awarded to the successful party.** Under modern practice, the general rule may be stated, that the successful party in replevin is entitled to damages against his opponent in all cases where damages are claimed in his pleading. The amount may be nominal, or substantial, as circumstances require.[5] The question of damages is so far an essential one in replevin, that a failure to claim them in the declaration is a fatal defect.[6] The successful party in this action may have judgment for the property, or for its value, in case it is not delivered. It is very evident that in many cases the restoration of the goods or the payment of the value falls far short of compensating for the injury plaintiff has sustained.[7] In such cases damages are awarded to make good the loss.[8]

§ 513. **Allowed only as an incident to the proceeding for possession.** Replevin is not the proper action for the recovery of damages, except as an incident to the proceeding for possession.[9] So when, after a demand and refusal, but before suit

[4] Savile *v.* Roberts, 1 Ld. Raymond, 380.

[5] In Kendall *v.* Fitts, 2 Foster, (N. H.) 9, it was said, that in replevin damages should always be assessed for the plaintiff or defendant. In the subsequent case of McKean *v.* Cutler, 48 N. H. 372, it was said, that a finding of damages was not essential to the validity of a judgment in replevin. See, also, as to the general rule, Brown *v.* Smith, 1 N. H. 38; Etter *v.* Edwards, 4 Watts, (Pa.) 68; Booth *v.* Ableman, 20 Wis. 24; Graves *v.* Sittig, 5 Wis. 219; Creighton *v.* Newton, 5 Neb. 100; School Dist. *v.* Shoemaker, 5 Neb. 36; Wright *v.* Williams, 2 Wend. 636; Buckley *v.* Buckley, 12 Nev. 423; Frey *v.* Dahos, 7 Neb. 195; Seymour *v.* Billings, 12 Wend. 286; Clark *v.* Keith, 9 Ohio, 73; Hohenthal *v.* Watson, 28 Mo. 360; Williams *v.* Phelps, 16 Wis. 87. The jury should determine whether the plaintiff had the right of property, or the right of possession only, at the commencement of the suit, and if they find either in his favor, they should assess such damages as are proper. Williams *v.* West, 2 Ohio St. 86. Replevin sounds in damages like trespass. Herdic *v.* Young, 55 Pa. St. 1, 76.

[6] Faget *v.* Brayton, 2 Har. & J. (Md.) 350; Crosse *v.* Bilson, 6 Mod. 102.

[7] See cases last cited.

[8] Stevens *v.* Tuite, 104 Mass. 333; Hemstead *v.* Colburn, 5 Cranch. C. C. 655.

[9] Johnson *v.* Weedman, 4 Scam. 495.

brought, the defendant offered to restore the property, the plaintiff on trial insisted that his right to damages was complete upon the refusal of the defendant to deliver; that a subsequent voluntary surrender would not defeat the action; the court held that surrender of the property was a bar to damages,[10] though perhaps the party might have been entitled to such damages as accrued after the refusal and before the surrender. When a distress was made of horses and cattle, and one horse and cow not levied upon followed the others to the place where they were impounded, although an effort was made to drive them back, and the next day the tenant was notified that he could get them by going for them, replevin would not lie; the defendant never had or claimed the possession. The only action which could be sustained would be an action for damages independent of the possession, and for that replevin is not adapted.[11]

§ 514. **May be allowed to both parties.** The verdict and judgment may sometimes be against both parties. That is, the plaintiff may have judgment for a portion of the property, while the remainder may be ordered to be returned to the defendant. In such cases each party is entitled to judgment against his opponent, for damages and costs, so far as he is successful.[12] The general power of the court extends without doubt to set off the damages and costs one against the other, and to give judgment for the balance.[13]

§ 515. **The reasons for the rule.** It must be kept in mind that in this action the plaintiff's suit is not only for his goods but for the damages he has sustained by reason of their wrong-

[10] Savage *v.* Perkins, 11 How. Pr. R. 17.

[11] Lindley *v.* Miller, 67 Ill. 245. See, also, Williams *v.* Archer, 5 M. G. & S. 318; Jansen *v.* Effey, 10 Iowa, 227; Whitfield *v.* Whitfield, 40 Miss. 367; Frazier *v.* Fredericks, 24 N. J. L. 163; Broadwater *v.* Darne, 10 Mo. 278.

[12] Brown *v.* Smith, 1 N. H. 36; Williams v. Beede, 15 N. H. 483; Powell *v.* Hinsdale, 5 Mass. 343; Wright *v.* Mathews, 2 Blackf. (Ind.) 187; Clark *v.* Keith, 9 Ohio, 73; Seymour *v.* Billings, 12 Wend. 286.

[13] McLarren *v.* Thompson, 40 Me. 285; Poor *v.* Woodburn, 25 Vt. 239. There were six issues; the jury found three for each party; the court allowed each party all the costs upon the pleadings where he had succeeded, and judgment was accordingly. Vollum v. Simpson, 2 Bos. & Pull. 368. In this replevin differs from other actions. Butcher v. Green, Doug. (Eng.) 652; Wright *v.* Williams, 2 Wend. 633; Porter *v.* Willet, 14 Abb. Pra. Rep. 319.

ful taking or detention, which furnished the foundation of his action; and, if he succeeds in establishing his claim, he is entitled not only to his property, or its value, but to such damages as will be just.[14] The claim for damages is as much a part of the case as the contest for the possession of the goods,[15] but if the plaintiff, for any cause, fails or dismisses his suit, or submits to a non-suit, the defendant is entitled to a judgment for a return of the property, or for its value, and to such damages as shall compensate him for the injury he has sustained.[16] The defendant is suing for a return of the goods and for damages,[17] and if successful is entitled to judgment, and upon a proper showing to the same damages the plaintiff would have had had he been successful.[18]

§ 516. **Plaintiff cannot dismiss so as to avoid a hearing upon the question of damages or return.** The plaintiff cannot dismiss his suit so as to avoid a hearing as to the value of the property and assessment of damages. In case of a dismissal for that purpose, the court will retain the case and hear and determine the questions as to damages and a return;[19] and if the plaintiff should dismiss his suit, it would not affect the defendant's right to an action on the bond.[20]

[14] Messer *v.* Baily, 11 Foster, (N. H.) 9; Bell *v.* Bartlett, 7 N. H. 178; Dorsey *v.* Gassaway, 2 Har. & J. (Md.) 402; Graves *v.* Sittig, 5 Wis. 223; Parham *v.* Riley, 4 Cold. (Tenn.) 10; Gray *v.* Nations, 1 Ark. 569.

[15] Buckley *v.* Buckley, 12 Nev. 430.

[16] Fallon *v.* Manning, 35 Mo. 274; Collins *v.* Hough, 26 Mo. 149.

[17] Gould *v.* Scannel, 13 Cal. 430; Bonner *v.* Coleman, 3 B. Mon. (Ky.) 464; Smith *v.* Snyder, 15 Wend. 324.

[18] Berghoff *v.* Heckwolf, 26 Mo. 512; Smith *v.* Winston, 10 Mo. 299.

[19] Mikesill *v.* Chaney, 6 Port. (Ind.) 52; Ranney *v.* Thomas, 45 Mo. 112; Berghoff *v.* Heckwolf, 26 Mo. 512.

[20] Hall *v.* Smith, 10 Iowa, 45.

NOTE XXVIII. *Discontinuance of the action.*—Plaintiff who has obtained the goods is not at liberty to dismiss his action, without liability to the defendant; unless he proceeds and establishes his right the defendant is entitled to a judgment for the return, Garber *v.* Palmer, 47 Neb. 699, 66 N. W. 656. And is entitled to have an adjudication, in that action, of his right to the goods, Vose *v.* Muller, 48 Neb. 602, 67 N. W. 598. And the court may refuse to allow a discontinuance, Aultman *v.* Reams, 9 Neb. 487, 4 N. W. 81. The court may nevertheless retain the suit, hear evidence, and if defendant establishes his right,

§ 517. **Where the suit is dismissed for informality.** It happens not unfrequently that the plaintiff is compelled to dis-

award him a return of the goods. Saussay *v.* Lemp Co., 52 Neb. 627, 72 N. W. 1026.

The suit is not to be discontinued by an agreement between the plaintiff, and one of several defendants, the others having adverse interests not consenting, Saunders *v.* Closs, 117 Mich. 130, 75 N. W. 295.

And though there be no adjudication of the rights of parties in the replevin suit defendant may recover full damages in an action on the bond, McVey *v.* Burns, 14 Kans. 291; the value of the goods, Manning *v.* Manning, 26 Kans. 98.

A non-suit cannot be ordered in the federal courts, against the objections of plaintiff, DeWolf *v.* Rabaud, 1 Pet. 476, 7 L. Ed. 227.

Nor in the territories, Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689. In Ahlman *v.* Meyer, 19 Neb. 63, 26 N. W. 584, Cobb, J., declared that he knew of no case which would justify the granting of a non-suit in the action of replevin. The reason assigned by his honor is that both parties are actors and are equally interested in the disposition of the cause upon its merits.

But where the property is not seized under the writ, or on failure of plaintiff to give bond, is returned to defendant, the court has no power over the goods, and the plaintiff is entitled to discontinue, Saussay *v.* Lemp Co., *supra*, Davison *v.* Gibson, 22 C. C. A., 511, 76 Fed. 717.

If third persons have interpleaded they may, nothwithstanding such non-suit, litigate between themselves the question of who is entitled to the property, Dawson *v.* Thigpen, 137 N. C. 462, 49 S. E. 959. Judgment of non-suit terminates the plaintiff's right to possession of the goods replevied; if he fails thereupon to restore them to the defendant he subjects himself to an action upon the bond, and he acts at his peril in delivering them to anyone else, Tinsley *v.* Block, 98 Ga. 243, 25 S. E. 429. Testimony of the plaintiff that before the date of his writ he had made an arrangement to sell the goods and had sold them but had not gotten his pay, does not necessarily import a conditional sale; and the court is not warranted in ordering a non-suit in such case, Brooks *v.* Libby, 89 Me. 151, 36 Atl. 66.

Filing an amended declaration against one only of two defendants, is equivalent to discontinuance of the action as to the other. MacLachlan *v.* Pease, 171 Ills. 527, 49 N. E. 714.

Defendant is not entitled to a discontinuance of the action by disclaiming title. He may still be liable for damages and costs. Choen *v.* Porter, 66 Ind. 194.

If defendant surrender part of the goods, the plaintiff is entitled to judgment for these, and for at least nominal damages. Judgment of discontinuance is error. Cardwill *v.* Gilmore, 86 Ind. 428.

Upon discontinuance of an action of replevin, in which goods seized under execution are replevied, the lien of the execution at once re-

miss his suit for some informality in the proceeding, where no trial upon the merits can be had, but when the court is justified in ordering a return of the property. In such case, the question of assessing damages, in addition to the return of the property, is one of some difficulty. If, for example, the suit is dismissed for some informality in the affidavit, writ or bond, the judgment may be for a return; the defendant may also ask for an assessment of his damages for the wrongful taking. In such case no evidence of the plaintiff's title is permitted, when, in case an opportunity had been offered, he might have been abundantly able to show himself to be the owner of the goods, and entitled to their possession. The judgment for return in such case does not affect the question of title to the property, but the judgment for damages, if rendered, would be conclusive to that extent, and the plaintiff compelled to pay them without redress, although, according to the equities of the case, the property was his own, and wrongfully taken from him. Cases are not wanting which hold that where the defendant sets up some purely technical defense to defeat the plaintiff, and thus avoids a hearing upon the merits, no return will be awarded;[21] but the current of authority is doubtless the other way.[22]

[21] Dickinson *v.* Noland, 2 Eng. (Ark.) 26; Hartgraves *v.* Duval, 1 Eng. (Ark.) 506; Hill *v.* Bloomer, 1 Pinney, (Wis.) 463; Gould *v.* Barnard, 3 Mass. 199.

[22] Crosse *v.* Bilson, 6 Mod. 102; Salkold *v.* Skelton, Cro. Jac. 519; Presgrave *v.* Saunders, 2 Ld. Raym. 984; Barry *v.* O'Brien, 103 Mass. 521; Dawson *v.* Wetherbee, 2 Allen, (Mass.) 462; Ranney *v.* Thomas, 45 Mo. 112; Wilkins *v.* Treynor, 14 Iowa, 393; Mason *v.* Richards, 12 Iowa, 74; Jansen *v.* Effey, 10 Iowa, 227; Fleet *v.* Lockwood, 17 Conn. 233; Gilbert on Replevin, p. 169.

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vives. Clow *v.* Gilbert, 54 Ills. Ap. 134, citing Burkle *v.* Luce, 1 N. Y. 163.

The sheriff from whom goods have been replevied, may on the discontinuance of the replevin, have trover for the value against the plaintiff in the replevin, *Id.*

If plaintiff dismiss his action, the goods having been retained by defendant, he may in a second suit recover damages from the date of the original detention. Allen *v.* Steiger, 17 Colo. 552, 31 Pac. 226.

Judgment of discontinuance is not conclusive as to the title; plaintiff having paid the value of the goods, upon the defendant's election to take the value, may recover that value in a second action, upon the original conversion. Tinsley *v.* Block, 98 Ga. 243, 25 S. E. 429.

Where unfair advantage is sought of a discontinuance the court will reinstate the action, Seals *v.* Stocks, 100 Ga. 10, 30 S. E. 278.

§ 518. **The same.** In a well considered case in Vermont, the goods were ordered to be returned for informality in bringing the suit, without any investigation into the title, defendant insisting upon an assessment of damages. The court denied his application, saying, that the disputed questions of title were not determined, and that damages, (beyond nominal,) should not follow the plaintiff's failure to sustain his suit for mere irregularity.[23] In Maine, after a judgment that the writ abate, an order for a return was made; but the court refused to assess damages, upon the ground that there was no issue upon which they could be estimated.[24]

§ 519. **The rule in such cases.** The true rule seems to be, that judgment for a return is only rendered when the court perceives such a course to be just; it will always hear evidence when a proper case is presented, as to whether the order for return should be made or not. At the same time it will consider all such facts as affect the question of damages; and if, from all the facts, it appears that the defendant has avoided a trial upon the merits, and that the plaintiff fails from a simple irregularity, when he otherwise would be likely to succeed, damages beyond nominal will very rarely, if ever, be awarded.[25]

§ 520. **The rule applicable to actions of tort generally apply to replevin; distinctions stated.** The rules for assessing damages in other cases, in the nature of tort, will generally be applicable to replevin. This distinction, however, exists, that in replevin the plaintiff asserts a continuing ownership in himself; he seeks a return of *his* goods, and damages for the interruption to *his* possession. In trover the plaintiff asserts that the defendant has converted the property to his own use; he therefore recognizes the transfer of the title to the defendant, and seeks simply a compensation for its value, not its return. It follows, that in trover the party can never recover for the use of the property, while it is equally clear that in replevin the successful party may, in many cases, be entitled to recover the value of the use of the property of which he has been wrongfully deprived.[26] Again, in trover, the right of property, general or

[23] Collomer *v.* Page, 35 Vt. 396. See, also, Thurber *v.* Richmond, 46 Vt. 399.

[24] McArthur *v.* Lane, 15 Maine, 245.

[25] Pierce *v.* Van Dyke, 6 Hill, (N. Y.) 613. See *ante*, Ch. —.

[26] McGavock *v.* Chamberlain, 20 Ill. 220; Allen *v.* Fox, 51 N. Y. 561; Williams *v.* Phelps, 16 Wis. 87; Scott *v.* Elliott, 63 N. C. 216.

special, is always in question, while in replevin the right of possession may alone be in issue. This does not change the fact, however, that in their substantial features great similarity exists between all actions brought for the conversion of chattels.[27]

§ 521. **Damages to plaintiff.** If the plaintiff prevails, the judgment is that the property belongs to him, that he rightfully took it by his writ, and that he is entitled to damages and costs, as well as judgment for the property.[28] Where the property was delivered to him upon the writ, his damages only include such sum as will compensate him for the injury he has sustained by reason of the wrongful taking or subsequent detention, together with any depreciation in value it may have suffered [29] up to the time when he obtained it by virtue of his writ, and not the value of the property. If the property was not delivered upon the writ, then its value, in addition to the damages for detention, may form a proper element of compensation.[30]

§ 522. **Damages to defendant.** Where the defendant makes claim to the property, and is successful, he is entitled to have it restored to him, or its value, with damages for the loss he has sustained by the interruption to his possession, estimated by substantially the same rules employed in estimating the plaintiff's damages. Damages to the defendant, however, are but an incident to the judgment for a return. If a return is adjudged, and the property has diminished in value while in plaintiff's possession, this decrease must be allowed to the defendant; otherwise, the plaintiff might return it in a depreciated condition. If it has increased in value, the increase must be allowed him, as the property is his, and he is entitled to the increase of his own property.[31]

§ 523. **The same. Not allowed unless a return of the property is claimed.** The order for a return is in the nature of

[27] See *ante*, § 44, *et seq.*

[28] Moore *v.* Shenk, 3 Barr. (Pa.) 13; Stevens *v.* Tuite, 104 Mass. 333; Nicholas Ins. Co. *v.* Alexander, 10 Humph. (Tenn.) 383; Fisher *v.* Whoollery, 25 Pa. St. 198.

[29] Young *v.* Willett, 8 Bosw. (N. Y.) 486.

[30] Ewing *v.* Blount, 20 Ala. 694; Russell *v.* Smith, 14 Kan. 374; Fisher *v.* Whoollery, 25 Pa. St. 197; Barkesdale *v.* Appleberry, 23 Mo. 389; Hohenthal *v.* Watson, 28 Mo. 360; Suydam *v.* Jenkins, 3 Sandf. 615; Williams *v.* Archer, 5 M. G. & S. (57 E. C. L.) 324.

[31] Mayberry *v.* Cliffe, 7 Cold. (Tenn.) 125; Hooker *v.* Hammill, 7 Neb. 231; Allen *v.* Judson, 71 N. Y. 76; Pearce *v.* Twichell, 41 Miss. 345; Neis *v.* Gillen, 27 Ark. 187; Pierce *v.* Van Dyke, 6 Hill, (N. Y.) 613.

a cross judgment. There must be some averment in the pleadings to sustain it.[32] It follows that where the defendant by his pleading disclaims a judgment for a return, as he does by the plea of *non cepit* or *non detinet*, etc., without other pleas, he cannot have damages.[33]

§ 524. **The same. Exceptions.** It is provided by statute in some States that the plea of *non cepit* or *non detinet* shall put in issue the plaintiff's title as well as the wrongful taking or detention. In such cases the defendant may have a return upon the plea of *non cepit* or *non detinet*, and if he have judgment for a return he may also have judgment for damages. The pleader in such case, upon following the forms laid down in the local statute, must be regarded as asserting all the rights which are allowed to that form of plea.[34]

§ 525. **The rules for estimating damages.** The rules for estimating damages in this action are by no means as simple as they at first appear. Any general rule, however well it may be adapted to a particular case, cannot fail to work hardship in others. It is more important, says the court in *Hamer* v. *Hathaway*, 33 Cal. 117, that the rule should be certain, than that it should be entirely beyond question on principle. With this general doctrine of stability all must concur. It must be added, however, that correct principles can alone become certain. In this, as in other actions at law, the case is tried and determined upon the rights of the parties as they existed at the time the suit was begun, but damages may be, and most usually are, assessed up to the time of the rendition of judgment, the same as interest upon a note. Damages to the defendant must be so assessed.[35]

[32] Gould *v.* Scannell, 13 Cal. 430; Bonner *v.* Coleman, 3 B. Mon. (Ky.) 464; Smith *v.* Snyder, 15 Wend. 324.

[33] The defendant is entitled to damages only when he shows by his pleadings that he is entitled to a judgment for the goods. When by his pleading he admits the plaintiff's right to the goods, it would be absurd to award him damages, even though he have a verdict and judgment for costs. Hopkins *v.* Burney, 2 Fla. 44; Gould *v.* Scannell, 13 Cal. 430. See People *v.* Niagara C. P., 4 Wend. 217; Bates *v.* Buchanan, 2 Bush. (Ky.) 117; Bemus *v.* Beekman, 3 Wend. 668; Whitwell *v.* Wells, 24 Pick. 25; Douglass *v.* Garrett, 5 Wis. 85. "If the defendant never had possession he cannot have return, nor is he entitled to damage for the detention of goods he never had." Richardson *v.* Reed, 4 Gray, (Mass.) 443.

[34] Pickens *v.* Oliver, 29 Ala. 528.

[35] Washington Ice Co. *v.* Webster, 62 Me. 341.

§ 526. **Nominal damages.** The rule for estimating damages to the successful party in replevin is similar in principle to that in other cases when there has been an invasion of a right. Nominal damages at least are awarded without proof of actual injury. The general rule is, that when one does an act injurious to another's right, which may be evidence for the wrong-doer in the future, damages may be awarded, even if the evidence predominates that there has been no substantial injury.[36]

§ 527. **The same.** This rule is based upon the assumption that any interference with the party's possession, or right of possession, is an injury, even if unaccompanied by actual loss. Its observance is frequently of the utmost importance in settling questions of title.[37]

§ 528. **Party claiming damages must show the extent of his injuries by proof.** It is for the injured party to show by proof the nature and extent of the injury he has suffered. He can in no case recover more than nominal damages without proof of the extent of his loss.[38] Simple proof that the defendant took the goods will not entitle the plaintiff to more than nominal damages.[39] The same rule applies in trespass. A trespass will not usually warrant substantial damages, unless some circumstances of aggravation or actual injury be shown.[40] The jury are never

[36] Mellor *v.* Spateman, 1 Saund. n. 346*b*; Strong *v.* Keene, 13 Irish L. R. 93; Smith *v.* Houston, 25 Ark. 184; Cory *v.* Silcox, 6 Ind. 39. Nominal damages have been called "a peg to hang costs on;" "A sum of money which has no quantity." Maule, J., in Beammont *v.* Greathead, (2 M. G. & S.) 52 E. C. L. 498. [Plaintiff is entitled to nominal damages, though the property demanded is surrendered after the institution of the suit, Cardwill *v.* Gilmore, 86 Ind. 428; and though no damages were in fact sustained, Robinson *v.* Shatzley, 75 Ind. 461.]

[37] Munroe *v.* Stickney, 48 Me. 462; Devendorf *v.* Wert, 42 Barb. 227; Stowell *v.* Lincoln, 11 Gray, 434; McConnell *v.* Kibbe, 33 Ill. 175. Awarded when defendant had no title to property. Champion *v.* Vincent, 20 Texas, 811; Smith *v.* Whiting, 100 Mass. 122; Allaire *v.* Whitney, 1 Hill, 484; Sedgwick on Meas. of Damages, 6 Ed. p. 55, says: "The rule as to nominal damages should be limited to cases where a right is *necessarily litigated*." A rule of much importance, and which should be more generally enforced. There seems to be a strong tendency in the English courts to discourage suits for nominal damages when no others appear. Williams *v.* Mostyn, 4 Mees & W. 145; Young *v.* Spencer, 10 B. & C. (21 E. C. L.) 145.

[38] Mann *v.* Grove, 4 Heisk, (Tenn.) 403.

[39] Phenix *v.* Clark, 2 Mich. 327.

[40] Rose *v.* Gallup, 33 Conn. 338.

authorized to assess damages without proof of their extent,[41] unless it be in exceptional cases when facts are submitted to their consideration to estimate under the order of the court.[42]

[41] Phenix *v.* Clark, 2 Gibbs, (Mich.) 327.

[42] Plaintiff proved damages, but not the amount; a judgment for the defendant was held error. Under such proof plaintiff was entitled to nominal damages, at least. Brown *v.* Emerson, 18 Mo. 103. [Damages cannot be allowed without proof thereof, Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797. And evidence of the amount thereof, Aultman Co. *v.* Richardson, 21 Ind. Ap. 211, 52 N. E. 86. The allegations of the writ are an admission of the plaintiff as to the quantity of the goods, but if made in mistake they are not binding, Washington Co. *v.* Webster, 68 Me. 449. The state of the market, and the supply, are proper considerations, Washington Co. *v.* Webster, *supra*. And prices current, obtained from manufacturers or dealers in the article, *Id.* The jury should not be allowed to refer to their own knowledge to determine the value of the use of work animals, Brown *v.* Morris, 3 Kans. Ap. 86, 45 Pac. 98; otherwise as to the value of household goods, Sinamaker *v.* Rose, 62 Ills. Ap. 118. Offers made to the plaintiff to purchase the thing converted, are not admissible, Illinois Co. *v.* Le Blank, 74 Miss. 650, 21 So. 760. In an action for taking gravel from plaintiff's lands, the price paid for gravel spread on the streets of a particular municipality, there being no evidence of the cost of getting it there, is not admissible, *Id.*; otherwise, if this omission is supplied; nor is such evidence admissible where the profits made by the contractors and the cost of a five-years' guarantee are included in the price paid, *Id.* Plaintiff replevied a large quantity of ice, and failed in his suit; upon the assessment of defendant's damages he offered, in order to show the weight of the ice, a book kept by one who weighed it after the replevy, setting down the several weights of the different loads and parcels; there was no evidence that his scales were those required by the statute, or that they had been sealed as required by the statute, or that he had ever been sworn as a weigher, as required by the statute. The book did not contain the entries of the general doings of this person, as a weigher, but merely the weights of this ice; held it was no more than the declarations *post litem motem* of the plaintiff's employee, and inadmissible, Washington Co. *v.* Webster, *supra*.

A witness testifying that great losses had occurred in a flock of sheep committed to the defendant. It was held admissible to cross-examine him as to losses in other flocks taken from the same original flock, and in the care of other parties, as tending to show that the loss was attributable to the condition of the sheep when received by defendant, Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085.

Live-stock of the value of two thousand dollars, replevied and retained six months; a large part of the herd was increase and calves; no special damages were averred. Held, that an allowance of eight hun-

§ 529. **The same.** The same rule applies when a return is adjudged to defendant. In the absence of proof of actual damages a judgment will simply be entered for a nominal amount.[43] When the jury award damages for detention without finding the fact of detention, such award is erroneous.[44] When the jury omit to find any damages, judgment therefor cannot be rendered.[45]

§ 530. **Compensation the object of the award.** The rule for ascertaining damages in replevin, when no fraud or malice is involved, is usually based upon the idea of compensation; the object being to restore the party, as far as pecuniary compensation will do so, to the condition he was in before the act complained of was committed.[46]

dred dollars was excessive upon the face of it, Legere *v.* Stewart, 17 Colo. Ap. 472, 68 Pac. 1059.

Judgment for damages without evidence to support it may be cured by a remittitur, Reddinger *v.* Jones, 68 Kans. 627, 75 Pac. 997. And the court of review may order a remittitur, Romberg *v.* Hughes, 18 Neb. 580, 26 N. W. 351.]

[43] Seabury *v.* Ross, 69 Ill. 533.

[44] Swain *v.* Roys, 4 Wis. 150.

[45] Black *v.* Winterstein, 6 Neb. 225.

[46] Berthold *v.* Fox, 13 Minn. 504; Bonesteel *v.* Orvis, 22 Wis. 522; Stevens *v.* McClure, 56 Ind. 384; Allen *v.* Fox, 51 N. Y. 564; Williams *v.* Crum, 27 Ala. 468; Dorsey *v.* Manlove, 14 Cal. 553. Dicta in Hotchkiss *v.* Jones, 4 Porter, (Ind.) 260, where court affirmed judgment in a fictitious case without looking at record. DeWitt *v.* Morris, 13 Wend. 497; Brizsee *v.* Maybee, 21 Wend. 144; Dows *v.* Rush, 28 Barb. 157; Dennis *v.* Barber, 6 S. & R. (Pa.) 420; Allison *v.* Chandler, 11 Mich. 542; Baker *v.* Drake, 53 N. Y. 211; Barnes *v.* Bartlett, 15 Pick. 75; Gillies *v.* Wofford, 26 Tex. 66; Wood *v.* Braynard, 9 Pick. 322; Woodburn *v.* Cogdal, 39 Mo. 222. Such damages are equivalent for the injury. Dorsey *v.* Gassaway, 2 Har. & J. (Md.) 402. Enough to compensate party. M'Cabe *v.* Morehead, 1 Watts & S. (Pa.) 513. Exemplary damages may be given. Taylor *v.* Morgan, 3 Watts, 334. Damages which cannot be accurately measured should not for that reason be denied, but the amount should be left to the finding of the jury. Gilbert *v.* Kennedy, 22 Mich. 117. In the absence of the elements of fraud, malice, or oppression, damages must be confined strictly to compensation for the injury. City of Chicago *v.* Martin, 49 Ill. 241. Consult Bell *v.* Cunningham, 3 Peters, 69; Tracy *v.* Swartwout, 10 Peters, 81. The common law rule was inflexible. Compensatory damages alone were given. Fidler *v.* McKinley, 21 Ill. 325; 2 Bla. Com. 438; Sedgwick on Meas. of Dam. 26; Parsons on Contracts, 5 Ed. 164, *et. seq.* [Plaintiff who prevails is entitled to recover all damages proximately occasioned by the wrong complained of, Live Stock Gazette Co. *v.* Union Co., 114 Calif. 447,

§ 531. **How the amount of compensation is ascertained.** A question, however, at once arises, how is the amount of that compensation to be ascertained? What elements enter into it? Where the value of the property is to be included, how shall it be found? And if the value is fluctuating, what time, between the taking and the final judgment, shall be selected as the time when the value shall be regarded as attaching? When the goods have a fixed and unvarying value, comparatively little difficulty arises from this source; but when the price is constantly changing, the time which shall be seized upon as the time for fixing the value presents another question.

§ 532. **When the goods have changed in value.** It may appear that the goods may have been removed to a distance from the place of taking, and such removal may have enhanced or may have diminished their value. The transfer may have been with a design to deprive the owner of his property, or it may have been in ignorance of his rights. A radical change may have taken place in the condition of the property while in the defendant's possession, before or pending the suit, or while in plaintiff's

46 Pac. 286. Where the defendant gives a forthcoming bond and retains the chattels, plaintiff prevailing recovers damages for detention to the date of the verdict, Lesser *v.* Norman, 51 Ark. 301, 11 S. W. 281. A statute that the plaintiff shall be entitled to "such damages as are right and proper" is not intended to leave the measure of damages to the undiscriminating sense of justice and propriety of a jury, Hainer *v.* Lee, 12 Neb. 452, 11 N. W. 888; but that the party shall be fully compensated for the wrong done him, Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085. The plaintiff may waive his right to damages for the detention, Williams *v.* Hochle, 95 Wis. 510, 70 N. W. 556. Mortgagee replevied the goods under the insecurity clause and failed; but while he detained the goods defendant executed a second mortgage which was a violation of the conditions of the first; held, that the defendant could recover only for the detention between the taking of the goods under the writ of replevin and the date of the second mortgage, Deal *v.* Osborne, 42 Min. 102, 43 N. W. 835. The value of the goods is in no event to be included in the damages assessed to the defendant, where he prevails; the bond stands in lieu of these, and in contemplation of law is capable of causing their immediate restoration, Stevens *v.* Tufts, 104 Mass. 328. Damages for detention are allowed, though the goods cannot be returned, Schrandt *v.* Young, *supra*, including the value of the use, if value in use is shown. *Id.*

If policy should be given any sway in the assessment of damages it should be in the direction of encouraging the return of the property. Schrandt *v.* Young, *supra*.]

possession, upon his writ. For example, a colt may have become a horse, or it may have died. Grass may have been cut and stacked, and the rain may have spoiled it; or any other of the changes incident to property may have taken place. These circumstances necessarily enter into the estimate of compensation, and must be carefully considered in all their bearings upon the rights of the parties.

§ 533. **The rule governing compensation applies only to cases where no malice or willful wrong is charged.** As before stated, the rule which usually governs the assessment of damages in replevin is based on the principal of compensation. The plaintiff, in his declaration, claims not only the goods, but damages for the taking or detention. Upon proof of such facts, he is entitled to such damages as will repair his loss. This rule is applicable in all cases of replevin, where no malice or willful wrong is charged.[47]

§ 534. **When taking was wrongful, damages estimated from the time of taking; otherwise, from the time of conversion.** Where the taking was wrongful, the damages may be estimated from the time of the taking; but where it was rightful in the first instance, the damages can only be estimated from the time of the wrongful conversion. The reasons for this rule are apparent. A rightful possession by the defendant can be no injury to the plaintiff; but a wrongful taking is presumed to be an injury, even when no actual damage is the result. If the taking was rightful, originally, and the defendant refuse to deliver, on request, his detention from that moment is wrongful, and damages should be assessed from that time.

§ 535. **Depreciation in value a proper element of damages.** Where the property diminishes in value while it is wrongfully detained, the depreciation is usually a proper element of damages.[48] This rule applies alike to both parties. The wrong-

[47] Bonesteel *v.* Orvis, 22 Wis. 522; Brannin *v.* Johnson, 19 Me. 362; Bruce *v.* Learned, 4 Mass. 614; Whitwell *v.* Wells, 24 Pick. 33; Allison *v.* Chadler, 11 Mich. 542; Baker *v.* Drake, 53 N. Y. 212; Warner *v.* Matthews, 18 Ill. 87. Trespass for taking teas; plaintiff entitled to value and interest, after the usual time of credit on such sales. Conard *v.* Pacific Ins. Co., 6 Pet. (U. S.) 262; Pacific Ins. Co. *v.* Conard, 1 Baldwin C. C. 138. See Champion *v.* Vincent, 20 Tex. 811; Bateman *v.* Goodyear, 12 Conn. 575; Ives *v.* Humphreys, 1 E. D. Smith, 196.

[48] Hooker *v.* Hammill, 7 Neb. 231; Frey *v.* Drahos, 7 Neb. 194; Moore

ful detainer of property is liable for its depreciation while in his hands.[49] The party cannot recover for the use, and at the same time have depreciation in value assessed.[50] But in Nebraska, the diminution in value, with the interest on the entire value, was given.[51]

§ 536. **The rule not uniform.** No uniform rule can be given for ascertaining the extent of compensation. Different measures of redress may be proper for the same injury suffered under different circumstances. What will make good the loss which the party has sustained, owing to the situation in which he was placed when the injury was inflicted, is the material question. In determining this, all relevant circumstances ought to be carefully considered.[52]

§ 537. **Interest as a measure of damage.** Interest upon the value is frequently regarded as a proper measure of damages.

v. Kepner, 7 Neb. 291; Mayberry *v.* Cliffe, 7 Cold. (Tenn.) 117; Gordon *v.* Jenney, 16 Mass. 465; Young *v.* Willet, 8 Bosw. (N. Y.) 486; Brizsee *v.* Maybee, 21 Wend. 146.

[49] Rowley *v.* Gibbs, 14 Johns. 385. [If plaintiff prevails he may recover for any deterioration while the goods are in defendant's possession, Yelton *v.* Slinkard, 85 Ind. 191, Merrill Chemical Co. *v.* Nickells, 66 Mo. Ap. 678, Trimble *v.* Mercantile Co., 56 Mo. Ap. 683, Renfro *v.* Hughes, 69 Ala. 581, Crossley *v.* Hojer, 11 Misc. 57, 31 N. Y. Sup. 837; Brennan *v.* Shinkle, 89 Ills. 604, Clow *v.* Yount, 93 Ills. Ap. 112, Findlay *v.* Knickerbocker Co., 104 Wis. 375, 80 N. W. 436, Hoester *v.* Teppe, 27 Mo. Ap. 207. Even though the defendant is an officer and has no claim except as an officer and by virtue of a levy of an execution and has gone out of office pending the action, he is to be allowed damages for depreciation of the goods in the plaintiff's hands, Bowersock *v.* Adams, 59 Kans. 779, 54 Pac. 1064. The allowance is to be made whether the depreciation is from acts or neglects of the defeated party, or any other cause, Mix *v.* Kepner, 81 Mo. 93, Findley *v.* Knickerbocker Co., *supra*.

A rise in value during the detention may be allowed to the successful defendant, Three States Co. *v.* Blank, C. C. A. 133 Fed. 479, Deck *v.* Smith, 12 Neb. 390, 11 N. W. 852, Schnabel *v.* Thomas, 98 Mo. Ap. 197, 71 S. W. 1076. But an increase in the market price for a short space ought not to aggravate the damages, unless evidence is given that the owner would have sold at that price, but for the detention. The jury may allow interest, in their discretion, Meschke *v.* Van Doren, 16 Wis. 319.]

[50] Odell *v.* Hole, 25 Ill. 204.

[51] Hooker *v.* Hammill, 7 Neb. 234.

[52] Shepherd *v.* Johnson, 2 East, 211; Berry *v.* Vantries, 12 S. & R. 94; Backenstoss *v.* Stahler, 33 Pa. St. 257.

The common rule is to allow it in all cases upon the value of property after the date of the conversion, unless some particular reasons exist to the contrary.[53] When the wrong consists merely in the detention of property, (not the subject of daily use,) without waste or depreciation, or in the compulsory postponement of the exercise of the party's rights under legal process,[54] interest is allowed. In fact, in all cases where damages are shown, in the absence of proof of some special damages, or proof that they were more or less than interest, interest upon the value during the time the successful party was deprived of his goods will usually be regarded as the only proper measure.[55]

[53] Hamer *v.* Hathaway, 33 Cal. 119; McDonald *v.* North, 47 Barb. 530.

[54] Beals *v.* Guernsey, 8 Johns. 446; Hyde *v.* Stone, 7 Wend. 354; Bissell *v.* Hopkins, 4 Cow. 53; Ripley *v.* Davis, 15 Mich. 75; Robinson *v.* Barrows, 48 Me. 186; Oviatt *v.* Pond, 29 Conn. 479; Jones *v.* Rahilly, 16 Minn. 322; Derby *v.* Gallup, 5 Minn. 119; Scott *v.* Elliott, 63 N. C. 215.

[55] Stat., 3, 4, W. IV., Ch. 42, § 29; Wood *v.* Braynard, 9 Pick. 322; N. Y. Guarantee Co. *v.* Flynn, 65 Barb. 365; Twinam *v.* Swart, 4 Lans. (N. Y.) 263; Stevens *v.* Tuite, 104 Mass. 333; Ormsby *v.* Vermont Copper Co., 56 N. Y. 623; Allen *v.* Fox, 51 N. Y. 567; Bartlett *v.* Brickett, 14 Allen, 64; Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614; Huggeford *v.* Ford, 11 Pick. 223; Mattoon *v.* Pearce, 12 Mass. 406; Barnes *v.* Bartlett, 15 Pick. 78; Caldwell *v.* West, 1 Zab. (21 N. J.) 411; Bonesteel *v.* Orvis, 22 Wis. 522; Bigelow *v.* Doolittle, 36 Wis. 119; Williams *v.* Phelps, 16 Wis. 80. [In the absence of other damages plaintiff recovers interest on the value, Curry *v.* Wilson, 48 Ala. 638, Hampton Co. *v.* Sizer, 35 Misc. 391, 71 N. Y. Sup. 990, Crossley *v.* Hojer, 11 Misc. 57, 31 N. Y. Sup. 837, Govin *v.* De Miranda, 140 N Y. 474, 35 N. E. 626, Kelly *v.* McKibben, 54 Calif. 192, Hanselman *v.* Kegel, 60 Mich. 540, 27 N. W. 678, Tucker Parks, 7 Colo. 65, 1 Pac. 427, Findley *v.* Knickerbocker Co., 104 Wis. 375, 80 N. W. 436, Saling *v.* Bolander, 60 C. C. A. 469, 125 Fed. 701, Macon Co. *v.* Meador, 67 Ga. 672, Woodburn *v.* Cogdal, 39 Mo. 222, Jackson *v.* Nelson, Tex. Civ. Ap. 39 S. W. 315. In Bonnot Co. *v.* Neuman, 109 Ia. 580, 80 N. W. 655, it was held error to allow interest from a date prior to the verdict, unless the value at that date is proven. In Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085, the rule of damages is stated as follows, (1), if there is no special value in the use, interest, (2), if the value of the use exceeds interest, then such value, whether the goods are returned or not, but no interest, (3), if loss, depreciation or deterioration occur while the property is withheld, the amount thereof, to be conditioned, however, upon the return of the goods. If interest upon the value is allowed, it is fatal error to allow even a nominal sum, as damages, in addition, Garcia *v.* Gunn, 119 Calif. 315, 51 Pac. 684. Where bonds are unlawfully detained, the plaintiff prevailing will be entitled to lawful interest from the time of the demand, though the

§ 538. **How assessed.** When the jury, in assessing damages for defendant, estimate the value of the property at a time subsequent to the conversion, they cannot add to this value interest from the time of conversion.[56] If interest was added from the time of conversion, such an assessment would in effect amount to double damages.[57] Where considerable time elapses between the verdict and the rendition of judgment, interest for that time cannot be included in the judgment.[58] This will not prevent the judgment from drawing such interest as is allowed by law.[59] In some States the officer is authorized to seize the property and hold it for a limited time, to enable the plaintiff to give bond. If the plaintiff fails to furnish it, the property must be returned to the defendant; and where such is the case, interest upon the value, with any depreciation or injury it has sustained, is proper, together with the expense of replacing the property.[60]

§ 539. **Where a part only of the goods are found.** Where the plaintiff is successful, and where a part of the goods sued for were not found by the officers, and have not been delivered, the plaintiff is entitled to recover the value of such undelivered part; and interest upon such value from the time of taking may also be added as proper damages.[61]

§ 540. **In suit on bond.** In an action upon the bond for a failure to make return, when the property could have been returned but was not, and was converted, the value with interest thereon was allowed.[62]

§ 541. **Where the suit is concerning the validity of a sale.** Where the contest was about the validity of a sale of personal property, value at the time of seizure, and interest, was regarded as proper.[63]

bonds bear a less rate of interest, Govin *v.* De Miranda, 140 N. Y. 474, 35 N. E. 626, and see Wegner *v.* Second Ward Bank, 76 Wis. 242, 44 Neb. 1096.]

[56] Atherton *v.* Fowler, 46 Cal. 323.

[57] Freeborn *v.* Norcross, 49 Cal. 313. See Landers *v.* George, 49 Ind. 309.

[58] Atherton *v.* Fowler, 46 Cal. 326.

[59] Hamer *v.* Hathaway, 33 Cal. 119.

[60] Morris *v.* Baker, 5 Wis. 389.

[61] Booth *v.* Ableman, 20 Wis. 602; Graves *v.* Sittig, 5 Wis. 223; Pacific Ins. Co. *v.* Conard, 1 Baldwin, C. C. 142; Dana *v.* Fiedler, 2 Kern. (N. Y.) 40; Brizsee *v.* Maybee, 21 Wend. 144; Andrews *v.* Durant, 18 N. Y. 500.

[62] Walls *v.* Johnson, 16 Ind. 374.

[63] Miller *v.* Whitson, 40 Mo. 100. See, also, Woodburn *v.* Cogdal, 39

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§ 542. **Where defendant is a stakeholder.** Where the defendant was the mere stakeholder of two certified checks for $2,500 each were replevied, the verdict was, "We, the jury, find the defendant guilty, and that the property replevied in said cause, and the right of possession of the same is in the plaintiff, and we assess the plaintiff's damages at $6,275," judgment upon such a verdict was erroneous. The only damage which the defendant could in any event recover for the wrongful detention of the checks was the interest upon the $5,000 from the time of the demand and refusal until they were replevied.[64]

§ 543. **Value of property, when allowed as damages.** When the plaintiff obtains possession of the property by the writ, and retains it until the trial, he, of course, cannot ask judgment for its value; when the property, however, is not delivered pending the suit, the plaintiff, if successful, is entitled to a judgment for the property or for its value; the value in such case, being one of the elements of damages, should be found by the jury.[65] In like manner, if the plaintiff has obtained the property upon his writ, and the verdict is for the defendant, the judgment usually is for a return of the goods. The finding in such case should embrace not only the damages for taking and detention, but also the value of the property, and the judgment is for the value in case the plaintiff fails to make the return as ordered by the court.[66]

Mo. 222; Mayberry *v.* Cliffe, 7 Cold. (Tenn.) 118; Blackie *v.* Cooney, 8 Nev. 44.

[64] Merchants' S. L. & T. Co. *v.* Goodrich, 75 Ill. 559.

[65] Merrill *v.* Butler, 18 Mich. 294; Bates *v.* Buchanan, 5 Bush, (Ky.) 117. See Gordon ads. Williamson, 20 N. J. L. 77. The same results are reached in Illinois and some other States, when the count in trover is permitted to be filed with the *declaration* in replevin for such goods as the officer cannot find to deliver upon the writ.

[66] Laborde *v.* Rumpa, 1 M'Cord, 15. At the common law, when the plaintiff complained that the defendant "still detained" the property, he was entitled to judgment for the value as well as damages for the taking and detaining. Easton *v.* Worthington, 5 S. & R. (Pa.) 131; Frazier *v.* Fredericks, 4 Zab. (24 N. J.) 162; Borron *v.* Landes, 1 Duv. (Ky.) 299; F. N. B. 69; Petre *v.* Duke, Lutw. 360. [Where merchandise is recovered the measure of plaintiff's damages is the value, Lamont *v.* Williams, 43 Kans. 558, 23 Pac. 592. Where the things are not marketable the measure of damages is their value to the owner, Stickney *v.* Allen, 10 Gray, 352. The cost of replacement is not the true measure of damages for the detention of second-hand household

§ 544. **The same.** So when the defendant retains the property by making claim of ownership, and giving bond under the statute, as he may in many States; upon a verdict for the plaintiff, the jury should find the value of the property, as well as the amount of damage for detention, so that the plaintiff may have judgment for the value in case the property is not delivered to him.[67] When the plaintiff elects to proceed without asking delivery of the goods pending the suit, as he may do under some of our State statutes, in case he succeeds, the judgment is for the delivery of the property to him, or the payment of its value. And where his petition asks for damages for detention, he may prove the value of the property as a proper element of damages to be awarded him, the action in such case being in the nature of trover.[68] In each of these cases the judgment is in the alternative, for the property, or in case it cannot be had, for its value. These rules cannot be said to be universal in their application. In some of the States the judgment is for the property or its value, at the option of the party in whose favor it is rendered. In the absence of local laws or practice to the contrary, the principles stated will apply.

§ 545. **When value is regarded as attaching.** The foregoing sections may to some extent be a guide as to when the value is allowed to enter into the question of damages; and that having been settled, the question arises, when shall the value be regarded

goods, Burchinell *v.* Butters, 7 Colo. Ap. 294, 43 Pac. 459. Where the goods were sold by the sheriff under execution against a stranger, pending the replevin, it was held proper to award the plaintiff the amount of the bid at that sale, Leonard *v.* McGinnis, 34 Minn. 506, 26 N. W. 733. But anomalous sales, not in the ordinary course of business, are not controlling; market value signifies a price established by sales in the way of ordinary business, Meixell *v.* Kirkpatrick, 33 Kans. 282, 6 Pac. 241. The owner of goods is not under any duty to sell the whole to any one purchaser, and an instruction that the measure of damages is a fair price, upon such a sale, is properly refused, Washington Co. *v.* Webster, 68 Me. 449. The plaintiff recovers the value only where the goods have been retained by the defendant, Lindauer *v.* Teeter, 41 N. J. L. 255. Where the quality of the goods is not shown, the defendant convicted of the unlawful detention cannot complain if they are assumed to be of the best, Curry *v.* Wilson, 48 Ala. 638.]

[67] Frazier *v.* Fredericks, 4 Zab. (N. J.) 162; Field *v.* Post, 9 Vroom, (N. J.) 346.

[68] Pugh *v.* Calloway, 10 Ohio St. 488.

as attaching. What point in the history of the dispute shall be seized upon as the moment when the value shall be fixed.

§ 546. **Value at the time of conversion.** A large number of cases hold that the value at the time of the conversion, or at the time the delivery was refused, together with interest, is the proper rule.[69] This question is exhaustively discussed in *Whit-*

[69] Jacoby *v.* Lanssatt, 6 S. & R. (Pa.) 300; Ormsby *v.* Vermont Copper Co., 56 N. Y. 623; Otter *v.* Williams, 21 Ill. 118; Whitfield *v.* Whitfield, 40 Miss. 352; Greer *v.* Powell, 1 Bush. (Ky.) 489; Keaggy *v.* Hite, 12 Ill. 99; Robinson *v.* Barrows, 48 Me. 186; Kennedy *v.* Whitwell, 4 Pick. 466; Greenfield Bank *v.* Leavitt, 17 Pick. 1; Parsons *v.* Martin, 11 Gray, (Mass.) 111; Pierce *v.* Benjamin, 14 Pick. 356; Riply *v.* Davis, 15 Mich. 75; Kennedy *v.* Strong, 14 Johns. 128; Bell *v.* Bell, 20 Geo. 250; Spicer *v.* Waters, 65 Barb. 227; Hendricks *v.* Decker, 35 Barb. 298; Lillard *v.* Whitaker, 3 Bibb. (Ky.) 92; Sproule *v.* Ford, 3 Litt. (Ky.) 26; Baltimore Ins. Co. *v.* Dalrymple, 25 Md. 269; Cushing *v.* Longfellow, 26 Me. 307; Shepherd *v.* Johnson, 2 East. 211; Davies *v.* Richardson's Ex'rs, 1 Bay. (S. C.) 102; Kipp *v.* Wiles, 3 Sandf. 585. The expense of teams, etc., to remove the property, may become part of the damages. Washington Ice Co. *v.* Webster, 62 Me. 361. In a suit for damages to a defendant when there was no malice, the value of the property at the time it was replevied was held to be the proper rule. Berthold *v.* Fox, 13 Minn. 507; Garrett *v.* Wood, 3 Kan. 231. In trespass, the value at the time the trespass was committed, Gilson *v.* Wood, 20 Ill. 37. When the form of the action is assumpsit, for money had and received, the plaintiff can only recover the sum received, not the value of the goods. Rand *v.* Nesmith, 61 Me. 111; Rowan *v.* St. Bank, 45 Vt. 160. When the plaintiff was *assignee* of goods seized by the sheriff, on execution, and must have sold them if they had come to his hands, the jury could properly ascertain the price at which they were sold by the sheriff at auction, as the true measure of damages. Whitehouse *v.* Atkinson, 3 Car. & P. (14 E. C. L.) 344. [The value is to be assessed as of the date of the taking, Findley *v.* Knickerbocker Co., 104 Wis. 375, 80 N. W. 436; Dodge *v.* Runels, 20 Neb. 33, 28 N. W. 849; Honaker *v.* Vesey, 57 Neb. 413, 77 N. W. 1100; Washington Co. *v.* Webster, 68 Me. 449; Woodburn *v.* Cogdal, 39 Mo. 222; Miller *v.* Whitson, 40 Mo. 97; Boylan *v.* Huguet, 8 Nev. 345; Conner *v.* Hillier, 11 Rich. S. C. 193; Stuart *v.* Phelps, 39 Ia. 14; Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745. If there be no established market price at the place and time of the taking recourse may be had to sales nearest in point of time and place, Washington Co. *v.* Webster, *supra.* In Missouri the value is assessed as of the date of trial, Merrill Co. *v.* Nickells, 66 Mo. Ap. 678; Chapman *v.* Kerr, 80 Mo. 158. In the case of goods of fluctuating value the rule has obtained in some courts of allowing the highest market value between the time of the conversion and the institution of the suit; but this rule seems now generally abandoned, 3 Suth. Dam. 496–509. Where the action is for a marketable

field v. *Whitfield*, 40 Misc. 352, where all the leading authorities on the subject are considered, and the court concludes its discussion: "From the examination which we have been able to give to this question, we think that may be safely affirmed: 1. That in actions for taking and detaining personal property, where no question of fraud, malice, oppression (or willful wrong, either in the taking or detention,) intervenes, the measure of damages is the value of the property at the time of the taking, or conversion, or illegal detention, with interest thereon to the time of trial; and this is a rule of law to be decided by the court. 2. That where the trespass, detention or conversion is attended by circumstances of malice, fraud, oppression, or willful wrong, the law abandons the rule of compensation, in a legal sense, and the measure of damages becomes a matter for the consideration of the jury, guided by the evidence before them. That under the first rule stated may be embraced all cases where the defendant, neither in the taking nor in the detention or disposition of the property, has been guilty of any willful wrong, but acts in good faith, and with no intent injuriously to affect plaintiff's rights. That under the second rule above stated may be embraced, 1, all cases where the original act was willful and wrongful; 2, or where the original act was *bona fide*, but the subsequent detention, sale, or other disposition of the property, after a knowledge of plaintiff's claim, was willful and injurious; 3, or where the original act, and subsequent disposition of the property for a greater price than its market value, at the time of the original taking, were all in ignorance of the plaintiff's rights, but the defendant seeks to retain the difference, as a speculation resulting from his original unintentional wrong; 4, or where the property in controversy has some peculiar value to the plaintiff, and is willfully withheld from the rightful owner, or he has been deprived thereof by the willful and wrongful act of the defendant. In all such cases it is the peculiar province of the jury to find such damages, according to the convictions of their own understandings, as are consistent with right; not as a matter of law, under the control and direction of the court, but as a rule of remedial justice, resting in their discretion."

commodity and defendant prevails, he recovers the market value on the day of the trial; but the plaintiff unless he appears to have acted willfully will be allowed for preparing the thing for sale and conveying it to market, Clement v. Duffy, 54 Ia. 632, 7 N. W. 85.]

§ 547. **The same.** In England, the statute, 3 and 4 W. IV. c. 42, § 29, allows interest upon the value of the property at the time of the seizure or conversion, and indicates the conversion as the time at which the value should be fixed. This is the rule laid down in many well considered cases in this country.[70] Where the plaintiff was non-suited, the defendant was entitled to interest upon the value of the goods from the date of replevin.[71] The same principles apply in trover.[72]

§ 548. **This rule applicable when the value of the property is stable; rule when the value varies.** The rule which estimates the value at the time of conversion, with intersst from that date, is equitable in cases where the value is stable. But when the value is changing, the rule would work unjustly in many, probably a majority, of cases; for instance, a wrongful taker could select the time when property was low, and derive a profit by seizing and disposing of it; therefore, where the value is changing, some other more equitable method must be devised.

§ 549. **The highest value after taking and before trial.** Many cases regard the highest value between the time of conversion and trial, as the proper one to be fixed.[73] *Markham* v. *Jaudon*, 41 N. Y. (Hand.) 235, was a case where the plaintiff furnished a margin for the purpose of buying stocks, and the defendant, with ten per cent. of plaintiff's money and ninety per cent. of his own, purchased the stocks for plaintiff. Defendant sold the same without orders, and the court, following the principles laid down in the cases last cited, gave damages at the highest prices after conversion and before judgment. This case has been cited and

[70] Yater *v.* Mullen, 24 Ind. 277. What it would take to replace the goods was held to be the measure of damages; in Starkey *v.* Kelly, 50 N. Y. 676. The value of the property at the time it should be restored; in Swift *v.* Barnes, 16 Pick. 196. The damages not governed by any fixed rule, but arbitrary, and to be estimated by the jury in view of all the circumstances. Jones *v.* Allen, 1 Head. (Tenn.) 626. The value with interest from the time of the conversion; Greenfield Bank *v.* Leavitt, 17 Pick. 3.

[71] Wood *v.* Braynard, 9 Pick. 322; Barnes *v.* Bartlett, 15 Pick. 78.

[72] Barnes *v.* Bartlett, 15 Pick. 78.

[73] Cortelyou *v.* Lansing, 2 Cain's Ca. 200; Barnett *v.* Thompson, 37 Geo. 335; Burt *v.* Dutcher, 34 N. Y. 493; Markham *v.* Jaudon, 41 N. Y. (Hand.) 239; Morgan *v.* Gregg, 46 Barb. 183; Wilson *v.* Mathews, 24 Barb. 295; Romain *v.* Van Allen, 26 N. Y. 309.

followed in a number of others. And, although the soundness of the rule has been affirmed as a general principle, its universal application has been denied.

§ 550 **The same.** In *Matthews* v. *Coe*, 49 N. Y. 57, CHURCH, Ch. J., said: "An unqualified rule, giving the plaintiff the highest price between the conversion and the time of trial, cannot be upheld on any principle of reason or justice." In *Baker* v. *Drake*, 53 N. Y. 213, the court said: "The rule laid down in *Markham* v. *Jaudon*, has been recognized in several cases where the value of the property was fluctuating, but its soundness as a general rule has been seriously questioned and denied in various cases." [74] The court there reviewed and examined a number of leading cases upon this subject, and concluded that the principles laid down in *Markham* v. *Jaudon* were not to be regarded as settled rules to which the principle of *stare decisis* should apply.[75]

§ 551. **The same. Observations upon the rule.** It may, however, safely be said that this rule, though somewhat circumscribed, continues to be a very general and necessary rule, *Matthews* v. *Coe*, and *Baker* v. *Drake*, *supra*, only limiting or directing the application, but not superseding the rule.[76]

§ 552. **The same.** In detinue for shares of stock which had been delivered to the plaintiff after suit was brought, the property was worth £3 5s. when demanded, and £1 at the time of delivery. This difference the plaintiff was allowed to recover.[77] In trover, the jury are not limited to any precise time, but may fix the value at any time between the demand and judgment.[78] If at the time the return is ordered, the property had increased in value, the defendant would be entitled to any increase that occurred, as the goods are his; if it had diminished, the loss ought

[74] Baker *v.* Drake, 66 N. Y. 518.

[75] See Morgan *v.* Jaudon, 40 How. Pr. 366; Stewart *v.* Drake, 46 N. Y. 449.

[76] Hamer *v.* Hathaway, 33 Cal. 119; Douglass *v.* Kraft, 9 Cal. 563; West *v.* Wentworth, 3 Cow. 82; Allen *v.* Dykers, 3 Hill, 593; Blot *v.* Boiceau, 3 Comst. 85; Lobdell *v.* Stowell, 51 N. Y. 77; Willard *v.* Bridge, 4 Barb. 361; Wilson *v.* Mathews, 24 Barb. 295; Commercial Bank *v.* Kortright, 22 Wend. 348; Kortright *v.* Com. Bank, 20 Wend. 91.

[77] Williams *v.* Archer, 5 M. G. & S. 318. See Archer *v.* Williams, 2 Carr. & K. (61 E. C. L.) 26; Barnett *v.* Thompson, 37 Geo. 335; Morgan *v.* Gregg, 46 Bar. 183.

[78] Johnson *v.* Marshall, 34 Ala. 528.

to fall upon the plaintiff, as he wrongfully interfered with the defendant's possession, and thus occasioned it.[79]

§ 553. **Qualifications of the rule; suit must be brought within a reasonable time.** This rule allowing the highest market price at any time after the taking and before judgment, is without doubt sustained by a large number of the cases in this country and England, prior to the statute 3 and 4 W. IV. c. 42, § 29. The rule, however, must be taken with this qualification, that the suit must be brought within a reasonable time, and its trial urged with all reasonable diligence. The plaintiff has no right to wait until the period of limitation is about to expire, nor to delay his suit for the purpose of having a longer time within which to compute damages. It is a rule of doubtful justice, said the court, to give the plaintiff the whole period of the statute of limitations within which to select his standard of value.[80]

§ 554. **The same.** This question arose in California upon the replevin of hay taken in 1863, when it was worth three to five dollars per ton. The trial was in 1869. The defendant proved that in 1864 it was worth thirty-eight to forty dollars per ton. The court, in discussing the case, said: "If a quantity of fruit, strawberries, for instance, be taken in the season of the greatest plenty, under circumstances which entitle the owner to indemnity only, and suit began at once to recover the value, trial, in the ordinary course of events, could not take place for many months. In the meantime the season of plenty has passed and the price has risen enormously, and under the rule allowing the highest prices the plaintiff could recover the enhanced value which he could by no possibility have realized himself." Under this construction the plaintiff received a verdict for $25,763 for property not worth more than $2,500 when it was taken. When we consider that the object to be attained is indemnity for losses actually sustained, this result is startling. The court then follows the rule laid down in *Scott* v. *Rogers*, *supra*, and says the correct measure of damages is the highest market price within a reasonable time;[81] and this agrees with the rule in *Cannon* v. *Folson*, 2 Iowa, 101, where many cases were cited, and with *Pinkerton* v. *Railroad*, *etc.*, 42 N. H. 424.

[79] Washington Ice Co. *v.* Webster, 62 Me. 341; Mayberry *v.* Cliffe, 7 Cold. (Tenn.) 124.

[80] Scott *v.* Rogers, 31 N. Y. 678.

[81] Page *v.* Fowler, 39 Cal. 416.

§ 555. **What is highest market value.** The rule is also subject to the following additional qualification, that the term "highest market value" embraces only such changes in the market as are due to the ordinary commercial causes. A sudden panic, or unusual excitement, or conspiracy among dealers, may give any article of merchandise a speculative but purely fictitious value. Such prices ought not to be taken into consideration by the courts in ascertaining values or damages to be awarded to contending suitors.[52] By "the highest market value," as used in this connection, the law also contemplates the range of the entire market and an average of prices running through a reasonable period of time, not any sudden or transient inflation or depression resulting from causes independent of the operation of lawful commerce.[53]

§ 556. **Further qualification of the rule.** The rule is subject to the further limitation that the party must show himself to be the owner of the property for which he claims such damages. For example, the plaintiff put up a margin and directed the defendant to purchase stocks, which the defendant afterwards sold without plaintiff's consent. Here the speculation was carried on with the defendant's money. If the plaintiff had had the chance of profit, he was subject also to the chance of a decline, which he avoided; he was also subject to the chance of his not availing himself of the use of the rise at the proper moment, which is no inconsiderable element, and the fact exists that if the stocks had risen he would, perhaps, have been unable to make further advances to hold them. The value of the stocks in such case would be improper. The proper course would have been for the plaintiff, on being notified of the sale, to have signified his disapproval and directed the defendant to replace the stocks, and if he had not done so, the plaintiff might have then bought the stock and charged him with the loss in so doing. The circumstances of a case like this will not warrant the transfer of all the chances of loss to the defendant, holding him responsible for all possible chances of gain, and making him an insurer that the plaintiff would have made that gain.[54] Where the goods are of a kind that varies in quality, and one party, by any artifice,

[52] Mayberry v. Cliffe, 7 Cold. (Tenn.) 124.

[53] Smith v. Griffiths, 3 Hill, 333; Durst v. Burton, 47 N. Y. 175.

[54] Baker v. Drake, 53 N. Y. 211. See same case, 66 N. Y. 518.

deprives the other from showing the real quality, the presumption as to quality will be against the party who practices the fraud.[85]

§ 557. **Measure of damages in suit for a note or bill.** The measure of damages in a suit for a bill or note seems to be, *prima facie*, the amount of the bill or note; the defendant, however, may give in evidence the insolvency of the maker, or any payment made on it, or any other facts showing the real value of the instrument, or that the actual damages were less.[86]

[85] Bailey *v.* Shaw, 4 Foster, (N. H.) 301.

[86] Potter *v.* Merchants' Bank, 28 N. Y. 641; Am. Ex. Co. *v.* Parsons, 44 Ill. 318; Keaggy *v.* Hite, 12 Ill. 99; Menkens *v.* Menkens, 23 Mo. 252; Ingalls *v.* Lord, 1 Cow. (N. Y.) 240; Robbins *v.* Packard, 31 Vt. 570. [The measure of damages for the conversion of negotiable bonds, is the market value, Loomis *v.* Stave, 72 Ills. 623. Stock sold without authority could have been replaced any time within thirty days at the same price at which it was sold; plaintiff had paid nothing upon it; held, he was entitled only to nominal damages, Colt *v.* Owens, 90 N. Y. 368, distinguishing Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507, where it is held that, whatever may be the form of the action, if stocks have been paid for, all fluctuations of the market are at the risk of the vendor who refuses to deliver while retaining the purchase money. But in Meixell *v.* Kirkpatrick, 29 Kans. 679, the measure of damages is held to be the difference between the market value and what the plaintiff had contracted to pay. The face value of municipal bonds is deemed the market value in absence of evidence to the contrary, Meixell *v.* Kirkpatrick, *supra*. The measure of damages for the conversion of stock is the market value of the stock on the day of conversion, Brewster *v.* Van Liew, 119 Ills. 554, 8 N. E. 842, Seymour *v.* Ives, 46 Conn. 109, Anderson *v.* Nicholas, 28 N. Y. 600. Jarvis endorsed land script in blank to Russell to secure five hundred dollars, and Russell delivered it so endorsed to Rogers, to secure one thousand dollars; Rogers took without notice of the rights of Jarvis; Jarvis' administrator was held entitled to recover of Rogers the value of the scrip less the two sums for which it had been pledged, Jarvis *v.* Rogers, 15 Mass. 389. *Prima facie*, the measure of damages for the conversion of a promissory note is the principal and interest unpaid at the date of conversion, with interest from that date to the trial, Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689;—so for a check, Haas *v.* Altieri, 2 Misc. 252, 21 N. Y. Sup. 950. But it may be shown that its actual value is less. Trover for a promissory note paid and left in the payee's hands; the note was produced and surrendered at the trial, plaintiff was allowed only nominal damages, Stone *v.* Clough, 41 N. H. 290. Action by depositor against a savings bank to recover his pass book; the measure of his damages is the amount of his deposit, with interest at lawful rate from the time of the demand, notwithstanding the bank's deposits draw a

If, however, defendant has done any act to diminish the value, if he has mutilated the note or erased a signature from it, such decrease in value, instead of being allowed in mitigation of damages, must be made good by the party who caused it;[87] and, as a rule, nothing done by the defendant while the goods are in his wrongful possession can avail him to reduce the damages for which he may be liable.[88] So, if the defendant has received a payment, and endorsed it upon the note, such endorsement is no ground to reduce the value. Bringing the money into court for the plaintiff, or restoring the note, will go to decrease the damages.[89]

§ 558. **The same.** Probably the most concise statement of the rule generally applicable in such cases is that the measure of damages is the *value* of the note, not necessarily the amount due, or purporting to be due upon it.[90] When the plaintiff put a city order into hand of parties to investigate a fraud in its issue, and they refused to return it, he was entitled to recover from them its full value; as it could not be collected from the city, he was not entitled to its face value.[91]

§ 559. **The same.** A bankrupt gave a check to one of his creditors, which was paid by the bank upon which it was drawn. The assignee brought trover and obtained a verdict for the full amount of the check. The action was based upon the fact that the check was drawn by the bankrupt without authority, his property belonging to his assignee. The verdict was set aside. Mansfield, C. J., said, "the plaintiff proceeds on the ground that the check, being drawn by a bankrupt, was worthless. If the position taken be true, how can he recover £300 on it."[92]

§ 560. **The value of coin sometimes estimated in cur-**

less rate, Wegner *v.* Second Ward Bank, 76 Wis. 242, 44 N. W. 1096; and see Govin *v.* DeMiranda, 140 N. Y. 474, 35 N. E. 626. Plaintiff in replevin for a deed of lands will not recover the value of the lands, Flannigan *v.* Goggins, 71 Wis. 28, 36 N. W. 846. Letters from those since deceased are not to be valued by consideration of what might be made of them for the purpose of levying black-mail, Donohue *v.* Henry, 4 E. D. Sm. 162.]

[87] McLeod *v.* McGhie, 2 M. & G. (40 E. C. L.) 326; Am. Ex. Co. *v.* Parsons, 44 Ill. 318.

[88] Carter *v.* Streator, 4 Jones, (N. C. L.) 62.

[89] Alsayer *v.* Close, 10 Mees. & W. 576.

[90] Turner *v.* Retter, 58 Ill. 264.

[91] Terry *v.* Allis, 16 Wis. 479; Terry *v.* Allis, 20 Wis. 32.

[92] Mathew *v.* Sherwell, 2 Taunt. 439.

rency. Coin may at times be regarded as an article of merchandise, upon which a market value may be placed in ordinary currency. In such a case, it was said that the measure of damages for its non-delivery was properly fixed by estimating its value in currency at the highest price between the time of taking and the trial.[93] When the property in controversy was a billiard table, the plaintiff offered proof that it was worth $500 in gold coin, and proved its value in legal tender or greenbacks, (to which an objection was made,) at $1,200. The court permitted the evidence, and sustained a verdict for $950.[94]

§ 561. **Damages occasioned by party's own act not allowed.** No one should be permitted to recover damages which are occasioned by his own act, neglect or default. When the plaintiff failed to give the proper bond, and to take possession of the property described in his writ, he could not recover damages for any deterioration, or for the detention while it was in the hands of the officer, through his neglect to furnish the security required by law.[95]

§ 562. **The place where the value is considered as attaching.** The place where the value is to be considered as attaching is sometimes a question of considerable importance; as in cases where the property is taken or detained at a point distant from any market for such articles, where, perhaps, it could not be sold at any price, or, if sold, it would be at a ruinous sacrifice, while at a neighboring market a fair price might be obtained; or where the property may have been taken at a place where there was no market for it, and by the taker transported at great cost, and sold at a price sufficient to pay not only the cost of transportation, but a fair profit upon the article. In all such cases it becomes a question of no little difficulty to determine which value shall be regarded as attaching to the property, the value at the place of taking, or at the distant market, and also whether the costs of transporting, when such costs have been incurred by the taker, shall be deducted. A solution of these questions will be best determined by a reference to cases involving such principles.

[93] Taylor *v.* Ketchum, 35 How. Pr. (N. Y) 289; Taylor *v.* Ketchum, 5 Robt. (N. Y.) 507.

[94] Tarpy *v.* Shepherd, 30 Cal. 181.

[95] Graves *v.* Sittig, 5 Wis. 219. See, also, Williams *v.* Phelps, 16 Wis. 80, where this case was commented on.

§ 563. **The same. General rule is, value where the goods were detained; value in another market may be evidence.** As a general rule, it may be stated that the value of the goods at the place where they were detained, that is, at the place where demand was made, or delivery should have been made, is the proper one. The value in an adjacent market may be proved as a fact not establishing the value, but as an aid to assist the court or jury in arriving at the true value at the place where the detention was had; and cases frequently arise where such proof, coupled with testimony of the cost of reaching such market, becomes relevant and proper in the highest degree. Where the property, however, when demanded, is situated at or adjacent to a steady and reliable market for such goods, the value at that place should govern, without reference to a distant, though perhaps more advantageous, one.[96] In trespass for timber cut and removed, the court said the plaintiff might have recovered his logs, had he chosen to pursue them; but as he elected to sue in trespass, he therefore can recover only the value of the logs at the place where the injury was done.[97] So, where the action was for coal dug in the mine of another.[98]

§ 564. **The same. Expense of transportation, etc.** When the action was for hay taken in Alameda County, and afterwards transported by the defendant to San Francisco, the plaintiff claimed the highest price at the latter place. The court said the market value was to be ascertained at the place where the conversion was had.[99] In *Hisler* v. *Carr*, the court said: "The value which the plaintiff is entitled to recover under our statute is the value of the property, to be ascertained at the place where it is detained, when the action was commenced." The property in this case was produce, part of which was shipped to San Francisco and sold. The plaintiff claimed the gross products of the sale, while the defendant claimed that a deduction should be made for the expenses in shipping, etc. The court said, in substance, that where, as in the present case, the plaintiff complains only of the detention of the property, if it is delivered on demand, his claim is satisfied, except damages for

[96] Fort v. Saunders, 5 Hlesk. (Tenn.) 487.
[97] Cushing v. Longfellow, 26 Me. 306.
[98] Martin v. Porter, 5 M. & W. 353.
[99] Hamer v. Hathaway, 33 Cal. 120.

detention; if it cannot be had, then the value at the place where the delivery should have been made stands in lieu of the property. Neither the price at San Francisco, nor that price less the freight and commissions, is the true criterion of the value at the place of the alleged detention; but proof of the value at San Francisco, and the cost of transportation there, is admissible to assist the jury in fixing the value at the place of detention.[100] The cost of manufacturing an article, and its transportation to market, may properly be given in evidence, not as fixing its value, but as a fact from which its value, at the time and place of conversion, may be arrived at.[101]

§ 565. **The same.** The suit was for the value of cattle which died of disease, through the wrongful act of defendant, as was charged. At the point where the cattle died there was no market, and it did not appear that any market for such cattle was to be found within two hundred miles. The court allowed evidence of the value at this distant market; the price there would necessarily be some guide to the value where the cattle were.[102]

§ 566. **The same. Reason for the rules stated.** This testimony, it will be observed, is not permitted as fixing the value, but as furnishing a guide by which the true value may be ascertained, by a process not unlike the computations of value, or interest which has always been allowed. A similar principle has been recognized in a late case in Illinois. The action was trover for the value of cast steel ingots. The court said there being no testimony as to the value of these ingots at the time of the alleged conversion, for the reason that they had no market value, it was not error to allow proof of what steel made from these ingots was worth per pound in the market, and proof of how much it would cost to convert these ingots into merchantable steel; thus allowing the jury to make a fair approximation of the value of the ingots.[103]

[100] Hisler *v.* Carr, 34 Cal. 645; Swift *v.* Barnes, 16 Pick. 196; Cushing *v.* Longfellow, 26 Me. 310.

[101] Brizsee *v.* Maybee, 21 Wend. 144.

[102] Sellar *v.* Clelland, 2 Colorado, 532.

[103] Meeker *v.* Chicago Cast Steel Co., 84 Ill. 277. Consult in this connection, Savercool *v.* Farewell, 17 Mich. 308; Gregory *v.* McDowell, 8 Wend. 435. The defendant was not allowed to show what effect the sale of so large a quantity would have on the market. Dana *v.* Fiedler, 2 Kern, 40; Berry *v.* Dwinel, 44 Me. 267; Dubois *v.* Glaub, 52 Pa. St.

§ 567. **Trespasser cannot recover for his labor in increasing the value.** A party cannot commit a trespass upon his neighbor, and then charge him with the expense of the labor. If so, a thief might cut through a wall and charge the owner for making a new doorway. Where a trespasser cut wheat, he was not allowed to deduct the cost of cutting, though he performed the whole labor of harvesting it.[104] So where timber is wrongfully taken and made into shingles, the owner may recover the value as shingles;[105] or if transported to a distant market, the owner may recover the goods or value at that market.[106] The rule may be regarded as general and well settled that a wrong-doer

238; Doak *v.* The Exr. of Snopp, 1 Cred. (Tenn.) 181; Durst *v.* Burton, 47 N. Y. 175; Smith *v.* Griffith, 3 Hill, 333; Wemple *v.* Stewart, 22 Barb. 154.

[104] Bull *v.* Griswold, 19 Ill. 631. [Where defendant forcibly expels plaintiff from his fields, and takes and harvests and markets the wheat growing therein, he will not be allowed an abatement of damages for the value of his labor in gathering and preparing the crop, Ellis *v.* Wire, 33 Ind. 127. And where an officer levies upon the growing grain of A, under execution against a stranger, he is not to be allowed the expense of harvesting, threshing and marketing it, Sims *v.* Mead, 29 Kans. 124. But where defendant cut trees upon state land under the fixed belief that he was authorized, and converted the logs into lumber and conveyed it to market, held, that even though the permit under which defendant assumed to act was absolutely void, the state should be allowed only the value of the trees as they stood, with interest to the verdict, State *v.* Shevlin Co., 62 Minn. 99, 64 N. W. 81; Bond *v.* Griffin, 74 Miss. 599, 22 So. 187; Illinois Central Co. *v.* Le Blanc, 74 Miss. 650, 21 So. 760; Acree *v.* Bufford, 80 Miss. 565, 31 So. 898. License to fell timber upon certain lands; the trees were felled by a trespasser; licensee brought replevin;—held, he thereby adopted the act of severance and must reimburse the defendant what he had expended in that service, Keystone Co. *v.* Kolman, 94 Wis. 465, 69 N. W. 165. The innocent purchaser of lumber, manufactured from logs cut by a trespasser, must answer in the same measure of damages as the original wrong-doer; *i. e.*, the value as the thing is at the time of his purchase, Bolles Woodenware Co. v. United States, 16 Otto (106 U. S.) 432, 27 L. Ed. 230. Conditional sale of standing timber; the vendee sold the logs to defendant, who bought without notice of the reservation of the title by the original vendor; held the original vendor might for nonpayment of the purchase money, recover the lumber made from the logs, but the measure of his damages was only the amount due him with interest, Lillie *v.* Dunbar, 62 Wis. 198, 22 N. W. 467.]

[105] Baker *v.* Wheeler, 8 Wend. 506.

[106] Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 492.

cannot sell the goods and compel the owner to accept the price at which they were sold. If there has been a loss, the owner is under no obligation to incur it.[107]

§ 568. **Or make a profit out of his wrongful taking.** Neither is such a taker or detainer permitted to make a profit out of his wrong. If the goods have been sold at a profit, the owner is entitled to it, and the wrongful taker cannot assert any right to it which is not based upon ownership of the property.[108] In *Suydam* v. *Jenkins*, 3 Sandf. (N. Y.) 621, after an exhaustive consideration of this question, the court laid down the rule as follows: "Add to the value of the property when the owner is dispossessed, the damages which he is proved to have sustained from the loss of its possession." It is when the property is wrongfully taken or detained that a right of action accrues to the owner. He is then entitled to demand a compensation for his loss; and if his demand is then complied with, it is plain that the value of the property at that time, by which we mean its market value, the sum for which it could then be sold would constitute at least a portion of the amount that the wrong-doer would be bound to pay. This sum may, therefore, be fairly considered as a debt then due, and consequently interest, until the time of trial or judgment, must in all cases be added to complete the indemnity. It is not, however, in all cases that the value of the property when the owner is dispossessed is to be determined by a reference to its market price, nor in all that the damages, which are to be added to the value, are to be limited to the mere allowance of interest. In most cases the market value of the property is the best criterion of its value to the owner; but in some cases its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, etc.; and we do not doubt that the "*pretium affectionis*," instead of the market price, ought then to be considered by the jury or court in estimating the value. In these cases, however, it is evident that no fixed rule to govern the estimate of value can be laid down, but it must of necessity be left to the sound discretion of a jury. But where an

[107] Hamer *v.* Hathaway, 33 Col. 119; Douglass *v.* Kraft, 9 Cal. 562.

[108] Whitfield *v.* Whitfield, 40 Miss. 352; Mayberry *v.* Cliffe, 7 Coldw. (Tenn.) 124; Suydam *v.* Jenkins, 3 Sandf. 615.

assignee for the benefit of creditors, who must have sold the goods had they come to his hands, brought suit against a sheriff who had seized them upon an execution, the jury might properly allow the amount for which they were sold by the sheriff.[109]

§ 569. **Statement of value in the affidavit usually binds the plaintiff, but not the defendant.** When the value of property is to be assessed, the statement in the affidavit of the plaintiff as to the value is frequently regarded as estopping him from asserting a different value. After fixing the value at a time when he was seeking the delivery of the property on the writ, he should not be heard to complain of the value so fixed by himself; but the defendant, who is in no way concerned in so fixing the value, is, of course, not affected by it.[110] This rule may in some cases work injustice, and in exceptional cases the plaintiff may be heard to explain what is in ordinary cases *prima facie* evidence against him.[111] But this does not authorize the clerk of the court to enter up judgment against the plaintiff for that value, upon a default and order for restitution. The right to possession or title to property is the real issue to be tried, and not the value.[112] The value is required to be found in certain States to inform the court what judgment to render or what sum to collect in case return or delivery cannot be had; otherwise the value is immaterial in the replevin suit.[113] When the property is expected to diminish in value by lapse of time, the obligor ought to be bound by the value stated by himself.[114] The enforcement of this rule is calculated to promote a fair and reasonable estimate, in his affidavit, by the party seeking the delivery.

§ 570. **Appraisement does not bind either party.** An appraisement of the value, under the statute, and a return of that value, does not preclude either party from offering the testimony

[109] Whitehouse *v.* Atkinson, 3 C. & P. 344.

[110] Gray *v.* Jones, 1 Head. 544; Huggeford *v.* Ford, 11 Pick. 225; Swift *v.* Barnes, 16 Pick. 196; Middleton *v.* Bryan, 3 Maul. & S. 155; Tuck *v.* Moses, 58 Me. 477; Parker *v.* Simonds, 8 Met. 205; Clap *v.* Guild, 8 Mass. 153; Washington Ice Co. *v.* Webster, 62 Me. 341.

[111] Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 34.

[112] Thomas *v* Spofford, 46 Me. 408.

[113] Cases last cited.

[114] Howe *v.* Handley, 28 Me. 251; Swift *v.* Barnes, 16 Pick. 194; Parker *v.* Simonds, 8 Met. 205.

of competent witnesses so as to show the real value,[115] as in such case neither party is called upon to act in making the appraisal. Neither is such an appraisal binding upon the sheriff who caused it to be made. But in case an officer is sued, his return of an appraisement which he caused to be made may be admitted as *prima facie* evidence against him.[116]

§ 571. **Special damages must be specially pleaded.** Special damages not naturally arising from the tortious act complained of, must be especially alleged in the declaration, and proved as alleged.[117] The circumstances of the taking need not be set out to entitle the plaintiff to damages commensurate with the injury which the taking occasioned and which are the natural or expected result of such taking;[118] and under a general allegation of damages, the plaintiff may prove any depreciation in the value of the goods while they were in the defendant's hands, from any naturally expected cause;[119] but any and all special damages from whatever causes arising, such as loss of business where that is proper, unexpected depreciation in value of the property, or damages from any wrongful act of the party subsequent to the taking, should be specially alleged.[120]

[115] Kafer *v.* Harlow, 5 Allen, 348; Leighton *v.* Brown, 98 Mass. 515; Wright *v.* Quirk, 105 Mass. 48.

[116] Sanborn *v.* Baker, 1 Allen, 521; Kafer *v.* Harlow, 5 Allen, (Mass.) 348.

[117] Bodley *v.* Reynolds, 8 Q. B. 779; Park *v.* McDaniels, 37 Vt. 594; Damron *v.* Roach, 4 Humph. (Tenn.) 134; Slack *v.* Brown, 13 Wend. 390, 393; Schofield *v.* Ferrers, 46 Pa. St. 438; Armstrong *v.* Percy, 5 Wend. 535; Strang *v.* Whitehead, 12 Wend. 64; Bennett *v.* Lockwood, 20 Wend. 223; Smith *v.* Sherwood, 2 Tex. 460; Bogert *v.* Burkhalter, 2 Barb. 525; Vanderslice *v.* Newton, 4 Comst. (N. Y.) 130; Burrage *v.* Melson, 48 Miss. 237; Stevenson *v.* Smith, 28 Cal. 102; Smith *v.* Sherman, 4 Cush. (Mass.) 408; Davis *v.* Oswell, 7 C. & P. 804. See White *v.* Suttle, 1 Swan. (Tenn.) 174.

[118] Schofield *v.* Ferris, 46 Pa. St. 438; Fagen *v.* Davison, 2 Duer. 153. But see and compare, Woodruff *v.* Cook. 25 Barb. 505.

[119] Young *v.* Willett, 8 Bosw. (N. Y.) 486. Even though the damage did not accrue until some time afterward. Dickinson *v.* Boyle, 17 Pick. 78; Brown *v.* Cummings, 7 Allen, 507. The following English cases, though none of them cases in replevin, illustrate the rule requiring special damages to be pleaded specially: Rose *v.* Groves, 5 M. & G. 613; Sippora *v.* Basset, 1 Sid. 225; Lowden *v.* Goodrick, Peake, (N. P.) 46; Pettit *v.* Addington, Peake, (N. P.) 62; Lindon *v.* Hooper, 1 Cowper, 418.

[120] Stevenson *v.* Smith, 28 Cal. 103; Strang *v.* Whitehead, 12 Wend. 64;

§ 572. **Loss by interruption of business.** In replevin, as in all other actions in the nature of tort, the damages should not be less than the amount of loss actually sustained, but the loss must be real, not speculative or probable merely.[121] Where the landlord wrongfully cut off steam power from his tenant's mill, the tenant had a right to suppose it was permanent, and dispose of his stock, machinery and fixtures, on the best terms he could, and the wrong-doer should be held liable for any loss that might be sustained from such a sale, so far as the same was the natural and probable result of the landlord's wrongful act. In estimating the loss sustained by breaking up his established business, there would seem to be no well founded objection to ascertain the amount of profits which it has yielded for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade or other causes they would have been less.[122]

Dewint *v.* Wiltsie, 9 Wend. 326. [Damages for detention cannot be allowed unless demanded by the pleadings, Creighton *v.* Haythorn, 49 Neb. 526, 68 N. W. 934. Nor in excess of what is demanded, Brook *v.* Bayless, 6 Okl. 568, 52 Pac. 738; Ocala Co. *v.* Lester, Fla., 38 So. 51. Damages to the goods between the demand and the taking by the sheriff, cannot be recovered unless the facts are set forth in the complaint, and the damages are demanded, Rapid Safety Co. *v.* Wyckoff, 20 Misc. 17, 44 N. Y. Sup. 601. Damages for the exposure and illness of a child by reason of the unlawful taking of defendant's household goods, cannot be recovered without proper averment and demand, Bateman *v.* Blake, 81 Mich. 227, 45 N. W. 831; nor expenses, though incurred on the faith of assurances of the other party, Johnson *v.* Fraser, 2 Idaho, 404, 18 Pac. 48. Where the property is damaged while in plaintiff's possession the defendant may, by supplementary answer, set up such damages and recover them, Bowersock *v.* Adams, 59 Kans. 779, 54 Pac. 1064. But for things not marketable, converted, the owner recovers the value to him, and he need not declare for it specially, Stickney *v.* Allen, 10 Gray, 352. And it is not necessary to aver the value of the use or hire of the goods, but only the value of the goods themselves, in order to recover interest thereon, Macon Co. *v.* Meador, 67 Ga. 672. Statute that the jury may assess damages "if any are claimed in the complaint or answer:" a mere demand of judgment for the goods "with damages for their taking and detention," not setting forth any facts out of which damages could arise, except the taking and detention, is not sufficient to entitle the defendant prevailing to damages. Shafer *v.* Russell, 28 Utah, 444, 79 Pac. 559.]

[121] Baker *v.* Drake, 53 N. Y. 212; Loker *v.* Damon, 17 Pick. 284.

[122] Chapman *v.* Kirby, 49 Ill. 219. A very similar case, White *v.* Moseley, 8 Pick. 356. See, also, Davenport *v.* Ledger, 80 Ill. 578. When

§ 573. **The same. Prospective profits.** This rule is probably more liberal than that sustained by the current of authority, though cases may be found to support it. But, as a rule, damages which include the expected profits of the party in business with the hazard attending it, are usually regarded speculative, rather than real.[123] For example, profits which are expected from the use of circus horses in the circus business, cannot be a meas-

a party leased a tavern and agreed to keep a certain ferry in good order, and afterward diverted the travel to another ferry, the lessor was allowed to recover his rent, but not expected profits. Dewint *v.* Wiltsie, 9 Wend. 326. [Damages to other property by reason of the taking of that in controversy, are not recoverable, Schrandt *v.* Young, 62 Neb. 254, 86 N. W. 1085. Plaintiff replevied a barn of which defendant was tenant at will and in which he had broom-corn; defendant prevailing plaintiff was not liable for damages to the broom-corn by reason of exposure to a sudden fall of snow, Jameson *v.* Kent, 42 Neb. 412, 60 N. W. 879. That plaintiff by being deprived of his tools lost his job, is not to be considered in estimating his damages in replevin for the tools, Kelly *v.* Altemus, 34 Ark. 184. But where the machinery of a manufactory was replevied and defendant prevailed, it was held that he might recover among other items of damage the loss resulting from the interruption of his business and the expense, delay and annoyance attending the replacement, Stevens *v.* Tuite, 104 Mass. 328. Plaintiff's goods were taken upon execution against a stranger and he was required to give a receiptor; he was accordingly left in possession, went on with the business and sold the goods; the receiptor was afterwards sued on his receipt, and it was held that the plaintiff might recover the full amount for which the receiptor was liable, Phillips *v.* Hall, 8 Wend. 610. The jury must not be left to confuse damages arising from the taking of exempt goods with those arising from the destruction of business, McGuire *v.* Galligan, 57 Mich. 38, 23 N. W. 479.]

[123] Bonesteel *v.* Orvis, 23 Wis. 524. See Seldner *v.* Smith, 40 Md. 603; Brannin *v.* Johnson, 19 Me. 361. [Plaintiff, recovering a saw-mill, is not allowed the estimated profits of operating it during its detention, even though he had an unfulfilled contract for the manufacture of such things as the mill would produce, Talcott *v.* Crippen, 52 Mich 633, 18 N. W. 392. Profits which depend upon capital, skill, supplies, demand or the product, are too uncertain to be accepted as a measure of damages Allis *v.* McLean, 48 Mich. 428, 12 N. W. 640. Loss of rents is not allowed where it does not appear that the plaintiff would have rented the premises, *Id.* The conjectural profits of a whaling voyage are not to be allowed, Brown *v.* Smith, 12 Cush. 366; nor the loss of profits which th defendant might have gained by an agister's contract, with the plainti' i: the animals had been left with him, Schrandt *v.* Young, 62 Neb. 354 86 N. W. 1085.]

ure of damages;[124] and as a rule, purely speculative or contingent damages can never be allowed.[125] The expected profits of a stock speculation carried on with the defendant's capital, cannot be a proper element of damages in a suit for an unauthorized sale of stocks by the defendant, who was the broker.[126] The profits of an illegal business cannot be an element of damages in any case. The expected profits of a patent machine cannot be allowed.[127] And as a general thing, loss by a mercantile firm by the seizure of their goods and interruption to their business, and consequent loss of expected profits, is not a proper element in computing damages.[128]

§ 574. **Loss of real or probable profits.** The jury may allow for the loss of near and stable or probable profits.[129] So when the plaintiff's bridge was carried away by the wrongful act of the defendant, the loss of tolls during the time necessary required to rebuilt it, is a proper element of damages.[130] Of course the jury must take into consideration the degree of probability that the party would have made a profit;[131] and damages can never include expected profits, unless it appear affirmatively that the party was absolutely prevented from realizing them by some act of the party in default;[132] a party cannot permit his business to lie still or suffer a loss of profit, and collect the damages so occasioned, from the defendant.[133]

§ 575. **Party claiming damages must do what he can to avoid loss.** A party may show that he has done all in his power to avoid the damaging effect of the defendant's act, and such evi-

[124] Butler *v.* Mehrling, 15 Ill. 490. See, also, Butler *v.* Collins, 12 Cal. 457; Campbell *v.* Woodworth, 26 Barb. 648.

[125] Houghton *v.* Peck, 8 Pa. St. 42. See cases last cited.

[126] Baker *v.* Drake, 53 N. Y. 211.

[127] Houghton *v.* Peck, 8 Pa. Ct. 42.

[128] Selden *v.* Cashman, 20 Cal. 57. See Allred *v.* Bray, 41 Mo. 484. For wrongful attachment, plaintiff was allowed to prove that her business was destroyed and she reduced to poverty. Moore *v.* Schultz, 31 Md. 418. See Ovlatt *v.* Pond. 29 Conn. 479.

[129] Mayberry *v.* Cliffe, 7 Cold. (Tenn.) 124. Compare Pacific Ins. Co. *v.* Conard, 1 Baldw. (C. C.) 138.

[130] Sewells Falls Bridge *v.* Fisk, 23 N. H. 171.

[131] Mayberry *v.* Cliffe, 7 Cold. (Tenn.) 124.

[132] Palm *v.* The Ohio & Miss. R. R. Co., 18 Ill. 217; The County of Christian *v.* Overholt, 18 Ill. 223.

[133] Brizsee *v.* Maybee, 21 Wend. 144.

dence will not diminish the damages.[134] If a trespasser willfully leaves his neighbor's gate open, and cattle enter and destroy his crop, the trespasser is liable; but if the owner pass it before the cattle enter, and refuse to shut it, he cannot recover.[135] The rule may be stated, that a party who suffers injury from the wrongful act of another, must do what he can to render the evil results as light as possible.[136] Where the defendant took the plaintiff's horse, which was useful to him in the way of trade, he was allowed the cost of hiring another horse, less the amount he would have paid for keeping his own while it was taken [137]

§ 576. **Expenses, counsel fees, etc.** Expenses sometimes form a part of the damage which a party has really sustained, and the question as to how far they can be reimbursed, is one of considerable importance. As a rule, expenses of the party in endeavoring to recover his property, time spent in getting the writ, attending court, etc., are not allowable as part of the damages.[138] Neither are counsel fees and other expenses of the suit, apart from the costs adjudged, strictly recoverable in the way of damages.[139] The only ground on which they should be allowed is in

[134] Chandler *v.* Allison, 10 Mich. 461.

[135] Loker *v.* Damon, 17 Pick. 289.

[136] Chandler *v.* Allison, 10 Mich. 461.

[137] Davis *v.* Oswell, 7 Car. & P. 804.

[138] Blackwell *v.* Acton, 38 Ind. 426. But, *contra*, see Bennett *v.* Lockwood, 20 Wend. 222.

[139] Park *v.* McDaniels, 37 Vt. 594; Earl *v.* Tupper, 45 Vt. 287; Hoadley *v.* Watson, 45 Vt. 289; Pacific Ins. Co. *v.* Conard, 1 Baldwin, (C. C.) 138. [If the plaintiff prevails he recovers for his expense and time in searching for his property, Yelton *v.* Slinkard, 85 Ind. 190; Brennan *v.* Shinkle, 89 Ills. 605. Moneys expended in pursuit of the goods may be allowed as part of the plaintiff's damages, Arzaga *v.* Villalaba, 85 Calif. 191, 24 Pac. 656; Cain *v.* Cody, 29 Pac. 778; Renfro *v.* Hughes, 69 Ala. 581; but see Kelly *v.* McKibben, 54 Calif. 192; Redington *v.* Nunan, 60 Calif. 632. The plaintiff must show that the time and money were properly expended, and the amount, Sherman *v.* Finch, 71 Calif. 70, 11 Pac. 847; Hays *v.* Windsor, 130 Calif. 230, 62 Pac. 395. Plaintiff may recover the cost of replacing a building unlawfully removed by defendant, Byrnes *v.* Palmer, 113 Mich. 17, 71 N. W. 331. And the reasonable and proper expenses incurred by defendant prior to the replevin, looking to the removal of the goods, may be allowed, even although after notice of the institution of the suit such preparations were continued, Washington Co. *v.* Webster, 68 Me. 449. But defendant prevailing will not be entitled to recover the cost of a new article purchased to supply the place of that replevied, Adams *v.* Wright, 74

case where the jury, as a matter of discretion with which they may be vested, consider the expenses in order that the plaintiff may not be impoverished by the cost of asserting his right in court.[140] In Connecticut the rule appears to be that, when the injury is wantonly inflicted, the expenses of litigation may be included as a proper part of the damages.[141]

§ 577. **The same.** In *Pacific Ins. Co.* v. *Conard*, 1 Baldwin, (U. S. C. C.) 138, the court instructed the jury that in cases where the taking was willful, the expenses which the party has been put to, to assert his rights, might properly be taken into consideration by them in making up their estimate of damages. In New York it was said that where the taking was wrongful, the plaintiff may recover a reasonable amount for time and ex-

Conn. 551, 51 Atl. 537. Attorney's bill is not recoverable, Harris *v.* Smith, 132 Calif. 316, 64 Pac. 409; Black *v.* Hilliker, 130 Calif. 190, 62 Pac. 481; Carraway *v.* Wallace, 17 So. 930; Hays *v.* Windsor, *supra*, Knight *v.* Beckwith Co., 6 Wyo. 500, 46 Pac. 1094; Mix *v.* Kepner, 81 Mo. 93; Hampton Co. *v.* Sizer, 35 Misc. 391, 71 N. Y. Sup. 990. Defendant prevailing, is not allowed either his attorney's bill nor the expenses of the preparation and conduct of his defense, Edwards *v.* Bricker, 66 Kans. 241, 71 Pac. 587. In Taylor *v.* Morton, 61 Miss. 24, it was said that to entitle the plaintiff to recover his attorney's bill, there must have been willful wrong akin to fraud, oppression, or malice, in the conduct of the defendant. Nor is plaintiff allowed for his time in preparing his defense, or his board and other expenses during that time, Becker *v.* Staab, 114 Ia. 319, 86 N. W. 305; nor for his time lost in prosecuting his claim, Taylor *v* Morton, 61 Miss. 24; nor where the defendant is an innocent purchaser from the original wrong-doer, is plaintiff to be allowed the expense of a journey from his home in searching for the goods, Renfro *v.* Hughes, *supra*. In one case plaintiff was allowed the expense of sending a man from a distant point to demand the goods, Davis Sewing Machine Co. *v.* Best, 50 Hun, 76, 4 N. Y. Sup. 510. But in Cook *v.* Gross, 60 Ap. Div. 446, 69 N. Y. Sup. 924, the court refused to extend this doctrine so as to allow the bill of an attorney for making demand; and in Hampton Co. *v.* Sizer, 35 Misc. 391, 71 N. Y. Sup. 990, railway fares of an officer of the plaintiff journeying about the litigation, were refused. Nor is there an allowance for trouble and expense not made necessary by the conduct of the defendant and to which the plaintiff would have been put had there been no taking, Wildman *v.* Sterritt, 80 Mich. 651, 45 N. W. 657.]

[140] Williams *v.* Ives, 2 Conn. 568; Parsons *v.* Harper, 16 Gratt. (Va.) 64; Earl *v.* Tupper, 45 Vt. 275; Hoadley *v.* Watson, Ib. 289.

[141] Linsley *v.* Bushnell, 15 Conn. 225; Welch *v.* Durand, 36 Ib. 182; Platt *v.* Brown, 30 Conn. 336; Dibble *v.* Morris, 26 Conn. 416; Ives *v.* Carter, 24 Conn. 392; Beecher *v.* Derby Bridge Co., 24 Conn. 491.

pense incurred in endeavoring to reclaim his property.[142] Where the defendant took the plaintiffs' horse and wagon, by reason of which the plaintiffs were induced to think that the person to whom they let it had absconded, and they expended considerable time and money in search of their property, the value of the time and the amount of the expenses were allowed as a proper element of damages.[143] In an action for false imprisonment, for an illegal arrest of plaintiff, evidence of the value of the counsel's fees was not admitted, not being specifically laid in the declaration.[144] In Wisconsin it has been held that counsel fees can no more be allowed in actions where vindictive damages are given than in other actions. If they can be given by the jury it must be on the principle that they are consequential and relate to the amount of the compensation proper to award, rather than that they enter directly into the compensation.[145] So, in Indiana, in a suit on the bond, it was said the plaintiff cannot recover fees paid his counsel in the replevin case, nor in the suit on the bond, nor is he entitled to any fees for his own attendance in the furthering of his suit.[146] In Vermont the rule has been stated that counsel fees did not form a proper element of damages.[147] So, also, in Michigan.[148] In Ohio the supreme court said in substance, that in cases nominally in tort, where no real malice is complained of, counsel fees ought not to be included; but when the act complained of involves the ingredient of malice, or insult, the jury which has the power to punish has necessarily the right to include counsel fee in their estimate of damages, if they see proper to do so.[149]

§ 578. **Expense of taking and removing the property.** The expenses of taking and moving the property by the officer should not be included in the damages. They constitute a part of the costs of the case and should be so assessed.[150] Where an

[142] McDonald *v.* North, 47 Barb. 530. See Yantis *v.* Burditt, 2 Dana, (Ky.) 254.

[143] Bennett *v.* Lockwood, 20 Wend. 223.

[144] Strang *v.* Whitehead, 12 Wend. 64.

[145] Fairbanks *v.* Witter, 18 Wis. 287.

[146] Davis *v.* Crow, 7 Blackf. 130; Blackwell *v.* Acton, 38 Ind. 425.

[147] Earl *v.* Tupper, 45 Vt. 275; Hoadley *v.* Watson, Ib. 289.

[148] Hatch *v.* Hart, 2 Gibbs, (Mich.) 289; Warren *v.* Cole, 15 Mich. 269.

[149] Roberts *v.* Mason, 10 Ohio St. 277. See, *contra*, Day *v.* Woodworth, 13 How. 363.

[150] Young *v.* Atwood, 5 Hun, (N. Y.) 234. Compare Washington Ice Co. *v.* Webster, 62 Me. 341.

officer seized horses of A. on an execution against him and A. afterwards replevied the horses from the custodian in whose charge they were left, and afterwards suffered non-suit in the replevin case, the costs of keeping the horses was held a part of the costs on the execution.[151] In Illinois, in a suit on a replevin bond, the court said that where the party was driven to compulsory process to secure the property which was ordered to be returned to him in the replevin suit, he could recover the costs of so doing in his action on the bond. The costs of the return were not a part of the costs for which he could have judgment in the replevin suit and were a proper item in the suit on the bond.[152]

[151] Davis *v.* Crow, 7 Blackf. 131.

[152] Langdoc *v.* Parkinson, 2 Bradw. (Ill.) 136.

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§ 579. **Value of the use, when proper to be allowed.** In many cases the property in dispute may possess considerable value for use, and small value, as merchandise, for sale or for consumption. In such cases the value of the use is frequently adopted as the measure of damages. For example, where work-cattle or horses, tools, or implements of trade or husbandry, are taken from the owner, who is thereby deprived of their use, the reasonable value of that use will, in many cases, be the only just compensation for their detention.[1] It would be highly unjust to hold that a party might take a span of horses worth, say, one hundred and fifty dollars, and detain them a year and then pay six per cent. on the value as compensation to the owner.[2]

[1] Allen *v.* Fox, 51 N. Y. 562; Morgan *v.* Reynolds, 1 Blake, (Mon.) 164; Carroll *v.* Pathkiller, 3 Port. (Ala.) 281; Hanauer *v.* Bartels, 2 Cor. 524; Fralick *v.* Presley, 29 Ala. 463; Clapp *v.* Walters, 2 Tex. 130; Machette *v.* Wanless, 2 Col. 180; Clements *v.* Glass, 23 Geo. 395; Dorsey *v.* Gassaway, 2 Har. & J. 402. For a case where the value of the use was not allowable, see Twinam *v.* Swart, 4 Lans. 263. See, also, Young *v.* Atwood, 5 Hun, 234.

[2] Williams *v.* Phelps, 16 Wis. 85. [Where the things recovered are valuable in use the value of the use during detention is allowed, Linglo *v.* Kitchen, 69 Ind. 349; Werner *v.* Graley, 54 Kans. 383, 38 Pac. 482; Renfro *v.* Hughes, 69 Ala. 581; Crossley *v.* Hojer, 11 Misc. 57, 31 N. Y. Sup. 837; Hutchinson *v.* Hutchinson, 102 Mich. 636, 61 N. W. 60; Hartley Bank *v.* McCorkell, 91 Ia. 660, 60 N. W. 197; Ocala Co. *v.* Lester, Fla., 38 So. 51; Benjamin *v.* Huston, 16 S. D. 569, 94 N. W. 584. Such sum as the jury are satisfied the use of the property would be worth, Boston Co. *v.* Myers, 143 Mass. 447, 9 N. E. 805. The value of the hire or use, Woods *v.* McCall, 67 Ga. 506; *e. g.*, where the things in question are domestic animals, Chase County Bank *v.* Thompson, 54 Kans. 307, 38 Pac. 274; Smith *v.* Stevens, 14 Colo. Ap. 491, 60 Pac. 580; a team, Hutchinson *v.* Hutchinson, *supra*; a horse, Hartley Bank *v.* McCorkell,

§ 580. **This applies only to replevin.** This rule, allowing the value of the use, is peculiar to the action of replevin. It grows out of the fact that the plaintiff asserts his continued ownership in the property, and seeks to recover the property and not its value. If, as in trover, the value was sought, of course compensation for the use of the property to the party who, by his action, asserts a transfer of title, would be absurd.[3] It only

supra; work animals, Kennett *v.* Fickel, 41 Kans. 211, 21 Pac. 93; Stanley *v.* Donaho, 16 Lea. 492; oil cars, Merchants Co. *v.* Kentucky Co., 26 C. C. A. 639, 81 Fed. 821; a slave, Miller *v.* Jones, 26 Ala. 247; a church organ, Farrand Co. *v.* Board of Church Extension, 17 Utah, 469, 54 Pac. 818. No deduction is to be made for the increase in value of an animal detained, during the detention, McGrath *v.* Wilder, 77 Vt. 431, 6 Atl. 801.

The question does not depend upon the use or non-use of the goods by the defendant, Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564. The successful party recovers the reasonable value of the use, not what he might have made by the use in his own business, Kelly *v.* Altemus, 34 Ark. 184; not what the defeated party received for the use, Adams *v.* Wright, 74 Conn. 551, 51 Atl. 537. In the case of machinery which wears in using, the damages for detention are reckoned at the value of the use, less the damage which would result from wear in use, Peerless Co. *v.* Gates, 61 Minn. 124, 63 N. W. 260; McGrath *v.* Wilder, *supra.* And the party demanding the value of the use must show that he was in a position to use the goods, and would have used them, Klinkert *v.* Fulton Co., 113 Wis. 493, 89 N. W. 507; Smith *v.* Stevens, *supra.* Pledgee of work animals without the right to use them can only recover interest on the value, Johnson *v.* Bailey, 17 Colo. 59, 28 Pac. 81. An officer claiming under a levy is not entitled to recover the value of the use, Tandler *v.* Saunders, 56 Mich. 142, 22 N. W. 271; *contra* Broadwell *v.* Paradise, 81 Ills. 474. Value of the use is allowed only for such time as the property might reasonably have been kept employed, Brunell *v.* Cook, 13 Mont. 497, 34 Pac. 1015. And the defeated party may show that the hire would have been less if taken for the length of time during which the property was detained than if taken by the day, Stanley *v.* Donaho, *supra.* Where the thing detained was a dummy or tramroad locomotive, evidence of the value of the use of an ordinary locomotive is not admissible, unless special circumstances are shown in the declaration, *e. g.*, that plaintiffs were under necessity to supply the place of the dummy, and could not supply it without the extraordinary expense. Ocala Co. *v.* Lester, Fla. 38 So. 512. If the plaintiff take judgment for the value of chattels at the time of the taking under the writ of replevin, he is not entitled to recover for the use. Colean Company *v.* Strong, 126 Ia. 598, 102 N. W. 506. Citing Powers *v.* Benson, 94 N. W. 929, Newberry *v.* Gibson, 101 N. W. 428.]

[3] McGavock *v.* Chamberlain, 20 Ill. 220; Allen *v.* Fox, 51 N. Y. 564.

applies in cases where the party claiming the use is in a situation to use it, and has a right to use it,[4] and only applies to cases where the property can be put to use. It is for only the loss of the use of property which the party is in a situation to use, and can use, that the value of the use is allowed.

§ 581. **The same. Not allowed a pledgee or an officer of the law.** A mere pledgee of goods has no right to use them. So, when the defendant had a judgment for the return of a sewing machine, on the assessment of damages the defendant claimed to be the owner, and testified as to the monthly value of the use. The plaintiff offered to show that the defendant obtained the machine as a pledge or security for a debt, and this defense was held good, and a judgment for the defendant for the value of the use was reversed;[5] and, following the analogies of this case, an officer of the law, who has seized property on an execution, has no right to use the property; the value of the use should not be assessed in his favor.[6]

§ 582. **The same.** Where the property was valuable for use, plaintiff may recover the value of the use during the time he was deprived of it, but not the natural depreciation in value during the same time; though when the property is incapable of use, the natural depreciation in value may be given.[7] Neither can a party be entitled to interest on the value, and at the same time the value of the use. Where use is allowed it excludes other compensations during the period for which the use is allowed. When a horse was bailed to defendant to feed, and he used it, and it afterwards died, though not in consequence of such use, the plaintiff could not recover for the use, in an action of trover. Perhaps assumpsit for the use might have been proper.[8]

§ 583. **The same. Not allowed unless the property is chiefly valuable for its use.** Where the property is valuable chiefly as merchandise, kept for sale or consumption, and not for use, its value as merchandise, and interest, and not the value of its use, is the proper measure of damages.[9] And generally, the

[4] Barney *v.* Douglass, 22 Wis. 464.

[5] McArthur *v.* Howett, 72 Ill. 359.

[6] See, in this connection, Twinam *v.* Ewart, 4 Lans. 263.

[7] Odell *v.* Hole, 25 Ill. 208; Garrett *v.* Wood, 3 Kan. 231.

[8] Johnson *v.* Weedman, 4 Scam. 496.

[9] Hanauer *v.* Bartels, 2 Col. 515; Machette *v.* Wanless, 2 Col. 170; Shepherd *v.* Johnson, 2 East, 211; Clark *v.* Pinney, 7 Cow. 681; Goulet *v.*

plaintiff can never recover the value of the use unless he shows the property to be valuable only for its use, and that he is in a situation where its use is a matter of right.

§ 584. **Where the successful party has only a limited interest.** Where the successful party in replevin has only a limited interest in the property in dispute, as, for example, a leasehold interest, or a lien for a limited amount, he cannot, as against the general owner, recover damages greater in amount than the value of that limited interest. The justice of this rule is apparent. In a contest between the owner of the general property and the owner of a limited interest in the same property, the rights of each can be defined and protected.[10] To illustrate: When the interest of the plaintiff was only an execution, and the other party was the general owner,[11] or, where the action was by one who had a life estate in slaves against the remainderman, the value of the life interest, and not the full value of the slaves, was allowed.[12]

Asseler, 22 N. Y. 225; Bonesteel *v.* Orvis, 22 Wis. 522; Allen *v.* Fox, 51 N. Y. 564.

[10] Townsend *v.* Bargy, 57 N. Y. 665; Weaver *v.* Darby, 42 Barb. 411; Warner *v.* Hunt, 30 Wis. 200; Childs *v.* Childs, 13 Wis. 19; Lloyd *v.* Goodwin, 12 S. & M. (Miss.) 223; Williams *v.* West, 2 Ohio St. 86; Rhoads *v.* Woods, 41 Barb. 471; Allen *v.* Judson, 71 N. Y. 77.

[11] Booth *v.* Ableman, 20 Wis. 22.

[12] Lloyd *v.* Goodwin, 12 S. & M. (Miss.) 223. [Where the plaintiff has only a special interest, his damages are the value of such interest, at the date of conversion, Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251; Pico *v.* Martinez, 55 Calif, 148; Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583. As against the general owner, only the value of his interest; as against a stranger, the full value, Jellett *v.* St. Paul Co., 30 Minn. 265, 15 N. W. 237. An officer holding goods under an attachment and prevailing in replevin, recovers the amount due on his writ, with interest and costs; he is not entitled to the amount of a demand included in the attachment and not then due, unless circumstances warranting an attachment upon an immature demand are shown to exist, Gamble *v.* Wilson, 33 Neb. 270, 50 N. W. 3. Where defendant holds the goods as a pledge and the plaintiff is the general owner, defendant may show the amount of the debt for which they are pledged, Clow *v.* Yount, 93 Ills. Ap. 112. Where pledgee sues pledgor, the measure of his damages is the value of the pledge, if less than the debt secured, otherwise the amount of the debt at the trial; or if the debt is discharged pending the action, nominal damages, Holmes *v.* Langston, *supra*. Where the mortgagee fails in replevin, the jury in assessing the defendant's damages should allow and deduct from the value of the goods, plus the damages for detention, the amount shown to be due upon the mortgage, Dixon *v.* Atkinson, 86 Mo. Ap. 24. The vendor in a

§ 585. **The same. Distress for rent.** When the suit was for the replevin of a distress for rent, and the tenant failed to prosecute his suit, and a return of the property was awarded, in a suit on the bond, the suit was regarded as between the owner of a limited interest against the owner of the general title; the measure of damages was only the value of the limited interest; that is, the amount of rent due, and not the full value of the property replevied.[13] So, when the defendant in the replevin had not paid for the goods, and could not be held liable to pay for them, he could not recover on the bond any more than the jury may find they would have gained by the sale of the goods if he had retained them.[14]

§ 586. **The same. Where the interest is an execution.** Where the interest of the plaintiff was only an execution against the defendant, or a lien on the property, the damages should be limited to the amount of the execution or lien, and the defendant may show that it is paid or discharged in mitigation of damages, and the burden of showing the amount of the execution, where it is relied upon, is on the party who relies on it.[15]

§ 587. **The same. As between the owner of a limited interest and an intruder.** But where the contest is between the owner of a limited interest in a chattel and an intruder, who has no interest in the property, the owner of the limited interest is entitled to recover the property, or its full value; because he may be liable to account to the general owner.[16] Where the suit is brought by a bailee, or one holding a special property, against the holder of the general title, he recovers the value of his special interest, and not the value of the property. Thus, if one hire a horse for a term, and it be taken from him by the owner, before the term expires, he could recover the value of his interest, and not the full value of the horse.[17] The same rule prevails when

conditional sale, electing to take damages in lieu of the chattels, is entitled to recover the balance due on the price if the value is greater than such balance, otherwise the value of the goods, Hodges *v.* Cummings, 115 Ga. 1000, 42 S. E. 394.]

[13] David *v.* Bradley, 79 Ill. 316.

[14] Seidner *v.* Smith, 40 Md. 603.

[15] Booth *v.* Ableman, 20 Wis. 21; Seaman *v.* Luce, 23 Barb. 240.

[16] Frei *v.* Vogel, 40 Mo. 150; Dilworth *v.* McKelvy, 30 Mo. 150; Falon *v.* Manning, 35 Mo. 271; Frey *v.* Drahos, 7 Neb. 194.

[17] White *v.* Webb, 15 Conn. 305; Faulkner *v.* Brown, 13 Wend. 64; Ingersoll *v.* Van Bokkelin, 7 Cow. 670; Atkins *v.* Moore, 82 Ill. 240;

the party connects himself with the general owner as bailee, or in any way showing himself responsible to the general owner, he is entitled to recover the full value as against any one who, without right, interferes with the property.[18]

§ 588. **The same. Between the general owner and the owner of a limited interest.** The general rule may be stated, that in an action between the general owner and one having a lien or a limited interest, when the latter prevails he is entitled to damages the amount of his lien, or value of his special property;[19] but as agent, a stranger who replevins property without right, the defendant, no matter if his interest be limited, is entitled to a return of the goods, or their full value. This rule is shown to be very ancient in *Lyle* v. *Barker*, 5 Binn. (Pa.) 458, which was an action against the sheriff for trespass in breaking the plaintiff's close and taking pipes of wine. The wine belonged to one Morris, but was held by the plaintiff as collateral for money lent, and the court allowed the full value, for the reason, that upon payment of his claim, the plaintiff was liable to surrender the wine or pay the full value.

§ 589. **The same.** When the plaintiff's title is legally divested after suit brought, and before trial, he can, as against the owner, recover nothing beyond costs, and such damages as he may have sustained up to the time his title was divested;[20] and the court will always hear evidence to show a change of ownership since the suit began, or which makes it improper to award a return, or full value as damages for a failure to make return.[21] And where a return has been awarded, and the suit is on the bond, the defendants may show any fact not settled in the replevin suit in mitigation of damages; but as against a trespasser, the defendant is entitled to a return of the goods, or their full value, notwithstanding his title may have terminated before trial. So, when a pawnee of property is liable to the owner for goods, he may recover the full value as damages against a stranger who takes them.[22]

Rhoads *v.* Woods, 41 Barb. 471; Davidson *v.* Gunsolly, 1 Mich. 388; Benjamin *v.* Stremple, 13 Ill. 468; Battis *v.* Hamlin, 22 Wis. 669.

[18] Booth *v.* Ableman, 20 Wis. 21; Leonard *v.* Whitney, 109 Mass. 266.

[19] Seaman *v.* Luce, 23 Barb. 240; Rhoads *v.* Woods, 41 Barb. 471; Ingersoll *v.* Van Bokkelin, 7 Cow. 681, n. *a*.

[20] Cole *v.* Conolly, 16 Ala. 271.

[21] Leonard *v.* Whitney, 109 Mass. 266.

[22] Lyle *v.* Barker, 5 Binn. 459.

§ 590. **Damages against officers for wrongful seizure.** Replevin against sheriffs and other ministerial officers for the wrongful seizure of goods is of frequent occurrence, and the question of damages to be awarded against officers in such cases, or in their favor, when they are entitled to the return of the goods, forms an important part of the chapter on damages. The law is well settled, that sheriffs and other ministerial officers are liable in damages for the wrongful seizure of goods under process. The form of the action, however, may be trespass, trover, or replevin, at the election of the party injured. Thus, if the sheriff, with an execution against A., seize the goods of B., B. may sustain an action against the sheriff for the goods, or their value; and if the goods are sold, or are not returned, he may recover the value. The value, and not the amount for which they were sold, is the measure of damages.[23] Though when the sheriff seize and sell goods, and the plaintiff is an assignee, who must have sold them had they come to his possession, the jury may be induced to find the sum for which the sheriff sold them.[24]

§ 591. **The same. Against officer acting in good faith.** As against a sheriff acting in good faith in the discharge of his official duties, exemplary damages are not allowed Even though he should seize and sell the goods of the wrong person, the value of the interest of the party in the property (not including loss of trade or character,) with interest, and reasonable compensation for any depreciation in the value, or cost of replacing it, is the proper measure of damages.[25] In *Saffell* v. *Wash*, 4 B. Mon. (Ky.) 93, is was said that the sheriff was not liable for costs when he levied on exempt property. That a defendant in execution should not be allowed to resort to this interdicted remedy (replevin,) even for his exempt property, except at the certainty of paying all the costs. But this is contrary to the entire current of the law in other States, and the principle would, if allowed to become established, turn loose upon society a set of licensed trespassers.[26]

[23] Pozzoni *v.* Henderson, 2 E. D. Smith, 146; King *v.* Orser, 4 Duer. (N. Y.) 431; Livor *v.* Orser, 5 Duer. 501; Whitaker *v.* Wheeler, 44 Ill. 441; Russell *v.* Smith, 14 Kan. 374.

[24] Whitehouse *v.* Atkinson, 3 Car. & P. (14 E. C. L.) 344.

[25] Beveridge *v.* Welch, 7 Wis. 45; Barney *v.* Douglass, 22 Wis. 464; Graves *v.* Sittig, 5 Wis. 219; Morris *v.* Baker, 5 Wis. 389; Meshke *v.* Van Doren, 16 Wis. 320; Noxon *v.* Hill, 2 Allen, 215.

[26] See *post*, § 592.

§ 592. **The Same. Officer acting with malice.** When, however, the sheriff has acted with malice or fraud, or with design to annoy or oppress, the process will not protect him more than if he were a private person.[27] But malice on the part of the plaintiff whose process the sheriff is executing cannot be given in evidence against the sheriff.[28] So, when the sheriff levies an attachment on goods not the property of the defendants,[29] he acts at his peril, and is answerable, if he makes a mistake;[30] and in such case it is no ground for new trial that the jury fix the damages at a greater or less sum than any of the witnesses fix them.[31] If the sheriff make an excessive levy, after satisfaction of the debt by sale of part of the goods, and a return of part only of the unsold goods, the value of the goods not returned, and damages for their detention, and for any injury they may have received, is proper.[32]

§ 593. **The Same. Where the suit is by the general owner.** Where the goods were replevied from an officer, who held them on several attachments, by a party having no right to them, the officer was entitled to the full value and damages (interest) for the detention. Nor should any deduction be made for attachments which were levied after the replevin.[33] This rule grows out of the fact that the sheriff making a levy is regarded as responsible to the defendant in execution for any surplus there may be after satisfying the execution. Where, therefore, the defendant in the execution replevies the goods, he is regarded as the general owner, and as against him the sheriff is not responsible to any other person for any surplus after satisfying the execution. The measure of damages, therefore, in such cases, is the amount of the execution, in case it is less than the value of the property, or the value of the property in case the execution is greater,[34] as the damages should not exceed the value of the property, possibly with interest added.

[27] Nightingale *v.* Scannell, 18 Cal. 315; Noxon *v.* Hill, 2 Allen, 215; McDaniel *v.* Fox, 77 Ill. 345.

[28] Nightingale *v.* Scannell, 18 Cal. 315.

[29] Milburn *v.* Beach, 14 Mo. 105.

[30] Ayer *v.* Bartlett, 9 Pick. 156; Joyal *v.* Barney, 20 Vt. 155.

[31] See note to Ayer *v.* Bartlett, 9 Pick. 156, citing many cases.

[32] Waterbury *v.* Westervelt, 5 Seld. (N. Y.) 598.

[33] Farnham *v.* Moor, 21 Me. 508; Lyle *v.* Barker, 5 Binn. 459.

[34] Jennings *v.* Johnson, 17 Ohio, 154; Sutcliffe *v.* Dohrman, 18 Ohio, 186; Battis *v.* Hamlin, 22 Wis. 669. See Coe *v.* Peacock, 14 Ohio St.

§ 594. **The Same. Where the suit is by one without right.** But where a party not the defendant in execution replevies the property, and upon trial a return to the sheriff is awarded, in such case the sheriff is regarded as responsible to the general owner for the surplus, and the measure of damages is the full value of the property and interest, without regard to the amount of the execution.[35]

§ 595. **Damages against officer for losing bond.** Where the officer has lost the bond, the defendant for whose benefit the bond was given may have his action the same as though no bond had been taken, and may recover the amount for which the securities in the bond would have been liable.[36] The principle governing in such case is that the party is entitled to be placed in as good a position as if the sheriff had done his duty, and the damages in such case are measured, not by the amount of the value of the goods or the defendant's interest in them, but the amount which could have been recovered if the breach of duty had not happened.[37]

§ 596. **The Same. For other failure in his duty.** If the sheriff fail of his duty, whereby a party is injured, he is usually responsible in damages. If on receiving a writ of replevin the officer fail or neglect to serve it, or if in attempting to serve it he is put off with vague information in reply to casual inquiries, he is responsible to the party for such damages as he may have sustained by such misconduct;[38] but the sheriff may negative the possibility of any advantage to the creditor from the performance of his duty, and the creditor will not be entitled to damages.[39] Thus

187; Niagara Elev. Co. *v.* McNamara, 2 Hun. 416; S. C. 50 N. Y. Ct. Appeals, 653.

[35] First Nat. Bank *v.* Crowley, 24 Mich. 499; Farnham *v.* Moor, 21 Me. 508; Buck *v.* Remsen, 34 N. Y. 383; Dilworth *v.* McKelvy, 30 Mo. 150; Long *v.* Cockrell, 55 Mo. 93; Fallon *v.* Manning, 35 Mo. 275. See Battis *v.* Hamlin, 22 Wis. 669; Lyle *v.* Barker, 5 Binn. 458.

[36] Perreau *v.* Bevan, 5 B. & C. 284.

[37] Aireton *v.* Davis, 9 Bing. 740. In an action for not arresting on *mesne* process, or permitting a debtor to escape, a plea by the officer *negativing* any damage is a good plea. Williams *v.* Mostyn, 4 Mees. & W. 145, overruling Barker *v.* Green, 2 Bing. 317.

[38] Hinman *v.* Borden, 10 Wend. 367.

[39] Mayne's Law of Damages, this title, where this question is fully and ably discussed.

when the plaintiff delivered to the sheriff a writ directing him to take certain goods of the party therein named as defendant therein; to a suit for false return for not levying, the sheriff was permitted to show that the goods were not the goods of the party against whom the writ issued.[40]

§ 597. **In suits between different officers.** Suits are sometimes brought by one officer against another to test the relative priority of the different processes held by them. In such cases the rule, as laid down in a case in Vermont, is, that damages beyond the actual value of the property should not be given.[41]

§ 598. **Damages between joint owners.** Replevin, as we have seen, cannot be sustained by one joint owner against his cotenant; but such actions are sometimes brought through mistake or by design, and the question arises, what damage shall be awarded against the plaintiff, who, though he may be a joint owner in the property, and equally entitled to possession with the defendant, must fail in his action. As a general rule the defendant who recovers because of the joint tenancy is entitled to be restored to the same position he was before the taking upon the writ, and is, therefore, entitled to judgment for a return, otherwise the plaintiff would gain all the advantage of a victory where the law compels a defeat. But when in such case the court comes to determine the question of damage, the defendant is not entitled to recover more than the value of his interest in the goods.[42]

§ 599. **The same.** Where the plaintiff's claim for delivery under his writ is based upon the assumption that he is entitled to possession of, and he obtains delivery of, the whole, he must, upon failure, return the whole. Where the action was brought by a stranger against a bailee of one joint owner, to whom the defendant is answerable for the return of the goods or their value, the damages must be the full value, and not the value of the interest of the bailor.[43]

[40] Stimson *v.* Farnham, 1 Moaks, (Eng.) 60.

[41] Goodman *v.* Church, 20 Vt. 187.

[42] Bartlett *v.* Kidder, 14 Gray, (Mass.) 449; Witham *v.* Witham, 57 Me. 448; Spoor *v.* Holland, 8 Wend. 445; Jones *v.* Lowell, 35 Me. 538; Ingersoll *v.* Van Bokkelin, 7 Cow. 670; Mason *v.* Sumner, 22 Md. 312; Sutcliffe *v.* Dohrman, 18 Ohio, 185. See, also, Reynolds *v.* McCormick, 62 Ill. 412.

[43] Russell *v.* Allen, 3 Kern. (N. Y.) 178.

§ 600. **Effect of the death or destruction of the property.** Questions frequently arise as to what effect the death, or destruction of the property pending the suit, will have on the rights of the parties; upon this question, the authorities with a few exceptions, can easily be harmonized. It was said in a New York case, that when the property sued for is a living animal, and it dies, it is a good plea to say that it is dead.[44] This ruling was based upon the idea that the return had become impossible, by act of God;[45] but this ruling has been questioned more than once. To permit a defendant who wrongfully takes possession, to claim that he holds it at the risk of the real owner and not at his own, and claim immunity for accident, would be unjust, in the extreme. The wrongful taker of property, when called upon to surrender it to the rightful owner or pay the value, cannot defend himself from judgment by showing his inability to deliver through death or otherwise.[46] If the recovery of the specific thing was the sole object of the action, of course upon its death or destruction the action would terminate; but the object is to recover the thing only in case it can be had, and its alternate value in case it cannot be delivered in specie. The result is, that the death or destruction of the thing sued for, does not defeat the action unless it be under circumstances which excuse the party from liability for the value.[47]

§ 601 **The same.** If in the action of replevin or detinue, the judgment for the delivery of the property or its alternate value, is to be prevented by its death or destruction pending the suit, it is obvious that that form of action is inadequate to redress the wrong or enforce the right to its full extent. The plaintiff must yield his desire to obtain the specific property, or he must incur the peril of losing not only the property, but all claim for compensation in case it die in the hands of the wrongful taker.[48] Therefore, in such cases, when the property has been destroyed and cannot be delivered or returned, the fact of its destruction

[44] Carpenter *v.* Stevens, 12 Wend. 589.

[45] See Melvin *v.* Winslow, 1 Fair. (Me.) 397.

[46] Caldwell *v.* Fenwick, 2 Dana, 333; Halle *v.* Hill, 13 Mo. 612; Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 34; Austin's Ex'rs *v.* Jones, 1 Gilmer, (1 Va.) 341; Scott *v.* Hughes, 9 B. Mon. 104.

[47] Carrel *v.* Early, 4 Bibb. (Ky.) 270.

[48] See Suydam *v.* Jenkins, 3 Sandf. 644; Middleton *v.* Bryan, 3 Maul. & S. 158.

does not furnish any excuse for the non-payment of the value. The New York cases referred to were based upon the hypothesis that the party came rightfully into the possession, and was liable only for ordinary care All the analogies in cases where the taking was wrongful are different.[49]

§ 602. **The same. Death of slaves pending suit does not affect the right to judgment for value.** The death of slaves pending the action for them has often been held not to defeat the plaintiff's right to a judgment for them or their value.[50] In *Carrel* v. *Early*, 4 Bibb (Ky.) 270, the proposition was that the slaves having died without fraud of defendant after suit begun, defeated plaintiff's right to their value. C. J. BOYLE said, "this proposition cannot be maintained. Were the recovery of the specified thing the absolute and sole object of the action of detinue, the destruction of the thing would necessarily defeat the action; but as the object is to recover the thing only upon condition it can be had, and if not then its value, it follows that the action cannot be defeated by the destruction of the thing unless under circumstances which would excuse the defendant from responsibility. He who wrongfully detains the property of another does so at his peril, and will be responsible to the owner,[51] though the property should be destroyed by accident, or taken from him by malice."

§ 603. **The same. Emancipation.** It has also been held that where slaves had become emancipated before the trial, that fact furnished no reason why the plaintiff should not have judgment for their value, (suit begun in March, 1852, tried in 1869.)[52]

§ 604. **Judgment when the property is lost or destroyed.** When it appears that the property was hopelessly lost or destroyed, so that judgment for its return would be of no avail, a

[49] Garrett *v.* Wood, 3 Kan. 231; Berthold *v.* Fox, 13 Minn. 501.

[50] White *v.* Ross, 5 Stew. & Porter, (Ala.) 123; Lay *v.* Lawson, 23 Ala. 377; Bettis *v.* Taylor, 8 Por. (Ala.) 564; Bell *v.* Pharr, 7 Ala. 807; Johnson *v.* Marshall, 34 Ala. 522; Carrel *v.* Early, 4 Bibb. 270. Action not proper if slave died before suit began. Caldwell *v.* Fenwick, 2 Dana, (Ky.) 332; Barksdale *v.* Appleberry, 23 Mo. 390. Value of use to the time of death. Haile *v.* Hill, 13 Mo. 612; Austin *v.* Jones, 1 Va. 341; Bethea *v.* McLennon, 1 Ired. (N. C.) 523; Rose *v.* Pearson, 41 Ala. 689.

[51] Barksdale *v.* Appleberry, 23 Mo. 392; Rose *v.* Pearson, 41 Ala. 692; Feagin *v.* Pearson, 42 Ala. 335.

[52] Wilkerson *v.* McDougal, 48 Ala. 518. See McElvain *v.* Mudd, 44 Ala. 48.

failure to render judgment for the return was regarded as a technical error, and judgment for the value was not disturbed.[53]

§ 605. **Damages allowed only where the defendant is entitled to a return.** The defendant is never entitled to damages unless he shows himself entitled to the property. Damages are in fact only an incident to judgment for a return, which should not be given unless the defendant plead and show some right or title in himself.[54] Damages to a defendant are to compensate him for the loss he has sustained by being deprived of his property, and their award involves a prior finding that the property belongs to the defendant. It would be a violation of all the principles of the law to give damages to one who had no right to the property, and could not show himself entitled to a return.[55]

§ 606. **Option of the defendant to pay value or return the goods; where allowed.** In some of the states it is at the option of the defendant in replevin to return the goods or pay the value as assessed by the jury;[56] but the contrary is the more common doctrine, but this is a purely local regulation.[57]

§ 607. **Damages to compel return.** It not unfrequently happens that the defendant makes some disposition of the property to defeat the writ of return, and contents himself with paying the alternate judgment for the value. In case the goods have an intrinsic value, above the market value, or a value to the parties, or one of them, greater than the market value, the disposition to keep them and pay the value may lead the party to adopt such a course as this; but where the goods have a peculiar value which makes their return important to the defendant, the jury in a proper case will be warranted in fixing the value at such

[53] Brown *v.* Johnson, 45 Cal. 76; Wilkerson *v.* McDougal, 48 Ala. 518.

[54] Whitwell *v.* Wells, 24 Pick. 25.

[55] Neis *v.* Gillen, 27 Ark. 184.

[56] Allen *v.* Fox, 51 N. Y. 569.

[57] Mayberry *v.* Cliffe, 7 Cold. (Tenn.) 121. [Where the plaintiff omits to give a bond, and prosecutes his action without the delivery of the property to him, and takes judgment for the value, he recovers also damages for the detention, Cook *v.* Hamilton, 67 Ia. 394, 25 N. W. 676;—but see Hasted *v.* Dodge, Ia., 35 N. W. 462, Colean Co. *v.* Strong, 126 Ia. 598, 102 N. W. 506, Bateman *v.* Blake, 81 Mich. 227, 45 N. W. 831. If the plaintiff prevailing, elects to take a money judgment in lieu of the goods he is to be allowed interest from the seizure of the goods to the day of judgment, Becker *v.* Staab, 114 Ia. 319, 86 N. W. 305. Just *v.* Porter, 64 Mich. 565, 31 N. W. 444.]

a sum as will be likely to compel their return.[58] So where the plaintiff sued for specified chattels, which had a peculiar value to him, the jury, with a view of inducing a surrender of the specific goods, placed a value on them higher than would otherwise have been warranted by the evidence, the verdict was allowed to stand.[59] This rule, highly advantageous where it appears that the party to whom such damages are awarded is clearly in the right, is liable to abuse, and such damages should never be allowed in any case unless it appears that the party has the property and can deliver, and that the increase in damages may result in producing a delivery, which ought to be made, and will otherwise be refused.

§ 608. **When and how assessed.** The damages should be assessed in the replevin suit. They are but an incident to the proceeding in replevin, and to prevent a multiplicity of suits, questions touching the damage should be settled in the replevin suit.[60] In Missouri, when the judgment is again the plaintiff, it is

[58] Mayberry v. Cliffe, 7 Cold. (Tenn.) 120; Goodman *v.* Floyd, 2 Humph. (Tenn.) 60.

[59] Cochran *v.* Winburn, 13 Tex. 143. But see, in this connection, Hoeser *v.* Kraeka, 29 Tex. 450.

[60] Hohenthal *v.* Watson, 28 Mo. 360; White *v.* Van Houten, 51 Mo. 578; Bower *v.* Tallman, 5 W. & S. (Pa.) 556; Redman *v.* Hendricks, 1 Sandf. (N. Y.) 32; Glann *v.* Younglove, 27 Barb. 480. [The damages must be assessed in the replevin suit, Stevens *v.* Tuite, 104 Mass. 328; Globe Co. *v.* Messick Co., 136 N. C. 354, 48 S. E. 781. The judgment should be in the alternative; and the execution should direct the officer to take the goods, or if not found, to collect the value, *Id.* And a second action after return of the goods, to recover for injuries to, or deterioration of the goods while in plaintiff's possession, cannot be sustained, Teel *v.* Miles, 51 Neb. 542, 71 N. W. 296. But where the bond is conditioned to pay "all damages sustained" by defendant, he is not required to demand the assessment of his damages in the replevin, but may defer it until his action upon the bond, Gould *v.* Hayes, 71 Conn. 86, 40 Atl. 930. And even though damages are assessed in the replevin, if they were not demanded by the answer they have no basis, the judgment is a nullity, and does not bar recovery of substantial damages in an action on the bond, *Id.* Where the plaintiff discontinues his action the court may assess the damages without a jury, Lamy *v.* Remuson, 2 N. M. 245. Ordinarily the jury need find only the value, interest being added by the court, in the judgment; but where defendant contends that there was an agreed price upon the goods, a part of which he has paid before the seizure, the jury must find upon this issue, Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745. And in Gordon *v.* Little, 41 Neb. 250, 59 N.

against him and his securities that they return the property or pay the value, with damages and costs. The jury, therefore, which tries this issue touching the replevin should pass upon the issues as to damages. They should find the value which the plaintiff and his security must pay in case they fail to return the property, and should assess the damages. There is no warrant of law to call a jury to try part of the case and another part of the case.[61] This rule is, however, by no means universal In Iowa, the damages might be recovered in the replevin suit or in a separate action on the bond.[62] In Maine, a similar rule obtained.[63]

§ 609. **Generally dependent on local statute.** This question however depends on the statutes of the different States. No general rule can be stated. By the common law, upon an omission to have damages assessed in the replevin suit, the defendant was entitled to have a writ of inquiry,[64] and unless the condition of the bond or some statutory prohibition exists, such course would be permitted now. When the condition of the bond is to pay such damages as shall be adjudged, the only safe course is to have the damages assessed in the replevin suit.[65] In Indiana, the plaintiff in a suit on the bond is permitted to recover even though damages were not assessed in the replevin.[66] In Illinois, the securities are not parties to the replevin suit, and evidence of the assessment of damages in the replevin suit is not admissible against them in suit on the bond.[67]

§ 610. **Value and damages should be separately assessed.** The value of the property and the damages for detention, etc.,

W. 783, it was held that the allowance of even nominal damages, without an assessment of damages is error, *contra*, McKean *v.* Cutler, 48 N. H. 370. When the plaintiff is non-suit, he is no longer an actor, and he is only to be heard to resist defendant's claim for damages; the affirmative rests on defendant, and he has the opening and close, Washington Co. *v.* Webster, 68 Me. 449.]

[61] Hohenthal *v.* Watson, 28 Mo. 360.

[62] Hall *v.* Smith, 10 Iowa, 45.

[63] In Washington Ice Co. *v.* Webster, 62 Me. 363, it was said that in case of a non-suit, without assessment of damages, that they might be assessed in suit on the bond.

[64] Humfrey *v.* Misdale, Comb. 11; Herbert *v.* Waters, 1 Salk. 205.

[65] Pettygrove *v.* Hoyt, 11 Me. 66; Sopris *v.* Lilley, 2 Col. 498.

[66] Whitney *v.* Lehmar, 26 Ind. 506; Hall *v.* Smith, 10 Iowa, 47.

[67] Shepard *v.* Butterfield, 41 Ill. 78. See this case.

should be separately assessed, and in no case should they be amalgamated.[68] The force of this will be apparent when it is considered that the claims for value and for damages are based upon entirely different grounds. Value is only allowed when the property cannot be had; damages are to compensate the party for being deprived of his property; but by agreement of the parties the value and damages may be assessed in one sum.[69]

§ 611. **Recovery cannot be for a greater sum than is claimed.** The damages stated in the writ or in the *narr* is not fixed with any very nice attention to the actual value. The pleader will usually take good care to fix it at the outside value, on the supposition that the jury would not give him any greater sum than the value as fixed by himself.[70] In California the right to a return must be determined in the first instance in the replevin suit, but if that is dismissed without trial the parties are left to the remedy on the bond.[71] The rule in this action, as in trover, does not confine the jury to the damages which were sustained prior to the date of the writ, but the injury may be continued up to the date of the trial,[72] the same as interest is computed upon a promissory note up to the date of the verdict or judgment.

§ 612. **Damages for property severed from real estate.** When the owner of real estate sues in replevin for property which has been severed therefrom he can recover only the value of the property after the severance; not its value as forming part of the real estate. The reason for this rule will be apparent when it is considered that the plaintiff sues for his property as his chattel, not as his realty. He had his election to sue in trespass, in which form he might have recovered the damage to the real estate; but having elected to treat it as chattel property he can only recover its value as a chattel. Thus, when a fence was removed from a farm, and the owner replevied it, proof that it was worth $200 as a fence, but the materials when removed were worth only $75, the plaintiff could only recover the value of the materials.[73]

[68] Sayers *v.* Holmes, 2 Coldw. (Tenn.) 259.

[69] M'Cabe *v.* Morehead, 1 W. & S. (Pa.) 515.

[70] Hoskins *v.* Robins, 3 Saund. 320, n. 1; Huggeford *v.* Ford, 11 Pick. 223. The plaintiff cannot recover a greater sum than he has claimed in his declaration. O'Neal *v.* Wade, 3 Ind. 410.

[71] Mills *v.* Gleason, 21 Cal. 274; Ginaca *v.* Atwood, 8 Cal. 446.

[72] Dailey *v.* Dismal Swamp, 2 Ired. (N. C.) 222.

[73] Pennybecker *v.* McDougal, 48 Cal. 162.

§ 613. **The same.** When the suit was for rails, and before the service of the writ the defendant built part of them into a fence, the sheriff could not take the fence, and the plaintiff could recover the value of the rails, not the value of the fence.[74] So a tenant who was dispossessed for non-payment of rent, and prevented from taking a chimney which he had the right to take, which could not be removed without taking down, the value of material unincumbered by any obligation to remove it was proper measure of damages.[75]

§ 614. **The same. Coal dug or timber cut.** Another class of cases arises where the property has, by its severance from the realty, been increased instead of diminished in value; of which coal dug from the mine of another, or timber cut from his land, furnish common instances. The severance does not change the title to the property. The owner may sustain replevin, but the question of damages to be given him in case he does not recover the property in specie is one of more difficulty. In England when the action was trespass for taking coal, the value was estimated at the value when severed from the realty, and not when in the mine.[76] In Illinois, after a full consideration of the authorities, the court followed substantially the rule in *Martin* v. *Porter*, 5 Mees. & W. 353, and gave the value at the mouth of the pit, less the cost of carrying it there, allowing nothing for the digging.[77]

§ 615. **The circumstances under which the severance was made, and the form of the action, material to be considered.** The circumstances under which the property was taken constitute a material element in determining damages in such case. In a case of trover the jury were told that if there was fraud or negligence on the part of the defendant they might give the full value of the coal after the removal; but if the defendant acted under the honest belief that he had a right to dig as he did, value of the coal in the mine was the proper damages, as an award of the value of the coal before removal will fully compensate the plaintiff for all the damage he has sustained.[78] This case of *For-*

[74] Bower v. Tallman, 5 W. & S. (Pa.) 561.

[75] Moore v. Wood, 12 Abb. Pr. R. (N. Y.) 393.

[76] Martin v. Porter, 5 Mees. & W. 353; Wild v. Holt, 9 Mees. & W. 672; Morgan v. Powell, 3 Adolph. & E. (43 E. C. L.) 278.

[77] Ill. & St. L. R. R. and Coal Co. v. Ogle, 82 Ill. 627; Robertson v. Jones, 71 Ill. 405; McLean Co. Coal Co. v. Long, 81 Ill. 359.

[78] Forsyth v. Wells, 41 Pa. St. 291; citing Wood v. Morewood, (43 E. C. L.) Adolp. & E. 440.

syth v. *Wells* was considered in *Ill. & St. L. R. R. and Coal Co.* v. *Ogle*, 82 Ill. 627, but the court followed *Morgan* v. *Powell*, 3 Adolp. & Ellis, 278, (43 Eng. Com. Law R. 734,) which was trespass for digging plaintiff's coal, where the court held that the plaintiff might recover the value of the coal when dug, allowing the defendant nothing for the digging, but if the defendant had moved the coal to the mouth of the pit he should be paid for his labor in so doing. But in that case PATTERSON, J., said, in substance, if the plaintiff had brought trover or detinue for the coal after it was brought to the pit's mouth he might have recovered the value which it then had without deduction. But this action was trespass for taking and detaching the mineral from the freehold, and the value must be regarded as attaching at the moment the trespass was committed. If the defendant put any expense on the coal after the first trespass it could not be recovered in this action. It would, therefore, seem that when the form of the action is replevin or trover, and not trespass, the rule laid down in *Forsyth* v. *Wells*, 41 Pa. St. 291, would be proper, rather than the exceedingly technical rule laid down in *Morgan* v. *Powell*, *supra*. In trover for the conversion of logs by mistake, the court held the measure of damages should be a sum sufficient to compensate the party for the injury he had sustained, [79] and, except in cases where punitive damages are proper, or where nominal damages are sufficient, this rule is the only just theory.[80] In the case of *Winchester* v. *Craig*, above referred to, the court most aptly illustrates the law in this case, by supposing a party cut trees by mistake and ships them a short distance, and another, under similar circumstances, cut timber and ships it to Europe. In separate actions against each the plaintiff claims the value at the place were the timber was sold. It is very evident that though the value of the standing timber was the same in each case, and the actual injury to the plaintiff the same in both cases, the verdict, if this recovery was allowed, would be very different, and he who had spent the most time and money in giving the timber any real value would be punished most, under no pretense of compensating the plaintiff.

§ 616. **Trees cut upon the land of another by mistake.** When trees are cut on the land of another by mistake, the value

[79] Winchester *v.* Craig, 33 Mich. 206; Northrup *v.* McGill, 27 Mich. 238.

[80] Winchester *v.* Craig, 33 Mich. 206.

of the trees cut down is given as the measure of damages, as the severance changes the property from real to personal property, but in no way changes the ownership. The value at the time of the severance is regarded as a just compensation.[81] In a suit for cutting timber, the form of the action being *trespass de bonis asportatis*, the logs being hauled to a certain landing; but the court allowed only the value at the place where they were cut, though in trover the value at the place where found might have been allowed.[82] But there are other cases where the court allowed the value less the value of the labor of cutting, which was deducted.[83] When the taking was by a willful trespasser, the rule is different; thus, where a trespasser cut wheat on another's land, he cannot deduct for the labor of cutting, but must give the owner the value of the wheat, as though he had harvested it himself.[84] When A. employed a builder to furnish materials and build a house on his lot, and was to pay for it by conveying another lot, the builder, fearing loss, sold the house to a person, who moved and placed a foundation under it on his own lot. A. sued the purchaser and builder in replevin. *Held*, that the house had become real estate, and that the plaintiff was entitled to the value.[85]

§ 617. **The general rule stated applicable to various changes in the property.** The rule has been stated with much force and clearness as follows: When the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, willful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If the raw material has, after appropriation, and without such wrong, been changed by manufacturer into a new species of property, as grain into whisky, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action, or limits the recovery to the value of the original articles.[86] But when the defendant has been guilty of any force or fraud to wrongfully

[81] Martin *v.* Porter, 5 Mees. & W. 353; Morgan *v.* Powell, 3 Adolp. & E. (43 E. C. L.) 278; Winchester *v.* Craig, 33 Mich. 206.

[82] Cushing *v.* Longfellow, 26 Me. 307.

[83] Hungerford *v.* Redford, 29 Wis. 345; Young *v.* Lloyd, 65 Pa. St. 204; Single *v.* Schneider, 24 Wis. 299; Herdle *v.* Young, 55 Pa. St. 176.

[84] Bull *v.* Griswold, 19 Ill. 431, 631.

[85] Reese *v.* Jared, 15 Ind. (Harrison), 142.

[86] Silsbury *v.* McCoon, 6 Hill, (N. Y.) 425.

deprive the plaintiff, the rule, as stated, does not apply, and the law gives the owner the entire property, without deduction for the increased value which the trespasser's labor has given it.[87] The intention of the law, in all these cases, is to do justice to the parties. Where a trespasser takes the timber of another, and cuts it into wood, and burns it, or where he takes cattle, which the owner prizes highly, and butchers them, the law cannot restore the cattle or the wood; it cannot fully and completely protect, or compensate for the injury. It can, however, approximate to it; but because a wrong has been done to the plaintiff, it will not mend the matter to inflict another wrong on the defendant. The law rather aims to protect the plaintiff, but at the same time to inflict no unnecessary injury on the defendant.[88]

§ 618. **Vindictive damages; when allowed.** In cases where the taking or subsequent detention is accompanied by any act showing malice or fraud, or that it was done for the purpose of oppression, or in willful disregard of the rights of the other party, the law abandons the rule of compensation, and allows exemplary damages, such as will not only compensate the party injured, but such other and additional amount as will serve as a lesson to him in the future, or shall punish him for the wrong committed.[89]

§ 619. **The general principles.** The rules governing cases of vindictive or exemplary damages in replevin is ably discussed in the case of *Whitfield* v. *Whitfield*, 40 Miss. 367. The rule there laid down is, that where the original taking was wrongful, or where the original taking was *bona fide*, but the subsequent detention, sale or disposition of the property, after a knowledge of the plaintiff's right, was in willful disregard of such right, or when the original taking and subsequent disposition of the prop-

[87] Salsbury *v.* McCoon, 3 Comst. 381.

[88] Warren *v.* Cole, 15 Mich. 271, citing many cases.

[89] Cable *v.* Dakin, 20 Wend. 172; Brizsee *v.* Maybee, 21 Wend. 144; Dorsey *v.* Manlove, 14 Cal. 553; Whitfield *v.* Whitfield, 40 Miss. 366; Davenport *v.* Ledger, 80 Ill. 574; Mitchell *v.* Burch, 36 Ind. 535; Biscoe *v.* McElween, 43 Miss. 556; Jamieson *v.* Moon, 43 Miss. 598; M'Cabe *v.* Morehead, 1 W. & S. (Pa.) 516; Taylor *v.* Morgan, 3 Watts. (Pa.) 334; Landers *v.* Ware, 1 Strob. (S. C.) 15. For a statement of the distinction between compensating and vindictive damages, see Hendrickson *v.* Kingsbury, 21 Iowa, 379; Graham *v.* Roder, 5 Tex. 141; Cole *v.* Tucker, 6 Tex. 266. Timber cut into boards, the enhanced value. Baker *v.* Wheeler, 8 Wend. 506.

erty at a price greater than its market value at the time of taking, were all in ignorance of the plaintiff's rights, but the defendant, after knowledge, seeks to retain the difference, as a speculation resulting from his original wrong; or, when the property has some peculiar value to the plaintiff, and is willfully withheld, in all such cases it is the peculiar province of the jury to fix such damages as will be consonant with right, not as a matter of law, but of remedial justice, resting with the jury.[90]

§ 620. **The same. The meaning of the terms "punitive," "exemplary" and "vindictive."** This rule of exemplary damages finds illustration in many cases, the general principle being the same in all, that where the taking was accompanied by any evident design to annoy, harass, oppress or insult, the jury may give such damages as will fully compensate the injured party for his actual losses, and in addition thereto such sum, as from all the circumstances of the case, seems just. The terms punitive damages—*damages to punish*—exemplary damages—damages for example, or to teach the party a lesson for the future—or vindictive damages—are, I conceive, frequently misconstrued. The law does not award any unjust or revengeful damages, but the terms only mean that in such cases compensation for the actual loss of property would not be full compensation for the injury actually

[90] This question is treated at length in Sedgwick on Meas. of Damage, 6th Ed., p. 544. See, also, Herdic *v.* Young, 55 Pa. St. 176; Dorsey *v.* Gassaway, 2 H. & J. (Md.) 402; Bruce *v.* Learned, 4 Mass. 614; Carey *v.* Bright, 58 Pa. St. 70; McBride *v.* McLaughlin, 5 Watts. (Pa.) 375; 3 B. Mon. 363. See Farwell *v.* Warren, 51 Ill. 467; Walker *v.* Smith, 1 Wash. C. C. 152. The question of punitive damages is exhaustively discussed in Fay *v.* Parker, 53 N. H. Rep. 343. The conclusion reached in that case is, that in cases when the action is for a tort, punishable by the criminal law, punitive damages cannot be assessed, as the defendant is liable to criminal punishment; and if punitive damages were permitted, he might be punished twice for the same offense, which is unconstitutional. *Quære* whether, in any civil action, the plaintiff can recover punitive damages. To the same effect, see Austin *v.* Wilson, 4 Cush. (Mass.) 273; Tabor *v.* Hutson, 5 Ind. 322; Humphries *v.* Johnson, 20 Ind. 190. Compare Birchard *v.* Booth, 4 Wis. 72; Wilson *v.* Middleton, 2 Cal. 54; Cook *v.* Ellis, 6 Hill, 466; Hoadley *v.* Watson, 45 Vt 289; McCabe *v.* Morehead, 1 W. & S. 513; Schofield *v.* Ferrers, 46 Pa. St. 439. The current of authority justifies the assessment of punitive damages in cases of wilful wrong. The rule is liable to great abuse, but its necessity has been made apparent.

sustained, and, therefore, as a matter of justice, the law permits further compensation sufficient not only to make up to the party for all the injury he has sustained, but to prevent the wrong-doer from deriving any profit from his wrongful act at the expense of the other.[91] The terms "punitive" and "vindictive" have become so fixed in the law that they cannot now be got rid of, yet they should never be used without explanation of their true meaning.[92] The law will not attempt to redress a wrong suffered by the plaintiff by inflicting another wrong on the defendant. In some cases the injuries are such that they are susceptible of a full and definite money compensation. When this is the case the law will not abandon a certain rule which will do complete justice for an uncertain rule which can hardly fail to do injustice.[93]

§ 621. **The same.** This question of punitive is one of the most difficult which the courts have to deal with, involving as it does a wide departure from the plain principles of the common law, often exposing a suitor to the danger of being heavily punished by what amounts to a fine assessed for the benefit of his opponent. The courts should exercise a most vigilant watch over all cases where such damages are claimed, and promptly suppress any attempt to recover them, except in cases clearly within the rule, and should promptly strangle any attempt to increase the amount of such damages by an appeal to the passion or prejudices of the jury. In no case can court or jury be required to exercise cooler judgment or sounder discretion than in the assessment of punitive or exemplary damages.

§ 622. **The same. Actual malice or gross carelessness must be shown.** The principal rule governing such cases is, that malice must appear. The mere doing an unlawful or injurious act is not of itself sufficient to warrant the jury in allowing anything beyond compensatory damages. The act must be shown to be prompted by a malicious motive or criminal indifference to obligations, or done under circumstances or in a manner which indicates such motives.[94]

[91] Heard *v.* James, 49 Miss. 236; Wilson *v.* Young, 31 Wis. 576; Selden *v.* Cashman, 20 Cal. 57. The terms "punitive," "vindictive" or "exemplary" damages have no different signification in law. Chiles *v.* Drake, 2 Met. (Ky.) 146; Brown *v.* Allen, 35 Iowa, 306.

[92] Detroit *Daily Post*, etc., *v.* McArthur, 16 Mich. 452.

[93] Warren *v.* Cole, 15 Mich. 271; Winchester *v.* Craig, 33 Mich. 205.

[94] Brown *v.* Allen, 35 Iowa, 306; Seeman *v.* Feeney, 19 Minn. 79;

§ 623. **No general rule exists for estimating.** No general rule can be laid down to govern cases of this kind; each case must be controlled by the circumstances which surround it. Where a trespass is committed in a wanton and aggressive manner, indicating malice or a desire to injure, a jury ought to be liberal, but not wanton,[95] in compensating the party injured in all he has lost in property, and, in some cases, his expense incurred in the assertion of his rights. There is, in such case, no fixed standard as to the amount which should be assessed, the jury

Ousley *v.* Hardin, 23 Ill. 403; Selden *v.* Cashman, 20 Cal. 57; Hyatt *v.* Adams, 16 Mich. 180. Vindictive damages cannot usually be recovered against a master for the act of his servant, unless he authorized or ratified the act. Hagan *v.* Providence & W. R. R. Co., 3 R. I. 88; Wardrobe *v.* Calif. Stage Co., 7 Cal. 118; Milwaukee R. R. *v.* Finney, 10 Wis. 388. Exemplary damages may be found against one of two defendants; but if one of them be innocent of malice or recklessness, such damages cannot be recovered against him. Becker *v.* Dupree, 75 Ill. 167. [In the absence of oppression or fraud the defendant's damages are merely compensatory, LaVie *v.* Crosby, 43 Ore. 612, 74 Pac. 220. But where a strong case of wrong, outrage, and oppression is shown, the jury may allow exemplary damages, Wiley *v.* McGrath, 194 Pa. St. 498, 45 Atl. 331; Pure Oil Co. *v.* Terry, 209 Pa. St. 403, 58 Atl. 814; Washington Co. *v.* Webster, 68 Me. 449. Exemplary damages may be given in replevin, according to the facts, as in any other action for a tort, Burrage *v.* Melson, 48 Miss. 237. But it has been held otherwise under the statute allowing merely the alternative judgment for the goods or their value and damages for the taking and withholding, Tittle *v.* Kennedy, 71 S. C. 1, 50 S. E. 544. Where a father, merely because the daughter will not unite in an attempt to set aside the will of her mother, excludes her from his house, compels her to sleep in an outhouse and prevents her from obtaining her clothing, exemplary damages may be allowed, Arzaga *v.* Villalaba, 85 Calif. 191, 24 Pac. 656. Defendants purchased an ice-house with ice in it, the quantity not stated. At a later date they found plaintiffs removing ice from the premises and interrogated them as to their right; plaintiffs refused to exhibit the lease which they held, or give any satisfaction to the inquiry of defendant, and defendant then prevented them from removing any more of the ice; held, they were not entitled to exemplary damages, Findlay *v.* Knickerbocker Co., 104 Wis. 375, 80 N. W. 436. One who, by replevin, is wrongfully dispossessed of the house which he occupies, and his family ejected and his goods flung in the street, is not entitled to exemplary damages, Riewe *v.* McCormack, 11 Neb. 261, 9 N. W. 88. The circumstances attending the taking or detention need not be averred to entitle plaintiff to exemplary damages, Burrage *v.* Melson, *supra*.]

[95] Detroit *Daily Post* *v.* McArthur, 16 Mich. 447.

being under the law the sole judges, and responsible only for a wise and proper exercise of their judgment.[96]

§ 624. **Illustrations of the principles.** The following illustrations of the rule will, it is believed, be of material aid in de-

[96] Pacific Ins. Co. *v.* Conard, 1 Baldwin, (U. S. C. C.) 138; Strasburger *v.* Barber, 38 Md. 103. [An officer should not be charged with the value of goods wrongfully seized, but which he has returned to the plaintiff, Long *v.* Lamkin, 9 Cush. 361. The return goes in mitigation of damages, Reynolds *v.* Shuler, 5 Cow. 327; Yale *v.* Saunders, 16 Vt. 243. The plaintiff in such case recovers only damages for the unlawful taking, Cook *v.* Loomis, 26 Conn. 483. The defendant may plead in mitigation of damages a return of a portion of the goods, Darnall *v.* Bennett, 98 Ia. 410, 67 N. W. 273. But it seems there must be an acceptance of the goods, Gove *v.* Watson, 61 N. H. 136. In trespass *de bonis* defendant cannot mitigate the damages by the return of the goods unless they are accepted by the defendant; nor by levying upon them under valid process against the defendant and applying the proceeds to pay the plaintiff's debt, Hanmer *v.* Wilsey, 17 Wend. 91; nor in trover, Otis *v.* Jones, 21 Wend. 394.

Taxes assessed against the defendant in respect of the property, and paid by the plaintiff before any distress, are not allowed to the plaintiff in mitigation of damages, Washington Co. *v.* Webster, 68 Me. 449. Where goods sold upon credit are delivered by vendor to a carrier with instructions not to deliver, and the carrier violates his instructions, or delivers without authority, he will not be permitted to abate the recovery by proof of the amount in fact paid by the buyer, Jellett *v.* St. Paul Co., 30 Minn. 265, 15 N. W. 237; but he may show payment in full, *Id.;* or any lawful application of the goods to the use of the owner; or that the goods have been restored to the plaintiff and accepted; or that the proceeds have by due process gone to pay his debts, *Id.;* or any lawful claim or lien which defendant may have upon the goods, *Id.* An infant who has purchased a sewing machine conditionally, the seller reserving title, with a proviso that in case of default all payments made shall be retained in compensation for the use of the machine, is not to be allowed these payments, where for his default, and an attempted concealment of the machine, the seller replevies it, Wheeler Co. *v.* Jacobs, 2 Misc. 236, 21 N. Y. Sup. 1006.

Plaintiff in replevin for a flock of sheep is defeated, and damages recovered for the value of the wool shorn from the sheep while in his possession; he is entitled to an allowance for the reasonable cost of the shearing, but not for the cost of keeping the sheep, Cunningham *v.* Stoner, 10 Idaho, 549, 79 Pac. 228.

If he appeals and reverses a judgment given against him, he is entitled to an allowance for the keep of the sheep pending his appeal; it would be unjust for the appellant to bear the expense of keeping the sheep while correcting the errors of the trial court, Cunningham *v.* Stoner, *supra.*]

termining how far the courts will incline to go in the direction of vindictive damages: When plaintiff's hogs were found in the defendant's possession under circumstances which justify the inference that he wrongfully took them with the intent to convert them to his own use. He knew that the plaintiff was hunting them, but did not tell him where they were. The plaintiff testified that he lost two weeks' time and had to stop his team and hired hand from the plow. The plaintiff was allowed pay for his time spent in hunting his hogs and his necessary expenses, in addition to compensation for the decrease in value which his hogs had suffered while in the defendant's possession.[97]

§ 625. **The same.** So when plaintiff's heifer was taken secretly by defendant, he was allowed compensation for the time spent in hunting for her.[98] When the defendant took the plaintiff's horse and wagon, and four days' time was spent and other expenses incurred in the pursuit, a verdict for the time and expenses was allowed to stand.[99] The plaintiff entrusted fifty head of cattle to defendant to feed for the winter, that he might have them ready to work with in the spring, and the defendant shipped twenty of the best and sold them for beef. The cattle were work-cattle when delivered; but the plaintiff was entitled to the value at the time of the sale.[100] When plaintiff fraudulently sued out a writ of replevin without color of right, and seized the defendant's goods, the jury are warranted in awarding the defendant exemplary damages, as for a willful trespass.[101]

§ 626. **The same.** In *Sugdam* v. *Jenkins*, 3 Sandf. (N. Y.) 624, the court stated the general rule for ascertaining damages in cases of trespass, substantially as follows: "Add to the value of the property where the right of action accrued, such damages as shall cover not only every additional loss which the plaintiff has sustained, but any increase of value which the wrong-doer has obtained, or has it in his power to obtain." This general rule, applied to cases where punitive or vindictive damages would be improper, seems to commend itself as eminently wise and proper.

[97] Mitchell *v.* Burch, 36 Ind. 535.

[98] Miller *v.* Garling, 12 How. Pr. (N. Y.) 203. To same effect, see McDonald *v.* North, 47 Barb. 530.

[99] Bennett *v.* Lockwood, 20 Wend. 223.

[100] Otter *v.* Williams, 21 Ill. 118.

[101] Brizsee *v.* Maybee, 21 Wend. 144; M'Cabe *v.* Morehead, 1 W. & S. (Pa.) 513; 15 Am. L. Reg. 525.

A different conclusion in terms, however, was reached in *Wilson* v. *Mathews*, 24 Barb. 295—in which the highest price of the property, at any time after the conversion and before the trial, was regarded as the proper measure of damages.[102]

§ 627. **Party who acts in defiance of another's rights is responsible for all consequences.** The action of replevin is an action in the nature of a tort, and when the act is in fact, as well as theory, a trespass, that is, where the taking was in willful defiance of the other party's rights, the party is supposed to act with all the consequences before his eyes, in full contemplation of all the damages which may legitimately follow his act, and so far as damages are plainly the result of his wrongful interference, he is responsible.[103]

§ 628. **Vindictive damages against officers of the law.** The rules governing the assessment of vindictive damages applies to officers of the law as well as to individuals, in all cases where the officer has acted with malice, or in an unjust or oppressive manner. A contrary doctrine would turn loose on society a set of licensed wrong-doers.[104] But the malicious motives of the party whose process the officer is executing, cannot be given in evidence against the officer.[105]

§ 629. **The same.** Where an officer in the *bona fide* discharge of his duty seizes the goods of the wrong person, without any circumstances showing an intent to do a willful injury, the fact of seizure will not authorize exemplary damages.[106] When the defendant, as sheriff and tax-collector, seized ten horses from

[102] This case is cited as overruling Suydam *v.* Jenkins, 3 Sandf. 624, Biglow overruled cases. While it does not do so in terms, its conclusions are different. See West *v.* Wentworth, 3 Cow. (N. Y.) 83; Com. Bank Buffalo *v.* Kortright, 22 Wend. 348.

[103] Chandler *v.* Allison, 10 Mich. 461, where the question is discussed. Fultz *v.* Wycoff, 25 Ind. 321; Dubois *v.* Glaub, 52 Pa. St. 238; Douty *v.* Bird, 60 Pa. St. 48; Hanover R. R. *v.* Coyle, 55 Pa. St. 396; Simmons *v.* Brown, 5 R. I. 299. The rule governing cases of willful trespass is the same substantially in all forms of action. See *ante*, Heard *v.* James, 49 Miss. 236.

[104] Nightingale *v.* Scannell, 18 Cal. 315; Russell *v.* Smith, 14 Kan. 374; Noxon *v.* Hill, 2 Allen, 215.

[105] Nightingale *v.* Scannell, 18 Cal. 315.

[106] Beveridge *v.* Welch, 7 Wis. 465; Phelps *v.* Owens, 11 Cal. 25; Selden *v.* Cashman, 20 Cal. 57; Williams *v.* Ives, 25 Conn. 573.

a cattle drover, and afterwards returned some of them, the drover proved that the cattle could only be driven by the use of his trained horses, etc., and that the tax warrant was void; but as there were no circumstances showing an intent to do a willful injury, the value of the property and interest only was allowed. The warrant in this case, though void and properly excluded as a justification or defense, was proper evidence to show the good faith of the officer.[107] In trespass against a sheriff for wrongfully seizing and selling goods, where no circumstances of aggravation appear, the action is regarded as an action of trover, and value only is allowed.[108]

§ 630. **Recoupment and set-off accounts cannot be adjusted in replevin.** Accounts cannot be adjusted, nor set-off allowed in the action of replevin or trover.[109] The nature of actions for tort does not allow an examination into counter-claims of indebtedness or damages. This is especially the case in replevin. The plaintiff sued for specific articles, and damages for their wrongful detention, and it is contrary to the spirit of the law to allow an off-set to be investigated in cases of a suit for the recovery of chattels wrongfully withheld.

§ 631. **But questions of set-off may be investigated in certain cases.** It does not follow, however, that the questions of set-off or recoupment cannot be investigated in replevin. When property is distrained for rent, the plaintiff may show that the landlord failed to keep his covenants to furnish lumber for a fence, and so show damage equal to the rent, and thereby defeat the distress;[110] but the law does not permit a wrongful taker to set up an account to justify his taking.

§ 632. **Illustrations of the rule.** When a note is sent to an attorney for collection, and he is sued in trover for the value of the note, he may recoup the value of his services in collecting,[111]

[107] Dorsey *v.* Manlove, 14 Cal. 555.

[108] Phelps *v.* Owens, 11 Cal. 25; Brannin *v.* Johnson, 19 Me. 361.

[109] Otter *v.* Williams, 21 Ill. 120; Stow *v.* Yarwood, 14 Ill. 427; Keaggy *v.* Hite, 12 Ill. 101; Streeter *v.* Streeter, 43 Ill. 155. [Unless some special equity is shown; *e. g.*, non-residence or insolvency, and such special circumstances must, it seems, be pleaded, Bell *v.* Ober Co., 111 Ga. 668, 36 S. E. 904.]

[110] Lindley *v.* Miller, 67 Ill. 248; Fairman *v.* Fluck, 5 Watts. 516; Phillips *v.* Monges, 4 Whart. 225; Peck *v.* Brewen, 48 Ill. 55; Peterson *v.* Haight, 3 Whart. (Pa.) 150; Warner *v.* Caulk, 3 Whart. (Pa.) 193.

[111] Turner *v.* Retter, 58 Ill. 265.

under plea of general issue.[112] Replevin for wheat; the defendant justified the detention on the ground that he had a lien as a warehouseman for storage, and the plaintiff contended that some forty bushels of wheat, equal in value to the storage, were destroyed. *Held*, proper matter for investigation in replevin, and that the damage might off-set or extinguish the lien.[113] A lien for freight is a proper matter of recoupment when a carrier is sued in trover for goods lost;[114] and generally whatever demand the defendant has growing out of the *same subject matter* as the plaintiff's claim, may be recouped.[115]

§ 633 **Set-off to suit upon bond.** Suit on the bond is in the nature of a contract, and set-off or recoupment properly pleaded, may be shown.[116]

[112] Babcock *v.* Trice, 18 Ill. 420.
[113] Babb *v.* Talcott, 47 Mo. 343.
[114] Saltus *v.* Everett, 20 Wend. 267.
[115] Streeter *v.* Streeter, 43 Ill. 155; Sears *v.* Wingate, 3 Allen, 103.
[116] Balsley *v.* Hoffman, 13 Pa. St. 603.

CHAPTER XIX.

PARTIES.

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§ 634. **Parties who may be plaintiff and defendant.** The party whose legal rights have been invaded is the proper party plaintiff in all cases, except when he labors under some personal disqualification, such as infancy, insanity, or the like. In replevin the person having the right to immediate and exclusive possession is the proper plaintiff, and the person who has the actual possession is the proper defendant. The action is sometimes permitted against one who has had possession of the property and has made away with it. The exceptions to the general rule have been stated.[1] Where the supervisor of a township is required by law to keep and preserve all books and papers belonging to his office, he may maintain replevin for such books or papers against any one who assumes to take them.[2] There appears to be no authority

[1] See *ante*, §§ 145 and 146.

[2] Phenix v. Clark, 2 Gibbs, (Mich.) 327.

for allowing a stranger who claims an interest in the property to come in and be made a party, and have his rights litigated, though such course would not violate any principle of the law. An independent replevin suit against the plaintiff in possession has been allowed. This rule has been carried so far that when goods are replevied from an agent or bailee, the owner, if a stranger to the suit, has been allowed an independent replevin suit against the plaintiff in the first suit, and not driven to appear and defend the suit against his agent.[3]

§ 635. **Owners of distinct interests cannot be joined; joint owners must be.** The action cannot be sustained by joining several parties owning several and distinct interests. The interests of all when aggregated may amount to the entire property, yet they are several and cannot be recovered in a joint judgment.[4] But all the joint owners or joint tenants must join; the owner of a part has no exclusive right to possess the whole.[5] When parties jointly cultivate lands, they may be regarded as joint owners of the crop, and all must join in an action for its recovery or value.[6] So when mills are worked on shares, the owner and occupant may be considered as tenants in common of the product, and may join in an action.[7] Where a society contributed money for the relief of the members, which was put in a box and entrusted with one member, he was not permitted to bring trover against another member who took it from him;[8] but if the box with the funds was, by agreement of all, left with one for safe keeping and to disburse on the order of the society, no reason is perceived why he might not have sustained replevin for it against any one who took it.[9] So the agent of several owners of a whaling vessel, who has, by usage of the port, authority to sell the cargo and distribute the supplies, may sustain replevin against any of the joint owners who may refuse to deliver it to him;[10] but in such case his right must be irrevocable. If one of the joint owners may revoke the

[3] White *v.* Dolliver, 113 Mass. 400. Compare Globe Works *v.* Wright, 106 Mass. 207.

[4] Chambers *v.* Hunt, 18 N. J. L. 380.

[5] See *ante*, Chap. VI.

[6] Putnam *v.* Wise, 1 Hill, 235.

[7] Rich *v.* Penfield, 1 Wend. 379.

[8] Holliday *v.* Camsell, 1 Durnf. & E. 658.

[9] Newton *v.* Gardner, 24 Wis. 232; Corbett *v.* Lewis, 53 Pa. St. 322.

[10] Rich *v.* Rider, 105 Mass. 307.

authority, the refusal to deliver will be a revocation.[11] But trover may be brought by one joint tenant by his co-tenant for joint property which the defendant has destroyed.[12] When one tenant in common takes all the chattels, the co-tenant hath no action, but may retake them if he can.[13]

§ 636. **Trustees, executors and administrators may be plaintiffs.** The action may be sustained by trustees when they are entitled to the possession of chattels in that capacity;[14] or by one entitled to possession for the use of another;[15] or by an executor or administrator in his capacity as representative of the deceased.[16] Such a one can also sue in his individual capacity in cases where he is individually liable.[17] Where brought by an executor or administrator, for a taking or detention from the deceased in his lifetime, the plaintiff must show the right of possession in the deceased, his death, together with the legal qualification of the plaintiff as such executor or administrator.[18]

§ 637. **Suit against an executor or administrator.** When the suit is against an executor or administrator, it should be against him individually; his taking or subsequent detention is not the act of the estate, but of himself as an individual.[19] An

[11] See Hunt *v.* Rousmanier, 8 Wheat. 174; Roberts *v.* Wyatt, 2 Taunt. 268.

[12] Wilson *v.* Reid, 3 Johns. 174.

[13] Coke on Lit., tit. Trover.

[14] Baker *v.* Washington, et al., 5 Stewart & P. (Ala.) 144.

[15] Pearce *v.* Twitchell, 41 Miss. 344.

[16] Cravath *v.* Plympton, 13 Mass. 454; Hambly *v.* Trott, 1 Cowp. 374; Cummings *v.* Tindall, 4 Stewart & P. (Ala.) 361; Allen and wife *v.* White, Admr., 16 Ala. 181. [An executor may replevy chattels pertaining to the estate of the testator, Cain *v.* Cain, 20 N. Y. Sup. 45. An administrator may maintain replevin in his representative capacity, The State *v.* Farrar, 77 Mo. 175. Under the code of Arizona replevin survives to the executor, Billups *v.* Freeman, 5 Ariz. 268, 52 Pac. 367.

A mere bailee transmits no title to his administrator, Blemuller *v.* Schnieder, 62 Md. 547. Executor may sue in his individual capacity for goods mortgaged to him as executor, or for goods mortgaged to the testator; and suing as executor, may recover, without evidence of the representative capacity, if entitled to recover in his individual capacity, Knoche *v.* Perry, 90 Mo. Ap. 483.]

[17] Patchen *v.* Wilson, 4 Hill, 59; Branch *v.* Branch, 6 Fla. 315; Carlisle *v.* Burley, 3 Gr. (Me.) 250; Hollis *v.* Smith, 10 East. 293.

[18] Halleck *v.* Mixer, 16 Cal. 574; Branch *v.* Branch, 6 Fla. 315.

[19] Smith *v.* Wood, 31 Md. 293.

administrator cannot in his official capacity commit a tort.[20] When the taking was by the deceased in his lifetime, and the property is detained by the administrator or executor, such facts may be alleged and proved in an action against the latter.[21]

§ 638. **A parish or corporation may bring the action.** In Massachusetts, where the parochial system prevailed, the action was permitted in the name of a parish for the recovery of its records.[22] It will also lie by or against a corporation;[23] but the corporation must sue in its corporate name and capacity. Individual members composing the body cannot assert the right of the corporation.[24] It has been said that replevin would not lie against a corporative aggregate, the reason being that such body could only distrain by bailiff, and the bailiff would be the proper defendant in a replevin suit of the distress.[25] This doubtless was in conformity to the old rule; but in modern jurisprudence a different practice has sprung up. It has been held that trespass for assault and battery would not lie against a corporation, for the reason that such a tort could only be committed by some person, while a corporation had no tangible existence;[26] but this case was subsequently considered in an Illinois case and its authority denied;[27] and the latter case is doubtless the true exponent of the law on this subject. Any other rule would enable a corporation to employ a worthless bailiff, and deprive the plaintiff of all the benefit of the remedy.[28]

§ 639. **Whether an assignee of property in the posses-**

[20] Rose *v.* Cash, 58 Ind. 278. [But in The State *v.* Farrar, 77 Mo. 175, it was held that where judgment goes against an administrator for the value of goods obtained by him upon a writ of replevin, it should be expressed to be *de bonis intestati*, and that the surety in the replevin bond given by an administrator, suing as such, who has satisfied the judgment against the administrator, may recover the amount paid, from the administrator and the sureties in his official bond.]

[21] Brewer *v.* Strong's Exrs., 10 Ala. 965; Easly *v.* Boyd, 12 Ala. 685.

[22] Sudbury *v.* Stearns, 21 Pick. 148.

[23] Beech *v.* Fulton Bank, 7 Cow. (N. Y.) 485; Maund *v.* Monmouth Canal, 1 Carr. & Marsh, 606; Fayette Ins. Co. *v.* Rogers, 30 Barb. 491.

[24] Bartlett *v.* Brickett, 14 Allen, 62.

[25] Barb. on Parties, 214.

[26] Orr. *v.* Bank of the United States, 1 Ham. (O.) 37; Bradley on Distresses, 91.

[27] C. & A. R. R. *v.* Dalby, 19 Ill. 353.

[28] See C. & N. W. Ry. *v.* Peacock, 48 Ill. 253, where trespass was sustained against a corporation.

sion of another can sue. The question as to whether the owner of goods which have been wrongfully taken can transfer the property, and with it a cause of action, is one upon which the authorities are at variance. By the common law, the right of action was not assignable. The owner of property in the possession of another who claimed to own it was looked upon as having a right of action which he must proceed upon in his own name, or forego his right. He was not permitted to sell and transfer this right to sue to another.[29] The term "*choose in action*" includes all rights to personal property not in possession, which may be enforced in an action at law, and is not limited to damages recoverable for breach of contract.[30] And *choses in action* were not assignable at the common law, and especially the right to sue for a tort was the personal privilege of the party, and not transferrable.

§ 640. **Sale of property permitted, notwithstanding adverse possession of another.** The right to sue in replevin has therefore been denied to an assignee of property in the possession of another. This was placed upon the ground that the assignment was a mere transfer of a right to sue, or a right to litigate, arising out of a tort.[31] Statutory changes, however, have been made in many of the States, which do away with the common law rule, and permit an assignment in such cases, and allow the assignee to sue in his own name.[32] Cases are numerous in modern practice where the assignment has been regarded, not as a transfer of a cause of action, with the right to litigate, but as a sale of the property.[33] The courts hold, that when the owner of property elects to part with it, and does sell it to one who is competent to acquire title, the wrongful act or trespass of a third party shall not be permitted to defeat a contract otherwise valid and complete.[34] The reasoning of HALLET, C. J., in *Hanauer* v. *Bartels*,

[29] 1 Ch. Plea. 15; O'Keefe *v.* Kellogg, 15 Ill. 352; McGoon *v.* Ankeny, 11 Ill. 558; Clapp *v.* Shepard, 2 Met. 127.

[30] Gillet *v.* Fairchild, 4 Denio, 81.

[31] Nash *v.* Fredericks, 12 Abb. Pr. R. 147, cases last cited.

[32] Lazard *v.* Wheeler, 22 Cal. 140.

[33] Cummings *v.* Stewart, 42 Cal. 230; McKee *v.* Judd, 2 Kernan, 622; Hoyt *v.* Thompson, 1 Seld. 347; Hall *v.* Robinson, 2 Comst. 295; North *v.* Turner, 9 S. & R. 244; DeWolf *v.* Harris, 4 Mason, 530; Cass *v.* N. Y. & N. H. R. R., 1 E. D. Smith, 522.

[34] Webber *v.* Davis, 44 Me. 147; Morgan *v.* Bradley, 3 Hawks, (N. C.) 559.

carries considerable force in support of this doctrine. He says, in substance, that "the taking and detention of property by a wrong doer does not deprive the owner of the power of making a valid sale of it. The purchaser, upon giving the holder notice of the transfer, may demand the property, and upon refusal, may maintain an action for the wrongful detention. * * * When the vendor and vendee of property are of an agreeing mind, where one intends to sell and deliver, and the other to accept, the object sought to be obtained cannot be defeated by the wrongful act of a third person, who has no other title than naked possession."[35]

§ 641. **The same. Purchaser may recover.** In addition to the soundness of this reasoning, the rule is supported by many well considered cases.[36] *Lazard* v. *Wheeler*, 22 Cal. 140, was a case where this question was presented, but decided on the authority of the code of that State, though the opinion of the court clearly indicates that, aside from the provisions of the code, the action might be brought by an assignee. In *Tome* v. *Dubois*, 6 Wall. (U. S.) 548, the Supreme Court of the United States says, that owners of personal property are not obliged to treat the acts of third persons, who invade their rights of property or possession, as a conversion. They may elect to waive the tort, and in such case may sell the property, and the purchaser may, after demand, sustain trover or replevin.

§ 642. **The same. Illustrations.** The assignee of a note, and chattel mortgage to secure it, may sustain replevin for the mortgaged property upon condition broken.[37] Goods which have been seized by the sheriff on process, may be sold by the owner. This is not regarded as a sale of the cause of action, but of the goods.[38] When the plaintiff in replevin delivered the chattel to

[35] Hanauer *v.* Bartels, 2 Col. 522. [Hall *v.* Robinson, 2 N. Y. 293, but the endorsement of a writing, evidencing the purchase of goods upon credit, the promise to pay the price, and that the title remains in the vendor, does not entitle assignee to maintain replevin, Roof *v.* Chattanooga Co., 36 Fla. 284, 18 So. 597.]

[36] Cass *v.* N. Y. & N. H. R. R., 1 E. D. Smith, 522; McGinn *v.* Worden, 3 E. D. Smith, 355; Hall *v.* Robinson, 2 Comst. 295; Cartland *v.* Morrison, 32 Me. 190; The Brig Sarah, etc., 2 Sumn. (U. S. C. C.) 211; Hall *v.* Robinson, 2 Comst. (2 N. Y.) 293; Parsons *v.* Dickinson, 11 Pick. 354; Carpenter *v.* Hale, 8 Gray, (Mass.) 157; Webber *v.* Davis, 44 Me. 147.

[37] Barbour *v.* White, 37 Ill. 165; Hopkins *v.* Thompson, 2 Port. (Ala.) 434.

[38] Coghill *v.* Boring, 15 Cal. 218.

his bondsman as his security, and was afterwards declared bankrupt, the security was permitted to recover in the bankrupt's name, for his own benefit.[39]

§ 643. **A father may sue for property of his minor child.** A father, being the natural guardian of his minor children, when they have no other guardian, may sustain replevin for their personal property,[40] or the infant may sue by his guardian or next friend; but a father would not be liable for a willful taking by his minor child, unless he in some way countenance or encourage it,[41] the minor himself being liable for his torts.[42] A guardian may maintain the action for property belonging to his ward, of which he is entitled to possession.[43]

§ 644. **Servant cannot sue for his master's goods.** A mere servant who has possession of goods by delivery from his master, which the master may at any time put an end to, has not such property or right of possession as will enable him to sustain this action.[44] But if one deliver goods to his servant as his bailee, and where the latter is responsible for them, he may be plaintiff in an action of trover.[45] So an officer who has seized goods upon process has sufficient property in them to sustain the action; he is responsible to the plaintiff in his process.[46] Where a commission in bankruptcy issues the assignee cannot sue an officer for goods of the bankrupt seized before the appointment of the assignee, though the officer sells afterward.[47]

§ 645. **Receiptor of an officer.** The question as to whether a receiptor to an officer who has seized goods on execution or attachment has such a property as will enable him to sustain replevin, has given rise to contradictory decisions. This right has

[39] Sawtelle *v.* Rollins, 23 Me. 196.

[40] Smith *v.* Williamson, 1 Har. & J. (Md.) 147; Newman *v.* Bennett, 23 Ill. 427.

[41] Tifft *v.* Tifft, 4 Denio, 175.

[42] School Dist., etc., *v.* Bragdon, 23 N. H. 507, cited as Milton *v.* Bragdon, 23 N. H. 507.

[43] Deacon *v.* Powers, 57 Ind. 489; Newman *v.* Bennett, 23 Ill. 427.

[44] Harris *v.* Smith, 3 S. & R. (Pa.) 23; Brownell *v.* Manchester, 1 Pick. 232; Clark *v.* Skinner, 20 Johns. 465; Ludden *v.* Leavitt, 9 Mass. 104.

[45] Harris *v.* Smith, 3 Serg. & R. 23.

[46] Brownell *v.* Manchester, 1 Pick. 232.

[47] Smith *v.* Clark, 4 Durnf. & E. 476.

been denied in many cases.[48] In *Miller* v. *Adsit*, 16 Wend. 335, after an elaborate discussion of the question and the authorities *pro* and *con.*, the court held that a receiptor, where he was accountable to the officer, had such possession as would enable him to sue. It is difficult to see any good reason which should deny the right of action to such a person where by the terms of the deposit he has the rightful possession of the goods, and is responsible to the officer for their safe return. His capacity is rather that of a bailee than a servant; he has an interest in the protection of the goods, and such a right as would justify him in resisting a trespass; he would be liable for the value in case he failed to protect them.

§ 646. **Attaching creditor not liable jointly with the officer.** An attaching creditor is not liable jointly with the sheriff who serves the attachment and takes possession of the property. The officer is the proper defendant.[49] When the attaching creditor has possession of the goods he may be a defendant; and an attaching creditor cannot be joined as plaintiff with the officer for a taking of goods from the officer's possession unless he had some possession at the time of taking.

§ 647. **Minor cannot sue.** A minor cannot sustain the action in his own name. Two partners who were minors joined in a chattel mortgage; one of them became of age and ratified the mortgage; the other could not sustain replevin after dissolution of the firm, though he had acquired the interest of the other partner. A minor must sue by his guardian or next friend.[50] The same rules apply to one laboring under any other legal disability. The surviving partner is entitled to the possession of the goods of the firm, and may recover them from one who wrongfully interferes; it is not necessary that he declare as surviving partner; his right to recover is an individual right, and he is not required to state the facts under which he claims title.[51] In some States local laws vests the administrator with the interest of the deceased partner

[48] Ludden *v.* Leavitt, 9 Mass. 104; Warren *v.* Leland, 9 Mass. 265; Commonwealth *v.* Morse, 14 Mass. 217; Dillenback *v.* Jerome, 7 Cow. 294; Norton *v.* People, 8 Cow. 137.

[49] Richardson *v.* Reed, 4 Gray, (Mass.) 443; Ladd *v.* North, 2 Mass. 516.

[50] Keegan *v.* Cox, 116 Mass. 290.

[51] Smith *v.* Wood, 31 Md. 293.

in partnership chattels. In such cases the administrator, and not the surviving partner, may sue.

NOTE XXIX. *Plaintiffs. Trustee, Administrator, Bailee, Depositary.*— One who has the right of possession, though in a trust capacity, may recover goods which are the subject of the trust. He need not sue as trustee, Odd Fellows Association *v.* McCallister, 153 Mass. 292, 26 N. E. 862; Hexter *v.* Schneider, 14 Ore. 184, 12 Pac. 668; Puffer Sons Co. *v.* May, 78 Md. 74, 26 Atl. 1020. He has the sole right of action, Upham *v.* Allen, 73 Mo. Ap. 224. And so, one to whom the goods have been conveyed as trustee, merely to enable him to bring the action, Wall *v.* Demitkiewiez, 9 Ap. D. C. 109. The death of the mortgageor in trust does not impair the right of the trustee, Carraway *v.* Wallace, Miss. 17 So. 930; and an agent who purchased goods in his own name for the benefit of the principal, though he pays for them with the moneys of the principal, and throughout the transaction acts for the principal, can nevertheless maintain replevin for the goods, Church *v.* Foley, 10 S. D. 75, 71 N. W. 759. A mere agent to foreclose a mortgage, never having had possession, cannot, Fullerton *v.* Morse, 162 Ills. 43, 44 N. E. 390. And see Mitchell *v.* Georgia Co., 111 Geo. 760, 36 S. E. 971. An unincorporated society may appoint a committee to control their properties, and one who receives such properties from the committee, on conditions afterwards violated, is answerable to the committee suing as trustees of the association to reclaim the article, Bartlett *v.* Goodwin, 71 Me. 350. The trustee should sue for himself, and not "for the use of" the beneficiaries; he must be treated as the real plaintiff and must show title in himself, Meyer *v.* Warner, 64 Miss. 610, 1 So. 837; Roof *v.* Chattanooga Co., 36 Fla. 284, 18 So. 597. An administrator may sue for the value of corporate stock issued to a decedent in his lifetime, Morton *v.* Preston, 18 Mich. 60; may maintain replevin for any of the chattels pertaining to the estate of the decedent, The State *v.* Farrar, 77 Mo. 175; even against the specific legatee, Highnote *v.* White, 67 Ind. 596; or the sole distributee, and though deceased left no debts, Pritchard *v.* Norwood, 155 Mass. 539, 30 N. E. 80. An intestate's personalty is at once cast upon his personal representative; the sole distributee can maintain no action, Reese *v.* Harris, 27 Ala. 301.

It seems that where the estate of a decedent is finally settled and it is ascertained that a specific legacy will not be needed for the payment of debts, the legatee may maintain replevin against the personal representative, Highnote *v.* White, 67 Ind. 596. Where, by the terms of a decedent's will, a trustee is appointed to have possession and control of a child's share, the beneficiary cannot recover the property from such trustee, Thieme *v.* Zumpe, 152 Ind. 359, 52 N. E. 449. A life insurance policy, payable to the insured, "his executors, administrators or assigns," for the benefit of infants, was upon his death delivered to the guardian of the infants, and by him surrendered to the insurer; the administrator of the insured after this settlement brought trover for the policy against the company, alleging that the settlement was

procured by the fraud and misrepresentation of the insurer. Held, that the guardian's possession of the policy was rightful, that the administrator could not maintain trover against him, that the guardian alone was responsible for the safe keeping of the policy, that the law affords him a remedy if it was wrongfully taken from him, and that the plaintiff had no right of action, Massachusetts Co. *v.* Hayes, 16 Ills. Ap. 233. The receiptor or bailee who has possession and whose possession is interfered with, may maintain replevin, Robinson *v.* Beserick, 156 Mass. 141, 30 N. E. 553. And a mere depositary having possession, Kellogg *v.* Adams, 51 Wis. 138, 8 N. W. 115; or one entitled to use the goods, at his pleasure, Tandler *v.* Saunders, 56 Mich. 142, 22 N. W. 271.

Plaintiff's horses seized by the defendant as sheriff were sold on execution against a third person, and purchased by a stranger, who delivered them to the plaintiff to pasture. It was held that, notwithstanding this actual possession, the plaintiff was entitled to judgment for possession. Plaintiff's possession in such case was declared to be not absolute, but in the nature of a bailment, terminable at the pleasure of the bailee. Benjamin *v.* Huston, 16 So. Dak. 569, 94 N. W. 584.

Receivers.—A receiver appointed in one state of chattels there, the court having jurisdiction, was ordered to convey them to market in another state and dispose of them. It was held that in the latter state the receiver might maintain replevin against an officer interfering with his possession, Cagill *v.* Woolridge, 8 Baxt. 580. The denial of a motion to remove a receiver has the effect of an appointment, and qualifies him to proceed with an action of replevin which, under color of a previous void appointment, he has instituted, Guy *v.* Doak, 47 Kans. 366, 27 Pac. 968.

Mortgagee.—Mortgagee, who, before any levy has assumed possession of the goods, may replevy them from the officer who levies under an execution against the mortgageor, although the mortgage is, but for such assumption of possession, fraudulent, for permitting the mortgagor to continue in possession with power to sell, Williams *v.* Miller, 6 Kans. Ap. 626, 49 Pac. 703. *Contra*, Wilson *v.* Voigt, 9 Colo. 614, 13 Pac. 726. The Baldwin Company executed a bill of sale of certain carriages to McEwen, and McEwen assigned it to the plaintiffs who had advanced money for the construction of the carriages; later McEwen by an attachment against the Baldwin Company got possession and delivered the goods to the plaintiff; the Baldwin Company afterwards attached the property as McEwen's. Held plaintiffs were at the least the equitable owners and entitled to possession, even though the bill of sale was intended as security, and they might maintain replevin, Thompson *v.* Dyer, 25 R. I. 321, 55 Atl. 824.

Mortgagor.—The right of action by one otherwise entitled is not impaired by the fact that he has executed a deed of trust of the chattels, as security, binding himself to deliver them, Haines *v.* Cochran, 26 W. Va. 719.

Pledgee.—The pledgee of a promissory note or check may maintain

replevin against an officer who levies upon it under an execution against the pledgor, Moorman *v.* Quick, 20 Ind. 67.

Bare Possession.—One in peaceable possession as owner may maintain replevin against one who without right disturbs his possession, Van Baalen *v.* Dean, 27 Mich. 104; St. Paul Co. *v.* Kemp, Wis. 103 N. W. 259. The widow in possession of personal property formerly belonging to her husband, may maintain trover as against any one but the administrator, Brown *v.* Beason, 24 Ala. 436. A bailiff deputed to foreclose a mortgage and who assumes possession of the mortgaged goods for the mortgagee, his employment being terminable at the mortgagee's pleasure, is a mere servant and his possession does not entitle him to maintain replevin, even as against a wrong-doer, Pease *v.* Ditto, 189 Ills. 456, 59 N. E. 983.

Partners and Tenants in Common.—The members of a voluntary association for benevolent purposes, have no several proprietary interests in the property of the society, nor any right to any proportional part thereof; either during the continuance of their membership or upon their withdrawal, Ahlendorf *v.* Barkhous, 20 Ind. Ap. 656, 50 N. E. 887. And if a member of such association secedes therefrom, the remaining members may maintain replevin for the regalia and other properties of the society in his possession, *Id.* Replevin for partnership goods must be brought by the co-partners and not by the partnership, Stever *v.* Brown, 119 Mich. 196, 77 N. W. 704; Heath *v.* Morgan, 117 N. C. 504, 23 S. E. 489. If one partner mortgage the firm property to secure his individual debt the other partner may maintain replevin, Deeter *v.* Sellers, 102 Ind. 458, 1 N. E. 854. In Ferguson *v.* Day, 6 Ind. Ap. 138, 33 N. E. 213, it was held that where partnership goods are seized for the individual debt of one of the firm, and the officer proceeds irregularly, all the partners, including the individual debtor, must unite in replevying the goods. Where one partner sells his interest to the other the latter may have replevin, though the partnership accounts are unsettled, Newberry *v.* Gibson, Iowa, 101 N. W. 428. A tenant in common cannot maintain replevin against his co-tenant, Hudson *v.* Swan, 83 N. Y. 552; Fell *v.* Taylor, 2 Pen. Del. 372, 45 Atl. 716. And all tenants in common must unite even in an action against a stranger, George *v.* McGovern, 83 Wis. 555, 53 N. W. 899; Fay *v.* Duggan, 135 Mass. 242; Corcoran *v.* White, 146 Mass. 329, 15 N. E. 636; Hoeffer *v.* Agee, 9 Colo. Ap. 189, 47 Pac. 973. And so where one is in possession as the trustee of several, all these must unite to recover the goods from such trustee, Smith-McCord Co. *v.* Burke, 63 Kans. 740, 66 Pac. 1036. And part owner cannot replevy the goods from an officer who has levied upon them under an attachment against the other owner, Bray *v.* Raymond, 166 Mass. 146, 44 N. E. 131. But it seems that one tenant in common may as against a mere wrong-doer, recover the whole common property, Bryant *v.* Ware, 30 Me. 295.

Consignor and Consignee.—The consignor has the entire property and may sue for its non-delivery; so the consignee if the property is in him. If one has the general and the other a special property the two may unite, Denver Co. *v.* Frame, 6 Colo. 382. A bill of lading

entitles the consignee named therein to maintain replevin, Powell *v.* Bradlee, 9 G. & J. 220; though consigned to him merely for sale, Stephens *v.* Head, 138 Ala. 455, 35 So. 565. In a similar case it was held that the consignor might replevy from an officer who attached them as the property of the consignee, Fleet *v.* Hertz, 201 Ills. 594, 66 N. E. 858.

Husband and Wife.—The husband cannot maintain replevin against the wife where the common law prevails, Walko *v.* Walko, 64 Conn. 74, 29 Atl. 243; Sherron *v.* Hall, 4 Lea. 499. A statute providing that actions relating to the separate property of a married woman must be in the name of husband and wife, controls, where replevin is instituted to recover wood cut from lands mortgaged to the wife, Waterman *v.* Matteson, 4 R. I. 539. In Maryland, husband and wife may join in an action to recover the wife's separate property, Herzberg *v.* Sachse, 60 Md. 426; or the wife may join with her, her next friend, Sherron *v.* Hall, *supra.* But a married woman, living apart from her husband, may maintain replevin against him, White *v.* White, 58 Mich. 546, 25 N. W. 490. And the wife, who is a sole trader, may recover her goods from an officer who seizes them on execution against the husband, Gavigan *v.* Scott, 51 Mich. 373, 16 N. W. 769.

Corporations.—In an action by "Hussey, President" of a certain incorporated society named, the corporation is not a party, McEvoy *v.* Hussey, 64 Ga. 315. The president of an incorporated benevolent society cannot maintain replevin for the books and papers of the corporation pertaining to the office of the secretary thereof, merely by virtue of his office as president; he must show some right to the possession, other than his official capacity. *Id.*

Guardian, Infant.—The guardian of an infant may in his own name maintain replevin for the chattels of his ward, Smith *v.* Williamson, 1 H. & J. 147; for the product of the ward's lands, Rose *v.* Eaton, 71 Mich. 247, 43 N. W. 972. The infant may either in his own name or by his guardian replevin goods of which he was in possession at the date of the unlawful seizure, though they were then in his father's house, with whom he was residing, Wambold *v.* Vick, 50 Wis. 456, 7 N. W. 438. A minor whose guardian has been discharged, may sue by his next friend, Bush *v.* Groomes, 125 Ind. 14, 24 N. E. 81.

Assignee.—The owner of goods unlawfully detained may assign his title and the assignee may maintain replevin, Lazard *v.* Wheeler, 22 Calif. 139; Cass *v.* New York Co., 1 E. D. Sm. 522; Wall *v.* DeMitkiewicz, 9 Ap. D. C. 109; Tome *v.* Dubois, 6 Wall. 548, 18 L. Ed. 943. This although the true owner never had possession of the goods, Lazard *v.* Wheeler, *supra.* The action may be maintained even though the assignment is made without consideration, and expressly to enable the assignee to sue and the assignor expects to receive compensation from the proceeds of the litigation, Wall *v.* De Mitkiewicz, *supra;* Coghill *v.* Boring, 15 Calif. 213. Many other cases support this false doctrine; they are all unsound in principle. The provision of the code that "every action shall be prosecuted in the name of the *real* party in interest" was never intended to countenance colorable transfers

and permit an action by one who has in truth nothing but the appearance of an interest.

One who sells goods which are in adverse possession, but with the condition that he shall recover them, may maintain replevin therefor, Bemis *v.* De Land, 177 Mass. 182, 58 N. E. 684. The endorsement of a note which is secured by mortgage entitles endorsee to maintain replevin as soon as the mortgage is forfeited, Crocker *v.* Burns, 13 Colo. Ap. 54, 56 Pac. 199; though the mortgage is not assigned, First National Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987. But the mere endorsement of a promissory note executed for the price of goods purchased upon credit and which declares that the title to the goods remains in the vendor, does not authorize the endorsee to replevy the goods, Roof *v.* Chattanooga Co., 36 Fla. 284, 18 So. 597. An assignment of a "certain claim" against the defendants "amounting to the sum of $144," does not pass title to the chattels, for the conversion of which the claim was asserted, Shapiro *v.* Lankay, 70 N. Y. Sup. 218. The plaintiff, who was in New York, was requested by Llata to purchase certain goods, and send them by Repko to Llata, in Cuba; he purchased and delivered the goods to Repko, who packed them in his trunk and delivered that to defendants, the agents of a steamship line. Repko concluded not to sail as he had intended, and demanded his trunk of the defendants; defendants refusing, Repko for the purpose of enabling plaintiff to recover his goods, delivered the key of the trunk to the plaintiff and authorized him to demand the trunk; it was held that this terminated all right which Repko had in the property and entitled plaintiff to maintain replevin upon defendant's refusal to surrender, Tanco *v.* Booth, 39 N. Y. St. 82, 15 N. Y. Sup. 110.

Joinder of Plaintiffs.—Where one mortgage secures two promissory notes to different payees, the two may upon forfeiture of the mortgage join in replevin for the goods, Durfee *v.* Grinnell, 69 Ills. 371. And so where the statute provides that "all persons having any interest in the subject matter of the action and in obtaining the relief demanded may join as plaintiffs," several mortgagees of the same chattels from the same mortgagor to secure separate debts may unite in replevying the goods, Earle *v.* Burch, 21 Neb. 702, 33 N. W. 255. The principal in a promissory note which has been paid, may sue for it, without joining the surety, Anonymous, 1 Ch. 501, cited Stone *v.* Clough, 41 N. H. 290; and the principal and surety may unite, Spencer *v.* Dearth, 43 Vt. 98. Promissory notes are the property of two minors having separate curators; the curators properly join to recover possession of the notes, Mayer *v.* Columbia Bank, 86 Mo. Ap. 108. Defendant cannot object that of the four plaintiffs all have the legal title and three have the equity to redeem from a mortgage, Hunt *v.* Holton, 13 Pick. 216. Mortgagor and mortgagee of chattels may unite in replevin although the right of possession is exclusively in the mortgagor. Longerbeam *v.* Huston, S. D. 105 N. W. 743.

Equitable Title.—A mere equity does not authorize replevin, Rice *v.* Crow, 6 Heisk. 28. Replevin cannot be brought in the name of one for the use of another; if equities are to be asserted a different procedure

must be adopted, Moore *v.* Watson, 20 R. I. 495, 40 Atl. 345; but it seems that in an action by a trustee, having the legal title the qualifying phrase "for the use of," should be rejected and the action proceed, Meyer *v.* Warner, 64 Miss. 610, 1 So. 837; Roof *v.* Chattanooga Co., 36 Fla. 284, 18 So. 597. A promissory note was executed by A, and B as A's surety, and made payable to C; A gave a chattel mortgage to B to indemnify him. Held, that C was not entitled to demand or replevy the mortgaged chattels until he had, by equitable suit against all the parties, foreclosed the mortgage and established his claim. Though it seems that by B's assignment of the chattel mortgage he might have reached the same position, Pierce *v.* Batten, 3 Kans. Ap. 396, 42 Pac. 924. The unsuccessful candidate in a voting contest will not be permitted to sustain replevin for the prize, upon allegation that the result was erroneously declared, Fisher *v.* Alsten, 186 Mass. 549, 72 N. E. 78; Penton *v.* Hansen, 13 Okla. 450, 73 Pac. 843.

Defendants. One in Actual Possession.—Replevin lies against one who has possession of the goods, Griffin *v.* Lancaster, 59 Miss. 340; Glass *v.* Basin & Bay Co., Mont., 77 Pac. 302; Christy *v.* Ashlock, 93 Ills. Ap. 651; Read *v.* Brayton, 143 N. Y. 342, 38 N. E. 261. The one in possession is the only proper defendant, Jenkins *v.* City of Ontario, 44 Ore. 72, 74 Pac. 467; Moore *v.* Brady, 125 N. C. 35, 34 S. E. 72; Heidiman Co. *v.* Schott, 59 Neb. 20, 80 N. W. 47; Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260; Gilbert *v.* The Buffalo Bill Co., 70 Ills. Ap. 326; Van-Gorder *v.* Smith, 99 Ind. 404.

Even though he be a mere servant he may be made defendant, Debord *v.* Johnson, 11 Colo. Ap. 402, 53 Pac. 255; or a receiptor, to an officer, Robinson *v.* Besarick, 15[illegible] Mass. 141, 30 N. E. 553; Irey *v.* Gorman, 118 Wis. 8, 94 N. W. 658; Douglas *v.* Gardner, 63 Me. 462; Estey *v.* Love, 32 Vt. 744; McMillan *v.* Larned, 41 Mich. 521; 2 N. W. 662; or a mere bailee, Colby *v.* Portman, 115 Mich. 95, 72 N. W. 1098; or an auctioneer to whom goods have been committed merely for sale, Grossman *v.* Walters, 58 Hun, 603, 11 N. Y. Sup. 471. Third persons claiming an interest but having no possession cannot be joined merely to settle their rights, Van Gorder *v.* Smith, *supra*. Where two claim title, only the one in possession need be made defendant, Seattle Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763; Scott *v.* McGraw, *supra*. The officer who makes an unlawful levy, and not the execution plaintiff, is responsible to the owner of the goods. The city cannot be joined with the marshal in replevin for an animal taken up by him for the violation of an ordinance, Jenkins *v.* The City of Ontario, *supra*. One who has no control of goods or authority to deliver them cannot be made defendant and charged with costs, even although for a special purpose he has the keys of the place where the goods are, Barnes *v.* Gardner, 60 Mich. 133, 26 N. W. 858. Replevin will not lie against one who has never had possession of the goods, Stahl *v.* Chicago Co., 94 Wis. 315, 68 N. W. 954; Lothrop *v.* Locke, 59 N. H. 532. An officer who has seized goods under a writ of replevin and delivered them to the plaintiff in that writ, is not liable therefor to a stranger, Boyden *v.* Frank, 20 Ills. Ap. 169. One who upon demand made for goods which are in his

possession, asserts title and refuses the demand, cannot say afterwards that he held as a mere servant and is not answerable in his own person, Alexander *v.* Boyle, 68 Ills. Ap. 139. The defendants are in possession of sheep under a mortgage from Day; plaintiff claims the sheep as lessor of Day: the administrator of Day is not a necessary party, Cunningham *v.* Stoner, Idaho, 79 Pac. 228.

Plaintiff, a steamship company, appointed defendant its agent for the sale of passage tickets. It was the understanding that defendant should appoint special agents at the various cities throughout the republic. Plaintiff delivered to defendant, from time to time, tickets for sale at an agreed commission. Defendant transmitted many of these to his special agents. Plaintiff having discontinued the agency sued in replevin for tickets delivered to defendant and not sold or returned. Held, that defendant's possession in the beginning was lawful; that his disposition of them was lawful, and therefore he was not, in contemplation of law, in possession of the tickets which he had delivered to his special agents, or responsible for them. National Co. *v.* Sheahan, 122 N. Y. 461, 25 N. E. 858, 10 L. R. A. 782.

Constructive Possession.—A client is liable in replevin for a writing which at the time of demand made upon him, is in possession of his attorney, Mitchell *v.* Eure, 126 N. C. 77, 35 S. E. 190. And so one who is in possession by his bailiff or agent, Richey *v.* Ford, 84 Ills. Ap. 121. Defendant was asserting title to a particular chain which was in plaintiff's possession; to obtain it he sued out an attachment against plaintiff, went with the officer to the premises of plaintiff, pointed the chain out, directed the officer to attach it, and assisted in the levy. When the plaintiff's writ was served the chain was in the sole possession of the plaintiff, or in possession of his attorney and in his presence. It was held that defendant was properly sued, without joining the officer, and would not be permitted to defeat the action by suggesting the non-joinder, Tripp *v.* Leland, 42 Vt. 487, citing Allen *v.* Crary, 10 Wend. 349; Skilton *v.* Winslow, 4 Gray, 441.

Executors.—Replevin will not lie against an executor for trust funds converted by the testator, unless the money or specific property into which it can be traced, is shown to have come to the executor's possession, Rowland *v.* Madden, 72 Calif. 17, 12 Pac. 226.

In Elmore *v.* Elmore, 58 S. C. 289, 36 S. E. 656, it was held by a divided court that the action of claim and delivery could not be maintained against an executor in his representative capacity to recover possession of personal property wrongfully withheld by him. Two judges denied the right of action on the ground that an executor has no right or power to impose upon the estate any liability by contract either expressed or implied, although the contract be entered into for the benefit of the estate, that by greater reason he has no power to charge it by any tort which he may commit. The other judges were of the opinion that when goods are wrongfully taken by the deceased, and remain in specie in the hands of the executor, the lawful owner may maintain a claim for them the same as if he was the original tort feasor.

Attorney.—An attorney who is known to be such, and acting in good faith for a client, and who causes goods to be taken under a chattel mortgage, is not liable in replevin to a stranger to the mortgage, who lays claim to them, Myers *v.* Lingenfelter, 81 Mo. Ap. 251.

Assignee for Creditors.—The assignee is the general owner; the insolvent cannot in an action of replevin inquire into his conduct nor maintain his action by evidence of negligence on the part of the assignee, Rodman *v.* Nathan, 45 Mich. 607, 8 N. W. 562.

Assignee for creditors takes the property subject to all liens, bargains and sales to which it was subject while in the hands of the assignor, whether valid as against creditors or not, Riebling *v.* Tracy, 17 Ills. Ap. 158; and his title may be assailed upon the same grounds as the title of one holding no official position or relation, Boyden *v.* Frank, 20 Ills. Ap. 169. An attaching creditor assailing a transfer by his debtor, cannot assert that it is a mere assignment for the benefit of creditors; his position as seeking to secure his individual claim upon the goods is at war with this position, Avary *v.* Perry Co., 96 Ala. 406, 11 So. 417.

Husband and Wife.—Where husband and wife are jointly in possession, replevin will lie against the husband upon his refusal to surrender the goods, McGregor *v.* Cole, 100 Mich. 262, 58 N. W. 1008. If the wife wrongfully detain the goods of a third person upon the husband's premises, he may be made defendant in an action of replevin, though his conduct is merely passive, Choen *v.* Porter, 66 Ind. 194. The husband may be liable, though the wife has the sole custody and care of the thing, Manning *v.* Mitcherson, 69 Ga. 447. Replevin lies against a *femme covert* in possession whose husband has fled the state, Heath *v.* Morgan, 117 N. C. 504, 23 S. E. 489. A married woman who has made a conditional purchase of a piano upon her own account must be made defendant, if the vendor would recover it. Her possession of her separate property cannot be the possession of her husband, Gentry *v.* Templeton, 47 Mo. Ap. 55.

Officer and Deputy.—An officer holding the goods under writ of replevin cannot be made defendant in a second replevin, even at the suit of a stranger, Weiner *v.* Van Renssalaer, 43 N. J. L. 547. A deputy sheriff seizing goods under a chattel mortgage acts not for the sheriff but as agent of the mortgagee; the sheriff is not liable for his acts, Depriest *v.* McKinstry, 38 Neb. 195, 56 N. W. 806.

Infants.—Replevin is founded on tort and lies against an infant, Wheeler Co. *v.* Jacobs, 50 N. Y. St. 767, 21 N. Y. Sup. 1006.

Wrongful Transfer to defeat the Writ.—One who has sold and transferred the goods to another in order to evade the writ, is liable, Helman *v.* Withers, 3 Ind. Ap. 532, 30 N. E. 5. One wrongfully obtaining the goods of another and refusing on demand to surrender them, is liable in replevin, though he no longer has them in his possession at the time of the institution of the suit, Eddings *v.* Boner, 1 Ind. T. 173, 38 S. W. 1110. Replevin lies against the sheriff, who before the institution of the action has sold the property, after having received

notice of the plaintiff's title while the goods are yet in his possession as sheriff. Mitchell *v.* McCleod, Ia., 104 N. W. 349.

Sheriff out of Office.—A sheriff from whom goods taken in execution have been replevied, is entitled to defend the action though he has returned his writ and gone out of office, Bowersock *v.* Adams, 59 Kans. 779, 54 Pac. 1064.

Joinder of Defendants.—Plaintiffs in execution upon which goods are levied, are not proper parties to a suit to replevy them, Blatchford *v.* Boyden, 122 Ills. 657, 13 N. E. 801; Ide *v.* Gilbert, 62 Ills. Ap. 524; McLachlan *v.* Pease, 66 Ills. Ap. 634. The plaintiff in execution cannot be joined with the officer, even though he direct the levy, House *v.* Turner, 106 Mich. 240, 64 N. W. 20. A person residing with the landowner impounded cattle unlawfully; the landowner refused to deliver them on demand; both parties are liable in replevin, Rowe *v.* Hicks, 58 Vt. 18, 4 Atl. 563. Where buyer obtains goods by fraud and while they are still in his possession makes an assignment for the benefit of creditors, both the assignor and assignee may be joined in replevin by the seller, Nichols *v.* Michael, 23 N. Y. 264. In Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797, it was said that if part of the goods claimed are shown to have been detained by one defendant, and the residue by the other defendant, a two-fold verdict may be given.

But it seems this was a clear case of mis-joinder, that the verdict should have been not guilty, and the judgment that each defendant should go without day.

Mis-joinder.—Mis-joinder of defendants does not defeat the action; one defendant may be found guilty and the other acquitted, Wall *v.* Demitkiewicz, 9 Ap. D. C. 109. Mis-joinder of defendants may be cured by putting the plaintiff to his election, Powell *v.* Bradlee, 9 G. & J. 220. But where two are sued as partners and it is shown that the whole title and right of possession is in one of them, the action fails, Deyerle *v.* Hunt, 50 Mo. Ap. 541. The defendant has no advantage, in the fact that one of several is joined as plaintiff without his consent, the one so united making no objection, Cinfel *v.* Malena, 67 Neb. 95, 93 N. W. 165. Where judgment was given in favor of two plaintiffs, one of whom had no right, the judgment in favor of the latter was reversed and that in favor of the other affirmed, Houck *v.* Linn, 48 Neb. 228, 66 N. W. 1103.

Amendments as to Parties.—If a married woman sue, the writ may be amended by uniting with her her husband as co-plaintiff, or her next friend, Sherron *v.* Hall, 4 Lea. 498. Defendants may be added, McCarthy *v.* Hetzner, 70 Ills. Ap. 480; Thorn *v.* Lazarus, 39 Ap. Div. 508, 57 N. Y. Sup. 279; even after the writ is abated, Hilton *v.* Osgood, 49 Conn. 110. Where the statute gives the wife all the remedies of an unmarried woman in regard to her separate estate, she is entitled to be made party to a suit in which her husband is seeking to recover goods belonging to her, Carney *v.* Gleissner, 62 Wis. 493, 22 N. W. 735. And see Lawall *v.* Lawall, 150 Pa. St. 626, 24 Atl. 289. Where goods are replevied by a stranger to a suit in which the same goods have already been replevied, the defendant in such second suit may plead the process

in the former action, under which he holds the goods, and make the other party to the original replevy party in the new suit, and so adjust all rights upon one record. Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409. And where the defendant pleads title in an assignee for creditors, the court should of its own motion order the assignee made party, Wilkins *v.* Lee, 42 S. C. 31, 19 S. E. 1016. But only such new parties can be added as were competent parties at commencement of suit, Burns *v.* Campbell, 71 Ala. 271. One who had no part in the original taking cannot be made party on the ground merely of a ratification subsequent to the commencement of the action, *Id.* In Gamble *v.* Wilson, 33 Neb. 270, 50 N. W. 3, it was said that the court was under no duty to order the proper party brought in; and in Kennett *v.* Fickel, 41 Kans. 211, 21 Pac. 93, it was held that the defendant had no right to bring in, as parties, strangers to the record who were asserting claim to the goods.

Intervention.—The provision of the code that "where a person not a party to the action, has an interest in the subject thereto and makes application to the court to be made a party, it must direct him to be brought in by proper amendment," is imperative. Petitioner claiming certain corporate bonds under a deed thereof to it as trustee, is entitled to be made a party to a replevin against a third person in which the same bonds are demanded, Michaelis *v.* Towne, 51 Ap. Div. 466, 64 N. Y. Sup. 751. One from whose possession goods have been taken has a right independent of any statute to appear and defend his title, First National Bank *v.* Hughes, 3 Neb. Unof. 823, 92 N. W. 986. A stranger to the suit who is entitled to the goods, may properly intervene, Hamilton *v.* Duty, 36 Ark. 474; Newton *v.* Round, 109 Ia. 286, 80 N. W. 391. But intervention will not be allowed if it will occasion delay, Dupont *v.* Amos, 97 Ia. 484, 66 N. W. 774. One who claims merely as a creditor represented by the sheriff, defendant, who attached the goods and who has submitted to a default, cannot intervene. A judgment in favor of the intervenor in such case, is error, *Id.* But it seems that the creditor may in such case move to set aside the default as against the sheriff and be substituted in his place, *Id.* Intervention is not allowed in bail trover under the laws of Georgia, Central Bank *v.* Georgia Co., 120 Ga. 883, 48 S. E. 325. The sureties in the bond in such case are not entitled to intervene and tender the property in controversy, or a portion of it, with compensation for what is not tendered; they must stand or fall by the judgment between the original parties, Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251. Where a third person claiming the goods is permitted to interplead, the plaintiff having given bond, and obtained the property, no direction as to the disposition thereof will be made until the determination of the action, Wright, etc., Works *v.* New York Co., 44 Misc. 580, 90 N. Y. Sup. 130. The intervenor is in effect a plaintiff and must show the facts constituting his right, Schmitt Co. *v.* Mahoney, 60 Neb. 20, 82 N. W. 99. Objections as to the form of the intervention must be raised promptly. All objections are waived by submitting the matter to the jury, Noble *v.* Worthy, 1 Ind. T. 458, 45 S. W. 137.

Substitution of Parties.—The court may substitute the real parties

interested in the defense of the suit for the sheriff who is the nominal defendant, they having indemnified him and there being no question as to their responsibility, Jakobi *v.* Gorman, 50 N. Y. St. 202, 21 N. Y. Sup. 762. If the sheriff has submitted to a wilful default it is an additional and sufficient reason for the substitution, *Id.* The statute providing that "if any person not a party to the action should claim to be the owner * * * he shall not institute another action * * * but make oath of his claim and file it with the officer taking the property * * * or with the clerk of the court * * * ; after the trial of the action of replevin an issue shall be made up between the successful party and such claimant * * * a trial had and such claimant shall be considered plaintiff in such issue." Held, that one filing the affidavit provided for does not thereby become a defendant in the original action, that until the issue is determined between the original parties no issue can be made up between such claimant and either of the original parties; that until such determination it can not be known who the claimant's adversary is or will be, that to render a judgment in favor of the claimant and against the plaintiff by default before disposition of the action between the plaintiff and defendant, is error, Ettringham *v.* Handy, 60 Miss. 334. The claimant under the statute is not required to file any bill of particulars of his damages, or to claim damages specifically, *Id.* In Iowa, it was held that a statute providing that the sheriff, defendant in an action of replevin, should be entitled to substitute, as defendant, the plaintiff in the process under which he seized the goods, and himself be discharged, is unconstitutional; that the aggrieved party is entitled to look to the one who did the wrong, and cannot be required to look to another, Sunberg *v.* Babcock, 61 Ia. 602, 16 N. W. 716. In Flanders *v.* Lyon, 51 Neb. 102, 70 N. W. 524, it was held that the assignee of the plaintiff, who has replevied the goods, cannot be substituted; that defendant is entitled to judgment against plaintiff for return, and this right cannot be defeated by transfer and substitution. A statute that "In an action against the sheriff for the recovery of property taken in execution, etc.," the court may order the substitution of the execution creditor, does not authorize such substitution after judgment; and such substitution does not confer a right of action upon the bond, Hicklin *v.* Nebraska Bank, 8 Neb. 463. In Kreibohm *v.* Yancey, 154 Mo. 67, 55 S. W. 260, it was held that where a new plaintiff is substituted the court may make it a condition that a new bond shall be executed.

Bailee sued in replevin, may by consent of parties be discharged and the real party in interest substituted, Harris *v.* Harris, 43 Ark. 535; but where plaintiff knowing the claims of a third person to the goods, omits him, and joins John Doe, he will not be permitted afterwards against the will of such third person, to substitute him as a defendant in place of Doe. The court assign as a reason that it is not clear that he would be protected by the undertaking, Hochman *v.* Hauptman, 76 Ap. Div. 72, 78 N. Y. Sup. 659. The substituted defendant will not be heard to object that the bailee was improperly sued, *Id.*; nor to object to the complaint, if sufficient as against the original defendant, Van

Gundy *v.* Carrigan ,4 Ind. Ap. 333, 30 N. E. 933, *Id.* Where an assignee for creditors, plaintiff in replevin, dies, pending the action, it is properly revived in the name of his successor as assignee, and not in the name of his administrator, Greer *v.* Howard, 41 O. St. 591. Where a collector of a decedent's estate institutes replevin, the administrator, upon his appointment, before final judgment, should be substituted as plaintiff, Loven *v.* Parson, 127 N. C. 301, 37 S. E. 271. The substitution as plaintiff of a corporation in which the plaintiffs named are interested and which was the owner of the goods, and entitled to possession at the institution of the suit, is not permissible, Liebmann *v.* McGraw, 3 Wash. 520, 28 Pac. 1107. One who has made no demand for the goods, nor given any bond, cannot be substituted as plaintiff, even though upon the facts he should have been plaintiff, and the nominal plaintiff in all things done, claimed under the title of such third person, Pierce *v.* Batten, 3 Kans. Ap. 396, 42 Pac. 924. Several executions at the suit of different creditors are levied by the sheriff upon a stock of goods; a stranger to the writ suing for the goods has one single cause of action against the sheriff; and if the creditors are substituted, they are liable jointly, Tootle *v.* Berkley, 57 Kans. 111, 45 Pac. 77. Where parties cause themselves to be substituted for the sheriff, they cannot complain of the substitution, if judgment is given against them, Romick *v.* Perry, 61 Ia. 238, 16 N. W. 93. The fact that persons to whom the plaintiff voluntarily surrenders the goods, pending suit, give bond "to perform the final judgment in the suit," does not make them parties, and judgment cannot go against them, Myers *v.* Credle, 63 N. C. 504.

Death of Party, or Transfer.—The defendant cannot be barred of his right to a return of the goods by the plaintiff's death, removal from the jurisdiction, or voluntary abandonment of his cause, Corbett *v.* Pond, 10 Ap. D. C. 17. The bond being conditioned to abide by and perform the judgment, the sureties are virtually parties to the action, *Id.* Upon the death of the plaintiff the cause may be prosecuted against the sureties, *Id.* And the defendant may have a jury to assess the damages and may have judgment for return of the goods, and judgment against the surety for his damages as assessed, *Id.*

The plaintiff's transfer or sale of the goods pending the action, does not work an abatement, Wall *v.* Demitkiewicz, 9 Ap. D. C. 109. The statute providing that replevin shall survive allows the revival of the action against the administrator of the defendant, McCrory *v.* Hamilton, 39 Ills. Ap. 490.

CHAPTER XX.

PLEADING.

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§ 648. **Pleading.** The pleadings in replevin at common law were complicated and peculiar to this action.[1] They have, how-

[1] Robinson v. Calloway, 4 Ark. 100; Southall v. Garner, 2 Leighs, (Va.) 372; Rogers v. Arnold, 12 Wend. 31; Gilb. on Replevin, 119; 1 Ch. Plea, title Replevin; Woodf. on L. & T. 588; Bacon Abr. title Replevin

ever, been greatly simplified by modern legislation, aided by the liberal construction of the courts. The limits of this work will not permit the consideration of any of the local statutes; a statement of the general principles is all that can be attempted.

§ 649. **Established rules govern.** Established rules and precedents should, in all cases, be followed. Any unnecessary departure from the recognized procedure, whether it arise from love of change, or from carelessness or ignorance, should not be encouraged.[2] Statutory provisions where they exist, whether they relate to the forms of pleading or mode of procedure, must be strictly followed.[3] Each State has its own peculiar laws which govern its practice. These are constantly being changed, and any attempt to state them would be likely to mislead.

§ 650. **The Affidavit.** The first step in the proceeding is the affidavit. This, though not a part of the record,[4] is one of the most important papers in the case. It is essential in all cases where the plaintiff desires a delivery of the property pending the action. In many of the States the plaintiff may elect to begin and prosecute his suit without asking delivery of the goods prior to judgment. Under such circumstances neither affidavit nor bond is necessary.[5]

§ 651. **A prerequisite to delivery.** In all cases where the plaintiff asks a delivery of the goods in the first instance, the affidavit is a prerequisite to the issuing of the writ or order for delivery. Without it the writ would be a nullity if issued, and the suit must fail.[6] The affidavit is in no way essential to the

and Avowry. Both parties are plaintiff; each may claim judgment. Seymour *v.* Billings, 12 Wend. 286; Persse *v.* Watrous, 30 Conn. 146; Brown *v.* Smith, 1 N. H. 36; McLarren *v.* Thompson, 40 Me. 285; Poor *v.* Woodburn, 25 Vt. 239.

[2] McPherson *v.* Melhinch, 20 Wend. 671; Anstice *v.* Holmes, 3 Denio, 245.

[3] Pirani *v.* Barden, 5 Ark. 81. When petition complies substantially with the provision of the statute, it is sufficient. The form or words of the statute need not be literally followed. Smith *v.* Montgomery, 5 Iowa, 371; Auld *v.* Kimberlin, 7 Kan. 601; Busick *v.* Bumm, 3 Iowa, 63.

[4] Town *v.* Wilson, 8 Ark. (3 Eng.) 465; Loomis *v.* Youle, 1 Minn. 175; Cox *v.* Grace, 5 Eng. (Ark.) 86. *Contra*, see Newell *v.* Newell, 34 Miss. 385.

[5] Baker *v.* Dubois, 32 Mich. 92; Catterlin *v.* Mitchell, 27 Ind. 298; Hodson *v.* Warner, 60 Ind. 214.

[6] Wilbur *v.* Flood, 16 Mich. 40; Milliken *v.* Selye, 6 Hill, 623; S. C., 13

trial of the case.[7] It is not evidence and does not prove or tend to prove the plaintiff's title to the property, though its statements as to value of the property may sometimes be taken to estop the plaintiff who made it from asserting a different value.[8] Its truth or falsity is not a question at issue on the trial.[9]

§ 652. **Must not be entitled.** The affidavit must not be entitled in the suit. The reason is that at the time of making it there is no suit pending.[10]

§ 653. **Must be drawn to meet the evidence.** The affidavit should be framed with a view to the evidence which will be produced at the trial. If the action be for a wrongful detention, proof of a wrongful taking would sustain such an averment without proof of demand.[11] Proof of a wrongful detention, however, will not sustain an averment of a wrongful taking. If the evidence will sustain an averment of wrongful taking, it is advisable, as simplifying the question of damages, that the declaration contain such a count. The averments in both the writ and declaration should follow the plaint or affidavit.[12]

§ 654. **Takes place of the plaint.** The affidavit takes the place of the plaint, or rather it is the plaint, the word having

Denio, 57; Perkins *v.* Smith, 4 Blackf. 302; Bridge *v.* Layman, 31 Ind. 385; Payne *v.* Bruton, 5 Eng. (Ark.) 57; Cutler *v.* Rathbone, 1 Hill, 204; Kehoe *v.* Rounds, 69 Ill. 352; McClaughry *v.* Cratzenberg, 39 Ill. 123; Stacy *v.* Farnham, 2 How. Pr. Rep. 26; Phenix *v.* Clark, 2 Mich. 327. Sheriff or coroner cannot administer the oath. Berrien *v.* Westervelt, 12 Wend. 194.

[7] Town *v.* Wilson, 8 Ark. (3 Eng.) 464.

[8] See *post*, § 658.

[9] Payne *v.* Bruton, 5 Eng. (Ark.) 57; Town *v.* Wilson, 8 Ark. (3 Eng.) 465.

[10] Rex *v.* Jones, 1 Str. 704; Haight *v.* Turner, 2 John. 371; People *v.* Tioga C. P., 1 Wend. 292; Hollis *v.* Brandon, 1 Bos. & Pull. 36; King *v.* Cole, 6 Term R. 298 and 640; Whitney *v.* Warner, 2 Cow. 500; Nichols *v.* Cowles, 3 Cow. 345; Milliken *v.* Selye, 3 Denio, 57; Stacey *v.* Farnham, 2 How. Pr. Rep. 26. But see and compare in this respect, *In re* Bronson and Mitchell, 12 Johns. 460, and note. The venue must be stated. Compare Cook *v.* Staats, 18 Barb. 407.

[11] Oleson *v.* Merrill, 20 Wis. 462; Stillman *v.* Squire, 1 Denio, 327; Cummings *v.* Vorce, 3 Hill, 282; Pierce *v.* Van Dyke, 6 Hill, 613; Cox *v.* Grace, 10 Ark. 87.

[12] Newell *v.* Newell, 34 Miss. 386. In Illinois it is not necessary to allege a wrongful taking or even a wrongful detention by the defendant. Whistler *v.* Roberts, 19 Ill. 274. But this cannot be stated to be the general rule.

the same meaning that it had in the Statute of Marlbridge. That statute required that there should be a "plaint," *i. e.*, complaint. This was simply a statement to the sheriff of the wrongful taking, upon which he made the delivery. There appears to be no authority for saying that it was, at that time, required to be in writing. The affidavit of modern practice is the "complaint" of olden time.[13]

§ 655. **By whom made. General requisites.** The affidavit may be made by the plaintiff, or some one in his behalf; when made by an agent, its averments must be as positive as those required from the principal.[14] It must be in writing, and signed by the plaintiff, or his agent making it.[15] There are cases, however, which hold that an affidavit purporting to be sworn to by plaintiff, and certified to be sworn to by him, is good without signature.[16] It must state that the plaintiff is the owner, and entitled to the immediate possession of the goods about to be replevied. The statutory requirements of the different States vary somewhat as to what is necessary to be stated in the affidavit, but they all substantially agree with the common law upon this point.[17]

§ 656. **Meaning of "owner."** The term "owner," as used in this connection, does not import absolute ownership; any special interest in the property will be sufficient.[18] In Ohio this

[13] Anderson *v.* Hapler, 34 Ill. 439. [The complaint, if verified, and containing the requisites of the statute, may serve as the affidavit, Louisville Co. *v.* Payne, 103 Ind. 188, 2 N. E. 582; Harris *v.* Castleberry, Ind. Ter., 64 S. W. 541; Bobilya *v.* Priddy, 68 O. St. 373, 67 N. E. 736; and will give jurisdiction, Lewis *v.* Connolly, 29 Neb. 222, 45 N. W. 622; Hudelson *v.* First National Bank, 51 Neb. 557, 71 N. W. 304; but if sworn on information and belief, merely, it will not suffice, Lewis *v.* Connolly, *supra.*]

[14] Frink *v.* Flanagan, 1 Gilm. (Ill.) 37. See, also, Branch *v.* Branch, 6 Fla. 315.

[15] Eddy *v.* Beal, 34 Ind. 161.

[16] Jackson *v.* Virgil, 3 Johns. 540; Shelton *v.* Berry, 19 Tex. 154; Crist *v.* Parks, 19 Tex. 234; Haff *v.* Spicer, 3 N. Y. Term, (Ca. Ca.) 190. When affidavit was signed by G. W. and R. Hoover, and sworn to by both, *held* sufficient. Hoover *v.* Rhoads, 6 Iowa, 506.

[17] In Arkansas plaintiff must swear that the cause of action occurred within two years. Payne *v.* Burton, 5 Eng. (Ark.) 57. See Milliken *v.* Selye, 3 Denio, 56.

[18] Johnson *v.* Carnley, 6 Seld. (N. Y.) 578; Sprague *v.* Clark, 41 Vt. 6; Williams *v.* West, 2 Ohio St. 83; Rogers *v.* Arnold, 12 Wend. 35.

question was directly presented. It was objected that the statute said, "If any person shall wrongfully detain the goods and chattels of another, the '*owner*,' his agent or attorney, may file, etc., etc.," and the court said in substance: It is the possessory title, and not the general ownership, which must be sworn to. Ownership without a right to immediate possession will not enable a man to make the statutory affidavit; but a right to immediate possession, without general ownership, will. If the word owner in the statute meant the owner of the general title, then an owner of a special title, such as a lease, even though entitled to possession, could not sustain the action even against a trespasser. To hold that a person with a limited or special title cannot make the affidavit to sustain this action, would destroy the uniform practice, and frequently result in irreparable mischief. The affidavit must be sworn to before the proper officer; in the absence of statutory provisions the sheriff or coroner cannot administer the oath.[19]

§ 657. **Defects in; when to be taken advantage of and how.** Formal defects in the affidavit must be taken advantage of before pleading to the merits; if not, they will be considered as waived.[20] Objections to the affidavit must be taken by motion or by plea in abatement; not by demurrer,[21] the reason being that demurring will not reach matters outside the record, and the affidavit is not a part of the record.[22] So, where the objections to the affidavit are taken by motion, the motion ought to set out and crave *oyer* of it; otherwise the court may refuse to examine or pass upon it.[23]

§ 658. **The truth of the affidavit not in issue.** The truth

[19] Berrien *v.* Westervelt, 12 Wend. 194. If a complaint (declaration) contains all that is necessary in an affidavit, and is sworn to and filed before the writ issues, the want of a separate affidavit on separate paper cannot be objected to. Minchrod *v.* Windoes, 29 Ind. 288. See, also, Perkins *v.* Smith, 4 Blackf. (Ind.) 299.

[20] Defects in affidavits are waived if defendants appear and go to trial without objection. Smith *v.* Emerson, 16 Ind. 355. See Tripp *v.* Howe, 45 Vt. 523; Eddy *v.* Beal, 31 Ind. 161; Lewis *v.* Brackenridge, 1 Blackf. 112; Baker *v.* Dubois, 32 Mich. 92; Perkins *v.* Smith, 4 Blackf. (Ind.) 299; Frink *v.* Flanagan, 1 Gilm. 38.

[21] De Wolf *v.* Harris, 4 Mason C. C. 515.

[22] Cox *v.* Grace, 5 Eng. (Ark.) 86.

[23] Town *v.* Wilson, 3 Eng. (Ark.) 464.

or falsity of the affidavit is not a question which can be enquired into upon the trial, except so far as the issues may go. It in no way affects the issues; it is not proof for the party making it.[24] The want of one may be brought to the knowledge of the court by motion. No reason is perceived why defects in an affidavit may not be taken advantage of by properly pointing them out by a motion in writing. In many of the States this would be sufficient, though a plea in abatement is more technical and exact. When the motion shows the want of an affidavit, the plaintiff may show that it is lost, and ask and obtain leave to supply its place.[25] This cannot be done by the clerk, or by simply filing a new affidavit with him; the court must make the order after an examination into the question as to whether it is a copy or not of the instrument offered.

§ 659. **Statement of value of property.** The common practice in most of the States is for the affidavit to state the value of the property.[26] This is usually accepted as the true value by the sheriff when he comes to take bond. However, this is not obligatory upon him. When no appraisement is required by the statute, he must be the judge as to whether the value stated in the affidavit is sufficient. If he is of opinion it is not, he should require bond in double such sum as he believes to be the true value.[27] For any failure to take adequate bond, he will be liable.[28] In many of the States the statute requires an appraisement;[29] and such value so ascertained is to govern the officer in fixing the amount of the bond.

§ 660. **Statement of value in affidavit; how far binding.** The statements in the affidavit as to value usually bind the plaintiff in any subsequent suit between the same parties, on the bond, or in the assessment of damages. The sworn statement of value made at a time when he is seeking to recover the property will

[24] Payne *v.* Bruton, 5 Eng. (Ark.) 57; Dennis *v.* Crittenden, 3 Hand. (42 N. Y.) 544.

[25] Morgan *v.* Morgan, 31 Miss. 546.

[26] Deardorff *v.* Ulmer, 34 Ind. 353; Schaffer *v.* Faldwesch, 16 Mo. 339.

[27] Kimball *v.* True, 34 Me. 88; People, etc., *v.* Core, 85 Ill. 248; Roach *v.* Moulton, 1 Chand. (Wis.) 187; Pomeroy *v.* Trimper, 8 Allen, 398; Deardorff *v.* Ulmer, 34 Ind. 353; Murdock *v.* Will, 1 Dall. 341.

[28] People, etc., *v.* Core, 85 Ill. 248.

[29] Watkins *v.* Page, 2 Wis. 92; Caldwell *v.* West, 1 Zab. (N. J.) 411.

estop him from asserting a different one at another time. The defendant is, of course, in no way bound by it.[30]

§ 661. **Must state that the property was not taken for any tax, assessment or fine.** Another provision, common to the statutes of all the States is, the affidavit must state that the property was not taken for any tax, assessment or fine levied by virtue of any law of the State. This requirement is imperative.[31] When the affidavit states that the property had not been seized for any legal tax, it was held to imply that it was taken for a tax of some sort, and the court should dismiss the suit, on motion.[32] When it stated that the property was not taken *in execution* for any tax, assessment or fine, the court said this may be true, and still the property may have been distrained, and the affidavit was held insufficient.[33]

§ 662. **Or upon execution or attachment, etc.** The affidavit must also state that the property has not been seized by virtue of any execution or attachment against the goods and chattels of the plaintiff liable to execution or attachment.[34] So, where the plaintiff was a supervisor of his township, authorized by law to keep and preserve the books and papers belonging to his office, the fact that the property was not legally subject to seizure on an execution or for a tax did not absolve the supervisor from the necessity of stating in his affidavit that it was not so taken. The requirements of the statute are imperative, and the nature of the property makes no difference.[35] There are cases, however, where the rule does not apply. In Vermont and Connecticut the writ was formerly employed chiefly to recover goods seized on attachment. The proceedings in such cases, however, were governed by local statutes

§ 663. **Or upon any writ of replevin against the plaintiff.** In some States the statutes require the affidavit to state that the property for which the suit is brought has not been taken upon any writ of replevin or order for delivery in such action; and it may be said, generally, that the law will not permit cross-replevin.

[30] See § 453, and the cases there cited.

[31] Phenix *v.* Clark, 2 Mich. 327; Mt. Carbon, etc., *v.* Andrews, 53 Ill. 182.

[32] McClaughry *v.* Cratzenberg, 39 Ill. 123.

[33] Campbell *v.* Head, 13 Ill. 126.

[34] Bridges *v.* Layman, 31 Ind. 385.

[35] Phenix *v.* Clark, 2 Mich. 327.

But it has been said this will not prevent the plaintiff from having this action upon a title which accrued to him after the seizure, nor in cases when the execution was void.[36]

§ 664. **Strict compliance with this condition required.** An affidavit, therefore, which stated that the property was not taken on any execution or judgment against the plaintiff, or any other mesne or final process whatsoever, will not be sufficient.[37] A strict compliance with all these statutory requisites is essential; the object of the law being to prevent the employment of this action in the excepted cases.[38] The law furnishes other

[36] Williams *v.* West, 2 Ohio St. 89. *Contra*, see Wilson *v.* Macklin, 7 Neb. 51.

[37] Auld *v.* Kimberlin, 7 Kan. 601.

[38] Westenberger *v.* Wheaton, 8 Kan. 169.

NOTE XXX. *Affidavit.*—The affidavit is the commencement of the action; if the goods are not then detained by defendant, the action is premature, Wheeler Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155. The statutory requirements must be strictly complied with, Spencer *v.* Bidwell, 49 Conn. 61. If, in fact, sworn before the writ issued, the failure of the officer to affix his jurat, is not fatal; it may be affixed after the objection is raised, Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10;—and even after appeal the plaintiff may subscribe the affidavit filed with the justice of the peace, which was in fact sworn before the justice, Crum *v.* Elliston, 33 Mo. Ap. 591. The affidavit, if in fact sworn, confers jurisdiction, though not subscribed, Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836;—and the omission of the affiant's signature to the copy of the affidavit required to be served with the writ, will not support a plea in abatement, Mathai *v.* Capen, 65 Conn. 539, 33 Atl. 495. In Illinois the affidavit in actions before a justice of the peace, is jurisdictional, and if wanting, defendant may move to dismiss even upon his own appeal to the Circuit Court, and after the lapse of several terms, Evans *v.* Bouton, 85 Ills. 579. Only where an affidavit is filed containing all the statutory requisites does the justice acquire jurisdiction, Clendenning *v.* Guise, 8 Wyo. 91, 55 Pac. 447; Simmons *v.* Robinson, 101 Mich. 240, 59 N. W. 623. In New York no affidavit of value is required before a justice unless the plaintiff requires an immediate delivery, Young *v.* Carey, 61 N. Y. Sup. 508. Where the statute provides that the action "shall not be brought" until a specified affidavit is filed, the omission of substantial compliance is fatal at any stage, even upon appeal, though no objection was started in the justice court, Armour *v.* Arres, 5 Neb. Unoff. 383, 98 N. W. 843. Where the statute makes the affidavit a prerequisite to the allowance of the writ, and provides that in case of a special property claimed the facts in relation thereto shall be stated, the affidavit must, where the action is

means to control wrongful seizure in these cases, but will not permit the withdrawal of the property pending the inquiry as to the seizure.

founded upon a chattel mortgage, set forth the date, that the debt is due and unpaid, when it matured, or violations of the conditions entitling plaintiff to possession,—otherwise the writ will be quashed, Bolin *v.* Fines, 51 Neb. 650, 71 N. W. 293; Paxton v. Learn, 55 Neb. 459, 75 N. W. 1096. Not alleging unlawful detention by the defendant it is fatally defective, Hudelson *v.* First National Bank, 51 Neb. 557, 71 N. W. 304. And if the statute require the value to be stated, the omission of this statement is fatal to the writ, even upon appeal from the justice to the district court, Barruel *v.* Irwin, 2 N. M. 223. Where the affidavit fails to aver that plaintiff is entitled to immediate possession the order for delivery should be quashed, Paul *v.* Hodges, 26 Kans. 225. Jurisdiction depends upon the sufficiency of the affidavit; it is a prerequisite to the issuance of the writ, or the order for the delivery, Carlon *v.* Dixon, 12 Ore. 144, 6 Pac. 500. Affidavit that plaintiff is entitled to possession of the goods, describing them, and that they are in possession of defendant, and are not subject to seizure, etc., etc., is a substantial compliance with the statutory requirement that the affidavit must show detention by defendant, Cartwright *v.* Smith, 104 Tenn. 689, 58 S. W. 331. An affidavit by an agent, averring that the goods were not taken in execution on any order or judgment "against affiant," making no allusion to the plaintiff, is insufficient and cannot be amended, Armour *v.* Arres, *supra*. Commercial Bank *v.* Ketcham, 46 Neb. 568, 65 N. W. 201; *contra*, Fisher *v.* Brown, 111 Ills. Ap. 491. The phrase "belonging to the plaintiff" is equivalent to the statutory phrase, "owned by the plaintiff," Dillard *v.* Samuels, 25 S. C. 319. The affidavit must describe the goods so as to indicate to the sheriff what is to be taken under the writ, Schwietering *v.* Rothschild, 26 Ap. Div. 614, 50 N. Y. Sup. 206. An affidavit describing the goods only by unintelligible characters, is not sufficient, *Id.* VanDyke *v.* N. Y. Co., 18 Misc. 661, 43 N. Y. Sup. 735. An affidavit that the goods "were not taken in execution, etc., against plaintiff but were taken by execution issued against plaintiff on a void judgment," is defective; plaintiff will not be permitted to assail the validity of the judgment, Wilson *v.* Macklin, 7 Neb. 50. But in Muller *v.* Plue, 45 Neb. 701, 64 N. W. 232, it was held that this interpretation was too strict, and that where goods are seized under execution upon a void judgment, the defendant in the writ may replevy them, and establishing the invalidity of the judgment will prevail, and see, Iron Cliffs Co. *v.* Lahais, 52 Mich. 394, 18 N. W. 121; Balm *v.* Nunn, 63 Iowa, 641, 19 N. W. 810. Affidavit that the goods "were not taken from plaintiff by any process legally and properly issued against him, or if so were exempt," is sufficient, Carlson *v.* Small, 32 Minn. 439, 21 N. W. 480. The statute required an affidavit that the goods were not taken in execution on any judgment or order against the plaintiff or

§ 665. **It must contain a correct description of the property. Amendments.** The affidavit should contain a correct

for the payment of any fine;" the affidavit omitted the conjunction "or"; held, that read with a pause after the word "plaintiff," it conveyed the proper idea and was sufficient, Hudelson *v.* First National Bank, *supra*. An affidavit which states that affiant is entitled to possession of the goods, is sufficient, though it omits the statutory word "immediate," *Id.* The affidavit failed to aver that the goods "had not been seized under any order of delivery, etc.," as required by statute, but it did aver that they were not "taken in execution on any order or judgment against plaintiff or any order of court under any other mesne or final process issued against plaintiff;" it was held that an order of delivery is "an order of the court," and that the omitted clause was adequately covered, so that the affidavit conferred jurisdiction, Scott *v.* Jones, 7 Okla. 42, 54 Pac. 308. The statute requiring an affidavit stating that affiant "believes that plaintiff is entitled to the immediate possession, etc.," is not complied with by an affidavit of one of the plaintiff's that he believes that "he as trustee, or Anna, his wife (the other plaintiff) in her own right, is entitled to immediate possession," Spencer *v.* Bidwell, 49 Conn. 61. An affidavit describing the lumber demanded as "North Carolina pine," and giving an itemized statement of the different sizes, grades and uses of the lumber, is sufficient, Sloan *v.* Implement Co., 25 Misc. 451, 55 N. Y. Sup. 558. The provision of the code that in an action against a corporation plaintiff need not prove on the trial the existence of the corporation, unless denied by verified answer, relieves the plaintiff of the necessity of averring, in positive terms, in his affidavit, the incorporation of the defendant, *Id.* An affidavit describing a portion of the goods by abbreviations of which no explanation is given, is defective as to these, and the writ may be vacated, National Co. *v.* Kaplan, 53 Ap. Div. 96, 65 N. Y. Sup. 732. An affidavit that defendant is the owner of and entitled to possession of "all the dry goods, etc., and fixtures and the personal property of Parsons and Beech" in a certain building described, was construed to import that the goods are those commonly known as belonging to Parsons and Beech, and therefore sufficient, McCarthy *v.* Ockerman, 92 Hun, 19, 37 N. Y. Sup. 914. Where the affidavit is a prerequisite to the writ of replevin the omission of such affidavit may be urged by one who is brought in as defendant after the institution of the action, even though there was such affidavit containing all the statutory requirements, as to the defendants originally named, Bardwell *v.* Stubbert, 17 Neb. 485, 23 N. W. 344. Where the statute requires that the plaintiff, claiming a special property in the goods, must set forth the facts in regard to such property, and several different things are specified in the affidavit, which avers that the same "belonged to or were consigned to said co-partnership of D. and L. and by the articles of co-partnership on the dissolution thereof deponent was and is entitled to all the property," it was held insufficient, for not averring the facts, so that the court might, on the face of the paper, see

description of the property which the plaintiff seeks to recover, as it will be shown by the proof.[39] And although amendments

[39] Taylor *v.* Riddle, 35 Ill. 567.

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that the special property was made out, Depew *v.* Leal, 2 Abb. Pr. 131. An affidavit that "the *defendants* are now legally entitled to possession" was construed as importing that *plaintiff* was so entitled, and was held sufficient, Churchill *v.* Rea, 126 Mich. 175, 85 N. W. 465; but in Clendenning *v.* Guise, 8 Wyo. 91, 55 Pac. 447, the same affidavit was held fatally defective. Defects in the affidavit are waived by answering to the merits and going to trial, Hudelson *v.* First National Bank, 51 Neb. 557, 71 N. W. 304,—or by an appearance and plea, Clark *v.* Dunlap, 50 Mich. 492, 15 N. W. 565; Udell *v.* Slocum, 56 Ills. Ap. 217; Hawes *v.* Robinson, 44 Ark. 308;—but not by going to trial after motion to quash overruled, Barruel *v.* Irwin, 2 N. M. 223. The court may allow an amendment if the affidavit be defective, Hudelson *v.* First National Bank, 51 Neb. 557, 71 N. W. 304;—even without statute, Fisher *v.* Brown, 111 Ills. Ap. 486; Wilson *v.* Macklin, 7 Neb. 50; and even while the cause is pending before a referee, Tackaberry *v.* Gilmore, 57 Neb. 450, 78 N. W. 32. But the omission of the value was held not amendable, Barruel *v.* Irwin, 2 N. M. 223. The amended affidavit may be sworn to by a different agent, Colborn *v.* Barton, 14 Ills. Ap. 449. New grounds cannot be supplied by an amendment, Crum *v.* Elliston, 33 Mo. Ap. 591. Omission of a sufficient description may be cured by a supplemental affidavit, Thorn *v.* Lazarus, 39 Ap. Div. 508, 57 N. Y. Sup. 279; and the affidavit may always be amended so as to state sufficiently whatever has been stated informally and indefinitely, Commercial Bank *v.* Ketcham, 46 Neb. 568, 65 N. W. 201; Meyer *v.* Lane, 40 Kans. 491, 20 Pac. 258. On motion to vacate the order for possession for defects in the affidavit the order should go in the alternative, unless by a day certain a sufficient affidavit is filed, *Id.* On discovery of an overvaluation of the goods in his petition and affidavit, plaintiff should be permitted to amend them according to the facts, McManus *v.* Walters, 62 Kans. 128, 61 Pac. 686. An affidavit sworn on affiant's belief may be amended, Lewis *v.* Connolly, 29 Neb. 222, 45 N. W. 222. The affidavit may be amended wherever not jurisdictional, Taylor *v.* Kalamazoo Circuit Judge, 100 Mich. 181, 58 N. W. 835. But where the affidavit is jurisdictional, substantial defects are not amendable, Barruel *v.* Irwin, 2 N. M. 223. Although it is the foundation of the action, it may, where the defendant retains the goods, be amended in the Circuit Court, upon an appeal, so as to increase the damages claimed, Hanf *v.* Ford, 37 Ark. 544. An amendment of the affidavit may be allowed where the matter to be supplied is a writing referred to in the original, and statements explanatory of what appears therein, stating no new substantial matter, Depew *v.* Leal, 2 Abb. Pr. 131. That the affidavit may be amended is well settled; an affidavit asserting in general and in definite terms the

are sometimes permitted to correct mistake, and in the furtherance of justice,[40] caution in the first instance is the safe course.[41]

[40] Perkins *v.* Smith, 4 Blackf. 302; Campbell *v.* Head, 13 Ill. 126; Parks *v.* Barkham, 1 Mich. 95; Applewhite *v.* Allen, 8 Humph. (Tenn.) 698; Baker *v.* Dubois, 32 Mich. 93; Wilson *v.* Macklin, 7 Neb. 52.

[41] Affidavit was signed by plaintiff, but had no jurat attached. He filed affidavit that he did swear to it. *Held*, the court might have permitted it to be verified *nunc pro tunc*. Bergesh *v.* Keevil, 19 Mo. 128; Anon, 4 How. (N. Y. Pr.) 290. The application to amend should be made before the decision upon the motion to quash the writ. If it is quashed, the suit is no longer pending for any purpose, except to assess damages. Campbell *v.* Head, 13 Ill. 126; Perkins *v.* Smith, 4 Blackf. 302; Smith *v.* Emerson, 16 Ind. 355; Eddy *v.* Beal, 34 Ind. 161.

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matters required by the statute, is amendable, and so confers jurisdiction, Swain *v.* Savage, 55 Neb. 687, 77 N. W. 362.

If the sheriff fails to take the goods, defects in the affidavit become immaterial; the action may be prosecuted for damages, without an affidavit, Lamont *v.* Williams, 43 Kans. 558, 23 Pac. 592. Where the statute requires the affidavit of the party, the affidavit of his attorney will not suffice, Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126. But in the absence of such requirement it seems the affidavit may be made by an agent, National Co. *v.* Kaplan, 53 Ap. Div. 96, 65 N. Y. Sup. 732;—or by an agent of one of two plaintiffs acting for both, Hudelson *v.* First National Bank, 56 Neb. 247, 76 N. W. 570. And where the statute allows the plaintiff to state the cause of detention "according to his best knowledge," the agent making the affidavit need not give the sources of his information, Sloan *v.* Implement Co., 25 Misc. 451, 55 N. Y. Sup. 558. A special agent of the general land office may make an affidavit on behalf of the United States, and if upon information and belief, it will be sufficient unless controverted, United States *v.* Bryant, 111 U. S. 499, 28 L. Ed. 496; he need not set forth the grounds of his belief, *Id.* Affidavit subscribed "J. M. S. per D. M. S.," it appearing from the justice's transcript that "D. M. S." was the agent of the plaintiff "J. M. S."; was held sufficient, Spencer *v.* Bell, 109 N. C. 39, 13 S. E. 704;—the affidavit of an agent need not show affirmatively that he has a personal knowledge, Sloan *v.* Implement Co., *supra*. The plaintiff is bound by the valuation set down in the affidavit, Lamy *v.* Remuson, 2 N. M. 245; Park *v.* Robinson, 15 S. D. 551, 91 N. W. 344; O'Donnell *v.* Colby, 55 Ills. Ap. 112; denial of the valuation by defendant does not change the rule, *Id.* Defendants may prove a greater value, O'Donnell *v.* Colby, *supra*. The affidavit being the foundation of the action and the clerk's authority to issue the writ, is part of the record, Newell *v.* Newell, 34 Miss. 385. Clerical mistakes will be regarded indulgently. An affidavit purporting in the body of it to be the affidavit of *Charles* Olson and subscribed by Charley Olson, is not for this variance insufficient, Olson *v.* Peabody, 121 Wis. 675, 99 N. W. 458. The affidavit de-

The affidavit, as has been shown, is the foundation of the suit. It is a statement to the officer upon which the mandate for delivery issues. The description in the writ and in the subsequent proceedings are based upon and follow the description in the affidavit. It should therefore be exact in all respects.

§ 666. **The declaration. Several counts joined.** It has been the constant practice to employ as many counts in the declaration as the pleader deems necessary for the proper presentment of his case. Counts for wrongful taking are properly joined with counts for the detention Counts claiming absolute property in plaintiff may be joined with counts in which he asserts a limited interest only.[42] But the averments of the declaration with respect to ownership or interest of the plaintiff in the property should not go beyond the claim in the affidavit and writ.[43]

§ 667. **Rights of parties under a single count.** Where the declaration contains but a single count for several articles, the plaintiff may recover part and the defendant part, the same as though there had been separate counts; each is entitled to judgment for the goods which he recovered, and to costs so far as he is successful.[44] Under a count charging wrongful detention the plaintiff may prove a wrongful taking, but if the charge be for taking it is not supported by proof of a detention merely.

§ 668. **Count in trover for goods not delivered.** In some of the States, in addition to the counts in replevin, the declaration may also contain a count in trover for such goods as the officer has been unable to find and deliver upon the writ.[45] The count in trover, however, cannot include any other goods than those described in the writ, and which are shown by the officer's return not to have been delivered.[46]

[42] Dickinson *v.* Noland, 2 Eng. (Ark.) 25; Cox *v.* Grace, 10 Ark. 87.

[43] Barnes *v.* Tannehill, 7 Blackf. 605; Cox *v.* Grace, 10 Ark. 87; Nichols *v.* Nichols, 10 Wend. 630.

[44] Seymour *v.* Billings, 12 Wend. 286.

[45] Nashville Ins. Co. *v.* Alexander, 10 Humph. (Tenn.) 383; Karr *v.* Barstow, 24 Ill. 580.

[46] Dart *v.* Horn, 20 Ill. 212.

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scribed the wrong-doer as *Wimmian* H. Peabody and the writ as William H. Peabody. William H. Peabody appeared and filed an affidavit for the removal of the cause, properly entitling it; held, notwithstanding the misnomer, there was jurisdiction in the court to which the removal was taken, *Id.*

§ 669. **Value of such goods usually given in damages.** The general practice prevailing in most of the States permits the plaintiff to recover the value of such articles as are not delivered as damages. The count in trover is purely statutory and can be allowed only when the statute so provides.

§ 670. **Form of the declaration; wrongful detention.** The declaration should be drawn to meet the proof which will be produced at the hearing.[47] The gist of the action is the wrongful detention. The plaintiff must allege the right or title in himself as it exists, the right to immediate possession, and the detention by the defendant.[48] This allegation of wrongful detention is essential, and the proof to sustain it is equally essential.[49] If the goods were restored before suit brought, the plaintiff cannot succeed on this action. An allegation that the defendant was about to take possession[50] will not sustain replevin.[51] If the declaration allege that the defendant "detained," it would imply that he had detained them but that were delivered to the plaintiff on the writ. Under this charge he could not recover damages subsequent to return of the writ. If the allegation be "he detains," this implies that the goods are still detained, and the plaintiff may prove and recover damages down to the time of the trial, and may also have as judgment for the value, in case the goods are not delivered, which he could not have under a charge of "he detained."[52] When the facts warrant such a charge it is best to allege a "wrongful taking,"[53] as well as detention, as simplifying the question of damages. A declaration for taking (in the "*cepit*,") should allege a "wrongful" taking, but an omission in this respect is cured by verdict.[54] Proof of a wrongful taking is not admissible under an allegation of wrongful detention unless it be for the purpose of excusing the plaintiff from the necessity of proving

[47] Newell *v.* Newell, 34 Miss. 385.

[48] Wilson *v.* Fuller, 9 Kan. 177; Paul *v.* Luttrell, 1 Col. 317; Yandle *v.* Crane, 13 Kan. 347.

[49] Brown *v.* Holmes, 13 Kan. 482.

[50] Paul *v.* Luttrell, 1 Col. 317.

[51] Herron *v.* Hughes, 25 Cal. 555.

[52] Petre *v.* Duke, Lutw. 360; Potter *v.* North, I Wm. Saurd. 347*b* n. 2; Fox *v.* Prickett, 5 Vroom, (N. J.) 13.

[53] Reynolds *v.* Lounsbury, 6 Hill, 534.

[54] Reynolds *v.* Lounsbury, 6 Hill, 534. See Childs *v.* Hart, 7 Barb. 370, where it was held that an allegation that the defendant took and unjustly detained would imply a wrongful taking.

a demand and refusal.[55] Where the action is against two or more for a joint wrongful taking it may, perhaps, be necessary to show a combination, or joint act, in order to secure a recovery against both, but it need not be alleged in the declaration.[56]

§ 671. **Allegation of wrongful taking; special damages must be specially alleged.** If there was wrongful taking, attended with any acts of willful wrong or insult, the declaration should so charge; the plaintiff may have the opportunity of enhancing his claim for damages by means of such proof.[57] If there are any special causes of damages the plaintiff should aver them in his declaration. There is room for misunderstanding on this subject, and considerable care should be used to avoid error. Damages which are the natural and expected result of the defendant's act, that is, all such damages as the law presumes to have accrued from the wrongful act, need not be specially alleged.[58] But the real or actual damages sometimes would not fall under this presumption, and in such cases they must be specially stated, to prevent surprise.[59] Where the action was for destroying a barn the plaintiff could not show the cost of boarding his horses elsewhere unless under some special allegation.[60] When the action was trover for a note which the defendant wrongfully claimed to hold as a valid note of the plaintiff, under a special allegation plaintiff could recover such damages as the wrongful act occasioned.[61] *Vicksburg & Meridian R. R. Co.* v. *Ragsdale*, is a case where this question is ably and extensively discussed.[62] Damages beyond the value of the property may be given when the taking was accompanied by acts of outrage, if such damages were the natural result of the taking; but consequential damages, not the natural result of the taking, must be specially claimed in the declaration.[63]

[55] Eldred *v.* The Occonto Co., 33 Wis. 141; Newell *v.* Newell, 34 Miss. 385; Colt *v.* Waples, 1 Minn. 134.

[56] Herron *v.* Hughes, 25 Cal. 560.

[57] Newell *v.* Newell, 34 Miss. 385.

[58] Ch. Pl. 428.

[59] De Forest *v.* Lute, 16 Johns. 122; Nunan *v.* City & Co. of San Francisco, 38 Cal. 689; Burrage *v.* Melson, 48 Miss. 239.

[60] Shaw *v.* Hoffman, 21 Mich. 155.

[61] Park *v.* McDaniels, 37 Vt. 595.

[62] V. & M. R. R. Co. *v.* Ragsdale, 46 Miss. 469.

[63] Schofield *v.* Ferrers, 46 Pa. St. 438.

§ 672. **The same. Special requirements.** It must allege that the goods are the goods and chattels of the plaintiff; it is not sufficient to say that the goods were taken out of the plaintiff's possession,[64] or to charge that defendant agreed to transfer the property to plaintiff,[65] or to simply allege that the plaintiff was entitled to possession.[66] The declaration must expressly allege that the goods are the property of the plaintiff.[67] That this is material will appear when it is considered that the defendant's plea is only to put in issue the property in the plaintiff.[68] In Iowa, it appears that the right to possession may alone be put in issue and determined,[69] and the averment of ownership does not require proof of absolute title to support it, but a right of present dominion or control over it, is sufficient.[70] Ownership without a right to immediate possession will not enable the party to make the affidavit, but right of present exclusive possession will, irrespective of the general title.[71] The evidence of title must not be set up, but the fact must be stated; the declaration should state positive issuable facts, not a rehearsal of argument.[72] An allegation of fraud in a horse trade is not sufficient, without showing a rescission of the contract; such a contract may be voidable, but until avoided is valid.[73] An allegation that the plaintiff on a certain day owned and possessed certain property, and that the defendant on that day took and wrongfully detained it, is sufficient.[74] It must show a right to the property in dispute in the plaintiff at the time suit was begun.[75]

§ 673. **The same. Allegation as to time and place.** It

[64] Bond v. Mitchell, 3 Barb. 304; Vandeburgh v. Van Valkenburgh, 8 Barb. 217; Johnson *v.* Neale, 6 Allen, (Mass.) 227; Prosser *v.* Woodward, 21 Wend. 205; Robinson *v.* Calloway, 4 Ark. 101.

[65] Bailey *v.* Troxell, 43 Ind. 433.

[66] Pattison *v.* Adams, 7 Hill, (N. Y.) 126; Webb *v.* Fox, 7 Durnf. & East. 392.

[67] Fontleroy *v.* Aylmer, 1 Ld. Raym, 239.

[68] Bond. *v.* Mitchell, 3 Barb. 304.

[69] Cassel *v.* Western Stage Co., 12 Iowa, 47.

[70] Johnson *v.* Carnley, 6 Seld. (N. Y.) 570; Sprague *v.* Clark, 41 Vt. 6; Cleaves *v.* Herbert, 61 Ill. 127.

[71] Williams *v.* West, 2 Ohio St. 83.

[72] Fidler *v.* Delavan, 20 Wend. 57.

[73] McCoy *v.* Reck, 50 Ind. 283.

[74] Adams *v.* Corriston, 7 Minn. 456; Hurd *v.* Simonton, 10 Minn. 423.

[75] Loomis *v.* Youle, 1 Minn. 175.

should state that the defendant, upon a time stated, which must be prior to the issuing of the writ,[76] at a place which must be indicated, such as within a certain village or town,[77] wrongfully took, and unjustly detains;[78] or, if the action be for detention only, the count may state that the defendant took, and "unjustly detains"[79] the plaintiff's goods.[80]

§ 674. **The same.** Formerly the plaintiff was required to state the close.[81] This was because distress could only be made upon the land out of which the writ issued.[82] This rule has been so changed that in cases other than for a distress for rent, a statement of the town will suffice.[83] So, when the declaration stated that the property was taken from the dwelling of the plaintiff, on Gay street, proof that the taking was on Gay street, sufficed.[84]

§ 675. **Averment of wrongful detention essential.** Whatever may be the facts in the case concerning the wrongful taking, and whatever be the allegations in the declaration upon that ques-

[76] It is a good defense that the writ issued before the cause of action accrued. Wingate *v.* Smith, 20 Me. 287. The date of the writ is not conclusive as to the time when the suit was begun. Federhen *v.* Smith, 3 Allen, 119.

[77] Johnson *v.* Woolyer, 1 Stra. 507; Muck *v.* Folkroad, 1 Browne, (Pa.) 60; Gardner *v.* Humphrey, 10 Johns. 53; Williams *v.* Welch, 5 Wend. 290. The action is local to the place of taking. Sleeper *v.* Osgood, 50 N. H. 335. And it has been said a change of venue is not usually granted. Atkinson *v.* Holcomb, 4 Cow. 45.

[78] Reynolds *v.* Lounsbury, 6 Hill, 534. Compare Childs *v.* Hart, 7 Barb. 370.

[79] Childs *v.* Hart, 7 Barb. (N. Y.) 370; Hurd *v.* Simonton, 10 Minn. 423; Adams *v.* Corriston, 7 Minn. 456; Coit *v.* Waples, 1 Minn. 134; Nichols *v.* Nichols, 10 Wend. 630.

[80] Vandenburgh *v.* Van Valkenburgh, 8 Barb. 217; Pattison *v.* Adams, 7 Hill, 126; Bond *v.* Mitchell, 3 Barb. 304; Robinson *v.* Calloway, 4 Ark. 101. Goods which the plaintiff was entitled to the possession of, substantially sufficient. Prosser *v.* Woodward, 21 Wend. 205; Stickney *v.* Smith, 5 Minn. 486. It is sufficient to allege that the defendant took the goods of the plaintiff and unjustly detains the same. Childs *v.* Hart, 7 Barb. 370; Simmons *v.* Lyons, 3 Jones & Spencer, (N. Y.) 554; Bond *v.* Mitchell, 3 Barb. 304.

[81] Gardner *v.* Humphrey, 10 Johns. 53.

[82] Steph. *Nisi Prius*, vol. 2, p. 1333.

[83] Muck *v.* Folkroad, 1 Browne, (Pa.) 60; Ely *v.* Ehle, 3 Comst. (N. Y.) 510; Williams *v.* Welch, 5 Wend. 290.

[84] Faget *v.* Brayton, 2 Har. & J. (Md.) 350.

tion, it is imperative that the declaration contain an averment of a wrongful detention by the defendant at the time the suit was begun; without this the plaintiff does not state a cause of action.[85] This question was squarely presented in Colorado, where the plaintiff declared for the taking, and the defendant pleaded *non detinuet*, and the court held the issue material.[86] A very similar rule was followed in Kansas.[87] As an omission to charge a wrongful detention, which is the gist of the action, is therefore fatal.[88]

§ 676. **Evidence of title not necessary to be stated.** The plaintiff is not at liberty to state the evidence of his title, but must simply aver title by direct and traversable averment.[89] In support of this averment, proof that the plaintiff was in actual undisputed possession, claiming to own the goods, is sufficient to entitle him to judgment, unless a better title be shown.[90] When the party claims and undertakes to show title, and shows possession only as an incident to title, evidence upon the question of title must control.[91]

[85] Childs *v.* Hart, 7 Barb. 370; Hurd *v.* Simonton, 10 Minn. 423; Adams *v.* Corriston, 7 Minn. 456; Coit *v.* Waples, 1 Minn. 134.

[86] Paul *v.* Luttrell, 1 Col. 318.

[87] Wilson *v.* Fuller, 9 Kan. 177.

[88] Draper *v.* Ellis, 12 Iowa, 316; Brown *v.* Holmes, 13 Kan. 482; LeRoy *v.* McConnell, 8 Kan. 273.

[89] Bond *v.* Mitchell, 3 Barb. 304; Prosser *v.* Woodward, 21 Wend. 205; Robinson *v.* Calloway, 4 Ark. 101; Alwood *v.* Ruckman, 21 Ill. 200; Pattison *v.* Adams, 7 Hill. (N. Y.) 126; Vandenburgh *v.* Van Valkenburgh, 8 Barb. 217; Martin *v.* Watson, 8 Wis. 315; Johnson *v.* Neale, 6 Allen, (Mass.) 227; Vogle *v.* Badcock, 1 Abb. Pr. (N. Y.) 176. See Ice *v.* Lockridge, 21 Tex. 461. It would seem that in Iowa, where a party claims under chattel mortgage, that the declaration should contain a copy of the mortgage and notes. Smith *v.* McLean, 24 Iowa, 332.

[90] Ely *v.* Ehle, 3 Comst. 507. When the plaintiff has the right to the possession, and can sustain trespass, replevin will lie. See, also, Dunham *v.* Wyckoff, 3 Wend. 280; Stickney *v.* Smith, 5 Minn. 486; Marshall *v.* Davis, 1 Wend. 109; Hunter *v.* Hudson Riv. Iron Co., 20 Barb. 493; Brockway *v.* Burnap, 12 Barb. 347; Brockway *v.* Burnap, 16 Barb. 309; Hendricks *v.* Decker, 35 Barb. 298. One who has the general or special property in the goods, accompanied by actual or constructive possession, can maintain replevin. Wilson *v.* Royston, 2 Ark. 315. Party without title, except to right of possession, may replevy against a wrong-doer. Prater *v.* Frazier, 11 Ark. 249.

[91] Hatch *v.* Fowler, 28 Mich. 210.

§ 677. **The same. An averment of right of possession sufficient.** The allegation of ownership, as has been shown, does not require for its support proof of ownership of absolute title.[92] Where the complainant alleged that the plaintiffs were possessed of the goods, described "as of their own proper goods," it was said to be sufficient.[93]

§ 678. **The same. Observations.** Title by possession, without other right to the property, will, where the possession is rightful, be sufficient to sustain replevin as against a wrong-doer; such title being regarded as sufficient to hold the property against all persons not showing a better title, and to recover it from one who wrongfully seizes it.[94] The possession must be a lawful one, acquired without force or fraud. The taker up of an estray, without any proceeding under the law, is a trespasser. His possession is not sufficient. But if one take up an estray, and duly comply with the law in such cases, his possession is rightful.[95]

[92] See *ante*, § 96.

[93] Stickney *v.* Smith, 5 Minn. 486. See Prosser *v.* Woodward, 21 Wend. 206; Marshall *v.* Davis, 1 Wend. 109; Hunter *v.* Hudson Riv. etc., 20 Barb. 493. When the plaintiff has the right to possession, and can sustain trespass, replevin is a concurrent remedy. Dunham *v.* Wyckhoff, 3 Wend. 280; Brockway *v.* Burnap, 12 Barb. 347; Brockway *v.* Burnap, 16 Barb. 309; Hendricks *v.* Decker, 35 Barb. 298; Rucker *v.* Donovan, 13 Kan. 251. One who has a general or special property in the goods, accompanied by possession, actual or constructive, can maintain the action. Wilson *v.* Royston, 2 Ark. 315. Party without title, if entitled to the possession, may sustain the action against a wrong-doer. Prater *v.* Frazier, 11 Ark. 249.

[94] Moorman *v.* Quick, 20 Ind. 68; Miller *v.* Jones, Admr., 26 Ala. 260; Shomo *v.* Caldwell, 21 Ala. 448; Prater *v.* Frazier, 6 Eng. (Ark.) 249. Proof of title recently before the taking would raise a presumption of continued ownership, and unless contradicted, would be sufficient. Smith *v.* Graves, 25 Ark. 441. See, also, Tison's Admr. *v.* Bowden, 8 Fla. 69. A mere receiptor, who has received the goods from an officer for safekeeping, cannot sustain replevin. Warren *v.* Leland, 9 Mass. 265; Ludden *v.* Leavitt, 9 Mass. 104; Dillenback *v.* Jerome, 7 Cow. 294; Norton *v.* The People, 8 Cow. 137. But, see, Miller *v.* Adsit, 16 Wend. 335; Thayer *v.* Hutchinson, 13 Vt. 504; Mitchell *v.* Hinman, 8 Wend. 668. So of a servant, who has only a right to possession by virtue of a delivery from his master, which the latter may put an end to at any time; but a bailee may sustain the action. Harris *v.* Smith, 3 S. & R. 23; Brownell *v.* Manchester, 1 Pick. 232; Stanley *v.* Gaylord, 1 Cush. 536; Bond *v.* Paddelford, 13 Mass. 395; Weld *v.* Hadley, 1 N. H. 298.

[95] Bayless *v.* Lefalvre, 37 Mo. 122.

§ 679. **Where the complaint follows the statute.** Where the complaint follows the form laid down in the code for the recovery of chattels in specie, it must be understood as asserting such a title and claiming such an interest in the goods as may be recovered in that form of action.[96] So where the statute provides that the plea of *non cepit* shall put in issue the property in the plaintiff, as well as the taking, the plaintiff may have a return of the goods under that plea. The charges in the declaration must follow the writ. Thus when the writ charges an unlawful detention, and the declaration an unlawful taking, there will be a variance.[97] The description of the property should be the same in the affidavit, writ and declaration; each must describe the property as it will appear in the proof.[98] When the complaint described only part of the property in the affidavit, and it appeared that the other part had been taken from the defendant on an attachment[99] before the writ could be served, it was allowed to stand. Parties may litigate, however, concerning property not included in the writ when they agree to do so. Thus, where property not embraced in the writ was described in the pleading, and the parties stipulated that the right thereto should be determined in the suit, it was regarded as sufficient to give the court jurisdiction.[100]

§ 680. **Declaration should state value of goods.** The declaration should state the value of the goods, though the statement of the value of the whole, and not of each article, has been held sufficient[101]. The statement of value is but a form of pleading. Even where it is not denied in the pleadings, it is not admitted, nor is the defendant precluded from showing the true value to be in excess of the sum stated by the plaintiff.[102]

[96] Pickens *v.* Oliver, 29 Ala. 528. See Halleck *v.* Mixer, 16 Cal. 574; Smith *v.* Montgomery, 5 Iowa, 370.

[97] Barnes *v.* Tannehill, 7 Blackf. 604; Nichols *v.* Nichols, 10 Wend. 630.

[98] Snedeker *v.* Quick, 6 Halst. (N. J.) 179; Cronly *v.* Brown, 12 Wend. 271; Stevens *v.* Osman, 1 Mich. 92; Stevison *v.* Earnest, 80 Ill. 517.

[99] Kerrigan *v.* Ray, 10 How. Pr. Rep. 213. When the declaration was for two bay horses, and the proof showed that the one was a sorrel, the variance was fatal. Taylor *v.* Riddle 35 Ill. 567. See Root *v.* Woodruff, 6 Hill. (N. Y.) 418.

[100] Sanger *v.* Kinkade, 16 Ill. 44.

[101] Root *v.* Woodruff, 6 Hill, (N. Y.) 418; Gillies *v.* Wofford, 26 Tex. 76; Ward *v.* Masterson, 10 Kan. 78; Woodruff *v.* Cook, 25 Barb. 505.

[102] Chicago & S. W. Ry. Co. *v.* N. W. Packet Co., 38 Iowa, 377; Bailey

§ 681. **Averment of demand.** The declaration at common law need not aver a demand. In Wisconsin, it need not aver demand and refusal. Under a charge of wrongful detention, plaintiff may prove a demand and refusal, or such a taking as will obviate the necessity of a demand.[103] Local laws will control this question, and no general rule can be stated.

§ 682. **Must claim damages.** The declaration must claim damages. An omission in this respect is a defect which has been held fatal.[104] The general claim of damages at the conclusion of the declaration will be sufficient to entitle the party to all such damages as are the natural and immediate consequence of the defendant's acts, of which the declaration complains. Thus the plaintiff may prove any depreciation of the goods arising from any natural and expected causes, while they were in the defendant's hands.[105] Special damages must be specially claimed.[106] In an action to recover possession of a mare, the damage resulting from a loss of flesh, and detention during the breeding season, should be specially alleged.[107]

v. Ellis, 21 Ark. 489. But, see Tulley *v.* Harloe, 35 Cal. 306. The objection that the complaint does not allege the value is cured after verdict for damages for the detention. Bales *v.* Scott, 26 Ind. 202. See Hawkins *v.* Johnson, 3 Blackf. 46.

[103] Oleson *v.* Merrill, 20 Wis. 462. But in some States such averments are necessary. See Campbell *v.* Jones, 38 Cal. 507; Hurd *v.* Simonton, 10 Minn. 423.

[104] Faget *v.* Brayton, 2 H. & J. (Md.) 350.

[105] Young *v.* Willet, 8 Bosw. (N. Y.) 486.

[106] Damron *v.* Roach, 4 Humph. (Tenn.) 134.

[107] Stevenson *v.* Smith, 28 Cal. 102.

CHAPTER XXI.

PLEADING BY DEFENDANT.

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§ 683. **General rules; each defendant may plead separately.** The action of replevin is in the nature of a tort. The defendant, or if there be more than one, each may set up as many separate defenses as he judges necessary for his protection. It was said by the Supreme Court of Kentucky in 1838, that the defendant in replevin had no legal right to file more than one plea. Formerly special pleas were pleaded under leave of the court, but the leave was always granted as a matter of course; and now the defendant may, as a matter of right under the general rules of practice, plead as many separate proper defenses as are necessary.[1] Proof of one sufficient defense, without reference to the others, will constitute a bar to the action.[2] Where the action is against two, each may claim title to the property in himself,[3] or each and

[1] Gaines *v.* Tibbs, 6 Dana, 147.

[2] Rogers *v.* Arnold, 12 Wend. 34; Mt. Carbon, etc. *v.* Andrews, 53 Ill. 184; Amos *v.* Sinnott, 4 Scam. 441; Chambers *v.* Hunt, 18 N. J. 339. See and compare Gaines *v.* Tibbs, 6 Dana, (Ky.) 146; Holton *v.* Lewis, 1 McCord, (S. C.) 12; Knowles *v.* Lord, 4 Whart. (Pa.) 500.

[3] Boyd *v.* McAdams, 16 Ill. 146.

both may plead any proper matter without reference to the statement in the pleading of the other.[4] It should be observed that where there are two defendants, they must plead the same facts in justification, or they cannot have return. For example, if two defendants set up separate pleas justifying the taking and demanding a return, and they should both be true, the court could not adjudge a return, though each might plead *non cepit* to part of the justifying the taking, as to other different, separate parts, and have judgment for a return of that part. But if a joint return is wanted, the defendants must plead or avow the same facts in justification;[5] but upon a joint plea of property in one of two defendants, the return may be adjudged to both.[6]

§ 684. **Separate defenses.** It is not material that separate pleas should be consistent with each other; each one is regarded as a separate defense, in no way dependent upon any other, but each must be consistent with itself. Thus *non cepit*, which denies the taking, may be pleaded with an avowry which acknowledges and justifies the taking; or *non cepit* and plea of property in defendant, or in a stranger; or pleas of joint property in the plaintiff and the defendant, may, any of them, be joined with any or all of the others without objection, and the party pleading may prove any one of these defenses without the others.[7]

§ 685. **Plea of title; must show title when the suit began.** Pleas which set up title in the defendant, or which rely upon title in any other person than the plaintiff, must allege it as existing at the time suit was begun. A plea claiming title on a certain day before the commencement of the suit is bad.[8] The plea must also contain a direct and issuable statement of the facts on which the defendant relies. It must not state the evidence by which facts are proved. If the defendant relies on title, he must state that he is and was owner, not that he bought it.[9]

[4] Martin *v.* Ray, 1 Blackf. 291.

[5] Gaines *v.* Tibbs, 6 Dana, (Ky.) 144.

[6] White *v.* Lloyd, 3 Blackf. 390. Compare Gotloff *v.* Henry, 14 Ill. 384.

[7] Shuter *v.* Page, 11 Johns. 196; Simpson *v.* McFarland, 18 Pick. 432; Whitwell *v.* Wells, 24 Pick. 27; Parsley *v.* Huston, 3 Blackf. 348; Harwood *v.* Smethurst, 5 Dutch, (29 N. J.) 195; Edelen *v.* Thompson, 2 Har. & G. (Md.) 32.

[8] Patton *v.* Hammer, 28 Ala. 618.

[9] McTaggart *v.* Rose, 14 Ind. 230; Martin *v.* Watson, 8 Wis. 315; Robinson *v.* Calloway, 4 Ark. 101.

§ 686. **Plea to title, or right of possession.** Where the defendant desires to put the title in issue he must do so by plea of property in himself or in a stranger, accompanied by a traverse of the plaintiff's rights and a denial of the taking.[10] Under such pleas the defendant may prove title in himself, no matter how derived,[11] or anything that shows that at the time the suit was begun he had the right to possession as against the plaintiff.[12] Plea of property in defendant must be understood to be a claim to all the property, or entire property in the goods, and under such a plea proof of property in the defendant and another is not admissible.[13] When the plea averred that at the time of the supposed taking the defendant was, and now is, the lawful owner, denying the plaintiff's title, it was regarded in substance as an admission of the taking and detention, with an avowry of title in defendant.[14] But a plea of *non cepit*, as we shall see, admits the property to be in the plaintiff,[15] and denies the taking only.

§ 687. **Plea by an officer.** When an officer defends the seizure of goods by virtue of process it need not be set out, but must be pleaded with sufficient certainty to show that it authorized the seizure.[16] Where the officer justifies the seizure of goods upon *fi. fa.*, he must produce a valid judgment as well as execution. The execution may be a defense to the officer when sued for trespass, but if he claim property in the goods as against a stranger he must produce a valid judgment in support of his execution.[17] But the prior possession of the officer under his writ may be sufficient to sustain trover or trespass against a stranger who takes the goods,[18] and upon the authority of this case a plea setting up his prior possession would be sufficient to entitle the sheriff to a return of the goods taken on execution without showing the judgment.[19] If the process be mesne, as, for example, an

[10] Mackinley *v.* M'Gregor, 3 Whart. 368; Rowland *v.* Mann, 6 Ired. (N. C.) 38.

[11] O'Connor *v.* Union Line, 31 Ill. 236.

[12] Dixon *v.* Thatcher, 14 Ark. 141; Van Namee *v.* Bradley, 69 Ill. 300.

[13] McIlvaine *v.* Holland, 5 Har. (Del.) 10.

[14] Chase *v.* Allen, 5 Allen, 599.

[15] Van Namee *v.* Bradley, 69 Ill. 300.

[16] Mt. Carbon, etc. *v.* Andrews, 53 Ill. 184.

[17] High *v.* Wilson, 2 Johns. 45. See and compare Holmes *v.* Nuncaster, 12 Johns. 395.

[18] Barker *v.* Miller, 6 Johns. 199.

[19] Thayer *v.* Hutchinson, 13 Vt. 503.

attachment, a plea setting up the writ will be sufficient without showing the grounds upon which it issued.[20] But it ought to aver a debt due from the defendant to the plaintiff.

§ 688. **Plea of property in defendant.** The defendant may always set up ownership of the property as a defense. The usual form of this plea is to deny the plaintiff's right to the property, and assert ownership and a right to possession in himself. If the defendant is successful upon this issue the judgment must be for a return of the goods, when they have been delivered to the plaintiff upon the writ, and for damages and costs.[21] The action, however, is a possessory one, and either party may claim and show a right to the possession at the time the suit was begun. Upon such showing he may recover even as against the owner.[22] An averment and proof of title, no matter how derived, will not constitute a defense where the plaintiff claims and shows himself entitled to possession.[23] Where there are two defendants and one of them owns, or has a right to possession of the property, they may so plead; and a judgment for a return will be sustained whether the other has any right or not.[24]

§ 689. **Property in third person.** Plea of property in a third person, a stranger to the suit, with a traverse of plaintiff's right, is always good.[25] This plea is permitted on the obvious principle that the plaintiff must show title or right of possession in himself. The burden of proof is on him, and the object of the plea is to show title out of the plaintiff. *Non cepit*, as we shall

[20] McGraw *v.* Welch, 2 Col. 288. See Mann *v.* Perkins, 4 Blackf. 271.

[21] Rogers *v.* Arnold, 12 Wend. 34; Quincy *v.* Hall, 1 Pick. 359.

[22] Darter *v.* Brown, 48 Ind. 395; Heeron *v.* Beckwith, 1 Wis. 20; Hunt *v.* Chambers, 1 Zab. (21 N. J.) 624; Seldner *v.* Smith, 40 Md. 603; Smith *v.* Williamson, 1 Har. & J. (Md.) 147.

[23] Corbitt *v.* Helsey, 15 Iowa, 296.

[24] White *v.* Lloyd, 3 Blackf. 390; Gotloff *v.* Henry, 14 Ill. 385; Waldman *v.* Broder, 10 Cal. 379.

[25] Hall *v.* Henline, 9 Ind. 256; Parker *v.* Mellor, 1 Ld. Raym. 217; Johnson *v.* Carnley, 6 Seld. (N. Y.) 576; McCurry *v.* Hooper, 12 Ala. 823; Ingraham *v.* Hammond, 1 Hill. 353; Harrison *v.* M'Intosh, 1 John. 380; Prosser *v.* Woodward, 21 Wend. 209; Schermerhorn *v.* Van Valkenburgh, 11 Johns. 529; Martin *v.* Ray, 1 Blackf. (Ind.) 292; Noble *v.* Epperly, 6 Ind. 415; Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44; Shuter *v.* Page, 11 John. 196; Marsh *v.* Pier, 4 Rawle, 283; Cullum *v.* Bevans, 6 Har. & J. (Md.) 469; Thompson *v.* Sweetser, 43 Ind. 312; Loomis *v.* Youle, 1 Minn. 175; Scott *v.* Hughes, 9 B. Mon. (Ky.) 104.

see, admits the title to be in the plaintiff; it simply denies the taking, and to enable the defendant to contest the plaintiff's title, and ask a return of the goods, he must plead property in himself or some other person, and deny the plaintiff's right as well to property as to possession. The traverse or denial of the plaintiff's right is the material part of the plea; the allegation of title in another is merely inducement.[26]

§ 690. **Form of the plea; does not admit the taking.** This plea must aver the goods to be the property of some third person, who must be named;[27] or, perhaps it may be in a fictitious person,[28] and should contain traverse or denial of the plaintiff's right, which is the material part of the plea. The plaintiff would not be permitted to reply, denying the property in such third person, as that would present an immaterial issue. This plea, even alone, does not amount to an admission of the taking, nor does it shift the burden of proof to the defendant. It denies that the plaintiff had the right to deliverance, and upon this issue the burden of proof is upon the plaintiff.[29] But if the plaintiff show, under such plea, that the defendant had possession of his property, the burden of proof would be shifted on the defendant to show how he came by it.[30] If the plea merely assert title in a stranger, without a traverse of the plaintiff's right, the burden of proof would be on the defendant to show the title as pleaded.

§ 691. **The same.** Where the defendant pleads property in a third person named, he cannot, upon the trial, be permitted to show title in another person not named. He has no right to mislead the plaintiff by pleading one state of facts and attempting to prove another.[31] It is not necessary that such third person should be a party to the suit;[32] and neither the plea nor the finding thereon binds the third party, unless he is in some way connected with the party filing it.[33]

[26] Rogers *v.* Arnold, 12 Wend. 33; Chambers *v.* Hunt, 18 N. J. L. 339; Chambers *v.* Hunt, 22 N. J. L. 553; Van Namee *v.* Bradley, 69 Ill. 300.

[27] Anstice *v.* Holmes, 3 Denio, 244.

[28] Anderson *v.* Dunn, 19 Ark. 650.

[29] Crosse *v.* Bilson, 2 Ld. Raym. 1016; Marsh *v.* Pier, 4 Rawle, 282; MacKinley *v.* M'Gregor, 3 Whart. 368; Gentry *v.* Bargis, 6 Blackf. 262; Johnson *v.* Plowman, 49 Barb. 472.

[30] Morris *v.* Danielson, 3 Hill, 168.

[31] McClung *v.* Bergfeld, 4 Minn. 148.

[32] Thompson *v.* Sweetser, 43 Ind. 312.

[33] Edwards *v.* McCurdy, 13 Ill. 496.

§ 692. **The same. Right of defendant to a return under this plea.** Upon the sufficiency of this plea as a defense no question has ever been raised. But as to whether proof of property in a third person in no way connected with the suit will entitle the defendant to judgment for a return of the goods, without connecting himself with the title of such third person, is a question upon which the cases differ. Many of them hold that the defendant may plead property in a stranger to the suit, and upon this plea may have return of the goods without connecting himself with the title of such stranger. The defendant, it is said, ought to have return, because the possession was illegally taken from him.[34] Upon a plea in abatement sustained, the action is suspended for the time. A plea in bar, if successful, destroys the action.[35] It must also be observed that upon judgment on a plea in abatement that the writ be quashed, the return of the goods does not necessarily follow. Return, in fact, is not ordered unless the defendant show that the goods were delivered to the plaintiff on the writ, and that they ought to be returned; and by the old authorities it seems that there is no reason why the defendant cannot assert title in himself and ask return in a plea in abatement.[36]

[34] Parker *v.* Mellor, 1 Ld. Raym. 217; Salkold *v.* Skelton, Cro. Jac. 519; Wildman *v.* North, 2 Lev. 92; Pressgrove *v.* Saunders, 6 Mod. 81; Pressgrave *v.* Saunders, 2 Ld. Raym. 984; Crosse *v.* Bilson, 2 Ld. Raym. 1016. And this rule has been followed in a number of modern cases. Harrison *v.* McIntosh, 1 John. 384; Walpole *v.* Smith, 4 Blackf. 305. "It is not necessary for the defendant, under this plea, to connect himself with the title of the stranger. It is enough for him that the plaintiff does not own it." Anderson *v.* Talcott, 1 Gilm. 371; Ingraham *v.* Hammond, 1 Hill. 353. Consult Constantine *v.* Foster, 57 Ill. 38; Gotloff *v.* Henry, 14 Ill. 384; Hunt *v.* Chambers, 1 Zab. 627; Noble *v.* Epperly, 6 Ind. 414; Prosser *v.* Woodward, 21 Wend. 205; Johnson *v.* Neale, 6 Allen, 228; Seibert *v.* M'Henry, 6 Watts. 303. "When any part of the goods belong to a third person, the defendant is entitled to a verdict for those goods or their value." Morss *v.* Stone, 5 Barb. 516; Snow *v.* Roy, 22 Wend. 602; Flnehout *v.* Crain, 4 Hill, 537; Seymour *v.* Billings, 12 Wend. 285; Williams *v.* Beede, 15 N. H. 485. Property in defendant, or in a third person, may be pleaded in bar or in abatement. Boles *v.* Witherall, 7 Mo. 162. Wilson *v.* Gray, 8 Watts. (Pa.) 35, and cases cited. But the plea in bar, and a defense under it, is the more common.

[35] Wallis *v.* Savil, Lutw. 16.

[36] Gilbert on Replevin, 126, citing many old cases.

§ 693. **Observations upon this rule.** But this cannot be said to be a general rule. A mere trespasser, or one who has obtained possession of goods by his own wrongful act, cannot set up the title of a stranger, and thereby obtain a return of goods wrongfully taken, without in some way connecting himself with the title of the stranger.[37]

§ 694. **The same.** This point was clearly stated by Scholfield, J., in a recent Illinois case: "The property, whether in the defendant or a third person, sufficient to sustain a defense, must be such as goes to destroy the interest of the plaintiff in the property in dispute, and which, if existing, would sustain the action; or, in other words, such as would defeat an action of trespass if brought for a wrongful taking, or trover if brought for a wrongful detention." As against a wrong-doer prior rightful possession is sufficient to enable the plaintiff to maintain the action. If the right of the plaintiff is better than that of the defendant, whatever it may be with regard to the rest of the world, he will recover. If the action can be sustained by one whose title rests in the simple possession of the goods, unquestionably in similar cases the same title would justify a judgment in his favor for a return of the goods, where he occupied the position of defendant.[38] This decision is abundantly sustained by the authorities. It follows the leading cases wherever this question has raised,[39] and is in harmony with the rule in trover, which is in this respect substantially like replevin; the defendant, a wrong-doer, cannot set up title in a third person to defeat the plaintiff's suit, without connecting his title with that of the stranger.[40]

[37] Duncan *v.* Spear, 11 Wend. 54; Rogers *v.* Arnold, 12 Wend. 30; Brown *v.* Webster, 4 N. H. 500; Reed *v.* Reed, 13 Iowa, 5; Dozier *v.* Joyce, 8 Porter, (Ala.) 303; Stowell *v.* Otis, 71 N. Y. 36; Gerber *v.* Monie, 56 Barb. 652; Hoyt *v.* Van Alstyne, 15 Barb. 568. See Wilkerson *v.* McDougal, 48 Ala. 518.

[38] Van Namee *v.* Bradley, 69 Ill. 300, closely following Presgrave *v.* Saunders, 1 Salk. 5. Compare, on this point, Chambers *v.* Hunt, 22 N. J. L. 553.

[39] Rogers *v.* Arnold, 12 Wend. 37; Duncan *v.* Spear, 11 Wend. 54; Miller *v.* Jones, Admr. 26 Ala. 248; Gerber *v.* Monie, 56 Barb. 652; Hoyt *v.* Van Alstyne, 15 Barb. 568; Stowell *v.* Otis, 71 N. Y. 36.

[40] Dozier *v.* Joyce, 8 Porter, (Ala.) 315; O'Brien *v.* Hilburn, 22 Tex. 624; Schermerhorn *v.* Van Valkenburgh, 11 Johns. 529; Rotan *v.* Fletcher, 15 Johns. 208. But see Hurst *v.* Cook, 19 Wend. 463, examining all the early authorities, and holding that in trover plea of property in third person is bad.

§ 695. **The same. Illustrations.** In detinue, when the plaintiff has shown a prior possession and made out a *prima facie* case, the defendant cannot defeat his recovery by simply showing an outstanding title in a stranger, with which he in no way connects himself.[41] In some of the cases cited, the right to possession was alone put in issue. When the plaintiff claims possession, and the right of possession is alone put in issue, the defendant cannot show title in a third party, because that may be consistent with the plaintiff's right of possession. A stranger may have title, while the plaintiff may have the right to present possession.[42] The defendant cannot set up title in a third person who is shown to acquiesce in the plaintiff's claim.[43]

§ 696. **The traverse.** When the defendant pleads property in himself, or in a third person, the plea should contain a "traverse," as it is called.[44] This is simply a denial of the plaintiff's right. It puts him upon proof of his title; to sustain the issues tendered by this plea he is bound to prove his rights as alleged. The traverse, in fact, is the material part of the plea.[45] This plea should also contain a statement that the property is in the defendant, or in some third person named; this latter averment is regarded only as an inducement to the main issue, which is the denial of the plaintiff's right.[46] It is the denial of his right that the plaintiff must answer. He cannot be permitted to waive the denial of his own rights, contained in the plea, and content himself with a denial of the rights asserted by the defendant.[47]

[41] Sims *v.* Boynton, 32 Ala. 354; Lowremore *v.* Berry, 19 Ala. 130; McGuire *v.* Shelby, 20 Ala. 456; Harker *v.* Dement, 9 Gill. (Md.) 7.

[42] Reese *v.* Harris, 27 Ala. 301; Corbitt *v.* Helsey, 15 Iowa, 296.

[43] Frost *v.* Mott, 34 N. Y. 253.

[44] Rogers *v.* Arnold, 12 Wend. 34; Anstice *v.* Holmes, 3 Denio, 244; Pringle *v.* Phillips, 1 Sandf. 292; Prosser *v.* Woodward, 21 Wend. 208; Hunt *v.* Chambers, 1 Zab. (21 N. J.) 625; Robinson *v.* Calloway, 4 Ark. 101.

[45] Anderson *v.* Talcott, 1 Gilm. 371; Johnson *v.* Neale, 6 Allen, (Mass.) 228; Seibert *v.* McHenry, 6 Watts. (Pa.) 303; Hunt *v.* Chambers, 1 Zab. (21 N. J.) 627; Noble *v.* Epperly, 6 Ind. 414; Dickinson *v.* Lovell, 35 N. H. 9.

[46] Gotloff *v.* Henry, 14 Ill. 384; Anderson *v.* Talcott, 1 Gilm. 371; Chandler *v.* Lincoln, 52 Ill. 74; Landers *v.* George, 40 Ind. 160; Parsley *v.* Huston, 3 Blackf. 348; Gentry *v.* Bargis, 6 Blackf. 262; Robinson *v.* Calloway, 4 Ark. 101; Hunt *v.* Bennett, 4 G. Greene, (Ia.) 513.

[47] Robinson *v.* Calloway, 4 Ark. 101; Constantine *v.* Foster, 57 Ill.

§ 697. **Exceptions to this rule.** There are cases, however, which seem to hold that a plea denying the plaintiff's right may be good without a traverse.[48] Where a plea contains simply an affirmative allegation that the property is the property of the defendant, or a stranger to the suit, without a denial of the plaintiff's title, the burden of proof will be upon the defendant, who asserts the title;[49] and this is in harmony with the general rule of pleading in other cases. The burden of proof is on him who asserts or holds the affirmative of the issue, and if the defendant choose to assert title in himself, without denial of plaintiff's right, he may do so, at the risk of making out the title he asserts.[50]

§ 698. **Replication.** In a replication to plea of property in stranger, the plaintiff must simply reaffirm his own title; he is under no obligation to notice the inducement or introductory part of the plea, or the claim that the property belongs to the defendant.[51] Replication that the goods were delivered to plaintiff by A. for safe keeping, without alleging property in A., is not sufficient. The deposit may have been by one who had no authority or title.[52]

§ 699. **Surrender to a third party by order of court.** When, during the pendency of the action, and before trial, the defendant has been legally required to deliver the property in dispute to a third person, who is the owner as against both the parties to the suit, such delivery may be pleaded, and will constitute a good defense to the replevin suit. Thus, when the sheriff was sued, by an assignee of the debtor, for goods which he had attached, he filed answer that the assignment was made to hinder, delay and defraud creditors; that the debtor had been adjudged a bankrupt, and that the assignee in bankruptcy had demanded and taken the goods, such answer was regarded a sufficient defense

36; Chambers *v.* Hunt, 2 Zab. (22 N. J.) 552; Same *v.* Same, 18 N. J. L. 339; Brown *v.* Bissett, 1 Zab. 267; Reynolds *v.* McCormick, 62 Ill. 415; Richardson *v.* Smith, 29 Cal. 529.

[48] Johnson *v.* Neale, 6 Allen, 228; Whitwell *v.* Wells, 24 Pick. 25; Loveday *v.* Mitchell, Comyns, 248.

[49] Chandler *v.* Lincoln, 52 Ill. 76; Harwood *v.* Smethurst, 5 Dutch. (N. J.) 196.

[50] As to evidence to show property in a third person, see Edmunds *v.* Leavitt, 21 N. H. 198.

[51] Chambers v. Hunt, 2 Zab. (22 N. J. L.) 552.

[52] Harrison *v.* M'Intosh, 1 Johns. 384.

to the replevin suit.[53] This rule is based upon the idea that, pending the suit, the property is in the custody of the law, and the court has a right to make such disposal of it as it sees proper.

[53] Bolander *v.* Gentry, 36 Cal. 109; Hunt *v.* Robinson, 11 Cal. 262; Cole *v.* Conally, 16 Ala. 274; O'Connor *v.* Blake, 29 Cal. 313.

NOTE XXXI. *Pleadings. Declaration or Complaint, Generally.*— Whether the goods were unlawfully taken or unlawfully detained, the declaration may be the same, Riley *v.* Littlefield, 84 Mich. 22, 27 N. W. 576. It is enough to aver plaintiff's interest and right to possession, and the wrongful detention; it is not necessary to aver that the goods are exempt, though this is the ground of the action, Eikenbary *v.* Clifford, 34 Neb. 607, 52 N. W. 377. Need not allege that the goods were not taken under execution against plaintiff, Daniels *v.* Cole, 21 Neb. 156, 31 N. W. 491; but if the complaint make this averment and the fact is otherwise, the plaintiff will not be heard afterwards to say that the goods are exempt, Eikenbary *v.* Clifford, *supra.* Plaintiff relying upon a mortgage put out by defendant, is not required to set out facts which estop defendant from denying its genuineness, First National Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987. Need not aver that the goods were not taken for any tax, assessment or fine, Payne *v.* June, 92 Ind. 252. Under an averment of ownership generally the intervenor may prove that the contract under which plaintiff claims, was obtained by fraud, Woodbridge *v.* DeWitt, 51 Neb. 98, 70 N. W. 506. Partners, plaintiffs, need not aver compliance with the statute requiring an affidavit of the partnership names to be filed in a public office, even though the statute provide that those included in its requirements "shall not maintain any suit" without compliance, Swope *v.* Burnham, 6 Okla. 736, 52 Pac. 924. A married woman need not aver her coverture; if the fact appear at the trial she may prove that the goods came to her as a gift, and are her separate property, Shumway *v.* Leakey, 67 Calif. 458, 8 Pac. 12; but if she aver her coverture she must further aver all the facts necessary to entitle her to maintain the action, *Id.* An infant suing by next friend need not aver leave to sue in this manner, Wilkins *v.* Wilson, 1 Marv. 401, 41 Atl. 76. Conservator suing to recover the goods of his ward need not aver a judicial declaration of insanity, Hoke *v.* Applegate, 92 Ind. 570; but seeking to disaffirm an alleged gift by the ward, under which the defendant claims, he must aver that the lunatic has been judicially declared such, that plaintiff was duly appointed, and that the disability continues, *Id.* Complaint for a promissory note payable to a third person need not aver an assignment to the plaintiff, nor give the date nor the place of payment nor the rate of interest, Highnote *v.* White, 67 Ind. 596. The complaint must show expressly who is plaintiff and who is defendant, Wilhite *v.* Williams, 41 Kans. 288, 21 Pac. 256; must give the individual names of the partnership, or association suing, Heath *v.* Mor-

gan, 117 N. C. 505, 23 S. E. 489. The designation of parties by initials is irregular but amendable, Stever *v.* Brown, 119 Mich. 196, 77 N. W. 704. An averment that the plaintiff is executor of a deceased person, named, and as such is entitled to the goods with the addition of the word executor after plaintiff's name, does not present in issuable form the plaintiff's representative capacity, Taylor *v.* Jackson, 35 Misc. 300, 71 N. Y. Sup. 745.

Must Aver Title, and How.—In most jurisdictions a general averment of ownership entitles the plaintiff to show any right of property, general or special, which confers upon him the right of possession; Buck *v.* Young, 1 Ind. Ap. 558, 27 N. E. 1106; Cumbey *v.* Lovett, 76 Minn. 227, 79 N. W. 99; Goodman *v.* Sampliner, 23 Ind. Ap. 72, 54 N. E. 823; Tucker *v.* Parks, 7 Colo. 62, 1 Pac. 427; and it is said this is the better form of pleading, Summerville *v.* Stockton Co., 142 Calif. 529, 76 Pac. 243, *e. g.*, a chattel mortgage and breach of its conditions, Miller *v.* Adamson, 45 Minn. 99, 47 N. W. 452; Crocker *v.* Burns, 13 Colo. Ap. 54, 56 Pac. 199; that the goods were obtained by fraud, Desbecker *v.* McFarline, 42 Ap. Div. 455; 59 N. Y. Sup. 439, affirmed 166 N. Y. 625, 60 N. E. 1110; Pekin Plow Co. *v.* Wilson, 66 Neb. 115, 92 N. W. 176; Salisbury *v.* Barton, 63 Kans. 552, 66 Pac. 618; Samuels *v.* Burnham, 10 Kans. Ap. 574, 61 Pac. 755; Benesch *v.* Waggner, 12 Colo. 534, 21 Pac. 706; Amer *v.* Hightower, 70 Calif. 440, 11 Pac. 697; or that the person under whom defendant justifies obtained them by fraud upon the plaintiff, Phœnix Iron Works *v.* McEvony, 47 Neb. 228, 66 N. W. 290; that plaintiff is entitled to the goods by virtue of an assignment for creditors, Krug *v.* McGilliard, 76 Ind. 28; that a bill of sale by plaintiff to defendant was never delivered, and that defendant obtained possession by force and wrong, Grinnell *v.* Young, 41 Minn. 186, 42 N. W. 929; that a lien under which the defendant claims has been extinguished by a tender of the amount, Jones *v.* Rahilly, 16 Minn. 320; that the plaintiff holds a bill of lading for the goods by assignment of the consignee, as security for moneys advanced, Schmidt *v.* First National Bank, 10 Colo. Ap. 261, 50 Pac. 733; that plaintiff is mortgagee in possession, Falk *v.* DeCou, 8 Kans. Ap. 765, 61 Pac. 760; that goods taken under execution are exempt, Carlson *v.* Small, 32 Minn. 439, 21 N. W. 480; that plaintiff is the assignee of a contract of conditional sale, the conditions of which have been violated, Myres *v.* Yaple, 60 Mich. 339, 27 N. W. 536. And the plaintiff need not set up how he derives title, nor anticipate and avoid an attack upon his title, Furman *v.* Tenny, 28 Minn. 77, 9 N. W. 172; Need not set up the claims and pretenses of defendant, Burgwald *v.* Donelson, 2 Kans. Ap. 301, 43 Pac. 100. Averring a particular title he may prove different title, Deacon *v.* Powers, 57 Ind. 489; and averring a chattel mortgage he may prove this, though the complaint also alleges absolute ownership, Darnall *v.* Bennett, 98 Ia. 410, 67 N. W. 273; he may set out his title specially, Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142. Where the complaint contains the general allegation of title followed by a specific statement of facts constituting the title, the latter must con-

trol; and if such specific statement shows that plaintiff in fact has no title, the complaint is bad, Boesker *v.* Pickett, 81 Ind. 554. If the complaint attempts to set up and rely upon only a special ownership by virtue of a chattel mortgage, not averring by whom or to whom it was executed, it fails to show a cause of action, Elliott *v.* First National Bank, 30 Colo. 279, 70 Pac. 421. In such case the complaint must set forth the terms of the mortgage, and show that according to its terms the plaintiff at the institution of his suit was entitled to possession, Johnson *v.* Simpson, 77 Ind. 413. Where plaintiff relies upon a mortgage which recites a prior mortgage he need not aver satisfaction or release of such prior mortgage, Payne *v.* McCormick Co., 11 Okla. 318, 66 Pac. 287. And showing a bare right to possession the complaint is bad, Dillard *v.* McClure, 64 Mo. Ap. 488.

And if the complaint allege ownership generally, the plaintiff cannot show a mere lien; by asserting title, plaintiff waives his lien, Hudson *v.* Swan, 83 N. Y. 552; Scofield *v.* National Elevator Co., 64 Minn. 527, 67 N. W. 645. But in Nebraska, plaintiff declaring as general owner, cannot prove a special ownership, Randall *v.* Persons, 42 Neb. 608, 60 N. W. 898; Strahle *v.* First National Bank, 47 Neb. 319, 66 N. W. 415; Robinson *v.* Kilpatrick Co., 50 Neb. 795, 70 N. W. 378; and the complaint must show all the facts constituting the special title, Strahle *v.* First National Bank, *supra*, Griffing *v.* Curtis, 50 Neb. 334, 69 N. W. 968. Merely averring that plaintiff "has a special ownership" in the goods, is not sufficient, *Id.* Suckstorf *v.* Butterfield, 54 Neb. 757, 74 N. W. 1076; Paxton *v.* Learn, 55 Neb. 459, 75 N. W. 1096. An averment that the plaintiff is entitled to possession "by reason of a chattel mortgage executed by one Baldwin," without any facts showing breach of conditions of the mortgage, or how plaintiff is entitled to possession, will not, even after verdict, suffice, Norcross *v.* Baldwin, 50 Neb. 885, 70 N. W. 511; and so in Washington, Kerron *v.* Northern Pac. Co., 1 Wash. 241, 24 Pac. 445; and in Kansas, Kennett *v.* Peters, 54 Kans. 119, 37 Pac. 999; and Kentucky, Cooper *v.* McKee, Ky., 89 S. W. 203; and Arkansas, Perry Co. Bank *v.* Rankin, 73 Ark. 589, 84 S. W. 725, 86 S. W. 279. And where the plaintiff counts expressly upon a lien or special property, he must show the amount for which the lien is asserted, Swope *v.* Burnham, 6 Okla. 736, 52 Pac. 924. But even under the rule in Nebraska, which it seems depends upon statute, a mortgagee who receives possession of the goods, at the execution of the mortgage, may recover them if tortiously taken without averring any breach of conditions in the mortgage, Meyer *v.* First National Bank, 63 Neb. 679, 88 N. W. 867.

In some courts it is held that plaintiff, seeking to recover goods, obtained from him by fraud, must aver the facts constituting the fraud; the averment that plaintiff is entitled to possession is, it is said, a mere conclusion of law, Payne *v.* Elliott, 54 Calif. 329. And so where goods are taken in execution and it is proposed to avoid the judgment, the facts constituting the invalidity must be set forth; a mere general

allegation that the judgment is void, is insufficient, Louisville Co. *v.* Payne, 103 Ind. 188, 2 N. E. 582.

The complaint must show title and the right to possession at the institution of the suit; to aver this as of an earlier date, will not suffice, Holly *v.* Heiskell, 112 Calif 174, 44 Pac. 466; Truman *v.* Young, 121 Calif. 490, 53 Pac. 1073; Kimball Co. *v.* Redfield, 33 Ore. 292, 54 Pac. 216; VanAlstine *v.* Wheeler, 135 Calif. 232, 67 Pac. 125. And the averment that the defendant "still unlawfully retains the possession," etc., does not cure this defect, *Id.*

In replevin for a dwelling house; a general averment that it is personalty is sufficient. Adams *v.* Tully, 164 Ind. 292, 73 N. E. 595.

Must show a Right to Possession.—The plaintiff must aver the right to immediate possession of the goods, Cameron *v.* Wentworth, 23 Mont. 70, 7 Pac. 648; Entsminger *v.* Jackson, 73 Ind. 144; may omit the word "immediate." Smith *v.* Wisconsin Co., 114 Wis. 151, 89 N. W. 829. If plaintiff relies upon a mortgage with the insecurity clause, he must aver that the mortgage debt has not been paid, Hudelson *v.* First National Bank, 51 Neb. 557, 71 N. W. 304; but otherwise if he shows that the goods have been attached on process against the mortgagor, Stevenson *v.* Lord, 15 Colo. 131, 25 Pac. 313; must show what promise or obligation the mortgage secures, and breach of the condition, or facts entitling plaintiff to possession, Thompson Co. *v.* Nicholls, 52 Neb. 312, 72 N. W. 217. The averment that the mortgage debt is due, where necessary, need not be in express terms; where it appears by the averments of the complaint, this is sufficient, Rodgers *v.* Graham, 36 Neb. 730, 55 N. W. 243. Where the action is founded on the breach of a covenant in the mortgage, to keep a strict account of sales, and render a statement on the first of each month and turn over the proceeds, etc., it need not be averred that any sales have been made nor moneys received, or that there was any surplus after the allowances permitted by the mortgage, Johnson *v.* Hillenbrand, 101 N. W. 33.

Must show a Wrongful Detention.—A mere averment of detention will not suffice, Stahl *v.* Chicago Co., 94 Wis. 315, 68 N. W. 954; Louisville Co. *v.* Payne, 103 Ind. 188, 2 N. E. 582. Demand and refusal need not be averred, Milligan *v.* Brooklyn Co., 34 Misc. 55, 68 N. Y. Sup. 744; nor the facts constituting a conversion; it is sufficient to aver the ultimate fact and not the evidence of it, *Id.* Kuhn *v.* McAllister, 1 Utah 273, 96 U. S. 87, 24 L. Ed. 615. But see Frischman *v.* Mandel, 26 Misc. 820, 56 N. Y. Sup. 1029. An allegation that the defendant, a sheriff, seized the goods under execution against a third person and that such third person obtained the goods of the plaintiff by fraud, is sufficient as to this, Desbecker *v.* McFarline, 42 Ap. Div. 455, 59 N. Y. Sup. 439, affirmed, 166 N. Y. 625, 60 N. E. 1110. It is not necessary to aver the taking of the goods; allegation of an unlawful detention, suffices, Hale *v.* Wigton, 20 Neb. 83, 29 N. W. 177. But the averment of an unlawful taking will not impair the jurisdiction of the court, where an unlawful detention is also averred, even although the unlawful taking

appears to have been in another jurisdiction than that in which the suit was commenced, Nebeker *v.* Harvey, 21 Utah, 363, 60 Pac. 1029.

Joinder of Counts.—It seems that in Texas a count in replevin may be united with a count for damages, and a count for the conversion of other goods, Wooley *v.* Bell, Tex. Civ. Ap. 68, S. W. 71.

Allegations as to Value.—The complaint need not state the separate value of the separate articles, Byrne *v.* Lynn, 18 Tex. Civ. Ap. 252, 44 S. W. 311, 544; but on motion, plaintiff may be required to value each article separately, Hall *v.* Law Guarantee Co., 22 Wash. 305, 60 Pac. 643, There is no occasion to aver the value of the goods, as the basis of the liability of the sureties in the bond, McLeod Co. *v.* Craig, Tex. Civ. Ap. 43 S. W. 934.

Damages.—The *ad damnum* need not cover the value of the goods, but only the damages for detention, Younglove *v.* Knox, 44 Fla. 743. 33 So. 427. Special damages from injury to the goods while in defendant's possession, must be expressly averred, Rosecrans *v.* Asay, 49 Neb. 512, 68 N. W. 627. An averment that while the goods were in defendant's possession they were "damaged and destroyed for the amount set opposite each article," followed by a list of the goods and an amount set opposite to each, is sufficient, after verdict, *Id.* A mere demand of judgment for the goods "with damages for their taking and detention," not setting forth any facts out of which damages could arise, except the taking and detention, is not sufficient to entitle the defendant prevailing, to special damages, Shafer *v.* Russell, 28 Utah, 444, 79 Pac. 559.

Need not Conform to the Affidavit.—The complaint need not correspond with the affidavit, Moser *v.* Jenkins, 5 Ore. 447. The affidavit described "one frame building now in course of erection and the appurtenances belonging thereto." The complaint described "all the lumber and materials" on a certain lot. The court refused to strike it off, Waters *v.* Reuber, 16 Neb. 99, 19 N. W. 687.

Prayer.—Where the statute prescribes that judgment shall be given in the alternative for the goods or their value, the plaintiff need not in his complaint demand judgment for the value, Chase County Bank *v.* Thompson, 54 Kans. 307, 38 Pac. 274. If the complaint be otherwise sufficient its effect is not impaired by an improper prayer for relief. If the defendants answer, any proper relief may be awarded, More *v.* Finger, 128 Calif. 313, 60 Pac. 933.

Verification.—Omission to verify complaint is not jurisdictional, the defect is waived where not assailed before judgment, Dorrington *v.* Meyer, 8 Neb. 213.

Plea or Answer, in General.—An answer purporting to go to the whole complaint, but in fact responding to a part only, is bad, Fisse *v.* Katzentine, 93 Ind. 490. An answer, which elsewhere than in the commencement, directs itself to a part only of the complaint and answers that part fully, is sufficient, Bowen *v.* Roach, 78 Ind 361. An answer directed to a particular paragraph of the complaint and averring that "whether the matters and things set forth therein are true

or false, defendant has no knowledge or information sufficient whereof to form a belief and he therefore denies the same," is sufficient, Seattle National Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763; distinguishing Collins *v.* Publishing Co., 1 Misc. 211, 20 N. Y. Sup. 892. A denial upon information and belief, is the proper form of denial where defendant has information inducing the belief that the complaint is untrue, but which information falls short of knowledge, Russell *v.* Admundson, 4 N. D. 112, 59 N. W. 477. A denial that plaintiff is the owner and averring that as to "whether he is entitled to possession defendant has not sufficient information or belief to enable him to answer, and on that ground denies the same," is sufficient to put in issue both the property and the right of possession, Cunningham *v.* Skinner, 65 Calif. 385, 4 Pac. 373. The answer need not aver continued right in defendant, down to the date of its interposition, Pico *v.* Pico, 56 Calif. 453. Inconsistent pleas may be pleaded, Holmes *v.* Tarble, 77 Ill. Ap. 114. Each plea must be complete in itself without reference to any other, Spahr *v.* Tartt, 23 Ills. Ap. 420. Property in a stranger is sufficient answer, Krewson *v.* Purdom, 13 Ore. 563, 11 Pac. 281. And a traverse of the plaintiff's property, is sufficient, Lamping *v.* Payne, 83 Ills. 463. And in Vermont, the general issue, Campbell *v.* Camp, 69 Vt. 97, 37 Atl. 238. *Non cepit* admits the plaintiff's title, Rowland *v.* Mann, 6 Ired. L. 38; and *non detinet*, Mattson *v.* Hanisch, 5 Ills. Ap. 102; Miller *v.* Gable, 30 Ills. Ap. 578. So the plea of not guilty, Stewart *v.* Mills, 18 Fla. 57. A disclaimer presents no issue, it is not even a traverse of the wrongful detention, Zeisler *v.* Bingman, 9 Kans. Ap. 447, 60 Pac. 657. In Connecticut by statute, if defendant would deny the detention he must file with his plea a disclaimer of title, McNamara *v.* Lyon, 69 Conn. 447, 37 Atl. 981. Where evidence of property in defendant may be received under a general denial, it is not error to strike out a special plea of property in defendant, Sparks *v.* Heritage, 45 Ind. 66.

Plea or Answer, in General.—An answer averring that the defendant purchased the goods of the plaintiff at a price named, and has paid for them accordingly, is a good defense, Baldwin *v.* Burrows, 95 Ind. 81. The answer may set up that plaintiff's only right is derived under a particular writing set forth, and if the writing confers no right the answer is sufficient. Dixon *v.* Duke, 85 Ind. 434.

General Denial.—Every defense is admissible under a general denial, White *v.* Gemeny, 47 Kans. 741, 28 Pac. 1011, 27 Am. St. 320; Street *v.* Morgan, 64 Kans. 85, 67 Pac. 448; Schulenberg *v.* Harriman, 21 Wall, (88 U. S.) 44, 22 L. Ed. 551; Livingston *v.* Moore, Neb., 89 N. W. 289; Randall *v.* Gross, Neb., 93 N. W. 223; Webster *v.* Brunswick Co., 37 Fla. 433, 20 So. 536.

The plea admits any evidence going to defeat plaintiff's claim, Jenkins *v.* Mitchell, 40 Neb. 664, 59 N. W. 90; Haas *v.* Altieri, 2 Misc. 252, 21 N. Y. Sup. 950; Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; *e. g.*, that the mortgage under which plaintiff claims was procured by fraud or mutual mistake, Plano Co. *v.* Daley, 6 N. D. 330, 70 N. W. 277; or want or failure of consideration, Aultman *v.* Stichler, 21 Neb. 72,

31 N. W. 242; Iowa Bank *v.* Frink, Neb., 92 N. W. 916; or duress in procuring such mortgage, *Id.;* or usury in the mortgage debt, Davis *v.* Culver, 58 Neb. 265, 78 N. W. 504; that such mortgage is for any reason invalid, Payne *v.* McCormick Co., 11 Okla. 318, 66 Pac. 287; that defendant had sold the goods to the plaintiff at a price to be fixed by a third person, plaintiff to pay defendant the difference between the mortgage debt and the valuation, and that after the appraisement was made plaintiff refused to comply with his agreement, Deford *v.* Hutchinson, 45 Kans. 318, 25 Pac. 641; a sale made by an agent of plaintiff, and subsequent ratification, Johnston *v.* Milwaukee Co., 49 Neb. 68, 68 N. W. 383; title in a stranger, Pitts Works *v.* Young, 6 S. D. 557, 62 N. W. 432; Griffin *v.* Long Island Co., 101 N. Y. 348, 4 N. E. 740; Kennett *v.* Fickel, 41 Kans. 211, 21 Pac. 93; Timp *v.* Dockham, 32 Wis. 146; though defendant does not connect himself with that title, Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275; that defendant is entitled to possession of the animals demanded, under contract with the plaintiff for the agistment thereof, which contract has not yet expired, Schrandt *v.* Young, 62 Neb. 255, 86 N. W. 1085; that defendant at the time the writ issued was entitled to a lien on the goods, Basset *v.* Haren, 61 Minn. 346, 63 N. W. 713; breach of a warranty under which a machine was purchased and waiver of a condition requiring notice of its unsatisfactory operation, Advance Co. *v.* Pierce, 74 Mo. Ap. 676; title in defendant, Timp *v.* Dockham, *supra;* a mortgage from the common source of title senior to the transfer under which plaintiff claims, Westbay *v.* Milligan, 74 Mo. Ap. 179; a partnership between plaintiff and defendant and that the goods are partnership property, Downtain *v.* Ray, Tex. Civ. Ap. 71 S. W. 758; the Statute of Frauds, Dixon *v.* Duke, 85 Ind. 434; VanDyke *v.* Clark, 64 Hun. 636, 19 N. Y. Sup. 650; that plaintiff's title originated in a mortgage executed by defendant and which, the defendant being illiterate, was falsely read to him, Plano Co. *v.* Person, 12 S. D. 448, 81 N. W. 897; Payne *v.* McCormick Co., *supra;* that an absolute bill of sale, relied upon by the plaintiff, was in fact given as security, Kerron *v.* Northern Pacific Co., 1 Wash. 241, 24 Pac. 445; fraud in the inception of the plaintiff's title, Woodbridge *v.* Dewitt, 51 Neb. 98, 70 N. W. 506; Mullen *v.* Noonan, 44 Minn. 541, 47 N. W. 164; or forgery, Gandy *v.* Pool, 14 Neb. 98, 15 N. W. 223; justification under process, Williams *v.* Eikenberry, 22 Neb. 210, 34 N. W. 373; Furman *v.* Tenny, 28 Minn. 77, S. C. *sub nom.*, Furman *v.* Furman, 9 N. W. 172; Best *v.* Stewart, 48 Neb. 860, 67 N. W. 881; that plaintiff's title is the result of a fraudulent conspiracy to cheat the creditors under an attachment in whose favor the defendant as an officer has seized the goods, Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57; justification under process against a third person, Young *v.* Glascock, 79 Mo. 574; Fruits *v.* Elmore, 8 Ind. Ap. 278, 34 N. E. 829; Connor *v.* Knott, 8 S. D. 304, 66 N. W. 461; Lane *v.* Sparks, 75 Ind. 278; levy under execution against a third person, and that an assignment for creditors by such third person under which the plaintiff claims, is fraudulent, Holmburg *v.* Dean, 21 Kans. 73, and see Bailey *v.* Swain, 45 O. St. 657; Merrill *v.* Wedgewood, 25 Neb.

283, 41 N. W. 149; a levy under process against H, and, plaintiff relying upon a purchase from H, that possession continued with H after the alleged sale, Feeney *v.* Howard, 79 Calif. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. 162; title to a moiety of the goods in a third person, execution against such third person directed to defendant as sheriff, and a levy thereunder, Branch *v.* Wiseman, 51 Ind. 1. An officer pleading a general denial with a special plea of justification will not be restricted to the matter specially pleaded, Horkey *v.* Kendall, 53 Neb. 522, 73 N. W. 953. And though the defendant plead fraud and fail in his proofs he may, under the general denial, rely upon the mistake or other matter of defense, Plano Co. *v.* Daly, 6 N. D. 330, 70 N. W. 277. Several cases limit the liberality of the defense in the general denial to the case in which the plaintiff's allegation of title is in general terms, Burchinell *v.* Butters, 7 Colo. Ap. 294, 43 Pac. 459; Basset *v.* Haren, 61 Minn. 346, 63 N. W. 713; Jones *v.* McQueen, 13 Utah, 178, 45 Pac. 202; Cumbey *v.* Lovett, 76 Minn. 227, 79 N. W. 99; Gallick *v.* Bordeaux, 22 Mont. 470, 56 Pac. 961; Kerron *v.* Northern Pacific Co., *supra*. In Gallick *v.* Bordeaux, *supra*, the court say there are reasons requiring that where the defendant would assail the transaction under which the plaintiff claims as fraudulent as against creditors of his vendor, the defendant should set up expressly the process under which he justifies; over-ruling Bickle *v.* Irvine, 9 Mont. 251. In Reed *v.* Reed, 13 Ia. 5, under a plea merely denying plaintiff's title, and averring right of possession in another, it was held that defendant could not be permitted to show that a receipt executed by himself to the plaintiff, agreeing to account to him for the goods, was deposited with a third person to be delivered only upon a condition never performed, and that the goods were the property of another. In Kerron *v.* Northern Pacific Co., *supra*, it was held that if the plaintiff set up in his complaint a bill of sale from defendant, the defendant, if he would make this defense, should plead expressly that the bill of sale was intended as security. Great liberality is allowed to the defense, under the general denial, Payne *v.* McCormick Co., 11 Okla. 318, 66 Pac. 287. It dispenses with an avowry or cognizance, D'Arcy *v.* Steuer, 179 Mass. 40, 60 N. E. 405. A special plea of property in defendant, pleaded in connection with plea of not guilty, may, where by statute the plea of not guilty puts in issue the right of possession, wrongful taking and detention, be stricken out on motion, Holliday *v.* McKinne, 22 Fla. 153. The rights of the parties may be fully shown and fully determined under a general denial, Cool *v.* Roche, 15 Neb. 24, 17 N. W. 119. In Vermont the plea of not guilty puts in issue the plaintiff's right to possession, the wrongful taking and the wrongful detention by defendant, Starkey *v.* Waite, 69 Vt. 193, 37 Atl. 292. In Michigan, under a statute that the plea of the general issue shall put in issue the detention, plaintiff's property, and plaintiff's right to possession, the defendant may show in justification a judgment and execution, and a levy thereunder upon the goods of the defendant therein, or that defendant holds the goods as administrator of a deceased person, Singer Co. *v.* Benjamin, 55 Mich. 330, 21 N. W. 358, 23 *Id.* 25. In Connecticut the defendant may

plead the general issue "with or without notice," as may be necessary. An officer may justify under this plea and the notice is liberally construed in favor of the pleader, Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57. It seems that independent of statute, the general issue admits evidence of property in the defendant or in a stranger, Smith *v.* Harris, 76 Ind. 104.

Plea in Abatement.—In Weber *v.* Henry, 16 Mich. 399, it was doubted whether a claim under levy of process from the Federal Court by an officer of that court should not be pleaded in abatement. Objections to the jurisdiction must be taken in the first instance, Buck *v.* Young, 1 Ind. Ap. 558, 27 N. E. 1106. Non-joinder of parties plaintiff must be pleaded in abatement, Bartlett *v.* Goodwin, 71 Me. 350. Where in the circuit court of the United States the action was brought by the assignee of the owner of goods taken for a tax levied under authority of the state a plea to the jurisdiction was entertained, Deshler *v.* Dodge, 16 How. 622, 14 L. Ed. 1084.

What must be Specially Pleaded. If the defendant would show that he came into possession of stolen goods innocently, he must plead it; the general denial only raises the question whether defendant's possession is lawful, Milligan *v.* Brooklyn Co., 34 Misc. 55, 68 N. Y. Sup. 744. If the complaint sets up as the basis of the plaintiff's right a bill of sale from the defendant, and the defendant contends that it was in fact a mortgage, he must plead it specially, Kerron *v.* Northern Pacific Co., 1 Wash, 241, 24 Pac. 445. If the defendant would deny that he was in possession of the goods at the institution of the action he must plead such denial, McLeod *v.* Johnson, 96 Me. 271, 52 Atl. 760; so of usury in the mortgage debt, for which the plaintiff has seized the goods, Burns *v.* Campbell, 71 Ala. 271; or fraud in the bill of sale through which the plaintiff claims, Burrows *v.* Waddell, 52 Ia. 195, 3 N. W. 37; or payments made by the defendant to plaintiff, in order to abate the judgment for the value, Simpson Co. *v.* Marshal, 5 S. D. 528, 59 N. W. 728; or a lien upon the goods, Guille *v.* Wing Fook, 13 Ore. 577, 11 Pac. 277. If mortgagee replevies from an officer, the latter, in order to show payment of the mortgage debt, must plead it affirmatively, Ament *v.* Greer, 37 Kans. 648, 16 Pac. 102. So if the defendant would protect himself by the judgment in a former action by a third person in which the plaintiff intervened, he must plead the record according to the fact; he must set up the suit, the plaintiff's intervention therein, and the judgment, Cavener *v.* Shinkle, 89 Ills. 161. And if an officer would justify under an attachment against a third person he must aver an indebtedness from the defendant in the attachment to the plaintiff therein, and show that the proceedings in that suit conformed to the statute, Jones *v.* McQueen, 13 Utah 178, 45 Pac. 202. And if he desires to show fraud in the transfer under which the plaintiff claims as an intervenor, he must plead such fraud, Burrows *v.* Waddell, *supra*. And if the officer in such case, justifying under process against A has levied upon goods in possession of B., an averment that B having obtained from A a bill of sale as security for a sum of money, used it fraudulently,

to gain a secret advantage over other creditors of A by claiming a larger amount than actually due, he must also aver a tender of the amount actually due prior to the levy, Wise *v.* Jefferis, 2 C. C. A. 432, 51 Fed. 641. The value of the goods and the damages alleged, are material allegations, and must be traversed by the answer, or defendant will be held to admit the same, Tucker *v.* Parks, 7 Colo. 62, 1 Pac. 427; but the admission of damages is construed to go no further than that plaintiff has sustained such damages as are consequential to the facts alleged, *Id.*

Demand of Return.—No judgment for return can be given unless the defendant by his answer demands a return, Summer *v.* Kelly, 38 S. C. 508, 17 S. E. 364; Aultman Co. *v.* O'Dowd, 73 Minn. 58, 75 N. W. 756; Bown *v.* Weppner, 62 Hun, 579, 17 N. Y. Sup. 193; Banning *v.* Marleau, 101 Calif. 238, 35 Pac. 772. *Contra*, Carrier *v.* Carrier, 71 Wis. 111, 36 N. W. 626; Harvey *v.* Ivory, 35 Wash. 397, 77 Pac. 725; Ulrich *v.* McConaughey, 63 Neb. 10, 88 N. W. 150.

Joinder of Defenses.—Defendant pleading fraud specially with a general denial and failing under the special plea, may, under the general denial rely upon mistake or other defense, Plano Co. *v.* Daly, 6 N. D. 330, 70 N. W. 277. Whatever is admitted in a special defense operates so far, as a modification of the general denial, Meixell *v.* Kirkpatrick, 33 Kans. 282, 6 Pac. 241. But this proposition seems inadmissible where inconsistent defenses are allowed.

Reply.—The answer of property in a third person only controls the allegation of plaintiff's ownership; it is not new matter within the meaning of the code, and requires no reply, Krewson *v.* Purdom, 13 Ore. 563, 11 Pac. 281. Defendant answered in (1) a general denial, and (2) that he was sheriff, etc., and seized the goods under execution against defendant, No reply to the latter allegation was required, White *v.* Gemeny, 47 Kans. 741, 28 Pac. 1011, 27 Am. St. 320; Street *v.* Morgan, 64 Kans. 85, 883, 67 Pac. 448, 1133. The answer denied paintiff's title and right of possession, and averred that one Van Waters was formerly owner and had sold to defendant. The latter allegation is not new matter and requires no reply, Williams *v.* Matthews, 30 Minn. 131, 14 N. W. 577. The defendant justified under an execution issued upon a judgment which was described; the reply denied "that there was any judgment at or before the execution issued or at any time since." Held sufficient to entitle the plaintiff to assail the judgment, Balm *v.* Nunn, 63 Ia. 641, 19 N. W. 810.

Change of Issues by Agreement.—The parties may change the issues by agreement, Bassett *v.* Haren, 61 Minn. 346, 63 N. W. 713. A stipulation that under a plea of the general issue any legal defense may be shown, is effectual, Robinson *v.* Hardy, 22 Ills. Ap. 512. In Maryland Co. *v.* Dalrymple, 25 Md. 242, the stipulation of counsel that plaintiff should be "considered as having amended his declaration," by adding such counts in tort as the evidence at the trial would justify, "with the same agreement as to pleas and replications," all errors in pleadings on both sides released,—was acted upon as an effectual amend-

ment. If the plaintiff try the case upon the theory that the right of possession is in issue he is bound by this concession upon appeal, Hall *v.* Southern Pacific Co., 6 Ariz. 378, 57 Pac. 617. Where the plaintiff himself proves facts which preclude a recovery the defendant may have advantage of these facts without pleading them, Esshom *v.* Watertown Co., 7 S. D. 74, 63 N. W. 229.

Construction.—All reasonable intendments should be made in favor of the plaintiff's pleading when first assailed after judgment, Merrill *v.* Equitable Co., 49 Neb. 198, 68 N. W. 365. Whatever is contained or recited in an exhibit attached to the complaint, is regarded as averred in the complaint, Wells *v.* Wilcox, 68 Ia. 708, 28 N. W. 29. The complaint alleged that plaintiff made his promissory note, describing it, for the accommodation of another, and delivered it to the payee solely for discount at a certain Bank, the proceeds to be applied to discharge other notes of said payee, endorsed by plaintiff for the accommodation of such payee; that discount thereof at said bank was refused, and that defendant without the knowledge of plaintiff or of payee of the note, wrongfully took, converted and "disposed of it" to his own use. It was held sufficient. Decker *v.* Matthews, 12 N. Y. 313. Allegations that defendant wrongfully took and detained the goods, and converted them to his own use "to plaintiff's damage, etc.," make an action of replevin ;the averment of conversion does not change the action to trover, Enos *v.* Bemis, 61 Wis. 656, 21 N. W. 812. Complaint averring that on a day named plaintiff "was the owner and entitled to possession of" the goods, and that on a day named "defendant wrongfully and by force came into possession," etc., in effect avers a taking from the plaintiff's possession, and is sufficient, Harris *v.* Smith, 132 Calif. 316, 64 Pac. 409. "The plaintiff as guardian is entitled to possession, etc.," sufficiently avers property in the lunatic or infant, Hoke *v.* Applegate, 92 Ind. 570. An averment that plaintiff who sues as guardian of a lunatic, "as guardian, etc., is entitled to possession, etc.," sufficiently states that the goods are the property of the lunatic, *Id.* "George W. Applegate, guardian of Joseph Stutsler, a person of unsound mind, complaining says," is not a sufficient averment that the lunatic has been so judicially declared, *Id.* A general allegation that plaintiff is "the owner of and entitled to immediate possession of," the goods and that "defendant unlawfully detains the same," is overcome by a specific statement and derivation of the right which shows that defendant's detention is lawful, Thieme *v.* Zumpe, 152 Ind. 359, 52 N. E. 449. An averment that plaintiffs at, etc., were the owners of the undivided two-thirds of certain premises by virtue of a certain testament described, that at the time of the death of the testator "there was and for many years had been deposited in the soil of said premises" certain earthenware, that defendant took the said earthenware and detained it, etc., not showing when, by whom or under what circumstances the deposit was made, nor but that the deposit was made by the defendant, nor but that, deposited by the owner of the soil, all knowledge of it had been lost to memory, is

vicious, Burdick *v.* Cheseborough, 94 Ap. Div. 532, 88 N. Y. Sup. 13. The complaint must show that plaintiff is entitled to possession; but this need not be by the use of these identical words. An averment that the defendants "wrongfully detained from the plaintiffs the following goods and chattels of the plaintiffs," describing them, sufficiently avers both ownership and plaintiff's right to possession. What is necessarily implied from the words used is as effectual as if expressed, Grever *v.* Taylor, 53 O. St. 621, 42 N. E. 829. A plea of property in the defendant is a denial of property in the plaintiff, Cooper *v.* Bakeman, 32 Me. 192. The complaint averring that on a day named, and at the county of the venue, the defendants "took and wrongfully detained from the plaintiff the following goods and chattels, the property of the plaintiff," describing them, "in which plaintiff claims the property and right to immediate possession," and averring demand and refusal, is sufficient, Towne *v.* Liedle, 10 S. D. 460, 74 N. W. 232. The complaint averring that plaintiff is the duly appointed administrator of E. M.; that at the time of her death said E. M. was the owner of certain promissory notes, describing them, that they are in possession of defendant, and have been ever since the death, etc., that plaintiff after his appointment as administrator, etc., demanded the said notes, and that defendant wrongfully detains the same, states a good cause of action against defendant, not as administrator in his own wrong, but in his individual capacity, McAfee *v.* Montgomery, 21 Ind. Ap. 196, 51 N. E. 957. Petition averring that plaintiffs are the owners of certain specific movables, that they are in possession of defendants, who unlawfully hold the same and refuse to deliver the same to petitioner, notwithstanding amicable demand, praying the writ of sequestration and citation to the defendants, and for judgment that the sheriff place defendants in possession, states a cause of action, Levert *v.* Hebert, 51 L. Ann. 222, 25 So. 118. Complaint demanding a promissory note executed by plaintiff to defendant, averred that "said note has been discharged by appellant by giving another note," which was described, "in lieu and place of and to discharge said note" first mentioned . . "which defendant now holds." Held insufficient for not showing an express agreement that the new note should discharge the old, nor that the new note was commercial paper, Combs *v.* Bays, 19 Ind. Ap. 263, 49 N. E. 358. No matter to what form of action, at common law, the language of the declaration is appropriate, the court will consider whether the facts stated entitle the plaintiff to any form of relief, legal or equitable, Kuhn *v.* McAllister, 1 Utah, 273, 96 U. S. 87, 24 L. Ed. 615. An answer that defendant purchased the goods for value without notice of plaintiff's claim, is bad for not showing when the purchase was made, nor that the vendor had title, Payne *v.* June, 92 Ind. 252. An answer that the goods "were not unlawfully detained by defendant nor was plaintiff entitled to the immediate possession thereof," is sufficient, Burlington Co. *v.* Young Bear, 17 Neb. 668, 24 N. W. 377.

A denial that plaintiffs are entitled to the goods "by virtue of any valid chattel mortgage executed by, etc.," is a mere negative pregnant,

and the execution of the mortgage set up in the complaint need not be proven, Sargent *v.* Chapman, 12 Colo. Ap. 529, 56 Pac. 194. An answer that "whether said warrant came to the hands of plaintiff as alleged" defendant has no knowledge, etc., is an admission that the warrant came to plaintiff's hands by some means, for the purposes alleged, Seattle Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763. A paragraph of the complaint alleged that desiring the collection of a certain warrant defendant forwarded and delivered to one Swartz "the said warrant", with an endorsement for collection for account of plaintiff. The answer as to this paragraph averred lack of knowledge or information sufficient to found a belief. It was not averred that the endorsement was made by the plaintiff, or that the endorsement was upon the warrant, when, as averred, Swartz delivered it to the defendant. Held that the fair effect of the denial was to put plaintiff to a proof of the facts entitling him to the warrant, *Id.* The answer claimed the moneys demanded in the complaint, as a gift from the ward represented by the plaintiff. A reply that the ward at the said time, etc., was "of unsound mind," not averring a judicial ascertainment of insanity, or the appointment of a guardian, or the continuance of the unsoundness of mind and a revocation by the guardian of the alleged gift, is insufficient, Hoke *v.* Applegate, *supra.* An affidavit subscribed by one as "president" of a corporation, alleging "that the corporation" had possession of certain books, that the same disappeared without *his* consent and that "he claims title to and possession thereof," Held, that the individual and not the corporation was the plaintiff, McEvoy *v.* Hussey, 64 Ga. 314. Answer of one defendant asserting title in another avails the latter, Carpenter *v.* Ingram, Ark. 91 S. W. 25.

Set-off and Counter-claim.—There are many cases which hold that a counter-claim or a plea of set-off is inadmissible in the action of replevin, Talbott *v.* Padgett, 30 S. C. 167, 8 S. E. 845; Kennett *v.* Fickel, 41 Kans. 211, 21 Pac. 93; Baldwin *v.* Burrows, 95 Ind. 81; Badham *v.* Brabham, 54 S. C. 400, 32 S. E. 444. In replevin for machinery purchased by defendant from plaintiff, it was held that the defendant could not set-off damages by delay in the delivery of the machinery; but the facts seem to show that the defendant had waived the delay, Frick Co. *v.* Stephens, 7 Kans. Ap. 745, 53 Pac. 378. In replevin by mortgagee against mortgageor, a counter-claim averred that the mortgage debt was for moneys advanced to enable defendant to stock and cultivate a plantation rented from plaintiff, and that plaintiff had maliciously intermeddled with the hands on the plantation, and induced them to demand an increase of wages, whereby defendant had been damaged in two thousand dollars, which, with payments and other matters of setoff averred in the preceding parts of the answer, was in full satisfaction. Held, not a proper counter-claim but a distinct cause of action for a malicious trespass, Hudson *v.* Snipes, 40 Ark. 75. Replevin for two horses; a counter claim for damages done by a stallion of the plaintiff running at large contrary to statute, is bad, for not averring that the

stallion was one of the animals demanded by the plaintiff, Roberts *v.* Johannas, 41 Wis. 616. In replevin by the assignee of chattel mortgage defendant cannot set up a counter-claim against the payee of the negotiable promissory note secured by the mortgage, National Bank *v.* Feeney, 9 S. D. 550, 70 N. W. 874. If the officer replevy and deliver to the plaintiff goods not named in the writ, defendant's only remedy is by separate action, Warren *v.* Leland, 2 Barb. 613. But it seems in such case, the facts being shown, the court should order a return of the goods; the court has plenary power to control its process, and to correct the mistakes and excesses of its officers. The defendant is not put to a separate action, Dewey *v.* Hastings, 79 Mich. 263, 44 N. W. 607. The defendant may under the ordinary code provision set up any equitable defense; but where he admits a chattel mortgage founded upon adequate consideration he cannot complain that the plaintiff under the powers of the mortgage has sold the goods, and cannot return them, and pray an account of their value and judgment for the balance, after deducting the mortgage debt, Schlessinger *v.* Cook, 9 Wyo. 256, 62 Pac. 152. And the defendant cannot counter-claim for damages arising from the taking under the writ, even though the answer avers that the taking was unlawful, Phipps *v.* Wilson, 125 N. C. 106, 34 S. E. 227; but see McIntire *v.* Eastman, *post.* In trover, for money taken by unlawful force, debts owing by plaintiff to defendant, cannot be set off, Murphey *v.* Virgin, 47 Neb. 692, 66 N. W. 652. But a statute prohibiting a counter-claim in replevin does not preclude the defendant from demanding return of the chattels, with damages for the detention, McIntire *v.* Eastman, 76 Ia. 455, 41 N. W. 162.

In other courts a more liberal rule is allowed, and it seems that the defendant may assert by way of counter-claim any cause of action arising out of, or intimately connected with, the same transaction under which plaintiff claims to be entitled to the goods, Wilson *v.* Hughes, 94 N. C. 182; *e. g.*, where the plaintiff claims under a chattel mortgage given for the price of the goods, defendant may counter-claim for a breach of warranty in the sale, Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53; and so by statute in Alabama, McDaniel *v.* Sullivan, Ala. 39 So. 355; or for defects in the machinery, which was sold under representation of perfect condition, Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980, see Jesse French Co. *v.* Bradley, 138 Ala. 177, 35 So. 44; for damages sustained by defendant by the failure of plaintiff to insure the machinery according to contract between them, Minneapolis Co. *v.* Darnall, 13 S. D. 279, 83 N. W. 266; or an indebtedness from the plaintiff to defendant, so as to show that nothing was in fact due on the mortgage, and this though the plaintiff held the mortgage as assignee, and the set-off was entirely disconnected with, and separate from the mortgage indebtedness, Davis *v.* Culver, 58 Neb. 265, 78 N. W. 504. A conditional vendor of machinery brought replevin; the defendant pleaded that by the failure of plaintiff to deliver the machinery within the time stipulated he had been damaged, etc., held, the counter-claim was properly pleaded, and the cause was transferred to the equity docket,

Ames Iron Works *v.* Rea, 56 Ark. 450, 19 S. W. 1063. In like case the defendant was allowed to counter-claim for damages sustained by the plaintiff's failure to deliver according to his contract, Simpson Co. *v.* Marshal, 5 S. D. 528, 59 N. W. 728. In replevin for a boat the defendant admitted plaintiff's title and pleaded that plaintiff had employed him for one year to have the care of the boat, and was indebted in a sum named for his wages and board promised; the counter-claim was held properly interposed, and a judgment for the defendant for the amount named, was affirmed, Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881. In replevin for a quantity of lumber the defendant was permitted to set up in defense a balance due him by a former owner for sawing the lumber, and his lien thereon for securing this balance, Holderman *v.* Manier, 104 Ind. 118. In Merchants Co. *v.* Kentucky Co., 16 C. C. A. 212, 69 Fed. 218, a plea of re-convention was received for damages sustained by defendant by reason of the violation of a contract, out of which the action originated. And where plaintiff counted upon a mortgage for the purchase money of the goods, the defendant alleging a new contract, and the violation thereof by the plaintiff, was allowed to recover the amount which he had already paid, Baldwin *v.* Dewitt, 19 Ky. L. Rep. 1248, 43 S. W. 246; and in like case, it is a good plea that by the allowance for usurious interest exacted by the plaintiff the debt is in fact discharged, Nunn *v.* Bird, 36 Ore. 515, 59 Pac. 808; and that defendant had conveyed lands to the plaintiff upon parol agreement to credit $500, as the value of the lands, upon the mortgage, Skow *v.* Locks, Neb. 91 N. W. 204. Senior mortgagee of lands seizes wood cut therefrom by the junior mortgagee, who brings replevin; defendant may, by way of counter-claim, assert the seniority of his mortgage, the insolvency of the mortgageor, the insufficiency of the security, and that plaintiff with notice of such insecurity, being in possession, cut the wood with the intent to impair and reduce defendant's security, Carpenter *v.* Manhattan Co., 93 N. Y. 552. In replevin for cattle the defendant was permitted to counter-claim for their care and sustenance, Dunham *v.* Dennis, 9 Ia. 543. In detinue to recover a horse defendant was permitted to plead a counter-claim to the effect that he had exchanged the horse for lands, upon the faith of defendant's representation that he was the owner of the lands, whereas, in fact, plaintiff had no title, and the plaintiff was insolvent, praying rescission, Walsh *v.* Hall, 66 N. C. 233. In replevin for cattle the plaintiff's complaint set up a chattel mortgage and default in its conditions; the defendant pleaded in counter-claim that he had been induced to purchase the cattle by fraudulent representations of the plaintiff; that the purchase was afterwards rescinded by mutual agreement, and the cattle returned to plaintiff, who had at a later date restored them to defendant under a new agreement, in effect, that defendant should dispose of them as the agent of plaintiff, that defendant kept and fed the cattle until taken by plaintiff, and had demanded the mortgage for cancellation. Prayer that the plaintiff be required to bring the note into court for cancellation. The court said that "no equity of defendant appertaining to

the property was pleaded in this part of the answer. It was therefore held properly stricken out, Anthony *v.* Carp, 90 Mo. Ap. 387, *sed quære.* Held, further, that the counter-claim for feeding the cattle, though a defense which might have been presented under the general denial, disclosed an interest in the property, which must be ascertained and determined, *Id.* But damages suffered by defendant by reason of the fraud of the plaintiff inducing defendant's purchase of the cattle, was held not a proper subject of counter-claim, Anthony *v.* Carp, *supra.*

In replevin for goods distrained for rent the tenant may set-off damages sustained by the failure to repair as covenanted in the lease, Murray *v.* Pennington, 3 Grat. 91; Bloodworth *v.* Stevens, 51 Miss. 475. If the plaintiff asserts a lien, anything that will defeat or discharge the lien, in any manner, may be interposed; and if plaintiff seeks damages for detention, whatever defenses will diminish or defeat the recovery, whether set-off or counter-claim or designated by other name, may be received, McCormick Co. *v.* Hill, 104 Mo. Ap. 544, 79 S. W. 745; and the counter-claim may be litigated, by consent of parties, even after the original action is dismissed, *Id.* See Wooley *v.* Bell, Tex. Civ. Ap. 68 S. W. 71; Carpenter *v.* Insurance Co., 93 N. Y. 553. In trover for exempt goods set-off is not allowed, Caldwell *v.* Ryan, Mo. Ap. 79 S. W. 743.

Amendments.—It is error to refuse leave to amend upon application seasonably made, Weich *v.* Milliken, 57 Neb. 86, 77 N. W. 363; Swope *v.* Burnham, 6 Okla. 736, 52 Pac. 924; even upon the trial, Tackaberry *v.* Gilmore, 57 Neb. 450, 78 N. W. 32. Plaintiff may be allowed to amend upon the trial so as to demand the value, Henderson *v.* Hart, 122 Calif. 332, 54 Pac. 1110; and as to the amount of the commodity demanded and the damages, if no surprise is occasioned to the defendant, Cain *v.* Cody, 29 Pac. 778; and so as to increase the allegation as to the value of the goods over three-fold, Leek *v.* Chesley, 98 Ia. 593, 67 N. W. 580; and by inserting specific articles not named in the original, Kirch *v.* Davies, 55 Wis. 287, 11 N. W. 689; so as to aver special ownership in lieu of a general ownership, Weich *v.* Milliken, *supra;* Tackaberry *v.* Gilmore, *supra;* even before a referee; and so as to demand damages for the taking or conversion, Riciotto *v.* Clement, 94 Calif. 105, 29 Pac. 414; National Co. *v.* Sheahan, 122 N. Y. 461, 25 N. E. 858. Misnomer of the parties may be amended, Stever *v.* Brown, 119 Mich. 196, 77 N. W. 704. An amendment may, where all parties to a transaction are present at the trial, be allowed so as to charge fraud therein, Kocher *v.* Palmetier, 112 Ia. 84, 83 N. W. 816: if all parties are present, Joyner *v.* Early, 139 N. C. 49, 51 S. E. 778; and where an intervenor has denied the plaintiff's title in general terms, he may upon an appeal amend his petition by alleging that the title was obtained by fraudulent misrepresentation, Woodbridge *v.* Dewitt, 51 Neb. 98, 70 N. W. 506. But it is error to allow plaintiff to strike from his complaint a portion of the goods claimed, where the defendant's answer avers that plaintiff has taken the goods under the replevin, and demands damages in respect thereof, Howell *v.* Foster, 65 Calif. 169, 3 Pac. 647. A refusal

to allow upon trial an amendment charging specific fraudulent representations, to induce plaintiff to part with his goods, where the original complaint charged only a false representation by the buyer, that he was solvent, is not error, Price Co. *v.* Rinear, 17 Wash. 95, 49 Pac. 223. Where the complaint is amended by the insertion of articles not claimed in the original and no answer is put into the amendment, there is no issue thereon, although the answer to the original, after certain admissions, among others "that plaintiff is the owner of the remainder of the property described in the complaint," denied all other averments except that of value, Kirch *v.* Davies, *supra*. No amendment can create a cause of action not existing at the date of the institution of the suit, Clemmons *v.* Gordon, 37 Misc. 835, 76 N. Y. Sup. 999. An action upon a replevy bond given in sequestration proceedings, cannot, after the sequestration proceedings are dismissed, be changed into an action for the conversion of the goods, Barrett *v.* Harbarn, 22 Tex. Civ. Ap. 207, 54 S. W. 644. But in Elder *v.* Greene, 34 S. C. 154, 13 S. E. 323, it was intimated that an action upon a replevin bond may be turned into an action of trespass. An amendment to the complaint, after verdict, so as to increase the allegation of value should not be permitted without granting a new trial, Younglove *v.* Knox, 44 Fla. 743, 33 So. 427. An amended petition relates to the commencement of the action; the goods need not be surrendered as a condition precedent to the right to amend, Pekin Co. *v.* Wilson, 66 Neb. 115, 92 N. W. 176. The court may impose reasonable conditions upon the right to amend; *e. g.*, that the party shall file the amendment within ten days and pay all costs, Bayless *v.* McFarland, 10 Okla. 747, 63 Pac. 859. Failure to comply with the order only deprives the party of the right to amend, it is error to order judgment of discontinuance, *Id.* But see Austin *v.* Wauful, 36 N. Y. St. 779, 13 N. Y. Sup. 184, where it was held that if plaintiff takes a continuance upon leave to amend his complaint within a limited time he waives error in the antecedent proceedings, and if he fail to comply with the rule his complaint may be dismissed. Defendant may amend so as to demand return of the goods, even after appeal and reversal, Banning *v.* Marleau, 101 Calif. 238, 35 Pac. 772; Aultman Co. *v.* O'Dowd, 73 Minn. 58, 75 N. W. 756. And where, after verdict, leave was applied for to amend in this respect and refused, and judgment given for the value, the Supreme Court treated the amendment as made, Young *v.* Glascock, 79 Mo. 574. Defendant may amend in this respect, even after reference, a trial had before the referee and judgment by him for return, Pico *v.* Pico, 56 Calif. 453—and defendant may amend by averring that the plaintiff took with knowledge of want of consideration in the chattel mortgage upon which he relies, Nunn *v.* Bird, 36 Ore. 515, 59 Pac. 808; and so as to allege the value of the goods, damages by the detention thereof, and so as to pray return and damages, McIntire *v.* Eastman, 76 Ia. 455, 41 N. W. 162; and so as to correct a mis-statement of the amount for which defendant claims a lien upon the goods, Barse Co. *v.* Adams, 2 Ind. T. 119, 48 S. W. 1023; and so as to aver that the goods were replevied

by the plaintiff after the institution of the action, Carroll *v.* Sprague, 59 Calif. 655. But after verdict for the defendant allowing him in the alternative, as the value of the goods, a sum in excess of what was claimed in his answer, he should not be allowed to amend the answer increasing the alleged value, without granting new trial, First National Bank *v.* Calkins, 16 S. D. 445, 93 N. W. 646. The answer of an intervenor may be amended, Hamilton *v.* Duty, 36 Ark. 474. Where the complaint counted for the taking and detention, without more, so far as appears, held proper to allow an amendment to the reply, showing that defendant as sheriff took the goods under an attachment against a third person, and that the suit in which the attachment issued had terminated in a judgment which had been fully satisfied before the institution of the replevin, Wise *v.* Jefferis, 2 C. C. A. 432, 51 Fed. 641.

Where the statute provides that if the goods be not taken or have been returned to the defendant for want of an undertaking, the action may proceed as one for damages, there is no requirement that the plaintiff in the contingency specified should amend his petition; the statute in effect accomplishes the amendment, Pugh *v.* Calloway, 10 O. St. 488; Young *v.* Glascock, *supra*. The court of review cannot order an amendment of the petition, Thompson Co. *v.* Nicholls, 52 Neb. 312, 72 N. W. 217. The allowance of an amendment will not be reviewed on appeal, unless manifest abuse of the discretionary power of the court is shown, Nunn *v.* Bird, 36 Ore. 515, 59 Pac. 808.

Supplemental Pleading.—Title to the increase of live-stock, born pending an action for the recovery of the dam, may be litigated in the same action by supplemental petition, Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11. In Morris *v.* Coburn, 71 Tex. 406, 9 S. W. 345, judgment was ordered for the value of the dam and the increase, without, so far as appears, any supplemental pleading. Replevin against the sheriff by A for goods levied upon under writs against B, it is not error to refuse a supplement complaint showing the taking under writs of attachment issued after the replevin of the goods at the suit of other creditors, Carroll *v.* Sprague, 59 Calif. 655.

Aider by Pleading Over.—The failure of the complaint to aver possession by defendant is cured by an answer alleging that defendant seized the goods as sheriff, etc., Garth *v.* Caldwell, 72 Mo. 622. The complaint averred that on a day named, prior to the institution of the suit, plaintiff was entitled to possession, not averring that he was still entitled; the answer denied that on the day named or at any time, plaintiff was entitled to possession, alleging that defendant is and at all times has been the owner and entitled to possession; held the answer cured the defects of the complaint, Flinn *v.* Ferry, 127 Calif. 648, 60 Pac. 434. Complaint not showing any title in the plaintiff, general or special, but merely the right to possession, the defendant's answer setting up the particulars of the plaintiff's claim cures the vice, Dillard *v.* McClure, 64 Mo. Ap. 488.

Aider by Verdict.—The failure of the complaint to aver expressly

a wrongful taking is cured by verdict, Roberts *v.* Porter, 78 Ind. 130. An answer which "admits" defendant's ownership, avers that he was unlawfully deprived of it, and demands judgment for return and damages for the detention, is sufficient after verdict, McIntire *v.* Eastman, 76 Ia. 455, 41 N. W. 162.

NOTE XXXII. *Evidence. Presumptions.*—Possession raises a presumption of title, Stevens *v.* Gordon, 87 Me. 564, 33 Atl. 27; Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528; Vinson *v.* Knight, 137 N. C. 408, 49 S. E. 891; but only as against one showing no better title, Stone *v.* McNealey, 59 Mo. Ap. 396. Title once shown is presumed to continue, McAfee *v.* Montgomery, 21 Ind. Ap. 196, 51 N. E. 957. If part of the goods of plaintiff are found in possession of defendant shortly after the loss thereof, the jury may infer that defendant found and appropriated all of them, Eddings *v.* Boner, 1 Ind. Ter. 173, 38 S. W. 1110. In the absence of evidence to the contrary it may be presumed that the goods are of the same value at the date of the trial as when replevied, Monday *v.* Vance, Tex. Civ. Ap., 51 S. W. 346. Acceptance of an assignment for creditors is presumed, Rowland *v.* Hewitt, 19 Ills. Ap. 450. Where the answer is not in the record, the court will, in support of the judgment against the sheriff, presume that he justified under process, Keane *v.* Munger, 52 Mo. Ap. 660. Where the goods are taken by the officer on the writ of replevin, the presumption is they were taken from the defendant, Pitts Works *v.* Young, 6 S. D. 557, 62 N. W. 432.

Burden of Proof.—Plaintiff has the burden of proving all the material allegations of his complaint, Wilhelm *v.* Scott, 14 Ind. Ap. 275, 40 N. E. 537, 42 N. E. 827;—his title, Cooper *v.* Bakeman, 32 Me. 192; Haveron *v.* Anderson, 3 N. D. 540, 58 N. W. 340; St. John *v.* Swanback, 39 Neb. 841, 58 N. W. 288. And it is not sufficient merely to establish facts which, if he were the owner, would entitle him to possession, Johnson *v.* Fraser, 2 Idaho, 404, 18 Pac. 48. That defendant founds his claim upon a charge of fraud in the transaction by which plaintiff's title is derived, does not change the rule, Love *v.* Hudson, 21 Tex. Civ. Ap. 377, 59 S. W. 1127. Plaintiff is required to show his right to possession; defendant is not required, in order to defeat the action, to show any interest in himself, Jenkins *v.* Mitchell, 40 Neb. 664, 59 N. W. 90. Plaintiff must identify the particular goods to which he is entitled, Schweinfurth *v.* Matson, 37 Ills. Ap. 62. He must show a wrongful detention by defendant, Morgan *v.* Jackson, 32 Ind. Ap. 169, 69 N. E. 410. Even though defendant has pleaded a lien in connection with the general denial, the burden still rests upon the plaintiff to prove that the detention is wrongful, Dodd *v.* Williams Smithson Co., 27 Wash. 89, 67 Pac. 352. One defendant pleaded that he was a partner with plaintiff, that the goods belonged to the firm, and that as a partner he sold them to his co-defendant. Held, this defense might have been made under the general issue, and the burden of proof remained with the plaintiff, Downtain *v.* Ray, 31 Tex. Civ. Ap. 298, 71 S. W. 758. Even though the defendant pleads an affirmative plea, it still devolves on the

plaintiff to establish his exclusive right, Jenkins *v.* Mitchell, *supra;* Johnston *v.* McCart, 24 Wash. 19, 63 Pac. 1121. Where plaintiff alleges fraud in the purchase of the goods, and defendant is a stranger to the transaction, (1), the plaintiff has the burden of proving the fraudulent intent of the original purchaser; (2), the defendant has then the burden of proving payment of a consideration; (3), the burden of proving notice of the fraud to defendant anterior to his purchase, then shifts to the plaintiff, Talcott *v.* Rose, Tex. Civ. Ap. 64 S. W. 1009; and see Hogan *v.* Detroit Co., Mich. 103, N. W. 543. Where plaintiff relies upon a sale from a former owner, under execution against whom the defendant has seized the goods, the burden is upon the plaintiff throughout; he must show a valid sale; the burden is not upon the defendant to prove it invalid, Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583. But see Williamson *v.* Finlayson, Fla., 38 So. 50. That plaintiff is the owner and defendant in possession may raise the inference that such possession is wrongful, but it does not change the burden of proof, Morgan *v.* Jackson, 32 Ind. Ap. 169, 69 N. E. 410. Plaintiff has the burden of proving the identity of the goods replevied with those described in the mortgage under which he claims, Boggs *v.* Stanky, 13 Neb. 400, 14 N. W. 392; Russell *v.* Amundson, 4 N. D. 112, 59 N. W. 477; Myers *v.* Van Norman, 87 Ills. Ap. 500; Truss *v.* Byers, 137 Ala. 509, 34 So. 616; Martin *v.* Le San, Iowa, 105 N. W. 996. Plaintiffs relied upon a chattel mortgage of an engine manufactured by them; the mortgage was executed in Wisconsin, the suit was brought in North Dakota; the defendant denied the allegations of the complaint "except that said engine is now in possession of defendant." Held, to put in issue, both the execution of the mortgage and the identity of the engine in defendant's possession with the engine described in the mortgage; and held there was no presumption of identity, Russell *v.* Amundson, *supra.* Mere identity in the color and age of animals in possession of defendants with those described in the mortgage, and the fact that defendant obtained them from the mortgagor, nearly three months after the mortgage was executed, is not sufficient, Kellogg *v.* Anderson, 40 Minn. 207, 41 N. W. 1045. Plaintiff claiming under a chattel mortgage not yet matured, and which provides that the mortgageor shall retain possession until default made in payment, or in other express conditions, has the burden of proving the violation of some of these conditions, *Id.* Defendant must recover on the strength of his own title; if he claims under a chattel mortgage he must show that the mortgageor had at least possession of the mortgage chattels at the date of the mortgage, Herman *v.* Kneipp, 59 Neb. 208, 80 N. W. 816. Where defendant pleads a chattel mortgage, and plaintiff replies accord and tender of satisfaction, he has the burden of proving his reply, Westover *v.* Van Doran, 29 Neb. 652, 46 N. W. 47. Defendant claiming under a chattel mortgage has the burden, of proving the identity of the mortgaged chattels with those claimed by the plaintiff, First National Bank *v.* Wood, 124 Mo. 72, 27 S. W. 554. Where defendant relies upon an estoppel he must prove the facts

raising the estoppel, Delaney *v.* Canning, 52 Wis. 266, 8 N. W. 897. If, the defense being non detention, it appears that defendant was in possession of the goods next previous to the institution of the suit, the burden is upon it to show that it had parted with such possession before the institution of the suit, Nichols *v.* Dodson Co., 85 Mo. Ap. 584. Where the evidence shows that defendant found a waist belt containing a sum of money, and that some of the money was afterwards found in possession of defendant, he has the burden of dispelling the inference that he obtained it all, Eddings *v.* Boner, 1 Ind. Ter. 173, 38 S. W. 1110. The intervenor has the burden of proving his rights as pleaded, Redman *v.* Ray, 123 N. C. 502, 31 S. E. 831. One who assails a transaction as fraudulent has the burden of proving the fraud, Foster *v.* Hall, 12 Pick. 89; Wyatt v. Freeman, 4 Colo. 14. Where goods have been obtained by fraud, or have been transferred when subject to some secret lien, or in violation of a trust upon which the property is held, and the party in possession defends as a bona fide purchaser, there is, as has been seen above, some discord in the authorities as to the question upon whom rests the burden of proving the circumstances of the second purchase. Upon sound principle it would seem that this burden ought to rest upon the one asserting the character of bona fide purchaser; (1), because, if the pleadings are properly framed the allegation of bona fide purchase comes from this party; and (2), especially because the matter is peculiarly within the knowledge of such party. And this seems to accord with the current of authority, Boone *v.* Chiles, 10 Pet. 177, 9 L. Ed. 388; Wyer *v.* Dorchester Bank, 11 Cush. 51; Barrett *v.* Warren, 3 Hill, 348; Thamling *v.* Duffey, 14 Mont. 567, 37 Pac. 363; Shirk *v.* Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. 150; Ulrich *v.* McConaughy, 63 Neb. 10, 88 N. W. 150; Heffley *v.* Hunger, 54 Neb. 776, 75 N. W. 53; Salisbury *v.* Barton, 63 Kans. 552, 66 Pac. 618; Keim *v.* Vette, 167 Mo. 389, 67 S. W. 223.

Many of these cases refer to the transfer of negotiable paper; but it would seem that in view of the policy of the law to give free currency to negotiable paper, the rule in relation to chattel property should be certainly not less strict than that which controls in the case of bills of exchange and promissory notes. But it was held in Singer Co *v.* Nash, 70 Vt. 434, 41 Atl. 429, that where an officer justifies under an attachment against a defendant who claims a secret lien, and which by the statute is subordinated only to claims of purchasers and creditors without notice, the officer has the burden of proving that the creditor whom he represents attached without notice of such lien; and in Hanchett *v.* Buckley, 27 Ills. Ap. 159, that where the pledgee of a warehouse receipt has advanced money upon the faith of the pledge, whoever would assail it for fraud in the purchase of the goods by the pledgor, has the burden of proving that the pledgee took with notice of such fraud. And in Brownell *v.* Twyman, 68 Ills. Ap. 67, that the burden of showing that a purchaser from the tenant took with notice of a lien for rents, is upon the landlord. And in Frischman *v.* Mandel, 26 Misc. 820, 56 N. Y. Sup. 1029, that where one was put in possession of goods

with authority to sell, replevin could not be maintained against one holding under him, without negative proof that such person was not a bona fide purchaser. And see Pritchard *v.* Hooker, Mo. Ap. 90, S. W. 415. One claiming that a chattel mortgage relied upon by his adversary is satisfied by damages sustained by breach of warranty upon sale of the mortgage goods has the burden of proving the amount of his damages, Aultman Co. *v.* Richardson, 21 Ind. Ap. 211, 52 N. E. 86. Where part of the goods are not exempt, the one claiming the exemption must show to what goods it extends, Hilman *v.* Brigham, 117 Ia. 70, 90 N. W. 491. Where the real controversy is whether defendant was entitled to apply the proceeds of mortgaged chattels to discharge a debt not named in the mortgage, so that the mortgage remains unsatisfied, the burden of proof as to this is on the defendant, First National Bank *v.* Parkhurst, 54 Kans. 155, 37 Pac. 1001. If, where defendant has justified the taking and detention of the goods, under a valid tax, plaintiff desires to proceed for an unlawful conversion by sale, the burden rests on him to show the unlawfulness of the officer's proceedings subsequent to the taking, Enos *v.* Bemis, 61 Wis. 656, 21 N. W. 812.

Competency and Relevancy.—The testimony is to be directed to the rights of the parties as they existed at the institution of the action, Fischer *v.* Burchall, 27 Neb. 245, 42 N. W. 1034, Evidence which is relevant to any one phase of the litigation, is admissible, Huthmacher *v.* Lowman, 66 Ills. Ap. 448. Where goods were deposited with defendant, and the question is with what authority and for what purpose, the defendant may show all his transactions and conversations bearing upon the subject. He may show an agreement that the goods should be sent to a particular firm in New York, and the letters received from that firm, Van Aukin *v.* O'Connor, 50 Mich. 374, 15 N. W. 516. Defendant, sued for certain stolen coupons, and who defended upon the ground that he received them from another merely for negotiation, and had paid to his principal the proceeds, without notice of the theft, produced a letter in which, as he testified, he received certain of the coupons. Held, that the letter was admissible without proof of the signature, Spooner *v.* Holmes, 102 Mass. 503. Plaintiff may put in evidence a bill of sale, between those not parties to the suit, under which he claims title to the goods, Beimuller *v.* Schneider, 62 Md. 547. Where usury by plaintiff is pleaded he may be interrogated as to the rate of interest usually charged in his business, Kreibohm *v.* Yancy, 154 Mo. 67, 55 S. W. 260. In determining the increase of live-stock, during a period, the average increase during the same years may be considered, Mann *v.* Arkansas Co., 24 Fed. 261. Replevin for wheat raised upon land formerly belonging to defendant, and to which plaintiff had acquired title by the foreclosure of a mortgage. The defendant was permitted to testify that there were original and renewal mortgages on the land; that plaintiff had enforced both, and by fraud had obtained judgments against him for double the amount due, that he had robbed defendant

of everything. Held erroneous and grossly prejudicial, Jordan *v.* Johnson, 1 Kans. Ap. 656, 42 Pac. 415.

Where the plaintiff claims under a mortgage, the mortgage is admissible, without any evidence of recording, the defendant not being shown to be either creditor, mortgagee or purchaser from the mortgageor, Fuller *v.* Brownell, 48 Neb. 145, 67 N. W. 6. Plaintiff claimed under a mortgage executed by Silver in the name of Silver & Smith. Held, a subsequent sale by Smith to Silver, of all interest in the firm property was admissible in behalf of plaintiff, *Id.*

In replevin for logs wrongfully cut, the defendant to shield himself from exemplary damages, may show that he claimed the land under a deed, in good faith. The deed, though subsequently annulled, is admissible on the question of good faith, Acree *v.* Bufford, 80 Miss. 565, 31 So. 898. The record of a decree awarding an injunction against a third person is admissible against defendant, who it is shown had been acting in concert with such third person in disturbing the plaintiff's possession of lands upon which the crops in controversy were grown, Hanlon *v.* Goodyear, 103 Mo. Ap. 416, 77 S. W. 481. Plaintiff claimed that the goods were forcibly taken from him; defendants, that they were delivered, pursuant to a sale. Evidence that at the same time defendants possessed themselves of other properties of plaintiff, is competent, upon the question of sale or no sale, Younglove *v.* Knox, 44 Fla. 743, 33 So. 427. In replevin for a mare, the plaintiff may testify that the mare has produced colts, that he owned them, had sold some of them, and had one taken in possession, and that defendant had never claimed them nor had possession of any of them—as tending to show title to the mare. Pacey *v.* Powell, 97 Ind. 371. Exchange of horses, with a warranty that the animal traded to plaintiff was gentle and a good driver; plaintiff sought to rescind the falsity of the warranty. held, that defendant might prove by one who came into possession of the animal a week after the attempted rescission, that he drove the animal and it was sound, gentle, and in every way within the warranty. Herzberg *v.* Sachse, 60 Md. 426. Where the question was as to the authenticity of certain marks upon a stock of goods, and whether these were the original cost marks, a witness of long experience as a merchant and who had made an invoice of the stock, was held competent to give his opinion upon this question. Sylvester *v.* Ammons, 126 Iowa, 140, 101 N. W. 782. It appearing that the marks were "fresh," it was held admissible to prove that the goods were old, *Id.* Also that the witness was competent to prove the difference between the amount of the invoice made by him and the wholesale price, *Id.* Marks upon logs habitually used by the owners for identification, may be referred to and testified of as evidence of ownership, though not shown to have been recorded in another state from which the logs escaped, as required by the statute of that state. St. Paul Co. *v.* Kemp, 103 N. W. 259. Evidence that plaintiff is in the habit of conducting business in a discreditable manner is incompetent, and ground for a new trial, Gumberg *v.* Goodstein, 95 Ap. Div. 101, 88 N. Y. Sup. 423. It seems incom-

petent to prove, *aliunde* a mortgage of cattle, that mortgagee, in the execution of the mortgage had not in mind the particular cattle demanded in replevin, First Natl. Bank *v.* Ragsdale, 171 Mo., 168, 71 S. W. 178. Plaintiff should not be permitted to put in evidence a mortgage executed by the defendant to a stranger, without proof of a superior lien in himself; or that the debt has been satisfied, or that the other things included in the mortgage were sufficient to satisfy it, Schnabel *v.* Thomas, 98 Mo. Ap. 197, 71 S. W. 1076. The officer's return of the writ is evidence, and as it seems the only competent evidence, as to which of two like bonds was given, in the particular cause, McManus *v.* Donohue, 175 Mass. 308, 56 N. E. 291. The officer's return, as to the things taken cannot be contradicted even by defendant, Rowell *v.* Klein, 44 Ind. 290. The officer should not be permitted to falsify his own return, Carraway *v.* Wallace, Miss. 17 So. 930. Where possession of the chattels at a day certain is the matter in issue, it is not competent for the witness to depose that the plaintiff had possession, Moore *v.* Shaw, 1 Kans. Ap. 103, 40 Pac. 929. "Have you parted with the title," is a question of law and improper to be propounded to plaintiff, Hopkins *v.* Davis, 23 App. Div. 235, 48 N. Y. Sup. 745. "Who was the owner of the property" not an improper question, Nelson *v.* McIntyre, 1 Ills. Ap. 603. A witness (party) should not be allowed to prepare in advance a schedule of the several articles replevied, setting down the value of each, and use that as testimony upon the trial to establish the value, Werner *v.* Graley, 54 Kans. 383, 38 Pac. 482. Nor to read from bills and books the cost in other cities of articles similar to those replevied. The question is the value at the place of the taking, Werner *v.* Graley, *supra*. A mere offer to prove material facts, not specifying by whom, or by what kind of evidence, may properly be rejected, Malone *v.* Stickney, 88 Ind. 594. An objection to evidence offered that it is irrelevant, is sufficient, where the evidence goes to establish a defense not alleged, Baker *v.* McInturff, 49 Mo. Ap. 505. Witnesses are not permitted to testify to their motives, belief or intentions, McCormick *v.* Joseph, 77 Ala. 236. But one seeking to disaffirm a sale upon credit because obtained by a previous false statement of the purchaser, may testify that in the particular sale he relied upon the purchaser's statements, Grever *v.* Taylor, 53 O. St. 621, 42 N. E. 829. Defendant claiming to have purchased goods in reliance upon previous statements of plaintiff, as to the title, must prove as a fact that he relied upon such statements; and he may prove it by his own oath, Strasser *v.* Goldberg, 120 Wis. 621, 98 N. W. 554. Statute that "Parties * * * in whose behalf an action is prosecuted against an administrator upon a claim against the estate of decedent, as to any matter of fact occurring before the death of such deceased person," should not be witnesses. Where the plaintiff claimed as the lessor of decedent and the defendants as mortgagees of decedent, the administrator of the decedent being unnecessarily made a party, the court said the claim asserted was solely against the other defendants, that the question was

as to the right of possession, and the plaintiff was a competent witness in his own behalf, Cunningham *v.* Stoner, 10 Idaho, 549, 79 Pac. 228.

Negative testimony may be considered, where from the nature of things no other is attainable. Plaintiff's witnesses deposed that cattle of certain brands were seen at certain times and places; witnesses for defendant, who were at the places, at the times spoken of, saw no such cattle. Held, the testimony of the latter were entitled to equal consideration with the former, Mann *v.* Arkansas Co., 24 Fed. 261. A witness was asked whether any person had authority from him to sell any machinery, without having first submitted a written order, the purpose being to negative such authority; it was held competent, though calling for the conclusion of the witness; because "there is often no other way to prove a negative." Peerless Co. *v.* Gates, 61 Min. 124, 63 N. W. 260. Parol evidence is not admissible to show that a merchant had agreed to make advances to a planter in addition to those set down in the mortgage which is the ground of action. Carraway *v.* Wallace, Miss., 17 So. 930. Parol agreement may be proven by parol, though it involves the terms of a written document, not produced or accounted for, Peeples *v.* Warren, 51 S. C. 560, 29 S. E. 659. Notwithstanding a bill of items, showing a purchase, is transmitted by a wholesale merchant to a retail merchant, with each shipment, during a long course of dealing, it may be shown that the transaction was in fact a bailment for a sale on commission; but the evidence must clearly preponderate, Chapman *v.* Kerr, 80 Mo. 158.

In replevin for goods alleged to have been sold conditionally by a firm to which plaintiff had succeeded, the order book of the firm showing an entry which a member of the firm testified was copied from an order slip in his own handwriting, setting forth, under the name of defendant, a portion of the articles, and the words "on contract," is admissible, in connection with evidence, that on the plaintiff's books, these words always import a conditional sale, Norman Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499. No writing is necessary to effect the transfer of chattels, Biemuller *v.* Schneider, 62 Md. 547. Plaintiff claiming a stock of goods may put in evidence the last invoice taken, though more than a year old, accompanied by evidence of goods purchased since, and the amount of sales;—because this is the best evidence in the power of plaintiff. Grinnell *v.* Young, 41 Min. 186, 42 N. W. 929. Replevin, plaintiff claiming under a chattel mortgage executed by one F. A bill of sale by F. to defendant was held admissible evidence for the plaintiff, without any evidence of its acceptance by defendant; there being evidence of delivery to him, and no explanation being offered on his part, and there being attached an inventory of the goods signed by defendant. The bill of sale referring to the inventory, it became part of it, and the offer in evidence of the bill of sale merely, carries with it, into the case, the inventory. Knoche *v.* Perry, 90 Mo. Ap. 483. An inventory of the furniture of a hotel, verified by the one who made it as true and correct, may be received in evidence as part

of his testimony, though he is not able to enumerate the articles from recollection; so of a like inventory made by another, which the witness subsequently verified, Bourda *v.* Jones, 110 Wis. 52, 85 N. W. 671. When the statute provides for filing and recording of an inventory of a married woman's separate property, and declares such inventory *prima facie* evidence of the wife's title, the inventory must be admitted in evidence, when the goods are claimed by the wife, and are of the same general kind as a portion of what is in question. Evidence *aliunde* may be received to show the identity in fact, Shumway *v.* Leakey, 67 Calif. 458, 8 Pac. 12. Assessment lists made by the husband, without the wife's knowledge do not bind her; nor even if made with her knowledge, unless it appears she intended thereby to allow him to assert title, Stanfield *v.* Stiltz, 93 Ind. 249. The assessment roll showing that goods were assessed as the property of the husband is not competent as against the wife, in the absence of evidence showing knowledge on her part of such assessment. Shumway *v.* Leakey, 67 Calif. 458, 8 Pac. 12. The tax rolls of the city are not admissible to show that plaintiff was not in possession of so much money as he claimed to have paid for his purchase. Tuckwood *v.* Hanthorn, 67 Wis. 326, 30 N. W. 705. But his statements to the assessor are. *Id.*

Failure to return property for taxation is a circumstance to be considered, in determining whether the party so defaulting is the owner, Kastl *v.* Arthur, 135 Mich. 278, 97 N. W. 711. Assessment lists are competent to prove property in the thing listed, McAfee *v.* Montgomery, 21 Ind. Ap. 196, 51 N. E. 957, citing Painter *v.* Hall, 75 Ind. 208; Burket *v.* Pheister, 114 Ind. 503, 16 N. E. 813; Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811. But not to prove value, *Id.* citing Cincinnati Co. *v.* McDougall, 108 Ind. 179, 8 N. E. 571.—Not admissible to prove either title or value, Carper *v.* Risdon, 19 Colo. Ap. 530, 76 Pac. 744.

A party cannot put in his tax schedule, showing the listing of the goods for taxation. This would be to allow him to make his own declarations evidence in his own favor. Schenck *v.* Sithoff, 75 Ind. 485. Where a particular conveyance, or transfer, is assailed by a creditor, as fraudulent, he may prove other acts of fraud of the same grantor though not shown to be within the knowledge of the grantee in the particular conveyance assailed, Foster *v.* Hall, 12 Pick. 89. So where vendor seeks to rescind a sale for fraud of the purchaser, in the purchase, other acts of fraud which are shown to be part of a general scheme of fraud, are admissible, in evidence. Huthmacher *v.* Lowman, 66 Ills. Ap. 448. Not so as to disconnected frauds, Hanchett *v.* Riverdale Co., 15 Ills. Ap. 57. Where the plaintiff seeks to rescind a sale of goods on the ground of fraud, evidence tending to establish his complaint is admissible, though it may tend to convict defendant of another similar fraud, Parrish *v.* Thurston, 87 Ind. 437. Where frauds in the purchase of property is alleged, evidence of other like frauds, by the same parties, at or near the same time, is admissible. Lincoln *v.* Claflin, 7 Wall, 132, 19 L. Ed. 106. And declarations of each of several

parties, made while they are engaged in a common design are admissible against the other, *Id.*

Where fraud in a conveyance or transfer is alleged, the acts and declarations of the grantor, prior thereto, are admissible to show that the transaction was fraudulent as to him; such evidence however, does not prejudice the purchaser; knowledge on his part of such fraudulent intent of the bargainor must be proved by other evidence. Bridge *v.* Eggleston, 14 Mass. 245. The reports of a commercial agency, of statements made by a merchant, are not admissible to prove fraud in the subsequent purchase of goods by the merchant, upon credit. The person to whom the statement was made must be produced, Cowen *v.* Bloomberg, 66 N. J. L. 385, 49 Atl. 451. In an action to recover goods obtained by alleged fraudulent representations, statements made by the buyer to the agents of the commercial agencies, and which were forwarded to the agency, entered on their books and communicated to sellers, to govern them in their dealings, are admissible in connection with evidence of their falsity and with evidence that the goods were sold on the faith of these representations, Salisbury *v.* Barton, 63 Kans. 552, 66 Pac. 618. So, in the same case, held that statements made at another time by the buyers, though never coming to the knowledge of the sellers, were admissible to show the authenticity of the statements relied on by the sellers, *Id.*

Where a merchant to obtain goods upon credit makes a written statement of his assets and liabilities, he will not be allowed to testify that he did not think or intend to answer the questions as to his liability, and had not read, nor understood the writing, Gulledge *v.* Slayden, etc., Co., 75 Miss. 297, 22 So. 952.

Where defendant, justified under an attachment against the husband of plaintiff, plaintiff may on cross examination be interrogated as to where she obtained the means with which she purchased the goods, or the property traded for them, how she obtained such property so exchanged, and as to her own and her husband's means, as well as his liabilities, at the time of the alleged purchase, Marrinan *v.* Knight, 7 Okla. 419, 54 Pac. 656. The plaintiff claimed under a bill of sale by his son; the intervenor was the wife of the son; evidence that the bill of sale was not subscribed by the son in the presence of the attesting witness, that he never admitted the execution thereof, that the witness subscribed her name as a witness, at request of plaintiff, and that plaintiff paid nothing for the bill of sale, that plaintiff knew the son was about to desert his wife, and assisted him with the expenses of his journey, to another state, are circumstances proper for the consideration of the jury, Lawall *v.* Lawall, 150 Pa. St. 626, 24 Atl. 289. Replevin for goods alleged to have been obtained by fraudulent misrepresentations of the buyer's financial condition; an assignment executed by the defendant for the benefit of creditors, after his purchase of the goods in controversy, is admissible against him. Noble *v.* Worthy, 1 Ind. Ter. 458, 45 S. W. 137. In an action to recover goods purchased in fraud, the plaintiffs were permitted to show that the

defendants had over-reached and defrauded a former partner; to show transactions between defendants, entirely disconnected with the litigation, by which such third persons were swindled, and defrauded; that entries in defendant's books were fraudulently changed, after the books had passed to a receiver (who was defendant); that defendants had been charged with embezzling cotton receipts of farmers, their customers. Held all this was incompetent, and prejudicial, Levy *v.* Lee, 13 Tex. Civ. Ap. 510, 36 S. W. 309. That immediately after the purchase of the goods, the buyer threw them upon the market to be sold at auction, agreeing to pay double the ordinary commission, and with a probable loss of twenty-five per cent of the value, in consideration of receiving a considerable advance in cash, on account, from the auctioneer, is not admissible as evidence of fraud in the purchase, where the buyer had executed notes for the price secured by mortgage of lands, and there was no evidence that she was not the owner of the lands, or that they were not an ample security for the debt, Seldner *v.* Smith, 40 Md. 602.

Declarations made by the buyer are competent as against an officer representing his creditors, to prove fraud in his purchase, Sommer *v.* Adler, 36 Ap. Div. 107, 55 N. Y. Sup. 483. Defendant purchased goods on credit; replevin, alleging insolvency and intent not to pay for them; the value of the good will of defendant's business is admissible in the question of solvency. *Id.* Kelty assigned a stock of goods for the benefit of his creditors; the assignee sold them to Baehr; Baehr borrowed the amount paid from Soufflер and mortgaged the stock to secure it; he afterwards sold to the plaintiff; defendant levied upon the goods under execution against Kelty. Evidence was given that Baehr's purchase, and his sale to the plaintiff, was made in pursuance of an arrangement between Baehr, plaintiff and Kelty, that Kelty was to furnish the amount to be paid to the assignee, and have the stock as soon as the liens were discharged. Held evidence that Soufflers had full knowledge of this arrangement and that he lent the money really to Kelty, was competent, Gevers *v.* Farmer, 109 Ia. 468, 80 N. W. 535. When the defense is that plaintiff's title was a purchase in fraud of creditors of the seller, plaintiff may be asked if at the time of the purchase he knew that the agents through whom he purchased were in the business of buying bankrupts' stock, for the purpose of cheating their creditors. Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57.

And the agent may be asked in cross-examination if he had negotiated other similar purchases for plaintiff, *Id.* The examination of the debtor in insolvency, a year after the sale, is not admissible, as the declaration of a co-conspirator. Such declarations are admissible only while made in the course of the conspiracy, *Id.* But the record of the proceedings had in the insolvency of this debtor, in another state, than that of the trial, being properly authenticated under the Act of Congress are admissible, though a mere informal minute, largely in abbreviated form, is kept. *Id.* When the cross-examination of plaintiff raises the suspicion that the purchase under which he claims was

colorable, and that nothing was paid, he may testify as to where he obtained the money asserted to have been paid, Tuckwood *v.* Hanthorn, 67 Wis. 326, 30 N. W. 705. He may state the amount of the inventory made by him without producing it. *Id.* Where plaintiff claims the goods under purchase from one under an execution against whom defendant seized them, and the contention of defendant is that the sale to plaintiff was fraudulent, part of a note executed by the vendor to the plaintiff, surrendered at the time of the sale, and destroyed by vendor, and afterwards picked up by plaintiff, is admissible. So the fact that plaintiff after his purchase replenished the stock from time to time, Butler *v.* Howell, 15 Colo. 249, 25 Pac. 313. Goods were replevied from an officer who took them under attachment against a former owner. The plaintiff claimed under the same former owner by bill of sale anterior to the attachment. Held that the defendant showing a continued possession in the attachment, defendant might also show that the demands in the attachment writ, were for goods sold on the faith of such apparent ownership of the goods. Talcott *v.* Crippen, 52 Mich. 633, 18 N. W. 392. Where plaintiff's title is assailed, as in fraud of creditors, he may be cross-examined as to the whole transaction. Lillie *v.* McMillan, 52 Iowa, 463, 3 N. W. 601. And great latitude should be allowed in the cross-examination of all those participating. Lillie *v.* McMillan, *supra.* Wrongful and extravagant conduct of defendant in a former seizure of the goods is wholly irrelevant, and all testimony thereto should be excluded, Flinn *v.* Ferry, 127 Calif. 648, 60 Pac. 431. Plaintiff claimed a stock of goods as purchaser from one who purchased from an assignee for creditors, defendant under execution against the assignor in insolvency. Held that evidence that as to a portion of the stock it was carried away and secreted by the assignee, and added to the stock after the sale by the assignee, was material, both as disputing plaintiff's title, and upon the question of fraud in the transaction under which plaintiff claimed. Gevers *v.* Farmer, 109 Ia. 468, 80 N. W. 535. Evidence that the plaintiff, pending an action by creditor of a former owner of the goods under a judgment and execution in which action the defendant justified, employed attorneys to defend that action until a bill of sale from such former owner could be procured, that such attorneys did appear, and by sham and false pleas procured delay until the bill of sale relied upon was obtained, is material to show fraud in the bill of sale. Malone *v.* Stickney, 88 Ind. 594. When the value of wheat is in question it is proper to ask where was the usual market for wheat, Porter *v.* Chandler, 27 Minn. 301, 7 N. W. 142. An appraisement is not evidence of the value against one who is not a party to it, LaMotte *v.* Wisner, 51 Md. 543. Evidence as to what the property sold for may go to the jury upon the question of value, Story & Clark Co. *v.* Gibbons, 96 Mo. Ap. 218; what the goods sold for upon execution against the mortgageor, is of no relevancy in an action by mortgagee against the officer, Peckingbaugh *v.* Quillin, 12 Neb. 586, 12 N. W. 104. The price at which the goods are sold at public auction is evidence of value, Jacob *v.* Watkins, 3 Ap. Div.

422, 38 N. Y. Sup. 763; Stevens *v.* Springer, 23 Mo. Ap. 375; Miller *v.* Bryden, 34 Mo. Ap. 602; otherwise as to the price paid by the plaintiff a month before the trial, Ascher *v.* Schaeper, 25 Mo. Ap. 1. The value cannot be established by plaintiff's statement of the value to herself, Jacob *v.* Watkins, *supra*. The affidavit in replevin is not admissible, to establish the value of the goods replevied, in the action against the officer and his sureties for taking an insufficient bond, Love *v.* The People, 94 Ills. Ap. 237. Not necessary that a witness should be an expert to testify as to value of machinery; if he has some knowledge of the subject, and of the particular property, he is competent. The extent of his knowledge goes to his credit. Fox *v.* Cox, 20 Ind. Ap. 61, 50 N. E. 92. The plaintiff's affidavit may be referred to as evidence of the value of the goods, Lamy *v.* Remuson, 2 N. M. 245. The value of an animal a year previous to the institution of the suit is competent upon the question of value, Denton *v.* Smith, 61 Mich. 431, 28 N. W. 160. Admissions as to value in pleadings are conclusive, and if the pleadings are read to the jury, a formal offer of them is not required. Edwards *v.* Eveler, 84 Mo. Ap. 405. Where the answer admits the value it need not be proven, Best *v.* Stewart, 48 Neb. 860, 67 N. W. 881; Schmitt Co. *v.* Mahoney, 60 Neb. 20, 82 N. W. 99. In Adler & Sons Co. *v.* Thorp, 102 Wis. 70, 78 N. W. 184, the court refused to consider testimony that some suits and sizes out of a lot of clothing had been sold, sufficient to abate, in favor of plaintiffs, the valuation which they had placed upon the goods in both affidavit and complaint. When the goods have been replevied and delivered to plaintiff, the jury may in the absence of any evidence accept the statements of the complaint, as sufficient against the plaintiff upon the question of the value, even though traversed by defendant. North Star Co. *v.* Rinkey, 92 Min. 80, 99 N. W. 429. What is said by the parties to a sale at the time thereof, touching the transaction, and the amount paid, is part of the *res gestae*, and competent, even in favor of the one speaking, Fox *v.* Cox, 20 Ind. Ap. 61, 50 N. E. 92. Declarations of one in possession of goods at the time of exchanging them, are admissible to show that another was the owner, Mitchell *v.* Sims, 124 N. C. 411, 32 S. E. 735. The declarations of vendor or donor at the time of the sale, or gift, with reference to such sale or gift, are part of the *res gestae*. Gullett *v.* Otey, 19 Ills. Ap. 182. Declarations of one in possession of chattels are admissible to show the nature of such possession, and the title claimed; but where the issue is, who was the actual owner they are not admissible to support the title of the declarant. Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792. Declarations of vendor are not admissible as against a hostile claimant, to prove title; unless the adverse claimant was present, Gullett *v.* Otey, *supra*.

The declarations of one in possession of goods are not admissible to show title when the party against whom the testimony is offered does not claim under the declarant; nor to show how the declarant came into possession of the goods; nor to show title in another person,—in an action to which the declarant is not a party, Carroll *v.* Frank, 28 Mo. Ap. 69. The bond given by defendant to retain the goods, may be put

in evidence to show an admission of defendant that he had taken the goods, Cothran *v.* Knight, 45 S. C. 1, 22 S. E. 596. Controversy between landlord and a purchaser under the tenant, the landlord claiming a lien upon the goods for his rent, pursuant to statute. It being made to appear that the landlord consented to the removal of the goods from the premises, and so waived her lien, the affidavit in replevin filed by the other party, averring detention by the landlord, will not be received as an admission of the landlord's possession, so as to revive or support his lien, Brownell *v.* Twyman, 68 Ills. Ap. 67. The minutes of a corporation showing a contract made with Graham, to build certain railroad, providing the necessary rails and other material, and that the contract is still regarded by both parties as in force, is admissible against the corporation and in favor of a third person, upon the question whether certain rails belong to Graham or the Company, Coos Bay Co. *v.* Siglin, 34 Ore. 80, 53 Pac. 504. Admissions in a sworn answer filed in a different suit, between other parties plaintiff, and, as defendants, including the defendants in the replevin, are admissible to contradict the testimony of one of the defendants in the replevin suit, Younglove *v.* Knox, 44 Fla. 743, 33 So. 427. When the answer admits title in plaintiff upon a certain date, a bill of sale made by him prior to that date, is not admissible, Dillery *v.* Borwick, 36 Ore. 255, 59 Pac. 183. A forthcoming bond admits the identity of the goods replevied, with those claimed by plaintiff; and when plaintiff seeks to avoid a sale to a third person for his fraud, the bond admits the identity of the goods replevied, with the goods sold. Hochberger *v.* Baum, 85 N. Y. Sup. 385. Where the answer denies the allegation of ownership, a failure to deny other averments of the complaint showing in detail the basis of the plaintiff's ownership, is not an admission of such averments, Summerville *v.* Stockton Co., 142 Calif 529, 76 Pac. 243. Evidence as to a right asserted by a stranger, not claiming under the plaintiff, is not admissible, Kennett *v.* Fickel, 41 Kans. 211, 21 Pac. 93. The contention being that certain books, the things replevied, were partnership property, a paper in plaintiff's handwriting proposing the dissolution of the firm, and declaring that money owing by the firm "for books," should be assumed by the plaintiff, and which was presented by plaintiff to defendant, before the controversy arose, though not subscribed by plaintiff is admissible against him as tending to show the partnership, and that among its assets were books, Jenkins *v.* Mitchell, 40 Neb. 664, 59 N. W. 90.

So a mortgage by the firm upon a portion of the books, to secure a debt of the firm, *Id.* Declarations of one operating a mill that he has leased it, or is the owner of it, amount to an assertion of title to the stock on hand in the mill. So the causing of sacks for the product of the mill to be printed with his name; and instituting suits for the price of goods sold from the mill, are all relevant to the issue of property in such goods, Nodle *v.* Hawthorn, 107 Ia. 380, 77 N. W. 1062. Declarations of a deceased person while in possession of goods that he is the owner, though self serving, are admissible as part of the *res*

gestae, Cunningham *v.* Stoner, 10 Idaho, 549, 79 Pac. 228, citing McConnell *v.* Hannah, 96 Ind. 102; Reiley *v.* Haynes, 38 Kans. 259, 16 Pac. 440, 5 Am. St. Rep. 737.

Admissions of one while in possession of a store, as to the character of such possession, and that he holds for another, affect one who claims under him, though such statements are not conclusive. Miller *v.* Jones, 26 Ala. 247. Statements and admissions of an alleged fraudulent purchaser, made subsequent to his parting with the possession of the goods, are not admissible to show his insolvency at the date of his purchase, McCormick *v.* Joseph, 77 Ala. 237. Plaintiffs brought replevin against the sheriff, for goods obtained from them by K. by means of fraudulent representations. The sheriff held them under writs of attachment against K. The affidavits upon which these writs issued were held irrelevant to plaintiff's case, Price Co. *v.* Rinear, 17 Wash. 95, 49 Pac. 223. The brand upon an animal is *prima facie* evidence, that the animal is the property of the one in whose name the brand is recorded; but it is only *prima facie*, and may be overcome. Debord *v.* Johnson, 11 Colo. Ap. 402, 53 Pac. 255. Flesh marks upon animals may be proven, to identify the animal, and establish ownership, though not recorded brands. Turner *v.* The State, 39 Tex. Cr. Ap. 322, 45 S. W. 1020. A certificate of a brand recorded after the taking which is in question is not admissible in evidence of title, Turner *v.* The State, 39 Tex. Cr. Ap. 322, 45 S. W. 1020. An entry in the plaintiff's record, showing the purchase of the properties of a firm, to which the plaintiff, a corporation, claimed to have succeeded, is a mere recital of a past transaction, and not admissible to establish such transaction. Norman Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499. An affidavit filed in another suit by an agent of the same plaintiff is not admissible in plaintiff's behalf, Dobbins *v.* Hanchett, 20 Ills. Ap. 396. Plaintiff who has replevied and retained the goods, will not be permitted to show what became of them, there being no claim that defendant received any part of them. After suit, plaintiff cannot manufacture evidence as to his purposes in obtaining the goods. Gevers *v.* Farmer, 109 Ia. 468, 80 N. W. 535. The plaintiff having obtained the goods upon the writ of replevin, evidence as to what he has done with them is immaterial upon the trial, Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823. It seems it would be otherwise if fraud is charged in the plaintiff's acquisition of title, *Id.*

Variance.—Plaintiff declared as owner; justification under a writ against Neis, alleged to be the owner. Reply that Neis never was the owner. Held that plaintiff could not upon the trial prove a purchase from Neis, antedating the execution, without first amending his reply. Simonds *v.* Wrightman, 36 Ore. 120, 58 Pac. 1100. If plaintiff in the complaint allege ownership he cannot upon the trial show a mere lien, Hudson *v.* Swan, 83 N. Y. 552. Nor a holding in trust for another, Gevers *v.* Farmer, 109 Ia. 468, 80 N. W. 535. Answer admitting a bill of sale to the plaintiff, but charging fraud therein, upon the creditors of the vendor, the defendant may nevertheless prove that the instrument was intended as a security for money. Culver *v.* Randle, Ore.,

78 Pac. 394. A verdict that a defendant is the owner cannot be supported by evidence of a special interest, Schmitt Co. *v.* Mahoney, 60 Neb. 20, 82 N. W. 99. *Substance of the Issue.*—Plaintiff in an action against several, for a recovery of a promissory note obtained by them, as she alleges, from her husband, who held as her agent, fraudulently, and without consideration, alleged also a conspiracy among defendants to accomplish this wrong. Held that she was not required to prove the conspiracy. She might prove it without alleging it; and if the wrong was accomplished by defendants, she may recover, though there was no previous combination. More *v.* Finger, 128 Calif. 513, 60 Pac. 933; Kocher *v.* Palmetier, 112 Ia. 84, 83 N. W. 816. *Sufficiency of Evidence.*—Evidence that an article was formerly the property of plaintiff, that it had never been sold, loaned or exchanged, is not sufficient, when the defendant shows a purchase from a third person, whom he names, at a time when, according to plaintiff's records, it was still in their stock room. Wagner Co. *v.* Robinson, 84 N. Y. Sup. 281. A mortgage in writing is not to be overthrown as secured by fraudulent imposition, except by clear and strong proof. Jumiska *v.* Andrews, 87 Minn. 515, 92 N. W. 470. The circumstance that plaintiff in offering a quantity of hides, spoke of them as "our hides," where a third person was present, is not sufficient to warrant an inference of a partnership between the parties, Jacobson *v.* Poindexter, 42 Ark. 97. Claflin & Co., through Jordan, purchased the stock of Kantrowitz for $10,000; $3,765 of this was discharged by satisfaction of the indebtedness of Kantrowitz to that firm, the balance in cash; the purchase was made without investigation as to the value of the stock, and Claflin and Company immediately resold the stock to O'Brien, an employee of theirs, at an abatement of $500; this abatement was not shown to be made by reason of any observation by Claflin & Co. leading to the belief that the goods had been over-valued in their purchase. O'Brien obtained from the cashier of Claflin & Co. the $3,000 paid to the agent of that firm. The residue, $6,500, was represented by his note. O'Brien did not require the property for any special purpose; he made no inventory of it, and immediately sent it to an auction house for sale. Held that these circumstances warranted the inference that Claflin & Co. in their purchase were conscious that Kantrowitz was intending to defraud other creditors. Grossman *v.* Walters, 58 Hun. 603, 11 N. Y. Sup. 471. Trover for a draft. A witness deposed that he bought of defendant a draft upon an Irish bank, payable to plaintiff, and left it with defendants to be sent to Ireland. It was proven that the draft was sent to Ireland, was paid and returned to defendant. But plaintiff proved that the indorsement of his name was not in his handwriting. There was no proof as to the particular instructions given to defendant as to the transmission of the draft, or that defendant did comply with such instructions, nor that plaintiff did not in fact receive the money; nor but that plaintiff's name was indorsed by some other person at his request. Held the proof was not sufficient to charge defendants. Boyle *v.* Roche, 2 E. D. Sm. 335

Sales to neighbors and acquaintances of the operators in a stock, at prices ranging from fifty cents to one dollar per share, do not establish a market value—but rather transactions made in order to create an *apparent* value. Fitz *v.* Bynum, 55 Calif. 459. Defendants are not to be made liable in replevin by evidence that a wrongdoer in taking the goods, exhibited a mortgage to them, and declared he was acting for them. Duffus *v.* Schwinger, 79 Hun. 541, 29 N. Y. Sup. 930.

The jury are not bound to accept the testimony of any single witness, especially an interested witness, as against the effect of contradictory circumstances appearing in the evidence, Nicholson *v.* Dyer, 45 Mich. 610, 8 N. W. 515. There is nothing conclusive as to the title in the fact that the goods are in the hands of a common carrier consigned to the plaintiff, *Id.*

Jury Acting of their own Knowledge.—A jury may find the value of household goods, of their own knowledge, Sinamaker *v.* Rose, 62 Ills. Ap. 118.

CHAPTER XXII.

PLEA OF NON CEPIT AND NON DETINET.

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§ 700. **Plea of non cepit or non detinet.** By the common law, this action was for the purpose of recovering a distress, and the plaintiff always charges a wrongful taking and detaining. The general issue in such case was, "*non cepit*."[1] Strictly speaking, there is no general issue to the action as usually brought in modern practice; for the reason that the action in almost all cases involves title to the goods, or something more than a simple taking and detaining.[2] *Non cepit*, however, is unquestionably a good plea, and is the general issue when the charge is for a wrongful taking, only.[3] *Non detinet* is the general issue to a charge of

[1] Bac. Abr. title Replevin and Avowry; Vin. Abr.

[2] Dole v. Kennedy, 38 Ill. 284; Amos v. Shunott, 4 Scam. 445; Anderson v. Talcott, 1 Gilm. 371; Gibson v. Mozier, 9 Mo. 258. See Ashby v. West, 3 Porter, (Ind.) 170.

[3] In Massachusetts, special pleas in replevin were prohibited. All matters of defense were permitted under plea of not guilty. Miller v. Sleeper, 4 Cush. 370.

wrongful detention, but the plea of *non cepit* is no reply to any other charge than that of taking, and *non detinet* is not a proper plea to any charge except for the detention of the goods. These pleas are of the same substantial nature as the plea of not guilty, in trespass. Statutory provisions exist in some of the States by which *non cepit* or *non detinet* puts in issue all material facts, not only the taking and detention, but the right of property.[4] And these decisions will probably be followed in all States having similar statutes.[5]

§ 701. **Admissions in the pleadings not evidence as to matters previously put in issue.** It is a general rule of pleading, which applies with peculiar force in replevin, where both parties are plaintiffs, that when any particular fact is affirmed upon one side and formally denied upon the other, that fact is in issue; no subsequent admission in the pleading can be used as evidence of the truth of it.[6]

§ 702. **Issues admitted cannot be denied.** It is also a rule that facts which are formally admitted in the pleading cannot be subsequently denied. The plaintiff having based his cause of action upon an alleged possession in the defendant, cannot afterwards deny such possession, and seek a recovery upon the ground that the defendant never had possession.[7]

§ 703. **Special statutory rules.** There is a provision incorporated into many of the codes, requiring a full statement of all the plaintiff's claim in the complaint, and compelling the defendant to specially deny such matters as he wishes to dispute upon the trial. A provision of the common law system has also been introduced, by which the defendant is regarded as admitting all such matters as he does not in his answer, deny. Where such provisions exist, the pleader must be careful to set out all such matters as he relies upon.

[4] Plainfield *v.* Batchelder, 44 Vt. 9; Loop *v.* Williams, 47 Vt. 415; Walpole *v.* Smith, 4 Blackf. (Ind.) 304; Noble *v.* Epperly, 6 Ind. 415; Timp *v.* Dockham, 32 Wis. 151; Yates *v.* Fassett, 5 Denio, (N. Y.) 26; Loomis *v.* Foster, 1 Mich. 165. See, also, Dillingham *v.* Smith, 30 Me. 370.

[5] Campbell *v.* Quinlan, 3 Scam. 288. In this connection, consult Little *v.* Smith, 4 Scam. 400; Rigg *v.* Wilton, 13 Ill. 15.

[6] Harington *v.* Macmorris, 5 Taunt. 228; Edmonds *v.* Groves, 2 Mees. & W. 642; Fearn *v.* Filica, 7 M. & G. 513. See Whitaker *v.* Freeman, 1 Dev. (N. C.) 271; Kirk *v.* Nowell, 1 Term. R. 261.

[7] Kingsbury *v.* Buchannan, 11 Iowa, 388.

§ 704. **Effect of a plea of non cepit.** The plea of *non cepit* is a proper plea of general issue to a charge of wrongful taking. Its office is to deny the taking.[8] It does not assert title in the defendant; its legal effect is to admit title to the property to be in the plaintiff.[9] It admits every fact necessary to sustain the plaintiff's action, except the single one of taking.[10] Under this plea the defendant cannot prove property in himself;[11] nor in a stranger;[12] nor give evidence of a justification;[13] nor ask a return of the goods;[14] or, for damages.[15] But while this plea admits the property to be in the plaintiff, it denies his right to damages;[16]

[8] Ely *v.* Ehle, 3 Comst. 510; Marshall *v.* Davis, 1 Wend. 115; Rogers *v.* Arnold, 12 Wend. 34; Seymour *v.* Billings, 12 Wend. 286; Trotter *v.* Taylor, 5 Blackf. 431; Carroll *v.* Harris, 19 Ark. 238; Wilson *v.* Royston, 2 Ark. 315; D'Wolf *v.* Harris, 4 Mason, (C. C.) 528; Hunt *v.* Chambers, 1 Zab. (21 N. J.) 624; Sanfd. Mfg. Co. *v.* Wiggin, 14 N. H. 446; Anderson *v.* Talcott, 1 Gilm. 365; Whitwell *v.* Wells, 24 Pick. 28; Miller *v.* Sleeper, 4 Cush. 370; McFarland *v.* Barker, 1 Mass. 153.

[9] Coit *v.* Waples, 1 Minn. 134; Ringo *v.* Field, 1 Eng. (6 Ark.) 43; Trotter *v.* Taylor, 5 Blackf. 431; Douglas v. Garrett, 5 Wis. 88; Hopkins *v.* Burney, 2 Fla. 46; Galusha *v.* Butterfield, 2 Scam. 227; Sanfd. Mf. Co. *v.* Wiggin, 14 N. H. 446; Green *v.* Dingley, 24 Me. 137; Sawyer *v.* Huff, 25 Me. 465; Moulton *v.* Bird, 31 Me. 297; Van Namee *v.* Bradley, 69 Ill. 299; Johnson *v.* Woolyer, 1 Str. 507; Bemus *v.* Beckman, 3 Wend. 672; Bourk *v.* Riggs, 38 Ill. 321; Vose *v.* Hart, 12 Ill. 378, Warner *v.* Matthews, 18 Ill. 83; Chandler *v.* Lincoln, 52 Ill. 74; Amos *v.* Sinnott, 4 Scam. 445; Hanford *v.* Obrecht, 49 Ill. 151; Mitchell *v.* Roberts, 50 N. H. 490.

[10] Ely *v.* Ehle, 3 Comst. (N. Y.) 510.

[11] Smith *v.* Snyder, 15 Wend. 327; Miller *v.* Sleeper, 4 Cush. (Mass.) 370.

[12] Vickery *v.* Sherburne, 20 Me. 35.

[13] McFarland *v.* Barker, 1 Mass. 153.

[14] Butcher *v.* Porter, 1 Salk. 94; Slpson *v.* McFarland, 18 Pick. 427; Holmes *v.* Wood, 6 Mass. 1; Bourk *v.* Riggs, 38 Ill. 321; Seymour *v.* Billings, 12 Wend. 286; Vose *v.* Hart, 12 Ill. 378; Hopkins *v.* Burney, 2 Fla. 47; Moulton *v.* Bird, 31 Me. 297.

[15] Douglass *v.* Garrett, 5 Wis. 88. Where the issue is upon the plea of *non cepit* alone, if found for the defendant, he is not entitled to a return. Underwood *v.* White, 45 Ill. 438. "If the defendant claim a return, he must add an avowry." Hopkins *v.* Burney, 2 Fla. 47. "It puts in issue nothing but the caption and the place, where, etc. Under this plea, the defendant cannot show property out of the plaintiff." Wilson *v.* Royston, 2 Ark. 315; D'Wolf *v.* Harris, 4 Mason, 528; Pangburn *v.* Patridge, 7 John 142.

[16] Hopkins *v.* Burney, 2 Fla. 45.

and under this plea the defendant cannot ask damages. It would be absurd to renounce all claim to the property, and then claim damages.[17] If the defendant desires to claim damages, he must add a plea setting up a right in himself.[18] Under this issue, the plaintiff must prove an unlawful taking substantially at the time and place laid in the declaration.[19]

§ 705. **Form of plea of non cepit.** The usual form of the plea of *non cepit* is, *non cepit modo et forma.* This puts in issue not only the taking, but the taking at the time and place mentioned in the declaration. If the defendant desires to present this issue, and to have a return of the goods, he should avow and justify the taking, or in some way set up a right to the goods and ask a return.

§ 706. **Other pleas may be joined with.** The defendant may join as many other pleas with *non cepit* as he deems proper. They are not required to be consistent with each other. Thus, he may plead *non cepit*, set up his right to distrain, claim ownership of the premises where the distress was made, or title in himself or in a stranger.[20] This rule, permitting the defendant to file several pleas was originally given by statute 4 Anne, C. 16, A. D. 1706, and has been the constant practice since that time. The approved doctrine is, that an admission of a state of facts in one

[17] Hopkins *v.* Burney, 2 Fla. 45; Douglass *v.* Garrett, 5 Wis. 88.

[18] Smith *v.* Snyder, 15 Wend. 324. "The plea only involves the taking and the place, not the title to the property." Seymour *v.* Billings, 12 Wend. 286. "This plea admits every fact necessary to maintain the action except the taking; that fact being proven, the plaintiff maintains the issue. If the defendant has any justification or excuse, he must plead it." Ely *v.* Ehle, 3 Comst. 510; People *v.* Niagara C. P., 4 Wend. 217. Neither *non cepit* nor *non detinet* denies the property in the plaintiff. Chandler *v.* Lincoln, 52 Ill. 76.

[19] Simpson *v.* McFarland, 18 Pick. 429; Badger *v.* Phinny, 15 Mass. 359; Baker *v.* Fales, 16 Mass. 147; Marston *v.* Baldwin, 17 Mass. 606. A wrongful possession is regarded as equivalent to a wrongful taking; so, also, is obtaining possession from one who had no authority. Gray *v.* Nations, 1 Ark. 566. And, see Sawyer *v.* Huff, 25 Me. 465; Marshall *v.* Davis, 1 Wend. 115; Barrett *v.* Warren, 3 Hill, 348.

[20] McPherson *v.* Melhinch, 20 Wend. 671; Simpson *v.* McFarland, 18 Pick. 427; Whitwell *v.* Wells, 24 Pick. 29; Mt. Carbon, etc., *v.* Andrews, 53 Ill. 184; McFarland *v.* Barker, 1 Mass. 153; Shuter *v.* Page, 11 Johns. 196; Paul *v.* Luttrell, 1 Col. 319.

plea cannot be taken as evidence of the existence or non-existence of those facts, if denied in any other.[21]

§ 707. **Plea of cepit in alio loco.** The plea of *cepit in alio loco*, (took, but in another place,) is proper in justification for a distress for damage feasant, or for rent, but is not applicable to other cases.[22] If the defendant ever had the cattle at the place named in the declaration, even if only in leading them to the pound, he should avow accordingly.[23] It must be followed by an avowry or cognizance, or by some justification of the taking, or it is no defence, as the plea admits the taking, and must justify, or admit that it was wrongful.[24]

§ 708. **Non detinet similar to non cepit.** The plea of *non detinet* is exceedingly like *non cepit*. It is governed by the same general rules and principles, and puts in issue simply the charge of wrongful detention.[25] It has been said, with much force, that *non detinet* is a proper plea to a charge of wrongful taking; that the plaintiff must establish a detention, even when his charge was for taking; that the detention is a material fact to be shown, and that this plea is proper.[26]

§ 709. **The same. Illustrations.** In Indiana, where the complaint alleged that the plaintiff was the owner, and entitled to the possession of the property "which the defendant has possession of without right, and unlawfully detained from the plaintiff," the defendant replied, denying the unlawful detention. The denial of the detention was held to tender a proper issue.[27] In Illinois this same point was decided the other way. The declaration contained but one count; that was for the wrongful taking and detention. The defendant pleaded *non detinet* and other pleas. The court said, the wrongful taking alleged in the declaration was traversable, and the defendant admitted it by denying the wrongful detention only.[28]

[21] Edmonds *v.* Groves, 2 Mees. & W. 642; Harington *v.* Macmorris, 5 Taunt. 232.

[22] Lougee *v.* Colton, 9 Dana, (Ky.) 123.

[23] Ch. Plea, Vol. 1, p. 499; Snow *v.* Como, Str. Rep. 507; Sawyer *v.* Huff, 25 Me. 465; Amos *v.* Sinnott, 4 Scam. 445.

[24] Gilbert on Rep. p. 129.

[25] Chandler *v.* Lincoln, 52 Ill. 74; Simmons *v.* Jenkins, 76 Ill. 497; Ferrell *v.* Humphrey, 12 Ohio, 113; Oaks *v.* Wyatt, 10 Ohio, 341.

[26] Paul *v.* Luttrell, 1 Col. 317.

[27] Riddle *v.* Parke, 12 Ind. 89.

[28] Simmons *v.* Jenkins, 76 Ill. 480.

§ 710. **The same. Observations.** The statutes under which these cases arose are in substance the same, but the conflict is not so serious as may at first appear. In the Illinois case the court followed the approved doctrine that the averment of taking was not answered by the plea of *non detinet*, and was therefore admitted. It does not follow, however, from anything appearing in that case, that the defendant would not have been permitted, under the plea of *non detinet*, to have shown that he had returned the goods before suit brought, had he chosen to take upon himself the burden of such proof. The Colorado case holds, in substance, that the burden of proof of the detention would have been upon the plaintiff.[29] The declaration, in that case, charged simply the taking, and not the detention. The conclusions drawn from these cases may not be warranted, but no other mode is perceived of harmonizing the seeming differences they present.

§ 711. **Disclaimer of interest in property no defense.** The defendant cannot avoid an action of replevin by a disclaimer of any interest in the property. This is no answer to the declaration, and is no reason for dismissing the suit. He may be guilty of a wrongful taking, or wrongfully detaining, notwithstanding his disclaimer. Such an instrument was properly stricken from the files.[30]

§ 712. **Plea of justification; the burden is upon the party alleging it.** Where the defendant justifies the taking under process, filing no other plea, the burden is upon him to sustain his plea.[31]

§ 713. **General rules governing plea of non detinet.** The rules governing pleas of *non detinet* are similar in principle to those applicable to pleas of *non cepit*. Under the issue formed by this plea, the plaintiff must prove his right to immediate and exclusive possession of the goods and the wrongful detention by the defendant.[32] While the defendant may show that he had re-

[29] Where the declaration was for the wrongful taking and detention, there was no plea of *non cepit*, but pleas of property in a third person, upon which issue was taken. The pleading was considered as admitting the taking and detention. The burden of proof was then upon the defendant to establish the truth of his pleas. Kern *v.* Potter, 71 Ill. 19.

[30] Smith *v.* Emerson, 16 Ind. 355.

[31] Hobbs *v.* Myres, 1 B. Mon. (Ky.) 241.

[32] Amos *v.* Sinnott, 4 Scam. 445; Rogers *v.* Arnold, 12 Wend. 30.

turned the goods before suit, or that he never had them, he cannot, under this plea alone, if successful, have a return of the goods.[33] *Non detinet* admits the right of property to be in the plaintiff.[34] Under it the plaintiff must prove a wrongful detention by defendant, and his right to immediate possession.[35] The plea of *non detinet*, by statute, in some of the States, puts in issue the property in the plaintiff, as well as the wrongful detention, and under such plea the defendant is presumed to assert all the rights which the statute confers upon such plea.[36] A return may therefore be awarded under such a statute upon a plea of *non detinet*.[37] In Wisconsin, under this plea, defendant may prove his right to the possession or his title to the property.[38]

§ 714. **Writ not dismissed for neglect of officer.** Within certain limitations, failure of an officer to do his duty will not defeat the rights of a party not in fault. The wrongful levy by an officer, as we have seen, does not deprive the owner of his goods.[39] When the writ is technically defective by mistake of the clerk, a return is not usually ordered, but the plaintiff may retain possession,[40] though this would not settle the question of title. So, where the sheriff was by law required to have the goods appraised, and allowed the defendant to give bond and have a return of them if he wished, and the officer did not have the goods appraised, and no opportunity was given to the defendant to give the statutory bond and have return, this does not authorize a dismissal of the writ. The officer may be liable in such case, but the plaintiff should not be made to suffer.[41] So, when an officer makes an unauthorized levy and sale of goods, the owner does not lose his goods, but may replevy them from the purchaser.[42]

[33] Johnson *v.* Howe, 2 Gilm. 345.

[34] Ingalls *v.* Bulkley, 15 Ill. 225. *Contra*, by statute, in some States. Walpole *v.* Smith, 4 Blackf. 304; Kennedy *v.* Shaw, 38 Ind. 474; Timp *v.* Dockham, 32 Wis. 151; Yates *v.* Fassett, 5 Denio, 26.

[35] Amos *v.* Sinnot, 4 Scam. 445. It admits the property to be in plaintiff, and defendant cannot claim return. Wells *v.* McClenning, 23 Ill. 410.

[36] Walpole *v.* Smith, 4 Blackf. 304; Yates *v.* Fassett, 5. Denio, 26.

[37] McKnight *v.* Dunlop, 4 Barb. 36. See Loop *v.* Williams, 47 Vt. 415.

[38] Dimond *v.* Downing, 2 Wis. 498; Emmons *v.* Dowe, 2 Wis. 322.

[39] See, *ante*, § 260, *et seq.*

[40] See, *ante*, § 501.

[41] Parlin *v.* Austin, 3 Col. 337.

[42] Samuel *v.* Agnew, 80 Ill. 554; Combs *v.* Gorden, 59 Me. 111; Pierce *v.* Benjamine, 14 Pick. 356.

CHAPTER XXIII.

REPLEVIN OF A DISTRESS.

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§ 715. **The right of distress.** Replevin is the ancient remedy for the recovery of goods wrongfully seized by way of distress. It does not fall within the scope of this work to discuss at length the law of distress or the rights of the landlord and tenant. Such a discussion more properly belongs to a treatise upon that subject. Mere mention of the law of distress as showing the foundation upon which to base the replevin, must suffice.

§ 716. **Origin of the right.** The power of distress was given to the lord in lieu of a forfeiture of the land. This was done for the purpose of compelling the tenant to pay the rent or perform the services due. Lands, originally, were occupied by bondsmen, who were themselves the property of the lord, and not capable of owning real estate. As these serfs became enfranchised, the

right to the use of the soil became the right of the tenant, but the rents were the property of the landlord, and he continued to collect them by his own authority, for in theory of the law in olden time no man needed the aid of a judge to take what was his own.[1] In process of time the goods came to be regarded as the property of the tenant. The landlord, however, had the right to seize and hold them as a pledge or security to compel the tenant to perform the services or pay the rent. By common law the landlord had no right to sell the distress; he could only hold it as a pledge or security. The statute, 2 W. & M. C. 5, gave the lord authority, under certain conditions, to sell the distress. This remedy was very mild compared with the severity of the older law, which allowed a forfeiture by which the lord would seize the land and turn the tenant out, thus stripping him of the entire fruits of his labor.[2] This power of distress extended not only to the crops, but everything on the land was equally liable. This right became an instrument of great oppression and many statutes were enacted to remedy the evils, until at length the tenant was permitted to show that the taking was wrongful and to give bonds to make that appear, upon which he was allowed to have his goods restored to him; that is, he was permitted to take back the pledge. This was *replegari* or replevin. Replevin would originally lie in no other case than to recover a distress wrongfully taken.[3]

§ 717. **The right to replevy the distress.** When the distress was for any cause wrongful, the action of replevin was given to the tenant, to enable him to recover it.

§ 718. **Right of distress in this country.** The law of distress has been very generally adopted in this country.[4] It never existed in North Carolina.[5] In Georgia it can only issue upon the oath of the landlord; the oath of an agent is not sufficient.[6] It was abolished in New York by statute, May, 1846.[7] It does not

[1] Taylor on Landlord and Tenant, § 557, and the cases cited.

[2] Bradby on Distresses, 6.

[3] See, *ante*, § 41, *et seq.*

[4] Woglam *v.* Cowperthwaite, 2 Dall. (Pa.) 68; Ridge *v.* Wilson, 1 Blackf. 409; Burket *v.* Bonde, 3 Dana, 209; Penny *v.* Little, 3 Scam. (Ill.) 301.

[5] Dalgleish *v.* Grandy, Cam. & N. (N. C.) 22.

[6] Howard *v.* Dill, 7 Ga. 52. *Contra*, in Kentucky, Mitchill *v.* Franklin, 3 J. J. Marsh. 477.

[7] Gulld *v.* Rogers, 8 Barb. 502.

exist in Missouri.[8] Formerly distress was permitted of all goods found on the premises, whether they belonged to the tenant or to another person. This rule, however, has now been overturned in all or nearly all the States,[9] and by statutory modifications the manner of enforcing the remedy has been greatly changed.

§ 719. **Distress not a suit at law.** Distress is not a suit at law. The landlord distraining empowers some one as his bailiff to seize goods of the tenant of sufficient value to pay the rent. Upon such seizure being made, it is the duty of the bailiff to make an inventory and file it in the proper court. Upon this being done the court proceeds to enquire if the relation of landlord and tenant exists, and if so, the amount of rent due to the landlord for rent,[10] and the amount so found due is certified by the court. No judgment is rendered and no execution is issued,[11] but a certificate is issued by the court to the bailiff of the finding, which constitute his authority to sell.[12] The reason for this is found in the fact that originally the rent was the property of the lord. His rights were superior to the tenant's in all the property until his rent was paid in full. The distress was a taking by the lord or by his authority ; and this idea so far continues to invest this proceeding, that the courts only interfere to ascertain that the relation of landlord and tenant actually exists, and the amount of rent due.

§ 720. **Replevin of a distress.** Replevin was a suit at law, to test the right of distress. If the tenant had offered security,[13] or if, for any cause, the distress was wrongful, the tenant might, upon this writ, have his goods restored to him, upon giving bond to show the taking was illegal.[14] The plaintiff was under no obligation to bring the rent tendered into court, as the question

[8] Crocker *v.* Mann, 3 Mo. 472.

[9] Powers *v.* Florance, 7 La. Ann. 524; Gray *v.* Rawson, 11 Ill. 527; Owen *v.* Boyle, 22 Me. 47; Hall *v.* Amos, 5 T. B. Mon. (Ky.) 89. See Allen *v.* Agnew, 4 Zab. (N. J.) 443; Briggs *v.* Large, 30 Pa. St. 287; Riddle *v.* Weldon, 5 Whart. 9. But, *contra*, see and compare Coburn *v.* Harvey, 18 Wis. 147; Laws of Wis., 1866; Trieber *v.* Knabe, 12 Md. 149.

[10] Bull N. P. 181; Sketoe *v.* Ellis, 14 Ill. 75.

[11] Towns *v.* Boarman, 23 Miss. 186; Richardson *v.* Vice, 4 Blackf. 13; Ferguson *v.* Moore, 2 Wash. (Va.) 54.

[12] Sketoe *v.* Ellis, 14 Ill. 75.

[13] Hilson *v.* Blain, 2 Bailey, (S. C.) 168; *Ante*, § 5, *et seq.*

[14] Kimball *v.* Adams, 3 N. H. 182; Gilbert on Replevin.

was not upon the tender, but whether the defendant was a trespasser. Bringing the money into court would have no bearing upon the question as to whether the defendant acted rightfully in making the distress, or was a trespasser.[15] Proof of the tender was sufficient. A tender of rent before distress makes the taking unlawful.[16] A tender after distress, and before impounding, makes the subsequent detention unlawful.[17] In either of these cases, the tenant may sustain replevin for the goods distrained. So, where there was no rent due, or when the distress was for services which the tenant was not bound to render, or when the distress was of beasts of the plow, when other goods could be found, and in some other cases, the distress was wrongful;[18] or, in modern times, where the distress is of goods by law exempt from seizure, in all these cases the tenant may sustain replevin.

§ 721. **Rights of the landlord.** Where any part of the rent is due and unpaid, the landlord has a right to distrain.[19] The fact that the distress was excessive or oppressive will not defeat his action, nor authorise the tenant to recover in replevin; though, for a grossly excessive distress, trespass might lie.[20] Where the property distrained is exempt by statute, the tenant may replevy; but he must make that the ground of his suit; and where the distress is for more rent than is due the landlord, or the officer who executes, the warrant, he is liable to the tenant in an action.[21] The taking of other security does not defeat the landlord's right

[15] Hunter *v.* La Conte, 6 Cow. 730; Horne *v.* Lewin, 1 Ld. Raym. 639; S. C., 2 Salk. 583.

[16] Gilbert on Replevin, 61.

[17] Firth *v.* Purvis, 5 T. Rep. 227 and 432; Six Carpenters' Case, 8 Coke R. 146; S. C., 1 Smith's Ld. Cases, 62; Browne *v.* Powell, 4 Bing. 230; Hunter *v.* La Conte, 6 Cow. (N. Y.) 728. [After distress for rent the tenant, before the impounding, tenders the rent and the costs, to the landlord's bailiff, the landlord not being present. The tender is refused and an excessive demand made for costs; the tender is in time, and the landlord is liable for the misconduct of the bailiff; replevin lies. Hilson *v.* Blain, 2 Bailey, 168.]

[18] Bradby on Distress, 259.

[19] Hare *v.* Stegall, 60 Ill. 380; Lindley *v.* Miller, 67 Pa. 248; Smith *v.* Fyler, 2 Hill. (N. Y.) 648; Bates *v.* Nellis, 5 Hill. (N. Y.) 651.

[20] Ib. See Smith *v.* Colson, 10 Johns. 91; Bowser *v.* Scott, 8 Blackf. 86.

[21] McElroy *v.* Dice, 17 Pa. St. 163.

of distress.[22] Nor is a previous demand for the rent usually necessary.[23]

§ 722. **Sub-lessor's liability.** Where a sub-lessor has his goods distrained by the landlord of his landlord, he cannot sustain replevin by proving payment to the party from whom he leased.[24] This rule, however, is not universal in its application. Any one of several joint tenants may distrain for the whole rent, or appoint a bailiff for the others; but the avowry in such case must lie for all.[25]

§ 723. **Payment to landlord who is a joint tenant.** Where the tenant leases from tenants in common, payment of rent to one is not necessarily a discharge of the rent; the others may distrain for their share.[26]

§ 724. **Rights of the tenant.** The landlord cannot distrain twice for the same rent, where the first distress was upon goods sufficient to pay the rent, even when the first distress was voluntarily abandoned;[27] nor where he might have taken sufficient at first.[28] The law will not suffer the tenant to be needlessly vexed. The landlord cannot distrain fixtures of the tenant,[29] or chattels in the actual use of the tenant or other person, or goods delivered to the tenant to be worked up in his trade for another;[30] nor goods which are by law exempt; nor articles worn upon the person of the defendant;[31] nor can a distress be per-

[22] Bates *v.* Nellis, 5 Hill, (N. Y.) 651.

[23] Mallam *v.* Arden, 10 Bing. 299; Giles *v.* Elseworth, 10 Md. 333.

[24] Quinn *v.* Wallace, 6 Whart. (Pa.) 452.

[25] Taylor, L. & T. 419. See Robinson *v.* Hofman, 4 Bing. 563.

[26] Decker *v.* Livingston, 15 Johns. 479. See Robinson *v.* Hofman, 4 Bing. 562.

[27] Dawson *v.* Cropp, 1 Man. G. & S. 962. See Ridge *v.* Wilson, 1 Blackf. (Ind.) 409.

[28] Wallis *v.* Savill, 2 Lutw. 493.

[29] Gorton *v.* Falkner, 4 Durnf. & E. 567.

[30] Gisbourne *v.* Hurst, 1 Salk. 249; Thompson *v.* Mashiter, 1 Bing. 283; Gibson *v.* Ireson, 43 E. C. L. 621.

[31] Maxham *v.* Day, 16 Gray, (Mass.) 213. [Fixtures severed by the tenant, or by his authority, and left on the premises, may be distrained, Reynolds *v.* Shuler, 5 Cow. 323. Goods of a sub-tenant on the premises may be distrained for rent due by the original lessee, Jimison *v.* Reifsneider, 97 Pa. St. 136. In Delaware the landlord may for rent in arrears distrain any goods on the demised premises, even those of a stranger, if not left in the way of trade; but if before the levy of the

mitted to take chattels after they have been actually levied on and taken by an officer with valid execution against the tenant. But the right of distress is not lost by a receipt in full for all rent due, when the only payment for which the receipt was given was an order on a third person, who had no funds of the person ordering.[32] Neither can distress be made on the day the rent falls due; the tenant has the whole of that day in which to pay.[33]

§ 725. **The avowry and cognizance.** Where the distress is for any cause wrongful, the tenant may replevy the goods. If the landlord wishes to contest the replevin and to secure a return of the goods, he must avow; or if the distress was made by a bailiff, he must make cognizance, and so set up the justness of the taking. These were originally the most important, and, in fact, almost the only pleadings of the defendant in replevin. They are still common in cases of replevin of a distress.[34] But the comparative infrequency of such cases has reduced the use, as well as the importance of these pleas. There seems to be a distinction between an avowry by joint tenants and tenants in common. Joint tenants must join in an avowry; tenants in common must sever. Each should avow for his share.[35] If one tenant in common should release, it is no discharge as to the others.[36]

§ 726. **Distinction between an avowry and cognizance.** An avowry was where the defendant admitted the taking and justified under some right of distress, as for rent due, and demanded a return of the goods. When the defendant sets up a taking by distress in his own right it is called an avowry. When he justifies under the right of another, by whose authority he acted, it is called cognizance; the former is called an avowant; the latter a cognizor. The difference between them is formal

distress warrant, the owner remove the goods, they cannot be pursued by the landlord, Robelen *v.* National Bank, 1 Marv. 346, 41 Atl. 80. Property of a stranger upon the pavement in front of the premises, is not distrainable, Id.]

[32] Printems *v.* Helfried, 1 Nott & McC. (S. C.) 187.

[33] Gano *v.* Hart, Hardin, (Ky.) 297; Johnson *v.* Owens, 2 Cranch. C. C. 160. [There can be no valid distress for rent, unless rent is actually due, Johnson *v.* Prussing, 4 Ills. Ap. 575.]

[34] Howard *v.* Black, 49 Vt. 10; Lindley *v.* Miller, 67 Ill. 244; Simpson *v.* McFarland, 18 Pick. 430; Quincy *v.* Hall, 1 Pick. 361.

[35] Stedman *v.* Bates, 1 Ld. Raym. 64; Harrison *v.* Barnby, 5 Term. 246; Cully *v.* Spearman, 2 H. Bla. 386.

[36] Decker *v.* Livingston, 15 Johns. 480.

only. When by mistake a party avowed when he should have made cognizance, the mistake was immaterial and amendable without delay.[37]

§ 727. **The exactness required in these pleas.** By an avowry or by making cognizance the defendant becomes a plaintiff, that is, he sues for the right to distrain; his pleading is in the nature of a declaration; and, therefore, as much strictness is required in such pleading as in a declaration; it must be good in every particular.[38] The right to distrain was an extraordinary power; the authority upon which it was made was required to be specifically shown in the pleading which attempted to justify it,[39] and required to be sustained by proof.[40] An avowry or cognizance must admit the taking in express terms, though if it contain an implied admission it will be good after verdict without an admission in terms.[41]

§ 728. **The same. Substance of these pleas.** By this pleading the avowant must state sufficient to make good his right of seizure against the plaintiff who is admitted to be the real owner of the goods. The avowant asserts and defends upon his right to seize the goods, and states the grounds of the right in his avowry.[42] Formerly the avowry was required to show that the avowant, or some one from whom he inherited the estate out of which the rent of the land arose was seized, and also to show the lease under which the plaintiff in replevin held from the avowant, as well as rent due and in arrear. But after alienations became frequent, and of small parcels of land, the fines to the lord therefor were not always paid; consequently the lord did not always know who his tenants were. By Statute 21 Henry VIII., Ch. 19, § 3, the lord was permitted to avow for a distress taken within his

[37] Brown *v.* Bissett, 1 Zab. (21 N. J.) 46; Wheadon *v.* Sugg, Cro. Jac. 373.

[38] Pike *v.* Gandell, 9 Wend. 149; Wright *v.* Williams, 2 Wend. 632; Yates *v.* Fassett, 5 Denio, 31; Crosse *v.* Bilson, 6 Mod. 103; Coan *v.* Bowles, 1 Show. 165.

[39] Goodman *v.* Aylin, Yelv. 148; Hawkins *v.* Eckles, 2 Bos. & Pul. 359; Weeks *v.* Peach, 1 Salk. 179; Same *v.* Same, 1 Ld. Raym. 679; Gilbert on Rep. 133, 144; McPherson *v.* Melhinch, 20 Wend. 671.

[40] Lavigne *v.* Russ, 36 Miss. 326; Waltman *v.* Allison, 10 Pa. St. 465.

[41] Gaines *v.* Tibbs, 6 Dana, (Ky.) 144.

[42] Hellings *v.* Wright, 14 Pa. St. 375; Simcoke *v.* Frederick, 1 Ind. 54; Trulock *v.* Rigsby, Yelv. 185; Godfrey *v.* Bullin, Yelv. 180.

fee, and by 11 George II., Ch. 19, § 22, to avow generally, without setting up his title; still he was required to aver title and seizure.[43] It was still necessary, also, to set out the lease, and to state amount of rent reserved and when payable,[44] and to show that the landlord was seized of the premises, and that the relation of landlord and tenant existed;[45] so an avowry by three and proof of a demise by one of them, is not sufficient.[46]

§ 729. **The rent; how payable; must be certain.** The rent was not necessarily payable in money,[47] but might be payable in services,[48] or anything susceptible of valuation[49] which was certain, or which might be reduced to a certainty;[50] but unless there was a certain rent there was no right to distrain.[51] The time for payment must also be fixed, unless the rent was fixed and in amount, and unless the time for payment was certain the tenant could never know how much or when to pay, and so could not be in default.[52]

§ 730. **The terms of the lease.** An avowry for rent should state the terms of the lease as they will appear in proof,[53] the amount of rent, and when it was due.[54] It must set out the holding from the plaintiff; it need not state the plaintiff's title,[55] but it must show that there was a tenancy and the avowant was the landlord.[56] It must also show the amount of rent and that it

[43] Harrison v. M'Intosh, 1 Johns. 384; Franciscus *v.* Reigart, 4 Watts, 117; Taylor *v.* Moore, 3 Har. (Del.) 6.

[44] Forty *v.* Imber, 6 East. 434; Caldwell *v.* Cleadon, 3 Har. (Del.) 420; Scott *v.* Fuller, 3 Pa. 55; Gilbert on Rep., 133, *et seq.*; Helser *v.* Pott, 3 Barr. (Pa.) 179; Valentine *v.* Jackson, 9 Wend. 302; Steele *v.* Thompson, 3 Penn. 34; Philpott *v.* Dobbinson, 6 Bing. 104.

[45] Bain *v.* Clark, 10 Johns. 424.

[46] Ewing *v.* Vanarsdale, 1 S. & R. (Pa.) 370.

[47] Myers *v.* Mayfield, 7 Bush, (Ky.) 212.

[48] Valentine *v.* Jackson, 9 Wend. 302; Smith *v.* Colson, 10 John. 91.

[49] Fraser *v.* Davie, 5 Rich. (S. C.) Law, 59.

[50] Valentine *v.* Jackson, 9 Wend. 302.

[51] Grier *v.* Cowan, Addis, (Pa.) 317; Myers *v.* Mayfield, 7 Bush. (Ky.) 212; Smith v. Fyler, 2 Hill, 648.

[52] Wells *v.* Hornish, 3 Pen. & W. (Pa.) 30.

[53] Phipps *v.* Boyd, 54 Pa. St. 342; Taylor *v.* Moore, 3 Har. (Del.) 6; Tice v. Norton, 4 Wend. 667.

[54] Wells *v.* Hornish, 3 Pen. & W. (Pa.) 30.

[55] Decker *v.* Livingston, 15 Johns. 479; Wright *v.* Mathews, 2 Blackf. 187.

[56] Nicholas *v.* Dusenbury, 2 Const. 287.

is due and in arrear.[57] It need not state the exact amount due, as that is not necessary to a certain and definite description of the contract,[58] the object of this certainty being to state the contract with certainty, so that it may be introduced in proof.

§ 731. **The usual plea to replevin of a distress.** In cases where the replevin is for a distress for rent, avowry seems to be the proper and regular mode of pleading[59] at the present time; and the rules substantially as before stated apply. It has been said that the avowry should state that the goods seized were those of the plaintiff, but in point of fact this is immaterial and need not be proved, as the landlord has the right in many cases to distrain goods of persons other than the tenant, provided they are found upon the premises.[60] It is, however, necessary to allege that the goods were seized upon the premises, or within the limits where distress is permitted, and that they are liable to distress.[61] Joint tenants must join in an avowry,[62] but tenants in common must avow severally.[63]

§ 732. **Form of avowry or cognizance.** An avowry or cognizance need not show that the distress was made by an officer, or that any affidavit was attached to the warrant of distress; even when such affidavit is required by statute, it does not form any part of the pleadings.[64]

§ 733. **Pleas to an avowry or cognizance.** An avowry or cognizance partakes of the nature of a declaration, as well as a

[57] Smith *v.* Aurand, 10 S. & R. 93; Wright *v.* Williams, 5 Cow. 345; Lander *v.* Ware, 1 Strobh. (S. C.) 15.

[58] Barr *v.* Hughes, 44 Pa. St. 517.

[59] Williams *v.* Smith, 10 S. & R. (Pa.) 202; Weidel *v.* Roseberry, 13 S. & R. 178; Hill *v.* Stocking, 6 Hill, 277; Lindley *v.* Miller, 67 Ill. 244. The defendant sought to justify his taking a distress for rent; instead of the usual form of avowry he has adopted the form of a plea in bar, and seeks by this departure from the precedents to deprive the plaintiff of more than one answer to each justification. The experiment cannot succeed. McPherson *v.* Melhinch, 20 Wend. 671.

[60] Musprat *v.* Gregory, 3 Mees. & W. 677; Spencer *v.* M'Gowen, 13 Wend. 256; Blanche *v.* Bradford, 38 Pa. St. 344. This was the common law, but it has been thought necessary to repeal or modify it in most of the States of the Union.

[61] Asbell *v.* Tipton, 1 B. Mon. (Ky.) 300.

[62] Stedman *v.* Bates, 1 Ld. Raym. 64.

[63] Bradby on Distress, 62; Harrison *v.* Barnby, 5 Term R. 246. See Jones *v.* Gundrim, 3 W. & S. (Pa.) 531.

[64] Webber *v.* Shearman, 6 Hill, 32.

plea. So far as it is an answer to the plaintiff's claim it is a plea; so far as it demands a return it is in the nature of a declaration: the plaintiff may plead as many separate defenses to it as he deems proper,[65] and to an avowry he may plead an abuse of the defendant's proceedings, or that they have been irregular.[66] Plea to an avowry is governed by the rules applicable to other pleas to declaration; it must answer all it professes to; each plea should only answer one avowry.[67] The pleas may deny the tenancy set up in the avowry, or may show that the rent is not due; or that the goods are privileged, or exempt from distress; or that the goods are the property of a stranger.

§ 734. **Plea of set-off to an avowry.** The plaintiff in replevin cannot off-set accounts against the distrainor unless it be such matters as grow out of the contract of leasing.[68] The action is in form an action *ex-delicto*, and seeks damages for the unlawful taking of personal property, and it is no justification for such taking that the defendant is indebted to the plaintiff. The landlord's indebtedness to the tenant would not take away his right to distrain for rent. But this will not prevent the tenant from showing anything which goes to prove that the rent was not due So, when the landlord leased a tavern and wagon yard, and agreed to put cinders on the yard, and did not do so, it was held the rent was conditioned in part upon the agreement to put the premises in better order, and the damage was allowed to reduce he rent.[69] But he may claim damages against the landlord on account of a breach of the contract of leasing,[70] or payment or part payment of the rent;[71] or may off-set any demand against the landlord arising out of the contract of leasing, and properly the subject of recoupment;[72] or may plead and show nothing in arrears. But he cannot set off another claim against the land-

[65] Webber *v.* Shearman, 6 Hill, (N. Y.) 31; McPherson *v.* Melhinch, 20 Wend. 671.

[66] Osgood *v.* Green, 10 Fost, (N. H.) 210.

[67] Nichols *v.* Dusenbury, 2 Comst. 287; Roberts *v.* Tennell, 4 Litt. (Ky.) 286.

[68] Beyer *v.* Fenstermacher, 2 Whart. (Pa.) 95.

[69] Fairman *v.* Fluck, 5 Watts, (Pa.) 516.

[70] Lindley *v.* Miller, 67 Ill. 244.

[71] Sapsford *v.* Fletcher, 4 Term. R. 512; Wolgamot *v.* Bruner, 4 Har. & McH. (Md.) 70 and 89.

[72] Streeter *v.* Streeter, 43 Ill. 155.

lord; the only questions to be decided in this action relate to tenancy and the rent due.[73]

§ 735. **Pleas to an avowry; averments in.** Plea to an avowry need not allege any place of taking, when the avowry justifies the taking at the place alleged in the declaration.[74] Plea that the defendant drove the cattle three miles to a public pound, but does not allege a nearer place, is bad.[75] So a plea to an avowry must show that nothing is in arrear for rent, or it will be defective. When the plea claimed that the landlord had neglected to keep his covenants for repairs, and that the damages resulting therefrom more than equaled the rent, the plea should have so stated; a mere claim of damages, though in several sums, will not be sufficient unless it be followed by an averment that the sums so due equal or exceed the rent claimed; otherwise it will not appear affirmatively but some rent is due.[76] Defendant avowed and justified the detention under his right of lien as the manufacturer; it was not denied but this was well avowed, but the plea to the avowry set up new matter that the work was done under a contract which precluded a lien; *held*, proper.[77] Such plea, however, must set up the agreement with certainty.

§ 736. **Plea to cognizance, denying authority of bailiff.** Where the defendant made cognizance as bailiff to J., the plaintiff pleaded that he was not Bailiff J. The plea was held good; for though it may be that J. had a right to distrain, yet a stranger without his authority could not.[78]

§ 737. **Plea of "non-tenure," or "nothing in arrear."** To an avowry for rent, the defendant (the plaintiff in replevin,) may plead *non tenure*, or nothing in arrear. The former of these pleas denies the tenancy; the latter admits the tenancy, but denies that rent is due.[79]

§ 738. **Same rules apply to cognizances.** Substantially the same rules apply to making cognizance as to an avowry, ex-

[73] Anderson *v.* Reynolds, 14 S. & R. 439.
[74] Judd *v.* Fox, 9 Cow. 262.
[75] Adams *v.* Adams, 13 Pick. 385.
[76] Lindley *v.* Miller, 67 Ill. 248.
[77] Curtis *v.* Jones, 3 Denio, 590.
[78] Trevilian *v.* Pyne, 1 Salk. 107.
[79] Bloomer *v.* Juhel, 8 Wend. 448.

cept in the latter case the cognizor sets up the title of the landlord and claims to act as his bailiff, and not in his own right.[80]

§ 739. **Effect of replevin on landlord's lien.** We have seen that by distraining the landlord acquires a lien to satisfy the amount of rent due. By replevin the lien of the landlord so acquired is gone; *i. e.*, the tenant, by replevying, retakes his former title, and the landlord must look to the security upon the bond.[81] The landlord may, however, have judgment for a return of the goods, and under a writ of return he may regain possession; in such case he may sell them to satisfy his lien. As against the plaintiff his lien or right to return may be good, but not as against strangers acquiring title in good faith.[82]

[80] Webber *v.* Shearman, 6 Hill, (N. Y.) 31; Ch. Pl.; Steph. Pl. 332, 376.

[81] Speer *v.* Skinner, 35 Ill. 302; Bruner *v.* Dyball, 42 Ill. 37; Burkle v. Luce, 6 Hill, 559; Woglam *v.* Cowperthwaite, 2 Dall. 68, 131; Acker v. White, 25 Wend. 614.

[82] Burkle *v.* Luce, 6 Hill, 558; Acker *v.* White, 25 Wend. 614.

CHAPTER XXIV.

THE VERDICT AND JUDGMENT.

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§ 740. **The verdict.** There is probably no form of action where more exactness is required in the verdict than in replevin. In other actions the issues are usually few and simple, while in replevin they may be numerous and sometimes complex. The verdict, therefore, requires the most careful attention.

§ 741. **Court may correct the form, but cannot change the substance.** The court is authorized, and will, in all cases, when it is necessary, correct mere formal mistakes in the verdict, so as to make it correspond with the true finding of the jury and the form required by law;[1] but cannot correct a verdict so as to change in any way the intention of the jury. Each party has a right to the verdict of the jury upon the issues presented, and if it is not relevant to the issues or erroneous, the court may set it aside, but cannot change it.[2] Thus the court would have no right to add nominal damages,[3] or a statement of the value of the property, after the verdict was rendered.[4] So, where the verdict is for the plaintiff without finding the sum due, judgment for the sum demanded is error.[5]

§ 742. **The same.** It is in the power of the court, after the verdict has been presented, and before the jury is discharged, to direct them to put it into form, or the court may instruct them to render a more specific verdict, or to pass upon issues duly presented which they have failed to pass upon. Such course is proper, and in many cases necessary.[6]

§ 743. **The jury must pass upon all questions at issue.** The jury are not required to pass upon any questions which are not in issue, nor which are admitted by the pleading; but simply upon those which are submitted for their determination.[7]

[1] Donaldson *v.* Johnson, 2 Chand. (Wis.) 160; O'Brien *v.* Palmer, 49 Ill. 73; Osgood, *v.* McConnell, 32 Ill. 75; Patterson *v.* United States, 2 Wheat. 221; Thompson *v.* Button, 14 John's R. 86; O'Keefe *v.* Kellogg, 15 Ill. 351.

[2] Coit *v.* Waples, 1 Minn. 134; Frazier *v.* Laughlin, 1 Gilm. 347; Moore v. Devol, 14 Iowa, 112; Hinckley *v.* West, 4 Gilm. 136; Wallace *v.* Hilliard, 7 Wis. 627; Ford *v.* Ford, 5 Wis. 399; Dunbar *v.* Bittle, 7 Wis. 144.

[3] Bemus v. Beekman, 3 Wend. 671.

[4] Wallace *v.* Hilliard, 7 Wis. 627; Taylor *v.* Hathaway, 29 Ark. 597; Eaton v. Caldwell, 3 Minn. 134.

[5] Taylor *v.* Hathaway, 29 Ark. 597. Compare Burhans *v.* Tibbitts, 7 How. Pr. Rep. 21, 74.

[6] Hunt *v.* Bennett, 4 G. Greene, (Iowa,) 515.

[7] Patterson *v.* United States, 2 Wheat. 221; Wilcoxon *v.* Annesley, 23 Ind. 287; Woodburn *v.* Chamberlin, 17 Barb. 446; Dana *v.* Bryant, 1

§ 744 **May find for both parties.** Where the plaintiff's claim is for several articles, it may be, and usually is, divisible. The defendant may set up as many separate defenses, material to the issues, as he judges proper, and the verdict may be in favor of the plaintiff for a portion of the property and for the defendant for the remainder,[8] as the facts and the rights of the several parties require.[9]

§ 745. **Each party may submit issues to the jury.** The verdict must be responsive to all the issues presented by the pleadings. Each party has a right to submit such material issues by proper pleading as he shall think necessary for the protection of his interests, and has the right to have the jury pass upon them. A failure of the jury to do so will justify the court in setting aside the verdict and granting a new trial. When the plea was *non cepit* and the verdict was "guilty of unjust detention," it did not dispose of the issue tendered in the plea.[10] When a plea of general issue and plea of property are interposed, a simple finding of "not guilty" is not responsive to the issue. In such cases a *venire de novo* will be ordered.[11] The proper practice in case the verdict omits to pass upon all the issues is by a motion for a *venire de novo*, not by a motion for a new trial. A *venire de novo* is granted for a defect appearing upon the record; a new trial for some matter outside of it.[12]

Gilm. 104; Briggs *v.* Dorr, 19 Johns. 95; Jack *v.* Martin, 12 Wend. 316; Machette v. Wanless, 1 Col. 225.

[8] Hotchkiss *v.* Ashley, 44 Vt. 195; Edelen *v.* Thompson, 2 Har. & G. (Md.) 32; Powell *v.* Hinsdale, 5 Mass. 343; Poor *v.* Woodburn, 25 Vt. 235; Brown *v.* Smith, 1 N. H. 36; Wright *v.* Mathews, 2 Black, (Ind.) 187; Dowell *v.* Richardson, 10 Ind. 573; O'Keefe *v.* Kellogg, 15 Ill. 351; Williams *v.* Beede, 15 N. H. 483.

[9] Pratt *v.* Tucker, 67 Ill. 346.

[10] Bemus *v.* Beekman, 3 Wend. 667; Smith *v.* Phelps, 7 Wis. 211; Heeron *v.* Beckwith, 1 Wis. 22; Ronge *v.* Dawson, 9 Wis. 246; Childs *v.* Childs, 13 Wis. 17; Hanford *v.* Obrecht, 38 Ill. 493; Patterson *v.* United States, 2 Wheat. 225.

[11] Wallace *v.* Hilliard, 7 Wis. 627; Bemis *v.* Wylie, 19 Wis. 318; Ronge *v.* Dawson, 9 Wis. 246; Smith *v.* Phelps, 7 Wis. 211; Johnson *v.* Howe, 2 Gilm. 346; Rose *v.* Hart, 12 Ill. 378; Smith *v.* Wood, 31 Md. 293. A verdict of no cause of action, is not responsive to the issues of taking, detention, and property in defendant. Ford *v.* Ford, 3 Wis. 399.

[12] Bosseker *v.* Cramer, 18 Ind. 45. When the verdict did not pass upon the whole issue, but left part of the facts denied by the plea unnoticed, it was bad, and judgment was reversed. Miller *v.* Trets, 1 Ld. Raym.

§ 746. **"Not guilty;" what responsive to.** There is, strictly speaking, no plea of general issue in replevin. Where the charge is for taking only, a plea of *non cepit* is equivalent to a general issue; if the charge is for detaining, the plea of *non detinet* has the same effect. A verdict of not guilty would be responsive to either.[13] When the pleas were, 1, *non cepit*, 2, property in defendant, and, 3, in a stranger, verdict of not guilty was responsive to *non cepit* only, and did not authorize any judgment upon the other pleas.[14]

§ 747. **Statutory exceptions.** In some of the States, by statute, the plea of *non detinet* or *non cepit* puts in issue not only the detention, but the right of property in the plaintiff;[15] while, by the common law, *non cepit* and *non detinet* admit the property to be in the plaintiff, but deny the taking and detention respectively.[16] Where the statute makes the plea of *non detinet* a denial of property in the plaintiff, a verdict of not guilty upon that plea must be regarded, it would seem, not only as responsive to the issue upon the detention, but upon the question of property as well.

§ 748. **In justice court.** In a justice court, where the pleadings are oral, the same strictness is not required; and where the case was an appeal from such court, a verdict finding the defendant guilty, though not strictly in form, was regarded as equivalent to finding property in plaintiff.[17]

§ 749. **Illustrations of the exactness required in the verdict.** The defendant pleaded that he had not taken or detained the property; also, property in a stranger, and property in defendant; the plaintiff joined issue upon the first, and replied to the second and third pleas. The jury returned a verdict, "we find the property to be in the plaintiff." *Held*, the verdict did

324. A verdict is bad if it vary from the issue submitted in any substantial matter, or if it find only part of the issues submitted. Patterson *v.* United States, 2 Wheat. 225.

[13] Dole *v.* Kennedy, 38 Ill. 284; Bourk *v.* Riggs, 38 Ill. 321.

[14] Hanford *v.* Obrecht, 49 Ill. 151; Hanford *v.* Obrecht, 38 Ill. 493. See, also, Bemus *v.* Beekman, 3 Wend. 667; Sprague *v.* Kneeland, 12 Wend. 164; Boynton *v.* Page, 13 Wend. 432; Machette *v.* Wanless, 1 Col. 225.

[15] Ford *v.* Ford, 3 Wis. 399; Timp *v.* Dockham, 32 Wis. 151; Walpole *v.* Smith, 4 Blackf. (Ind.) 304; Noble *v.* Epperly, 6 Port. (Ind.) 411; Plainfield *v.* Batchelder, 44 Vt. 9; Loop *v.* Williams, 47 Vt. 415.

[16] See plea of *non cepit*. *Ante*, Chap. 22.

[17] Jarrard *v.* Harper, 42 Ill. 457.

not authorize a judgment. It omitted to find whether the property had been taken or detained by the defendant.[18]. A verdict of *non detinet* only establishes the question of detention. It does not find the right of property. The finding may be true, and yet the property may be some other person's than the plaintiff.[19] So, upon the issue of *non cepit*, a finding for the defendant only determines the fact that the defendant did not take the property as charged. It does not in any way settle the title. Upon this issue a finding by the jury of an actual wrongful taking by defendant will necessarily entitle the plaintiff to a judgment, because an actual wrongful taking may occur, and yet the taker be the owner of the property.[20]

§ 750. **The same.** Where the title, as well as the right to the possession, is in issue, and the verdict is only as to the right of possession, the issue as to title is not determined, and a new trial should be granted. The title may be in one, and the right of possession in another, and these questions, when submitted, should be passed upon.[21] When the defendant claimed only a lien upon the goods, and the verdict was silent upon this subject, a new trial was granted.[22]

§ 751. **Finding need not be in express words.** The finding need not be in express words when the intention of the jury is clear. Thus, where the plaintiff, in his declaration, sets up several distinct causes of action, and general issue is pleaded, and the jury allow him certain specified causes, and say nothing about the others, the verdict may be sufficient to authorize a judgment for him to the extent to which it finds for him; and such verdict, and judgment thereon, will be a bar to a second action on the causes not named in express words.[23]

[18] Huff v. Gilbert, 4 Blackf. (Ind.) 19; Smith *v.* Houston, 25 Ark. 184.

[19] Bemus *v.* Beekman, 3 Wend. 668; Emmons *v.* Dowe, 2 Wis. 322.

[20] Heeron *v.* Beckwith, 1 Wis. 22; Moulton v. Smith, 32 Me. 406.

Appleton *v.* Barrett, 22 Wis. 568. Pleas were, did not take or detain. Verdict, "we find the right of property to be in plaintiff, and assess his damages as one cent." *Held*, insufficient to authorize judgment in his favor. It was not responsive to the issues. Richardson *v.* Adkins, 6 Blackf. 142.

[22] Warner *v.* Hunt, 30 Wis. 200.

[23] Brockway *v.* Kinney, 2 John. 210; Freas *v.* Lake, 2 Col. 480; Irwin *v.* Knox, 10 John. 365; Markham *v.* Middleton, 2 Strange, 1259; Lewis *v.* Lewis, Minor, (1st Ala.) 95; Ward *v.* Masterson, 10 Kan. 78.

§ 752. **The same. Illustrations.** When the suit was for two slaves, "Ben" and "Joe," the verdict was, we find for the plaintiff for "Ben," and was silent about "Joe," the court said, we do not suppose any one would regard this as a verdict upon part of the issues. The silence of the verdict as to "Joe" is equivalent to an express finding as to him for the defendant.[24] Verdict, that the "defendant had a special property in the goods to an amount of an execution," stating it, and that the "plaintiff had unjustly taken and detained it," and assessing damages is sufficient, though it ought to determine the general ownership.[25]

§ 753. **The verdict may be general if it cover all the issues.** When the verdict, by its terms, necessarily disposes of all the material issues in the case, an express finding upon all the separate issues may not be essential. When the defendant pleads property in himself, and property in A., and in a stranger, a finding of property in the defendant, upon the first plea, is sufficient, though the others are disregarded.[16] The jury may sometimes deliver a general verdict, embracing all the issues submitted, and such verdict is clear and explicit upon them all. Thus, when the pleas are *non cepit*, *non detinet*, property in defendant, and property in third person, a general verdict, "we, the jury, find the issues for the defendant," is equivalent to a finding of all the issues for the defendant. It is not simply equivalent to a verdict of not guilty. The verdict of not guilty would be responsive only to the pleas of *non cepit* and *non detinet*.[17] Where the answer was, first, general denial; second, property in defendant; and third, property in a stranger, the verdict was, "we find for the plaintiff, that he is entitled to possession, and find value to be $125." *Held*, sufficient to cover all the issues.[18] When the verdict was for the defendant, $28.75, on a plea of property, it was, in effect, a verdict for the defendant generally, and a judgment

[24] Wittick *v.* Traun, 27 Ala. 566. To same effect, see Stoltz *v.* The People, 4 Scam. (Ill.) 168; Clark *v.* Keith, 9 Ohio, 73; Hotchkiss *v.* Ashley, 44 Vt. 198; Brown *v.* Smith, 1 N. H. 36.

[25] Single *v.* Barnard, 29 Wis. 463; White *v.* Jones, 33 Ill. 161.

[16] Ramsey *v.* Waters, 1 Mo. 406; Faulkner *v.* Meyers, 6 Neb. 415. See Freas *v.* Lake, 2 Col. 480.

[17] Freas *v.* Lake, 2 Col. 480; Underwood *v.* White, 45 Ill. 438. We find for the plaintiff, and against the defendant, was sufficient. Krause *v.* Cutting, 28 Wis. 655; S. C., 32 Wis. 688; Rhodes *v.* Bunts, 21 Wend. 19; Wheat *v.* Catterlin, 23 Ind. 85.

[18] Clark *v.* Heck, 17 Ind. (Harr.) 281.

for return, with costs, was correct.[29] A contrary conclusion, however, on a similar finding, was reached in Iowa. It was for the defendant, for $50, and was said to be a verdict that the plaintiff was entitled to the property upon paying the defendant that sum.[30]

§ 754. **The same. Illustrations.** When the plaintiff alleged that he was the absolute owner, and entitled to the immediate possession of the property, and the verdict was, "we, the jury, find for the plaintiff," it was held sufficient to warrant judgment for the plaintiff. The verdict was to the effect that the plaintiff was the absolute owner, and entitled to the immediate possession;[31] but a general verdict cannot be sustained when the issues are conflicting, and when all cannot be truly found for one party or the other.[32] When those issues are submitted, the jury should find whether the party has title to the property on the right of possession only.[33]

§ 755. **Verdict should not merge different issues.** The verdict should not amalgamate different issues, unless it be clear that such a verdict will be responsive to all of them, and that it will give the court clear and unmistakable information of what the jury intended to find upon each. Thus, the jury should not amalgamate damages for the taking or detention of property with the value of the property taken. Each should be found separately;[34] otherwise, the court cannot tell from the verdict what judgment to render.[35] Where the declaration contains a sufficient cause of action properly stated, with other matter not actionable, and damages are awarded, it will be presumed that the damages were given on the actionable part only. Thus, the declaration

[29] Huston *v.* Wilson, 3 Watts. 287.

[30] Hunt *v.* Bennett, 4 Greene, (Iowa,) 512.

[31] Rowan *v.* Teague, 24 Ind. 304.

[32] Hewson *v.* Saffin, 7 Ohio, Pt. 2, 234; Johnson *v.* Howe, 2 Gilm. 346.

[33] Wolf v. Meyer, 12 Ohio St. 432; Verdict that the plaintiff is the owner, and lawfully entitled to possession of the logs described in the complaint, and that their value is $—, and the plaintiff's damages are $—, is a general verdict for the plaintiff, and is equivalent to a special finding that the logs were detained by the defendant. Eldred *v.* The Oconto Co., 33 Wis. 137. To same effect, see Stephens *v.* Scott, 13 Ind. 515. Compare Swain *v.* Roys, 4 Wis. 150.

[34] Nashville Ins. Co. *v.* Alexander, 10 Humph. 383; Sayers *v.* Holmes, 2 Cold. (Tenn.) 259.

[35] Carson *v.* Applegarth, 6 Nev. 188.

was for one table, chest and other articles specified, and for one-third of four stacks of fodder. The verdict was for the plaintiff, and damages assessed at $91. The court refused to disturb the verdict, presuming that the damages were assessed on the articles specified and not on the two-thirds part of the fodder.[36]

§ 756. **Separate defendants may have separate verdicts.** When there are several defendants, it is error to assume that all of them are guilty of the acts charged in the declaration; the jury should be left to say whether all were engaged in the acts complained of or not,[37] and they may find one or more of the defendants guilty and acquit others;[38] or may find one guilty as to a portion and not guilty as to other portions of the property.[39]

§ 757. **Verdict must be certain.** The verdict must be certain. When four hogs were replevied, and the jury found two of them to be the property of the plaintiff, without stating which two, the verdict was regarded as uncertain and insufficient.[40] Verdict describing the property as "said property," if the goods are sufficiently described in the declaration, is good.[41] When the jury found for the plaintiffs $5,619.37, and in the verdict stated that this amount, less the advances and commissions, was due the plaintiff, without finding what those advances and commissions were, the verdict was uncertain, and no judgment could be rendered on it.[42] When the issue was *non detinet* and title to the property in the defendant, a verdict for defendant when the jury assessed value of property and nominal damages, did not warrant a general judgment for the defendant, though it was doubtless proper for the court to put it in form.[43]

§ 758. **The same. Illustrations.** When but one issue is presented in the pleadings, a general verdict for plaintiff, assessing damages and value of the property separately, is suffi-

[36] Ellis *v.* Culver, 1 Har. (Del.) 76.

[37] Dart *v.* Horn, 20 Ill. 213.

[38] Carothers *v.* Van Hagan, 2 G. Greene, (Iowa,) 481; Hotchkiss *v.* Ashley, 44 Vt. 199; Wilderman *v.* Sandusky, 15 Ill. 60.

[39] Simpson *v.* Perry, 9 Geo. 508; Walker *v.* Hunter, 5 Cranch. C. C. 462.

[40] Machette *v.* Wanless, 1 Col. 225; Campbell *v.* Jones, 38 Cal. 507; Dowell *v.* Richardson, 10 Ind. 573.

[41] Anderson *v.* Lane, 32 Ind. 102.

[42] Wood *v.* Orser, 11 Smith, (25 N. Y.) 348. See, also, Donaldson *v.* Johnson, 2 Chand. (Wis.) 160.

[43] Donaldson *v.* Johnson, 2 Chand. (Wis.) 160.

cient.[44] So a verdict that the property belonged to the plaintiff, and that he should recover one cent damages for detention was a sufficient finding that the plaintiff was entitled to possession.[45]

§ 759. **Must be consistent.** The verdict must not be inconsistent with itself; the findings upon the separate issues presented must be such as will be consistent with each other, and such as can be carried into effect in a judgment. There was a complaint against A. and B. A. pleaded property in a stranger; B. pleaded it in himself. The jury found a verdict as follows: "We, the jury, find for the defendants." The verdict, being general, was regarded as inconsistent and repugnant; the property, according to the letter of the finding, was in a stranger, and at the same time in one of the defendants; this was impossible. The court intimated, however, that if the parties were to treat it as a general finding for the defendants upon the question of wrongful taking only, it might be sufficient upon that issue, but it would not authorize judgment for a return.[46] If there be a material repugnancy in the verdict, it is not competent for the court to decide which is true and which is false; if it were the court could substitute its judgment for that of the jury; in such cases it can only set the verdict aside.[47]

§ 760. **Value of property; when must be found.** The rules in some of the States require the jury to find the value of the property;[48] but the fact that they did not so find should be taken advantage of at the first opportunity.[49] The verdict must find both the value and the damages for detention, or it is doubtful if any judgment can be rendered upon it;[50] even when the

[44] Everit *v.* Walworth Co. Bank, 13 Wis. 419; Fitzer *v.* McCannan, 14 Wis. 63; Wheat *v.* Catterlin, 23 Ind. 88.

[45] Stephens v. Scott, 13 Ind. 515; Gotloff *v.* Henry, 14 Ill. 384.

[46] Tardy *v.* Howard, 12 Ind. 404; Hewson *v.* Saffin, 7 Ohio, pt. II. 234; *Contra*, Edelen *v.* Thompson, 2 Har. & G. (Md.) 31.

[47] Hewson *v.* Saffin, 7 Ham. (Ohio,) pt. II. 232; Barrett *v.* Hall, 1 Mas. 447.

[48] Everit *v.* Walworth Co. Bank, 13 Wis. 419; Fitzer *v.* McCannan, 14 Wis. 63; Wallace *v.* Hilliard, 7 Wis. 627; Farmers' L. & T. Co. *v.* Com. Bank, 15 Wis. 424. Even though not denied. Jenkins *v.* Steanka, 19 Wis. 126; Carson *v.* Applegarth, 6 Nev. 188; Lambert *v.* McFarland, 2 Nev. 58; Pickett *v.* Bridges, 10 Humph. (Tenn.) 175; Bates *v.* Buchanan, 2 Bush. (Ky.) 117; Young *v.* Parsons, 2 Met. (Ky.) 499.

[49] Watts *v.* Green, 30 Ind. 99.

[50] Wallace *v.* Hilliard, 7 Wis. 627.

defendant waives a return, the value should be found.[51] In other States, and by the common law, the value is immaterial.

§ 761. **Value of separate articles.** In many of the States the jury are required to find the value of each separate article, so that upon a return of part of the entire lot the defendant may be discharged from the payment of the value of that part.[52] This provision is intended for the benefit of the party who is adjudged to deliver the goods, so that he may not be compelled to deliver goods and at the same time pay the value; and objection to a verdict, when the value of several articles is assessed in one gross sum, must be taken at the earliest practicable moment. This rule is in force in many States, but is not universal.

§ 762. **Conditional verdict.** A verdict that is conditional upon some subsequent act of the party is not warranted.[53] So one which expresses an opinion of law without deciding questions of fact cannot be sustained.[54]

§ 763. **Value where the party's interest is limited.** The amount which the defendant may recover is not necessarily the full value of the property; when the defendant has only a limited interest, the value of that, and not the full value, will be awarded him. Thus, with an execution upon property less than its value, there would only be a claim to the extent of the sum for which the execution issued, and interest.[55] Where property is taken from an officer by the defendant in the execution, verdict for the officer should be for the amount of the execution; but when replevied by one who is a stranger to the process, the officer may be liable over to the defendant from whom it was taken; in such case the finding for the officer should be the full value.

[51] Farmers' L. & T. Co. *v.* Com. Bank, 15 Wis. 424.

[52] Whitfield *v.* Whitfield, 40 Miss. 369; Hoeser *v.* Kraeka, 29 Tex. 451; Eslava *v.* Dillihunt, 46 Ala. 698; Drane *v.* Hilzheim, 13 S. & M. (Miss.) 337; Caldwell *v.* Bruggerman, 4 Minn. 270; Pickett *v.* Bridges, 10 Humph. (Tenn.) 175. *Contra*, Ward *v.* Masterson, 10 Kan. 78.

[53] Verdict that the plaintiff was entitled to the property provided a chattel mortgage was not paid in ten days. Rose *v.* Tolly, 15 Wis. 443.

[54] Verdict was: "We find the plaintiff had a right to replevy the mill." *Held*, to amount only to a conclusion of law, which the jury had no authority to decide; judgment could not be rendered upon it. Keller *v.* Boatman, 49 Ind. 108.

[55] Booth *v.* Ableman, 20 Wis. 21; S. C., 20 Wis. 603; Single *v.* Barnard, 29 Wis. 463.

§ 764. **Verdict for damages; when essential.** In *McKean* v. *Cutler*, 48 N. H. 372, it was said that a verdict for plaintiff upon a question of title will not be set aside because the jury did not find damages; the judgment for damages is not a necessary ingredient in replevin. This case is entitled to the more weight because it considers and differs from *Kendall* v. *Fitts*, 2 Foster, (N. H.) 9, and because in this way the question was directly and forcibly presented, as to whether a judgment for damages is an essential one in replevin. It is probable, however, that the courts will not extend the doctrine laid down in *McKean* v. *Cutler*. It must be borne in mind that damage is one of the principal questions in replevin; that it is always claimed in the declaration.[56] And when with this, is considered the fact that all the issues presented must be passed upon, it will seem the better course to insist upon a verdict and final judgment for damages (nominal in amount, if no more), in all cases.

§ 765. **The same.** When damages other than nominal are awarded, they must, in all cases, be assessed by a jury,[57] unless by consent of parties a jury is waived.

[56] Buckley *v.* Buckley, 12 Nev. 423; Paget *v.* Brayton, 2 H. & J. (Md.) 350.

[57] Pearsons *v.* Eaton, 18 Mich. 80.

NOTE XXXIII. *Verdict, in General.*—The findings or verdict must be upon the ultimate, and not the probative, facts; findings of the probative facts will support a judgment only when the ultimate facts are necessarily deducible therefrom, Murphy *v.* Bennett, 68 Calif. 529, 9 Pac. 738. A finding that "plaintiff at, etc., was the owner," is the finding of an ultimate fact, and not a conclusion of law. *Id.* Upon such a finding it is not prejudicial error that the court fails to find upon affirmative defenses set up by the answer, *Id.* There is no propriety in requiring in the verdict any direction for the delivery of the goods; this direction is to be contained in the judgment only, Ryan *v.* Fitzgerald, 87 Calif. 345, 25 Pac. 546. There may be a verdict in favor of one defendant and against the other, Wall *v.* Demithiewicz, 9 Ap. D. C. 109; and one defendant may be liable for all the goods and judgment go against the other for a part only, *Id.* The verdict must conform to the statute. If the statute require it to be in the alternative the subsequent action of the defendant in waiving his claim to the goods and accepting the value, does not supply the defect of the verdict, Thompson *v.* Lee, 19 S. C. 489. But where the record shows that the goods cannot be returned, and there is an agreement as to the value there is no occasion for an alternative verdict, Noble *v.* Worthy, 1 Ind.

T. 458, 45 S. W. 137. In Ulrich *v.* McConaughey, 63 Neb. 10, 88 N. W. 150, it was held that notwithstanding the impossibility to return the goods, the jury must still observe the statutory directions as to the verdict, but that defects of form will not be fatal unless prejudicial. A verdict will not be rejected because informal or containing immaterial matter, Baum Company *v.* Union Savings Bank, 50 Neb. 387, 69 N. W. 939. A verdict is not defective because the damages and the value are reported separately, Baum Co. *v.* Union Savings Bank, *supra.* In Mix *v.* Kepner, 81 Mo. 93, it was held that this was the only proper form in which the assessment should be made.

Must Conform to the Issues and Find all the Issues.—The verdict is bad if it varies from the issue in a substantial matter; or finds but part of the issue, Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689. The verdict must find the whole issue, Cooke *v.* Aguirre, 86 Calif. 479, 25 Pac. 5; and as to all of the goods in controversy, Young *v.* Lego, 38 Wis. 206; even as to goods which are not replevied, Carrier *v.* Carrier, 71 Wis. 111, 36 N. W. 626; Hews *v.* Walls, 27 Ills. Ap. 445; must dispose of all the issues as to all the defendants, Miller *v.* Bryden, 34 Mo. Ap. 602. Where the answer denies the ownership a verdict finding only that plaintiff is entitled to possession, the value, and his damages, is defective; no judgment can be given, Holt *v.* Van Eps, *supra;* Yick Kee *v.* Dunbar, 20 Ore. 416, 26 Pac. 275. A verdict "we find the property to be in the plaintiff" is defective, for failing to find either the taking or the detention by the defendant, Huff *v.* Gilbert, 4 Blf. 19. A verdict of not guilty of the detention, merely, leaves undetermined the question of the right of possession, Smith Co. *v.* Holden, 73 Vt. 396, 51 Atl. 2. Where a mortgage of chattels is a mere lien, the verdict that the mortgagee had at the commencement of the action, "the right of property and right of possession," and assessing his damages, is not responsive to the issues, Hayes *v.* Slobodney, 54 Neb. 511, 74 N. W. 961. Where a portion of the goods are not replevied a verdict that the right of property is in the plaintiff, and assessing his damages in a sum named, for the goods not obtained, is defective for want of a finding of guilty or not guilty of the conversion of the goods not replevied, Nelson *v.* Bowen, 15 Ills. Ap. 477. The statute provided that the general issue should put in issue not only the detention of the goods, but the plaintiff's property and right of possession; verdict that defendant "did not unlawfully detain the goods," held defective, Harris *v.* O'Gorman, 118 Mich. 553, 77 N. W. 12. It does not expressly appear in this report what plea was pleaded. The verdict need not expressly declare that the detention was wrongful, in order to sustain an award of nominal damages, Hammond *v.* Solliday, 8 Colo. 610. A verdict for plaintiff must award the possession of the goods to the plaintiff, must find the value, and assess his damages for the detention; a verdict for a sum of money merely will not support a judgment, Conklin *v.* McCauley, 41 Ap. Div. 452, 58 N. Y. Sup. 879. Where the issue was tried by the court and the findings were wholly

against the plaintiff's ownership, it was held that he could not complain that there was no finding as to the right of possession, Banning *v.* Marleau, 133 Calif. 485, 65 Pac. 964, distinguishing Cooke *v.* Aguirre, 86 Calif. 479, 25 Pac. 5, Fredericks *v.* Tracy, 98 Calif. 658, 33 Pac. 750.

Certainty required in the Verdict.—The verdict must be full enough to enable the court to render the proper judgment, Alderman *v.* Manchester, 49 Mich. 48, 12 N. W. 905. The maxim "that is certain which can be made certain," applies to a verdict as well as other writings; and a verdict "for the plaintiff and the value of the property taken to be $72 and interest" is made certain by reference to the complaint, Hobbs *v.* Clark, 53 Ark. 411, 14 S. W. 652. Where several articles of the same character are replevied, and as to a part of them there is a verdict for the plaintiff, and as to the residue for the defendant, the verdict must specify which of these articles go to each party, Carrier *v.* Carrier, 71 Wis. 111, 36 N. W. 626. If the verdict, taken in connection with the pleadings, shows what the judgment should be, this will suffice, Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53. A verdict that "plaintiff was not, at etc., or since, the owner, the defendant did not wrongfully take and does not wrongfully detain, etc., that H. was on, etc., the owner, and defendant, a constable, etc., seized the same by virtue of two writs of attachment against H. duly issued by G., a justice of the peace," not indicating whether plaintiff was not the owner in any sense, or that a sale by H. to plaintiff was void as against creditors for want of delivery and continued change of possession, is not sufficiently specific, Banning *v.* Marleau, 101 Calif. 238, 35 Pac. 772. Upon a complaint alleging ownership, and the right of possession a verdict "for the plaintiff, that at the commencement of this action plaintiff was and now is entitled to possession of" the goods, describing them, "of the value of $750 and assess his damages at one dollar," entitles the plaintiff to judgment for the full value, the goods not having been replevied; and the verdict is not defective because the full amount of plaintiff's recovery is left to computation. A judgment for $716 was affirmed, Baum Iron Co. *v.* Union Savings Bank, 50 Neb. 387, 69 N. W. 939.

Construction.—In construing the verdict, the court will have regard to the manner in which the issues were submitted to the jury, Towne *v.* Liedle, 10 S. D. 460, 74 N. W. 232. Mere surplusage, as where the jury finds the value unnecessarily, may be rejected, Lindauer *v.* Teeter, 41 N. J. L. 255, Van Meter *v.* Barnett, 119 Ind. 35, 20 N. E. 426. It seems that the court may indulge in reasonable intendments to sustain the verdict. A verdict for a certain sum "as damages," must be interpreted to import that the sum named is the value of the goods; for otherwise it is no verdict; and the court further indulged the presumption that the plaintiff had exercised his right of election to take the value in lieu of the goods, McGriff *v.* Reid, 37 Fla. 51, 19 So. 339. And where the verdict was for damages, generally, it was presumed to include both damages for the taking and for the detention,

Ryan *v.* Fitzgerald, 87 Calif. 345, 25 Pac. 546. And the verdict will be construed with reference to the legal presumption that, where the goods are seized under the writ, they were found in defendant's possession, Pitts Works *v.* Young, 6 S. D. 557, 62 N. W. 432. The findings of the jury are to be taken as a whole; the inconsistencies in one passage may be explained away by another, Meixall *v.* Kirkpatrick, 33 Kans. 282, 6 Pac. 241. The verdict need not be expressed formally; if the meaning of the jury can be ascertained therefrom, the court will mould it into form and give effect, Lindauer *v.* Teeter, *supra*. Error of form will not be regarded if substantial justice is reached, Leonard *v.* McGinnis, 34 Min. 506, 26 N. W. 733. In a special verdict nothing is taken by intendment, Peninsula Co. *v.* Ellis, 20 Ind. Ap. 491, 51 N. E. 105. Special findings are to be reconciled with the general finding, if possible, Citizens Bank *v.* Larabee, 64 Kans. 158, 67 Pac. 546. A verdict "for the plaintiffs and that the goods, etc., are and were, etc., wrongfully detained by the defendant from, etc.," is equivalent to a special finding of property in the plaintiff, Goldsmith *v.* Bryant, 26 Wis. 34. Where the plaintiff has exercised his option to take the value instead of the goods, a return of "guilty and assess his damages at, etc.," is sufficient, Jeffreys *v.* Greely, 20 Fla. 819. In an action commenced before a justice, where the issues are formed by implication, a general verdict of guilty is a finding upon all the issues in the action when turned into an action of trover, Nelson *v.* Bowen, 15 Ills. Ap. 477. But a verdict "we find the right of property in the plaintiff and assess his damages at, etc., for detention of goods not obtained," does not find the defendant guilty of anything, and is defective, *Id.* Where, upon plea of property in the defendant the verdict was "for the plaintiff and assess the damages at $300 and interest $111, total $411," it was held that the verdict was insufficient in not finding the issue of property in the defendant, Jones *v.* Snider, 8 Ore. 127. And where the verdict was that at the commencement of the suit the right of the property in the goods and possession thereto was in the plaintiff, assessing his damages at, etc., is fatally defective in not responding to the issue upon the plea of *non detinet*, though it seems that if the jury had awarded damages "for the detention" it might have been supported, Reidenour *v.* Beekman, 68 Ind. 236. A verdict "for the plaintiff, property to the value of $477 and damages to the amount of $100," will not sustain a judgment for possession of any specific property, Holliday *v.* McKinne, 22 Fla. 153. Even where the pleadings show that the goods have been sold by the defendant under process, a verdict "for the plaintiff in the sum of $512," is not sufficient, Smith *v.* Smith, 17 Ore. 444, 21 Pac. 439. But a verdict "we do assess the damages of the property mentioned in the declaration at $825, and the actual damages at six per cent. per annum to be $24 75," was held intelligible and sufficient, though informal, Brannin *v.* Bremen, 2 N. M. 40. Where the defendant pleaded *non cepit*, *non detinet*, and property in himself, a verdict of guilty, and assessing the

plaintiff's damages, was held to comprehend all the issues, Goldstein *v.* Smith, 85 Ills. Ap. 588. A verdict "we find the issues for the defendants and assess their damages at, etc.," answers the issues upon the pleas of *non detinet*, property in the defendant, and rightful possession in the defendant by virtue of an agister's lien, Holmes *v.* Tarble, 77 Ills. App. 114. The court found "that on, etc., plaintiff was not nor at any time since has been the owner of and entitled to possession, etc., that defendant did not wrongfully come into possession thereof and does not wrongfully detain the same, that defendant, a constable, seized the goods by virtue of two writs of attachment, described, against one H, who was then the owner and in possession," etc. The controversy being as to the purchase of the goods by plaintiff from H., and whether it was fraudulent as against the creditors of H, and whether there had been a sufficient delivery and continued change of possession, it was held on appeal that these findings were not specific enough to show whether the court below determined that plaintiff was not the owner in any sense, or that the sale by H. was fraudulent as against creditors, merely for want of delivery and continued change of possession, Banning *v.* Marleau, 101 Calif. 238, 35 Pac. 732. Plaintiff committed a wagon wheel to defendant for repairs; defendant made the repairs and demanded $1.75 as the agreed price for his work; plaintiff insisted that the price agreed upon was only seventy-five cents, which he tendered, and replevied the wheel. The verdict was that "Mr. Smith pay Dinneen seventy-five cents and take his wheel." Held, that it was impossible to determine whether the jury intended that defendant should be satisfied with the seventy-five cents already paid into court for his benefit, or that plaintiff should pay another seventy-five cents; or whether in the opinion of the jury there had been an unlawful detention of the wheel or not, Smith *v.* Dinneen, 61 Ap. Div. 264, 70 N. Y. Sup. 477. In replevin by mortgagee, the verdict was "that the right of property and possession of said property was in plaintiff when the action was commenced, and that the value of this right was $117.17." The jury also made a special finding that the value of the property was $160. The sum named in the verdict, $117.17, was in fact the amount due plaintiff upon his mortgage. It was held that while the verdict was erroneous in finding the general right of property in the plaintiff, when in fact he had only a special property, the error was corrected by the finding of the right of possession in plaintiff, Muller *v.* Purcel, Neb., 99 N. W. 684. A verdict "for the plaintiff and against the defendant," assessing his damages at $78, is unmistakable in its intent, and is sufficient, no objection to the form being interposed when returned, Towne *v.* Liedle, 10 S. D. 460, 74 N. W. 232. Where the defendant is an officer and justifies the taking under a process against a third person alleged to be the owner, a finding of property in the officer is erroneous, Gilligan *v.* Stevens, 43 Ills. Ap. 401. Where the goods have been replevied from defendant's possession a finding that plaintiff was not entitled to possession, is necessarily a finding that defendant

was so entitled, Pico v. Pico, 56 Calif. 453. Where the plaintiff has possession of the goods a verdict in his favor and assessing the damages at a sum certain, is sufficient, Williams v. Bugg, 10 Mo. Ap. 585. A verdict finding the property in the plaintiff, omitting any finding upon the plea of property in a third person in whom defendant has also pleaded property, is sufficient, Thompson *v.* Dyer, 25 R. I. 321, 55 Atl. 824. Controversy as to twenty-six head of cattle claimed by each party under chattel mortgages; there was a general verdict for the plaintiff. The jury in answer to special interrogatories declared that twenty head of the cattle claimed by the defendant were not included in his mortgage, and that the twenty-six head were included in the mortgage to the plaintiff. It was held that although the jury had, in answer to other interrogatories, assumed to give a description which was irreconcilable with the general finding, it was the duty of the court to enter judgment for the plaintiff upon the general finding, Citizens Bank *v.* Larabee, 64 Kans. 158, 67 Pac. 546.

Plaintiff sued to recover goods procured upon credit by fraudulent representations, as they alleged. The purchaser had assigned for the benefit of creditors; verdict, "the property owned by Frank (the insolvent) at the time of his purchase from plaintiff exceeded his indebtedness nearly $1,000, that he was not then insolvent, that when he made the purchase he did not intend to pay for the goods, the value of the goods in question was $300." The answer admitted detention of part of the goods, and denied detention of the residue. Held, that the verdict was defective in not finding what goods were detained by defendant, and in not finding the ownership, Feder *v.* Daniels, 79 Wis. 578, 48 N. W. 799. A verdict that plaintiff "at the commencement of this action was entitled to the possession of the property in question, and that the value thereof is $208 and his damages $395, sufficiently declares that defendant was detaining the goods, Clouston *v.* Gray, 48 Kans. 31, 28 Pac. 983. A verdict "we find the issues for the defendant and assess his damages at $12.50," finds neither the right of property, the right of possession nor the value of either. No judgment can be founded thereon, Fulkerson *v.* Dinkins, 28 Mo. Ap. 160. Where defendant denies plaintiff's right of possession, a verdict "for the defendant one dollar," is not sufficient, and the waiver by plaintiff of his claim does not cure the defect, Thompson *v.* Lee, 19 S. C. 489. A finding by a justice of the peace "that the possession of the property at the beginning of this action was in the plaintiff will be construed according to its plain import, that is, that the goods were not detained by the defendant, Degering *v.* Flick, 14 Neb. 448, 16 N. W. 824. A verdict that the plaintiff is the owner but that the defendant did not unlawfully detain the goods, no more entitles one of them than the other, to a judgment for the goods, Rodman *v.* Nathan, 45 Mich. 607, 8 N. W. 562. "We find for the plaintiff as follows: That plaintiff is entitled to the immediate return and possession of the following articles," specifying them and giving the value of each, is a

sufficient response to every issue in the pleadings, Corbell *v.* Childers, 17 Ore. 528, 21 Pac. 671. A verdict that defendant at the institution of the suit was entitled to the possession of the goods, is, where plaintiff claims under a chattel mortgage, tantamount to a general verdict against the validity of a promissory note secured by the mortgage, Nunn *v.* Bird, 36 Ore. 515, 59 Pac. 808. A verdict that "plaintiff, entitled to all the cotton and two hundred bushels of wheat raised on the Holmes place, and defendant is entitled to the four hundred bushels raised on the Everett place at seventy-five cents per bushel, less $70 paid by plaintiff for harvesting, threshing and seed, total amount for defendant $230," was sustained, Everett *v.* Akins, 8 Okla. 184, 56 Pac. 1062. A finding that A. was the owner at one time, is without effect as to his right at a prior time, Henry *v.* Ferguson, 55 Mich. 399, 21 N. W. 381. Where the goods had been delivered to the plaintiff a verdict "for the defendant, assessing the value," was held sufficient to sustain a judgment for return or for the value, Echepare *v.* Aguirre, 91 Calif. 288, 27 Pac. 668. A. replevied a horse upon which M. had levied, as the property of D. There was no question but that A. was the owner if D. was not. A verdict that A. was the owner and that M. had a lien to the amount of his levy, return of the goods not being waived, and there being no finding of the value of the goods, was held insensible, Alderman *v.* Manchester, 49 Mich. 48, 12 N. W. 905.

"We find judgment for plaintiff, value of coal $546, damages in pursuit of property $384, total $930." Held the verdict might be construed as a general verdict for the plaintiff, besides assessing separately the value of the goods and the damages, and a sufficient response to the issues upon the plea of property, and the right of possession, Cain *v.* Cody, 29 Pac. 778. Where the action, no bond being given, proceeds as one for damages only, a verdict "for the plaintiff," and assessing the damages answers the issues and is sufficient, Philleo *v.* McDonald, 27 Neb. 142, 42 N. W. 904. A verdict for the defendant that he was entitled to possession of the goods, finding the value and the damages for detention, sufficiently answers all the issues and entitles the defendant to an alternative judgment for return or the value, although the defendant claimed only one moiety. The value of defendant's interest, the court say, is readily ascertained by computation, Ela *v.* Bankes, 37 Wis. 89. A verdict for the defendant, finding also the value of the goods, and that "plaintiff is indebted to defendant in $189, which is a lien on the horses," is sufficient to sustain a judgment for the return of the animals to defendant "to be held by him as security for $189," or, at defendant's election, for the amount of the indebtedness named, against plaintiff and his sureties. Kronck *v.* Reid, 105 Mo. Ap. 430, 79 S. W. 1001.

General Verdict.—A general verdict finds all the issues for the plaintiff, and determines that plaintiff is the owner of the goods and entitled to the possession, Towne *v.* Liedle, 10 S. D. 460, 74 N. W. 232. Where, upon a general and special issue there is a general verdict for the

plaintiff, and the matter of the special plea is such that if true the verdict should have been for defendant, the omission to find upon the special issue is matter of form only, and judgment will be entered for the plaintiff, Lindauer *v.* Teeter, 41 N. J. L. 255. A finding that the goods were not unlawfully taken or detained by defendant is a mere conclusion of law, and considered in connection with special findings of all the facts, will be disregarded, Aultman *v.* Richardson, 21 Ind. Ap. 211, 52 N. E. 86. A general verdict for the defendant finds all the issues, and even though the value be not found, judgment of return may be given, Adamson *v.* Sundby, 51 Minn. 460, 53 N. W. 761; Meredith *v.* Kennard, 1 Neb. 312; even although inconsistent pleas are pleaded, Atlas Co. *v.* Stickney, 70 Ills. Ap. 176; but see *contra*, Hewson *v.* Saffin, 7 Ohio, part II, 232; Mattson *v.* Hanisch, 5 Ills. Ap. 102; Dobbins *v.* Hanchett, 20 Ills. Ap. 396; Rohe *v.* Pease, 189 Ills. 207, 59 N. E. 520. Where the evidence shows that the goods cannot be restored to the plaintiff, the defendant having retained them and disposed of them, a verdict "for the plaintiff" in a sum named, is sufficient; a general verdict for the plaintiff is equivalent to a finding that he was lawfully entitled to the possession, McNamara *v.* Lyon, 69 Conn. 447, 37 Atl. 981; Van Gundy *v.* Carrigan, 4 Ind. Ap. 333, 30 N. E. 933; is equivalent to finding that plaintiff is the owner and entitled to possession, Gaines *v.* White, 1 S. D. 434, 47 N. W. 524; McAfee *v.* Montgomery, 21 Ind. Ap. 196, 51 N. E. 957; O'Farrell *v.* McClure, 5 Kans. Ap. 880, 47 Pac. 160. Where two are sued for the detention of several articles, and it appears that as to a portion of the goods one of the defendants never had them, and is in no manner accountable for them, a general verdict for the plaintiff is erroneous, Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797.

As to the Property in the Goods.—In the absence of statutory requirement, there need be no express finding as to who has the property; a general finding, even where the question of property is the main issue, is sufficient, Prescott *v.* Heilner, 13 Ore. 200, 9 Pac. 403. But this issue must be answered; and a verdict that plaintiffs "are entitled to" a part of the goods, and the remainder "belongs to defendants," will not support a judgment for the plaintiffs, Phipps *v.* Taylor, 15 Ore. 484, 16 Pac. 171. A finding of damages, merely, in favor of the plaintiff will not support a judgment in the alternative, Norcross *v.* Nunan, 61 Calif. 640. Where, under the pleadings, the plaintiff may show only a special ownership or the right of possession, a verdict that plaintiff is entitled to the possession merely, not finding the general property, is sufficient, Buck *v.* Young, 1 Ind. Ap. 558, 27 N. E. 1106.

When must find the Value.—Where, under the statute, the successful party is entitled to alternative judgment for the goods, or the value thereof, the value must be found, Welton *v.* Baltezore, 17 Neb. 399, 23 N. W. 1; Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330; Dixon *v.* Atkinson, 86 Mo. Ap. 24; Goodwin *v.* Potter, 40 Neb. 553, 58 N. W. 1128; Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980. Where the successful party claims only a special interest, the verdict must find the value of

that interest, Creighton *v.* Haythorn, 49 Neb. 526, 68 N. W. 934; *i. e.*, if the successful party claims as mortgagee, the amount of the indebtedness, Earle *v.* Burch, 21 Neb. 702, 23 N. W. 254; DeFord *v.* Hutchinson, 45 Kans. 318, 25 Pac. 641; Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620; or where the defendant is an officer who has taken the goods in execution, the amount of his execution; the general value need not be found, because immaterial, Welton *v.* Baltezore, *supra;* Hanson *v.* Bean, 51 Minn. 546, 53 N. W. 871. Where it appears that the property has depreciated in value between the time of the replevin and the trial, the finding of the present value of defendant's interest suffices, Heffley *v.* Hunger, 54 Neb. 776, 75 N. W. 53. The verdict must find the value, the statute is mandatory, Meeker *v.* Johnson, 3 Wash. 247, 28 Pac. 542, citing and criticising Morrison *v.* Austin, 14 Wis. 601; Nickerson *v.* Stage Co., 10 Calif. 520, Levy *v.* Leatherwood, Ariz., 52 Pac. 359. The statute provided that if the plaintiff fail, and have the goods in his possession, and the defendant in his answer claims the same and demands return thereof, "the court or jury may assess the value of the property, and the damages for taking and detaining the same;" it was held that the jury must make the assessment if the issues are tried by a jury. In the absence of such finding no judgment can be given, Goodwin *v.* Potter, *supra.* The value and the damages should be found separately, Mix *v.* Kepner, 81 Mo. 93. The requirement of the statute that if the defendant prevails, and the plaintiff is in possession of the property, the verdict must find the value of the goods as well as the damages, is for the benefit of the defendant, and if he accepts the verdict assessing damages only he is concluded, Dixon *v.* Atkinson, 86 Mo. Ap. 24. If the successful party is already in possession no injury is done by the omission of the jury to find the value, Busching *v.* Sunman, 19 Ind. Ap. 683, 49 N. E. 1091; Samuels *v.* Burnham, 10 Kans. Ap. 574, 61 Pac. 755; Garth *v.* Caldwell, 72 Mo. 622; Prescott *v.* Heilner, 13 Ore. 200, 9 Pac. 403; Hanscom *v.* Burmood, 35 Neb. 504, 53 N. W. 371; Van Gundy *v.* Carrigan, *supra;* Caruthers *v.* Hensley, 90 Calif. 559, 27 Pac. 411; Fischer *v.* Cohen, 22 Misc. 117, 48 N. Y. Sup. 775; Hopper *v.* Hopper, 84 Mo. Ap. 117. So, where the thing replevied is an insurance policy and has been delivered into the custody of the court, there is no need to find its value, Harris *v.* Harris, 43 Ark. 535; and so where the defendant disclaims all interest, and denies the detention, Hinchman *v.* Doak, 48 Mich. 168, 12 N. W. 39.

Value of the Separate Articles.—The defendant who has retained the goods is entitled, if the verdict is against him, to have the value of each article specified; and it is error to deny this, Hanf *v.* Ford, 37 Ark. 544; Hobbs *v.* Clark, 53 Ark. 411, 14 S. W. 652; Hoeser *v.* Kraeka, 29 Tex. 450; Martin *v.* Berry, Tex. Civ. Ap., 87 S. W. 712; Rowland *v.* Mann, 28 N. C. 38; Spratley *v.* Kitchens, 55 Miss. 578; White v. Emblem, 43 W. Va. 819, 28 S. E. 761; Drane *v.* Hilzheim, 13 Sm. & M. 336. The reason of the rule is that the statute permits a delivery of a portion of the goods in satisfaction *pro tanto* of the judgment for return, Harris *v.* Harris, 43 Ark. 535.

But the party may waive his right, and is presumed to waive it unless he demands such separate valuation in advance of the verdict, or objects to the verdict for the omission, before the jury separate, Hobbs *v.* Clark, *supra;* First National Bank *v.* Calkins, 16 S. D. 445, 93 N. W. 646; Johnson *v.* Fraser, 2 Idaho, 404, 18 Pac. 48. One who has neither alleged nor proved the separate values cannot complain, Brenot *v.* Robinson, 108 Calif. 143, 41 Pac. 37; and there need be no such findings where there is no judgment for the value, Live Oak Co. *v.* Ingham, Tex. Civ. Ap. 44, S. W. 588. And where the defendant has disposed of all the goods and the jury find for the plaintiff, defendant is not prejudiced by their failure to find the separate value of the different articles, Jones *v.* McQueen, 13 Utah, 178, 45 Pac. 202, Brady *v.* Cook, 68 Miss. 636, 10 So. 56. A verdict for the defendant finding the aggregate value of the goods will suffice where the complaint alleges only the aggregate value, Black *v.* Hilliker, 130 Calif. 190, 62 Pac. 481. And where the plaintiff's pleadings gives the value of each article, a verdict which finds the value "as stated in the petition," is sufficient, Lillie *v.* McMillan, 52 Ia. 463, 3 N. W. 601. Where the statute requires that the jury shall "as far as practicable assess the value of each article separately," a saw-mill and steam-engine must be valued separately, Savage *v.* Russell, 84 Ala. 103, 4 So. 235; two mules, Southern Co. *v.* Johnson, 85 Ala. 178, 4 So. 643. But the statute is complied with where articles of different brands and different values are set out collectively, the value of the individual article, and then the value of the class, being given, Avary *v.* Perry Co., 96 Ala. 406, 11 So. 417. The rule must in any case be construed reasonably. A barouche and harness may be valued as one; the horses should be valued separately, Drane *v.* Hilzheim, 13 Sm. & M. 336. Whatever may, according to common understanding, be taken as parts of one whole, may be so taken in the assessment; and it was held that the rule requiring separate valuation was inapplicable where the plaintiff and one of the defendants were tenants in common of a stock of goods, Kean *v.* Zundelowitz, 9 Tex. Civ. Ap. 350, 29 S. W. 930. The rule requiring separate valuation has no application to a mare and her colt; they constitute for this purpose a single thing, Henry *v.* Dillard, 68 Miss. 536, 9 So. 298. The omission in the verdict may be cured by the award of a writ of inquiry, Duane *v.* Hilzheim, *supra.* In other courts the rule requiring the separate valuation is rejected, unless such valuation is required by the statute, Wall *v.* Demitkiewicz, 9 Ap. D. C. 109; Stevenson *v.* Lord, 15 Colo. 131, 25 Pac. 313; Kellogg *v.* Burr, 126 Calif. 38, 58 Pac. 306. And in Whetmore *v.* Rupe, 65 Calif. 237, 3 Pac. 851; the court said "we do not agree that the wrong-doer may, through his wrong-doing, acquire the privilege of restoring to the owner a particular article or paying its value as found by the jury instead." And in Byrne *v.* Lynn, 18 Tex. Civ. Ap. 252, 44 S. W. 311, the court said that a wrong-doer is not to be held to insist upon the separate valuation of different articles in order that he may keep a portion by payment.

Damages.—The damages should be assessed separately from the value

§ 766. **The judgment.** The judgment in replevin, when the court has jurisdiction of the persons and subject matter, is con-

of the goods, Mix *v.* Kepner, 81 Mo. 93, and the verdict should show for what the damages are assessed, Ridenour *v.* Beekman, 68 Ind. 236. The failure to assess damages to the prevailing party, cannot be assigned as error by the other, Prescott *v.* Heilner, 13 Ore. 200, 9 Pac. 403; Buck *v.* Young, 1 Ind. Ap. 558, 27 N. E. 1106; Gaines *v.* White, 1 S. D. 434, 47 N. W. 524. Where the statute prescribes interest upon the value as the measure of damages for the detention, the jury need find only the value; the court may add interest in the judgment, Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745. An excessive allowance of damages may be cured by a remittitur, Hampton Co. *v.* Sizer, 35 Misc. 391, 71 N. Y. Sup. 990.

Description of the Goods.—The description of the goods need be only reasonably certain. Where horses are replevied a description of them by pairs with the value of each pair, is sufficient, Prescott *v.* Heilner, *supra.* Ordinarily a verdict for defendant as to a portion of the goods must describe them; but where the record shows that the whole have been destroyed by fire the plaintiff is not prejudiced by an omission in this respect, Richardson Drug Co. *v.* Teasdall, 59 Neb. 150, 80 N. W. 488. A verdict which refers to "the horses in controversy" gives a sufficient description, Hopper *v.* Hopper, 84 Mo. Ap. 117. Where the property has been destroyed the verdict need not describe it, Findlay *v.* Knickerbocker Co., 104 Wis. 375, 80 N. W. 436.

When Objections must be Taken—Where the statute provides that a verdict not covering the issues "may be corrected by the jury under the instructions of the court or the jury may be again sent out," all objections to the verdict must be made when it is delivered, Johnson *v.* Fraser, 2 Idaho, 404, 18 Pac. 48. A verdict returned by less than a full panel if received without objection, must stand, Goldstein *v.* Smith, 85 Ills. Ap. 588.

Amendment.—The verdict may be amended in open court in the presence and by the consent of the jury, even after proclamation of adjournment has been commenced, Kreibohm *v.* Yancey, 154 Mo. 67, 55 S. W. 260; and even after error brought the verdict may be amended to conform to the manifest purpose of the jury, Lindauer *v.* Teeter, 41 N. J. L. 255. The court has an inherent power to amend the verdict, Plano Co. *v.* Person, 12 S. D. 448, 81 N. W. 897, citing Murphy *v.* Stewart, 2 How. 263, 11 L. Ed. 261. Where the plaintiff claims under a mortgage, and the fact of the mortgage and the amount due upon it are admitted by the pleadings, the court may even after the term and after appeal, amend the verdict for the plaintiff, by inserting the value of his interest, Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53. And where the verdict finds interest upon the value and assesses damages in addition, in distinct sums, the court in its judgment may reject either, Johnson *v.* Fraser, *supra.*

clusive upon all parties.[58] It may determine the property, the special property, or the right of possession; and when so determined the parties cannot set up or claim different rights or interests as against the judgment.[59] The parties may have separate interests; if so the judgment should not be joint.[60] When the court has no jurisdiction, it cannot render a judgment against the defendant, even for costs.[61]

§ 767. **Should embrace all parties and all issues.** The judgment should be for or against all parties; final judgment against part of the defendants will not dispose of the case as to others, and will be erroneous. It is equally important that all the parties should be disposed of as that all the issues should be.[62] The judgment, therefore, should determine all the issues, *i. e.*, all the rights of all the parties to all the property.[63] It may be good as to some defendants, and bad as to others;[64] but when a writ of replevin against two defendants is served upon one, a judgment against both is wholly void.[65]

§ 768. **The same.** Where the court without a jury passes upon the issues the judgment should determine all the issues submitted, the same as required with a jury. If the judgment is for the plaintiff the court should find the value of the property, where that is necessary, and that the plaintiff is the owner or entitled to its possession; it should assess damages and order a delivery, if that has not been had upon the writ. Each of these steps are essential to a valid judgment.[66]

§ 769. **Must be certain.** Where a justice entered judgment as follows: "A trial was had and a judgment rendered against the defendant for one cow," it was held not sufficient. It did not find the value of the property, or that the plaintiff was entitled

[58] Maids *v.* Watson, 13 Mo. 544; Pomeroy *v.* Cocker, 4 Chand. (Wis.) 174; Lutes *v.* Alpaugh, 23 N. J. L. 165; Penrose *v.* Green, 1 Mo. 774.

[59] Carlton *v.* Davis, 8 Allen, 94; Witter *v.* Fisher, 27 Iowa, 10; Lowe *v.* Lowry, 4 Ohio, 78; Perry *v.* Lewis, 49 Miss. 443.

[60] Sweetzer *v.* Mead, 5 Mich. 107.

[61] Collamer *v.* Page, 35 Vt. 387.

[62] Barbour *v.* White, 37 Ill. 164.

[63] Dow *v.* Rattle, 12 Ill. 373; Rose *v.* Tolly, 15 Wis. 444; Perry *v.* Lewis, 49 Miss. 443.

[64] Mercer *v.* James, 6 Neb. 406.

[65] Only *v.* Dickinson, 5 Cold. (Tenn.) 486.

[66] Beemis *v.* Wylie, 19 Wis. 319; Bates *v.* Wilbur, 10 Wis. 416; Heeron *v.* Beckwith, 1 Wis. 17; Beckwith *v.* Philleo, 15 Wis. 224.

to possession; nor did it assess the damages. It could not be read in evidence in another case for the same cow.[67]

§ 770. **Judgment upon default.** When the plaintiff failed to appear, the defendant, at common law, had judgment for a return and damages.[68]

§ 771. **When property has been delivered plaintiff cannot have value.** When the property has been replevied and delivered to the plaintiff, of course he cannot have judgment for the value. He must take judgment for the property in his possession and such damages and costs as he can obtain.[69]

§ 772. **Judgment for value or delivery.** Where the plaintiff has not already obtained the possession of the property by his writ or order for delivery, and has judgment in his favor, the form of the judgment is for the delivery of the goods, or for the value in case a delivery cannot be had.[70] The judgment in such cases is usually required to be in the alternative. In Minnesota there can be no judgment for value if the property can be delivered. A judgment for value not in the alternative is not necessarily erroneous if the court perceive that the delivery is impossible.[71] It does not follow from an omission of the court to ascertain the value and render the judgment therefor that the property had no value, or that such value cannot be ascertained in suit upon the bond.[72] Therefore, where judgment for value or in the alternative is not imperative under the statute, the judgment may be for a return of the goods; in such case the value may be ascertained and recovered in suit upon the bond, if the return is not made.[73]

[67] Beemis *v.* Wylie, 19 Wis. 319.

[68] Stat. 7 H. VIII. Ch. 4; Wilk. on Rep. 72.

[69] Rockwell *v.* Saunders, 19 Barb. 473; Seaman *v.* Luce, 23 Barb. 240; Merrill *v.* Butler, 18 Mich. 294; Blackwell *v.* Acton, 38 Ind. 426; McNamara *v.* Eisenleff, 14 Abb. Pr. (N. S.) 25; Rowark *v.* Lee, 14 Ark. 426; Garrett *v.* Wood, 3 Kan. 231.

[70] Ward *v.* Masterson, 10 Kan. 77; Marix *v.* Franke, 9 Kan. 132; Clary *v.* Roland, 24 Cal. 149; and cases last cited. See, also, Fitzhugh *v.* Wiman, 9 N. Y. 559; Glann *v.* Younglove, 27 Barb. 480; Callarati *v.* Orser, 4 Bosw. (N. Y.) 94; Smith *v.* Coolbaugh, 19 Wis. 107.

[71] Boley v. Griswold, 20 Wall. 486. Cases last cited.

[72] Kafer *v.* Harlow, 5 Allen, 348; Hawley *v.* Warner, 12 Iowa, 42; Mason *v.* Richards, 12 Iowa, 73; Nickerson v. Chatterton, 7 Cal. 568; Clary *v.* Rolland, 24 Cal. 147.

[73] Hall *v.* Smith, 10 Iowa, 45.

§ 773. **Judgment in the alternative for the goods or for their value.** When the judgment is for the defendant, and he is entitled to a return, the judgment should be in the alternative, *i. e.*, for the delivery of the property, or in case that cannot be had then the value of the property as found by the jury;[74] upon such judgment he is entitled to all the processes of the court which are issuable upon other judgments.

§ 774. **Exceptions to this rule.** There are cases which hold that the defendant may waive the return and take judgment for the value alone if he so elect.[75] This rule, however, varies in different States; the statute controls, and upon this subject it is the only guide. In Illinois the judgment is for the return and not in the alternative, except where the property was held as security for the payment of money; in such case the judgment may be in the alternative for the payment of the amount for which it was rightfully held, with damages within a given time to be fixed by the court, or make return of the property.[76] In California a judgment which left the defendant at liberty to pay the amount or deliver the property, as he might elect, was held erroneous; it must be for the delivery of the property, if delivery can be had, or for the value in case it cannot.[77] In Wisconsin the defendant may waive a return and take judgment for the value of the property.[78] The same rule prevails in Michigan[79] and in Arkansas, where an acceptance of a verdict for the value will be sufficient without a formal waive of a return on record.[80] In New York the defendant cannot elect to take judgment for the value, but it must be in the alternative.[81] In Mississippi the value of each

[74] Mason v. Richards, 12 Iowa, 73; Eslava v. Dillihunt, 46 Ala. 702; Smith v. Coolbaugh, 19 Wis. 107; Jansen v. Effey, 10 Iowa, 227; Marix v. Franke, 9 Kan. 132; Chissom v. Lancool, 9 Ind. 531; Bales v. Scott, 26 Ind. 202; Easton v. Worthington, 5 S. & R. 133; Dwight v. Enos, 9 N. Y. (5 Seld.) 470; Hall v. Jenness, 6 Kan. 365; Copeland v. Majors, 9 Kan. 104; Nickerson v. Chatterton, 7 Cal. 568; Pratt v. Donovan, 10 Wis. 379.

[75] Smith v. Coolbaugh, 19 Wis. 107; People v. Tripp, 15 Mich. 518; Williams v. Vail, 9 Mich. 162.

[76] Rev. Stat. Ill. Ch. 119, § 22.

[77] Cummings v. Stewart, 42 Cal. 232.

[78] Pratt v. Donovan, 10 Wis. 378; Morrison v. Austin, 14 Wis. 602; Farmers' L. & T. Co. v. Com. Bank of Racine, 15 Wis. 425.

[79] Adams v. Champion, 31 Mich. 235; Wheeler v. Wilkins, 19 Mich. 78; People v. Tripp, 15 Mich. 518.

[80] Hill v. Fellows, 25 Ark. 13.

[81] Seaman v. Luce, 23 Barb. 240; Fitzhue v. Winman, 5 Seld. (N. Y.) 559.

separate article must be found; judgment should be for the delivery of each, or the payment of its value; upon the delivery of any one or more of the articles the defendant stands discharged from the payment of its value.[82] This is also the rule in Texas.[83] The code of Alabama requires the jury to assess the value of each separate article where it is practicable. When the articles were a large number of house goods of small value, and neither the plaintiff nor defendant objected to the verdict when returned, an assessment of the value in gross was held sufficient.[84] In Tennessee, with reference to such articles as are in their nature distinct, the jury must find the value of each separately.[85] So in Mississippi, the jury must assess the value of each separate article; but what in common understanding is considered as parts of one whole may be so in law. In replevin for a barouche and harness and two horses, the barouche and harness may be regarded as parts of one whole, and but one value placed upon them; but the horses should be valued separately.[86] Where the defendant gives bond under the statute and retains the property the judgment for the plaintiff should be in the alternative for the property or its value.[87]

775. **Judgment for each party for different parts of the goods.** It sometimes happens that the plaintiff recovers a verdict for a portion only of the property, while the defendant has a verdict for the remainder. In such cases, each is entitled to judgment for the portion so found for him, together with damages and costs in so far as he is successful. When the action was for merchandise, and the jury found the defendant "guilty" as to all the property mentioned, except two pieces of satin, and that the plaintiff recover all the goods except those, and that he also recover one cent damages, and that the defendant recover the satin and four dollars and twenty cents damages, it was held that the judgment must follow the verdict, and that the costs must be

[82] Whitfield *v.* Whitfield, 40 Miss. 369. See, also, Caldwell *v.* Bruggerman, 4 Minn. 270; Hoeser *v.* Kraeka, 29 Texas, 451; Pickett *v.* Bridges, 10 Humph. (Tenn.) 175.

[83] Hoeser *v.* Kraeka, 29 Texas, 451.

[84] Eslava *v.* Dillihunt, 46 Ala. 702.

[85] Pickett *v.* Bridges, 10 Humph. (Tenn.) 171; Rowland v. Mann, 6 Ired. (N. C.) 38; Sayers *v.* Holmes, 2 Cold. (Tenn.) 259.

[86] Drane *v.* Hilzheim, 13 S. & M. (Miss.) 337.

[87] Anderson v. Tyson, 6 S. & M. (Miss.) 244.

apportioned equitably. In such case the court, under its general powers, could set off the damages and costs and award execution for the balance, when no reason for a contrary course appeared to exist.[88]

§ 776. **Separate judgments as to separate defendants.** Where there are several defendants, a verdict as to one need not embrace the others. One may be guilty of the taking or of detention and the others not. The rules which apply in cases of trespass govern the judgment in replevin. The constant practice is to render judgment against one who may be found guilty and at the same time discharge those not guilty.[89] So, when the action is against joint defendants, the court may adjudge a return of the goods to one of several, while as to the others no return is allowed.[90] Where there is more than one defendant, when judgment is against all, it must be a joint judgment for joint damages; each of the defendants is jointly liable for all the damages which the plaintiff has sustained without regard to the fact that one may have been more or less guilty than the others.[91] But the plaintiff may, before verdict, enter *nolle prosequi* as to one and take judgment as to the others, and when the jury erroneously assess several damages, the plaintiff may enter a *nolle* as to all but one and take judgment against him.[92]

§ 777. **Order for delivery part of the judgment.** The order of delivery is part of the judgment.[93] It must be made at the same time, or at least while the court has its record before it; it cannot be made at a subsequent term, even upon notice to the

[88] Poor v. Woodburn, 25 Vt. 239. See, also, Brown v. Smith, 1 N. H. 36; Powell v. Hinsdale, 5 Mass. 343; Clark v. Keith, 9 Ohio, 73; O'Keefe v. Kellogg, 15 Ill. 353; McLarren v. Thompson, 40 Me. 285; Wright v. Mathews, 2 Blackf. (Ind.) 187.

[89] Carothers v. Van Hagan, 2 G. Greene, (Iowa.) 481; Church v. DeWolf, 2 Root. (Conn.) 282; Wakeman v. Lindsay, 19 L. J. Q. B. 166; Addison v. Overend, 6 Term R. 357 & 767; Ouly v. Dickinson, 5 Cold. (Tenn.) 486.

[90] Woodburn v. Chamberlin, 17 Barb. 452.

[91] Clark v. Bales, 15 Ark. 452; Layman v. Hendrix, 1 Ala. 212; Simpson v. Perry, 9 Geo. 508; Fuller v. Chamberlain, 11 Met. 503.

[92] Crawford v. Morris, 5 Gratt. 90; Wallace v. Brown, 5 Post. 216; Holley v. Mix, 3 Wend. 350; Cahoon v. Bank of Utica, 3 Seld. (N. Y.) 490; Pearce v. Twichell, 41 Miss. 346.

[93] Weizen v. McKinney, 2 Wis. 288; Nickerson v. Chatterton, 7 Cal. 572; Kates v. Thomas, 14 Minn. 461; Dwight v. Enos, 5 Seld. (N. Y.) 470; Wil-

other party. The court has no power to correct its records at a subsequent term.[94]

§ 778. **Defendant entitled to reasonable time to comply with the judgment for return.** When the judgment is for a return or payment of the value, the defendant is entitled to a reasonable time within which to make the return, and so excuse himself from the payment of the value. Thus, where the judgment was for a return of the mare and colt in dispute, or in lieu thereof one hundred and sixty dollars, a few days thereafter the plaintiff tendered the mare and colt to the defendant, who refused to receive them and demanded the money value as assessed by the jury, a tender within thirty days was held to be within a reasonable time.[95]

§ 779. **Effect of payment of judgment for value.** Where the judgment is against the defendant for value, and that value is paid, the effect of the judgment and payment is to transfer the title to the party against whom the judgment is rendered.[96] So in trover judgment for plaintiff changes the ownership, so that as against the defendant this plaintiff cannot again claim title.[97] But in replevin the right to possession may be the only issue to be tried, and in such case the judgment is no evidence of title. When the title is in issue and determined, the judgment will, of course, be conclusive upon the parties until reversed in a legal manner,[98] and this rule applies as well where the property is not delivered upon the writ as where it is.[99]

§ 780. **The same.** When plaintiff sued for rails, and the defendant had used part of them in building a fence before the service of the writ, judgment for damages in replevin was a bar to subsequent suit in trover for the value.[100] The record of an

kins *v.* Treynor, 14 Iowa, 393; Clark v. Warner, 32 Iowa, 219; Funk v. Israel, 5 Iowa, 454; Fitzhugh *v.* Wiman, 9 N. Y. 559.

[94] Lili v. Stookey, 72 Ill. 495.

[95] McClellan *v.* Marshall, 19 Iowa, 562.

[96] Marix *v.* Franke, 9 Kan. 132.

[97] Adams *v.* Broughton, Andrews, 18. See Hoag *v.* Breman, 3 Mich. 162.

[98] Seldner *v.* Smith, 40 Md. 603; Wallace v. Clark, 7 Blackf. 299; Warner *v.* Matthews, 18 Ill. 83. See Judgment for Return, *ante*, Ch. XVI.

[99] Parmalee *v.* Loomis, 24 Mich. 242.

[100] Bower *v.* Tallman, 5 W. & S. (Pa.) 556. See, also, Osterhout *v.* Roberts, 8 Cow. (N. Y.) 43; Livingston *v.* Bishop, 1 Johns. 290; Sharp *v.* Gray, 5 B. Mon. (Ky.) 4; Janes *v.* McNeil, 2 Bailey, (S. C.) 466.

ineffectual suit in replevin for money is not a bar to another action for the same money.[101]

§ 781. **Judgment of non-suit does not affect title.** Judgment of non-suit or discontinuance does not bar the plaintiff from another action for the same cause.[102] This was the common law. The statute in England, Stat. Westm. 2d, 13 E. 1, C. 2, which restrains the plaintiff from a second replevin, but permits him to proceed by a writ of second deliverance, is applicable only to actions founded upon a distress, and is local to that kingdom.[103]

§ 782. **Judgment of dismissal.** When the suit is dismissed for informality the plaintiff may maintain another action upon the original unlawful taking. Such judgment for return constitutes no bar to this action because the case was not heard upon its merits. Nor is it a valid objection that the defendant has not in fact taken out any writ of return or actually taken the property into his possession. The judgment for a return was ordered upon the defendant's motion to dismiss the writ; the plaintiff yielded to it and returned the property to the place from which he had taken it under his defective proceeding; this left the plaintiff's case where it was when he instituted his first action.[104]

§ 783. **Illustrations of the effect of judgment.** When the plaintiff in replevin who had obtained delivery of the goods upon his writ sold them and afterwards died and the suit was abated, the defendant in the suit brought replevin from the purchaser and was permitted to set up his prior title to sustain his action against the purchaser; the record of the first suit, which was abated, constituting no bar.[105] So judgment by default does not always settle the rights to the property; there should be a finding by the court.[106] But parties sued in trespass cannot set up the fact that they sold the property to one from whom the owner

[101] Sager v. Blain, 5 Hand. (41 N. Y.) 448.

[102] Hackett v. Bonnell, 16 Wis. 471; Dagget v. Robins, 2 Blackf. 415; Westcott v. Bock, 2 Col. 335.

[103] Daggett v. Robins, 2 Blackf. 418.

[104] Wallbridge v. Shaw, 7 Cush. 560; Wilbur v. Gilmore, 21 Pick. 250; Morton v. Sweetser, 12 Allen (Mass.) 134.

[105] Lockwood v. Perry, 9 Met. 446.

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

has recovered it in replevin. The recovery in replevin from a purchaser from a trespasser is no defense for the trespasser.[107]

§ 784. **Judgment for value of limited interest.** When the interest of the defendant is less than the value of the property a judgment in his favor should not be for full amount, but only for the value of his interest, unless he is in some way liable to the general owner. When the suit is for mortgaged property, defendant succeeding is entitled to a return; but in such cases he only takes the lien of his mortgage; if he ask for judgment for the full amount he must take the value of his interest.[108]

§ 785. **Judgment for value on count in trover.** In Illinois, where the officer's return shows that the property or any part of it was not delivered, the plaintiff may add a count in trover, and upon proper proof take judgment for the value of the property not delivered.[109] The rule in Tennessee and Florida is similar to that of Illinois in this respect, and was so in Colorado until changed by statute.

§ 786. **When property is lost judgment for return immaterial.** Where it appears upon trial that the property is hopelessly lost or destroyed so that a judgment for a return would be of no avail, a failure to render a judgment for its return would be at most a technical error, for which judgment for the value would not be reversed.[110]

§ 787. **Judgment for value in such cases.** The death or destruction of the property does not necessarily do away with the necessity of judgment for the value. By the ancient law the property was presumed to belong to the plaintiff, and the only interest which the defendant claimed in it was the right to hold it as security or a pledge for the rent claimed to be due. Property so seized or impounded was, even while in pound, at the owner's risk if it died.[111] If replevied by the owner the landlord lost his lien and was required to look to the security upon the bond; if the animal died pending the replevin suit the rights of the landlord were not affected. But under the present practice the controversy is more frequently concerning the title or right

[107] McGee *v.* Overly, 7 Eng. (Ark.) 164.

[108] Fowler *v.* Hoffman, 31 Mich. 221; Russell *v.* Butterfield, 21 Wend. 300.

[109] Kehoe *v.* Rounds, 69 Ill. 352; Dart *v.* Horn, 20 Ill. 213.

[110] Brown *v.* Johnson, 45 Cal. 77; Boley *v.* Griswold, 20 Wall. 486.

[111] See *ante*, § 8; Gilbert on Rep.; 3 Bla. Com. 145.

of possession than of distraint. The common law, therefore, furnishes no rules to determine what the judgment should be in such cases. In New York it was held that when the property was an animal that died before a return, plea showing that fact, and that it died without the fault of the defendant, was good.[112] But where the property is wrongfully taken out of the owner's possession upon a writ of replevin the taker cannot, upon judgment against him, excuse his liability for the payment of the value by showing its death or destruction. Property so taken is not at the risk of the rightful owner while in possession of the wrongful taker. This question, however, more properly arises in another place.[113]

[112] Carpenter *v.* Stevens, 12 Wend. 589.

[113] See Damages, § 600, *et seq.*

NOTE XXXIV. *Judgment in General.*—No judgment can be entered except that which the statute allows, Bateman *v.* Blake, 81 Mich. 227, 45 N. W. 831; Johnson *v.* Mason, 64 N. J. L. 258, 45 Atl. 618. The rights of the parties must be determined with reference to the time of the institution of the suit, Brown *v.* Hogan, 49 Neb. 746, 69 N. W. 100. The judgment must determine the right of possession as to all the goods demanded and the right to which is denied, Olson *v.* Peabody, 121 Wis. 675, 99 N. W. 458; whether replevied or not, Carrier *v.* Carrier, 71 Wis. 111, 36 N. W. 626. May be given for nominal damages without the formality of an assessment McKean *v.* Cutler, 48 N. H. 370; see the opinion of Doe, J., in this case in denunciation of mere formalities and opprobrious niceties; "there is not any word or form of expression that is indispensable in a judgment." And the value may be determined from the plaintiff's affidavit without calling a jury, Lamy *v.* Remuson, 2 N. M. 245. Judgment for the plaintiff not mentioning damages or costs implies that plaintiff is entitled to nominal damages and costs, and an execution for costs will not be set aside, though the clerk omit to insert in it a direction to collect one cent damages, as he might properly do, Starkey *v.* Waite, 69 Vt. 193, 37 Atl. 292. A judgment authorizing execution against the defendant unless the goods are forthwith delivered, is bad in form, Seattle Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763. A judgment against three defendants, upon stipulation, signed by the attorney of one only, as defendant's attorney, two defendants not appearing, and the complaint showing no cause of action against them, must be vacated on motion, Stahl *v.* Chicago Co., 94 Wis. 315, 68 N. W. 954. A judgment that the plaintiff recover a sum named, the value of the property in controversy, "to be discharged on payment of another sum," the amount of certain claims asserted against the defendant, is erroneous; the judgment must be according to the statute,

for the possession of the goods or the value, Spencer *v.* Bell, 109 N. C. 39, 13 S. E 704. Plaintiff had pledged certain horses to defendant and brought replevin, claiming that the debt was paid; he failed in his action, and judgment was given that the goods be returned to defendant "to be holden by him as security for $189.10, or at defendant's election he recover of plaintiff and the sureties, said sum," Kronck *v.* Reid, 105 Mo. Ap. 430, 79 S. W. 1001. All the equities of the parties may be adjusted in replevin, Maryville Bank *v.* Snyder, 85 Mo. Ap. 83. Defendant was in possession of certain horses as constable, claiming under an execution issued upon a judgment enforcing an agister's lien; plaintiff claimed under a chattel mortgage junior to the lien, and insisted that the proceedings enforcing the lien were void; but, it appearing that the lien was unquestionably valid, the animals were awarded to the defendant, *Id.* And although plaintiff's action is prematurely brought, and the goods have been sold pending the suit, by the sheriff, yet if plaintiff has an interest, the value of that interest may be ascertained in the replevin and judgment given in his favor accordingly, Harward *v.* Davenport, 105 Ia. 592, 75 N. W. 487. Judgment in favor of all of several defendants, some not having any interest, is error, Steele *v.* Matteson, 50 Mich. 313, 15 N. W. 488; Jandt *v.* Potthast, 102 Ia. 223, 71 N. W. 216; Hall *v.* Jenness, 6 Kans. 356. A judgment that the plaintiff "retain the property replevied," and recover the value, is not injurious, where the record shows nothing was taken on the writ, Greenberg *v.* Stevens, 212 Ills. 606, 72 N. E. 722. The judgment must follow the verdict, Holliday *v.* McKinne, 22 Fla. 153, Gordon *v.* Little, 41 Neb. 250, 59 N. W. 783; McGriff *v.* Reid, 37 Fla. 51, 19 So. 339. But the court is not required to enter a judgment for damages merely because damages are awarded by the verdict; where there are distinct findings of both damages and interest upon the value, the court may omit either in the judgment, Johnson *v.* Fraser, 2 Idaho, 404, 18 Pac. 48. But in Everett *v.* Akins, 8 Okla. 184, 56 Pac. 1062, where the verdict declared that defendant "is entitled to the four hundred bushels of wheat * * * at seventy-five cents per bushel, minus $70 paid by plaintiff for harvesting, threshing and seed, total amount for defendant $230," it was held the court had no power to vacate the allowance made by the jury to the plaintiff for harvesting, threshing and seed. If the court give judgment that plaintiff is the owner, upon the mere finding that he is entitled to possession, it is error, Yick Kee *v.* Dunbar, 20 Ore. 416, 26 Pac. 275. The judgment must conform to the pleadings, Eikenbary *v.* Clifford, 34 Neb. 607, 52 N. W. 377. But the parties may voluntarily litigate a controversy not made in the pleadings, and the successful party may have such relief as is equitable; the defendant failed to replevy the goods; on the trial plaintiff's title was admitted by the defendant, and defendant's right to detain the goods as security for $50 was admitted by the plaintiff. Held, that plaintiff should be awarded the goods on payment of fifty dollars, or, if possession could not be had, the value less fifty dollars, Bassett *v.* Haren, 61 Minn. 346, 63 N. W. 713. Where plaintiff fails the judgment

may direct the delivery of the goods to an intervenor who appears to be entitled, Grubbs *v.* Stephenson, 117 N. C. 66, 23 S. E. 97. The judgment must describe the goods, Tumulte *v.* Jordan, 67 N. J. L. 509, 51 Atl. 466; either by express words, or by reference to the pleadings or other part of the record, Cooke *v.* Aguirre, 86 Calif. 479, 25 Pac. 5, Seattle Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763; must describe the goods with reasonable certainty, Guille *v.* Wong Fook, 13 Ore. 577, 11 Pac. 277. The judgment may refer to the complaint for the description, Kelly *v.* McKibben, 54 Calif. 192; Foredice *v.* Rinehart, 11 Ore. 208, 8 Pac. 285. In some States it is held that the judgment must show the separate value of each article, Savage *v.* Russell, 84 Ala. 103, 4 So. 235; Herder *v.* Schwab Co., Tex. Civ. Ap., 37 S. W. 784; Bowman *v.* Weber, Tex. Civ. Ap. 41 S. W. 493; but see NOTE XXXIII. p. 640. The judgment must determine the rights of the parties as to all of the goods. A judgment in favor of the plaintiff for a portion only, and silent as to the residue, will be modified on appeal so as to direct a return of these latter articles to the defendant, Ryan *v.* Fitzgerald, 87 Calif. 345, 25 Pac. 546.

Judgment for the Goods, for Plaintiff.—In Tennessee, the plaintiff prevailing, is entitled to judgment for possession, with damages for the taking and detention, Parham *v.* Riley, 4 Cold. 5. In Texas he recovers the goods, and in the alternative the value at the time of the verdict; and if live-stock be in question, the increase, Morris *v.* Coburn, 71 Tex. 406, 9 S. W. 345. A judgment for the plaintiff should award him the property with damages for the detention, or in case delivery cannot be had, the value, Hammond *v.* Morgan, 101 N. Y. 179, 4 N. E. 328. Plaintiff claiming under a mortgage upon a stock of goods is entitled to judgment for possession of the whole, though the debt secured by the mortgage is less than the value of the goods, Swope *v.* Burnham, 6 Okla. 736, 52 Pac. 924; but the plaintiff to entitle himself to a judgment for possession must show an existing and immediate right of possession, Nichols *v.* Knutson, 62 Minn. 237, 64 N. W. 391. Where plaintiff has obtained possession under the writ there can be no judgment for delivery, Leonard *v.* McGinnis, 34 Minn. 506, 26 N. W. 733; the judgment in such case should award plaintiff the possession, with his damages and costs, Webb *v.* Hecox, 27 Misc. 169, 58 N. Y. Sup. 382; Hanscom *v.* Burmood, 35 Neb. 504, 53 N. W. 371. Plaintiff's right to a judgment for the goods, or the value with damages, is not affected by his failure to take out an order of delivery, Eaton *v.* Langley, 65 Ark. 448, 47 S. W. 123; and if plaintiff shows title and right of possession to any part of the goods, he is entitled to judgment as to so much, Altemus *v.* Holcomb, 20 Ky. L. Rep. 96, 45 S. W. 360. Where defendants, in open court, relinquish all claim to the goods, judgment should go in favor of plaintiff for possession and costs, Frick Co. *v.* Stephens, 7 Kans. Ap. 745, 53 Pac. 378. And the fact that no damages are assessed to the plaintiff is immaterial, McKean *v.* Cutler, 48 N. H. 370. Where defendant surrenders a part of the goods plaintiff is entitled to judgment for the possession of these, and to at least nominal damages, Cardwell *v.* Gilmore, 86 Ind. 428. Plaintiff and defendant severally

claim under mortgages from the same mortgageor; plaintiff is adjudged the senior, and defendant guilty of dentention; plaintiff having obtained the goods under the writ is entitled to a judgment for possession and for costs; it is error to adjudge the defendant the amount of his mortgage, even though the value of the goods be found to exceed both mortgages, Olin *v.* Lockwood, 102 Mich. 443, 60 N. W. 972. In New Jersey, where defendant gives bond and retains the goods, there can be no judgment for possession, but only for the value, and damages for the detention, Fort Wayne Corporation *v.* The Security Co., 65 N. J. L. 221, 47 Atl. 559. The plaintiff may have judgment for the goods, though there be no finding of value, Hay *v.* Muller, 7 Misc. 670, 28 N. Y. Sup. 57. Where defendant has confused the lumber of plaintiff with other like lumber, so that the particular lumber belonging to the plaintiff cannot be conveniently distinguished, plaintiff may recover the quantity to which he is entitled, supplied if necessary by other lumber, with which it has been so confused, Starke *v.* Paine, 85 Wis. 633, 55 N. W. 185.

For Return to Defendant.—If plaintiff fails the general rule is to award a return, Stanley *v.* Neale, 98 Mass. 343; as where the plaintiff fails because the action is brought in the name of the trustees of a corporation and not in the corporate name, Bartlett *v.* Brickett, 98 Mass. 521, Glenn *v.* Porter, 68 Ark. 320, 57 S. W. 1109; or because plaintiff was partner and tenant in common with defendant at the institution of the suit, Jenkins *v.* Mitchell, 40 Neb. 664, 59 N. W. 90; Fugina *v.* Brownlie, 65 Wis. 628, 27 N. W. 408; Ingals *v.* Ferguson, 138 Mo. 358, 39 S. W. 801; or the defendant prevails on a demurrer to a plea in abatement, Walko *v.* Walko, 64 Conn. 74, 29 Atl. 243; or the cause is discontinued by operation of law, Daley *v.* Mead, 40 Minn. 382, 42 N. W. 85; or by the plaintiff voluntarily, Schweer *v.* Schwabacher, 17 Ill. Ap. 78; Manix *v.* Howard, 82 N. C. 125; Liebman *v.* McGraw, 3 Wash. 520, 28 Pac. 1107, rejecting the authority of Capitol Company *v.* Hall, 10 Ore. 204; Kneebone *v.* Kneebone, 83 Calif. 645, 23 Pac. 1031; or where judgment of non-suit is given for defects in the plaintiff's allegations, Kimball Co. *v.* Redfield, 33 Ore. 292, 54 Pac. 216; or the action is commenced without the affidavit required by statute, Barruel *v.* Irwin, 2 N. M. 223; or the plaintiff fails on the trial to make out his case, Pabst Co. *v.* Butchart, 68 Minn. 303, 71 N. W. 273; Washington Co. *v.* Webster, 68 Me. 449; Lochnitt *v.* Stockton, 31 Ills. Ap. 217; or it appears that the defendant, at the issuing of the writ, was the marshal of the United States and holding the goods under process from the court of the United States; and in such case there should be no alternative, Williams *v.* Chapman, 60 Ia. 57, 14 N. W. 89; or the sheriff has seized goods not described in the writ, Dewey *v.* Hastings, 79 Mich. 263, 44 N. W. 607; or the defendant prevails upon one of several pleas, MacLachlan *v.* Pease, 66 Ills. Ap. 634. The defendant may have judgment, though the writ has never been returned, upon proof made that the goods were delivered to the plaintiff, Frank *v.* Brown, 119 Mich. 631, 78 N. W. 670. Defendant is entitled to judgment for the return of all

the property, and if the property, *all of it*, cannot be returned, then for the value of all of it, Whetmore *v.* Rupe, 65 Calif. 237, 3 Pac. 851. Where pending replevin for live-stock, some of the animals die, defendant prevailing, is entitled to judgment for the value of all, both the quick and the dead, Lillie *v.* McMillan, 52 Ia. 463, 3 N. W. 601. Return will not be awarded, if, at the institution of the suit, the defendant was not in possession, Hursh *v.* Starr, 6 Kans. Ap. 8, 49 Pac. 618; House *v.* Turner, 106 Mich. 240, 64 N. W. 20; Blatchford *v.* Boyden, 122 Ills. 657, 13 N. E. 801; or assets no claim, DePriest *v.* McKinstry, 38 Neb. 194, 56 N. W. 806. It is the policy of the law to settle the right of possession and all questions which may arise therefrom, in one action, *Id.* Return will not be awarded for the mere failure of the plaintiff to tender in advance of the trial, promissory notes given for the goods which were obtained by a fraudulent misrepresentation, Doane *v.* Lockwood, 115 Ills 490, 4 N. E. 500—depends upon statute—; or the plaintiff fails merely for the omission to prove the demand in advance of suing out the writ, Webster *v.* Brunswick Co., 37 Fla. 433, 20 So. 536, McGregor *v.* Cole, 100 Mich. 262, 58 N. W. 1008; nor where the defendant disclaims all right in the goods, Hinchman *v.* Doak, 48 Mich. 168, 12 N. W. 39; Farrah *v.* Bursley, 100 Mich. 547, 59 N. W. 245; nor where defendant's right to the goods expires pending the action, Legere *v.* Stewart, 17 Colo. Ap. 472, 68 Pac. 1059; nor even upon verdict for the defendant unless the verdict finds that the defendant is *then* entitled to return, *Id.*; nor if the defendant denies the detention and asserts no claim to the goods, Hursh *v* Starr, *supra;* nor where the plaintiff is entitled to possession at the trial, though not so entitled at the institution of his suit, Barney *v.* Brannan, 51 Conn. 175; Flinn *v.* Ferry, 127 Calif. 648, 60 Pac. 434, Ator v. Rix, 21 Ills. Ap. 309; but otherwise if the plaintiff's only claim is a lien acquired after a wrongful taking, as for rent accrued, the landlord having distrained before any rent was due, *Id.;* nor where the defendant is mortgageor in default and has no right to the possession of the goods, even though they were taken from him by unlawful force, Nichols *v.* Knutson, 62 Minn. 237, 64 N. W. 391; nor where the defendant is an officer who has unlawfully levied upon exempt goods, even though the law prohibits an action of replevin against an officer in such case, Saffell *v.* Wash., 4 B. Monr. 92; nor even where the defendant is found not guilty unless his right appears superior to that of the plaintiff, Smith Co. *v.* Holden, 73 Vt. 396, 51 Atl. 2; nor when the plaintiff entirely fails, if defendant give no evidence of right in himself, Capitol Company *v.* Hall, 10 Ore. 202; nor where the defendant pleads merely *non detinet*, Dyer *v.* Brown, 71 Ills. Ap. 317; nor upon verdict of not guilty upon such plea, or the plea of *non cepit*, or both, Mattson *v.* Hanisch, 5 Ills. Ap. 102, Hackett *v.* Jones, 34 Ills. Ap. 562. And where the action is dismissed, other defendants are not entitled to judgment that the goods shall be returned to the sheriff, from whom they were taken, Oppenheimer *v.* Lewis, 20 Ap. Div. 332, 46 N. Y. Sup. 765; nor is defendant entitled to return where he pleads *non cepit* merely, though the plaintiff is non-suit,

Hoeffner *v.* Stratton, 57 Me. 360. Defendant who disclaims by his answer, cannot demand that the goods be restored to his co-defendant who makes default, Sheehan *v.* Golden, 85 Hun, 462, 33 N. Y. Sup. 109. Defendants sued jointly, and answering separately, may have a joint judgment for the return of the goods, or in the alternative for their value, although they hold by distinct titles, Myers *v.* Moulton, 71 Calif. 499, 12 Pac. 505. There can be no judgment of return where the defendant has given bond and retained the goods, Allen *v.* Steiger, 17 Colo. 552, 31 Pac. 226. Nor where the goods immediately upon the service of plaintiff's writ, were replevied by other parties acting in concert with the defendant, Joseph *v.* Braudy, 112 Mich. 579, 70 N. W. 1101; nor where by any means the defendant has already obtained the goods, Goodheart *v.* Bowen, 2 Ills. Ap. 578. The statutory provision that "judgment may be for a return thereof or for value, etc.," gives the court a discretion to omit an order for the return when substantial justice requires this, Johnson *v.* Fraser, 2 Idaho, 404, 18 Pac. 48. Judgment for the plaintiff as to part of the articles sued for, pursuant to an offer of compromise made by the defendant, entitles defendant to the residue, Shepherd *v.* Moodhe, 150 N. Y. 183, 44 N. E. 963. Where the plaintiff demanding goods which have been taken under execution against a stranger, joins the creditors with the sheriff in his action of replevin, he cannot complain of a judgment for return to all of the defendants, Brunk *v.* Champ, 88 Ind. 188. The power of the court to refuse a return where defendant's right is expired, is not dependent upon the allegations of the answer, but upon equitable principles, and the consideration that it is not advisable to return the goods to one who must immediately yield them in a second replevin by the same plaintiff, Pico *v.* Pico, 56 Calif. 453. Judgment for return may be entered against both the principal in the bond and his sureties, or against either of them, according to his circumstances, Corbett *v.* Pond, 10 Ap. D. C. 17. In Texas the judgment for return must permit the return of any goods replevied, in satisfaction *pro tanto*, Clopton *v.* Goodbar, Tex. Civ. Ap. 55 S. W. 972; Jackson *v.* Nelson, Tex. Civ. Ap. 39 S. W. 315. Plaintiff appeared to have no title; the defendant was an officer and claimed under an attachment which had been dissolved; the assignee of the defendants in the attachment had demanded the goods of the officer; the court, inasmuch as the officer's right was terminated and the assignees were not parties, so that the judgment would not bind them, refused to order return of the goods to the officer, merely to enable him to comply with the demand of the assignee, Gardner *v.* Lane, 98 Mass. 517. Finding of value is not necessary to entitle defendant to a judgment of return, Adamson *v.* Sundby, 51 Minn. 460, 53 N. W. 761. The statute provided that if either party shall have only a lien or special property in the goods, the finding shall be accordingly, and the court shall render such judgment as may be just. Another statute provided that when goods replevied have been attached they shall, in case of return, be held liable to the attachment until final judgment in the suit in which they were attached, and for thirty days

thereafter; the trial in a replevin suit in which an attaching officer was defendant occurred before judgment in the attachment suit. Held there could be no judgment for return of the goods to the officer, and that the section first cited refers to other liens than those accrued by the levy of an execution or attachment, Frederick *v.* Mecosta Circuit Judge, 52 Mich. 529, 18 N. W. 343. If defendant, pending the replevin, assign his interest in the goods to another, he is not entitled to return; and the plaintiff must be permitted to show this on the trial, Campbell *v.* Quinton, 4 Kans. Ap. 317, 45 Pac. 914. Plaintiff cannot complain that the judgment against him is for damages merely, and that no judgment is given for return of the goods, Scott *v.* Burrill, 44 Neb. 755, 62 N. W. 1093; Branch *v.* Wiseman, 51 Ind. 1. A justice of the peace failing to enter judgment on a verdict in replevin, at the time of its return, thereby lost jurisdiction; at a later day he entered judgment awarding the goods to the plaintiff, and for costs and damages. The Circuit Court on *certiorari* to review this judgment has no power to award return of the property to defendant, Smith *v.* Bahr, 62 Wis. 244, 22 N. W. 438.

Where the Court is without Jurisdiction.—If the court is without jurisdiction there can be no judgment for return, Smith *v.* Fisher, 13 R. I. 624; Gray *v.* Dean, 136 Mass. 128; Elder *v.* Greene, 34 S. C. 154, 13 S. E. 323; Widber *v.* Benjamin, 75 Vt. 152, 53 Atl. 1071; Vogel *v.* The People, 37 Ills. Ap. 388; State *v.* Letton, 56 Neb. 158, 78 N. W. 533; nor for damages, *Id.* Nor where the writ is made returnable at a day later than prescribed by statute, and the action is dismissed on this account, Reid *v.* Panska, 56 Neb. 195, 78 N. W. 534; but see *contra*, Novelle *v.* Daw, 94 N. C. 43; McDermott *v.* Isbell, 4 Calif. 113, Colby *v.* O'Donnell, 38 Ills. Ap. 196, Stimer *v.* Allen, 88 Mich. 140, 50 N. W. 107; Walko *v.* Walko, 64 Conn. 74, 29 Atl. 243; Bates *v.* Stanley, 51 Neb. 252, 70 N. W. 912; Barruel *v.* Irwin, 2 N. M. 223; Coverdale *v.* Alexander, 82 Ind. 503; O'Donnell *v.* Colby, 55 Ills. Ap. 112.—*Return not awarded, unless demanded.*—Return may be awarded when the action is dismissed for mere defect in the service, Gray *v.* Dean, 136 Mass. 128; *contra*, when the writ abates because no bond was given, Smith *v.* Fisher, 13 R. I. 624. There can be no judgment for return unless demanded by defendant's answer, Bown *v.* Weppner, 62 Hun. 579, 17 N. Y. Sup. 193; Banning *v.* Marleau, 101 Calif. 238, 35 Pac. 772, Summer *v.* Kelly, 38 S. C. 508, 17 S. E. 364, Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; Lomme *v.* Sweeney, 1 Mont. 584; Gallup *v.* Wortman, 11 Colo. Ap. 308, 53 Pac. 247; Aultman *v.* O'Dowd, 73 Minn. 58, 75 N. W. 756; Young *v.* Glasscock, 79 Mo. 574, Merrill Co. *v.* Nickels, 66 Mo. Ap. 678; Cowling *v.* Greenleaf, 32 Kans. 392; but after judgment for defendant for costs merely it is said that defendant cannot legally contest plaintiff's right to the possession, Cowling *v.* Greenleaf, *supra*. And in Harvey *v.* Ivory, 35 Wash. 397, 77 Pac. 725, it was held that the defendant, if the plaintiff fails, may have return of the goods without demanding it; the plaintiff's possession, it is said, is conditioned upon his maintaining his action, and if he fails the defendant is en-

titled to return as a matter of right; and in Puller *v.* Thomas, 36 Mo. Ap. 105, although the statute provided that judgments for return shall be granted where "the defendant in his answer demands return," it was held that although defendant made no demand for return of the goods, a judgment for return, and no other judgment, could be given. The latter cases seem in accord with the rule that the plaintiff may have such relief as he shows himself to be entitled to, whether within the prayer of his complaint or not; the provision of the code "if the defendant claim a return thereof" judgment may be for a return of the property, seems to be of no greater force than the ordinary provision that the complaint shall contain "a demand for the relief which the plaintiff claims." Under a system which awards to the plaintiff whatever relief he may show himself entitled to, irrespective of what he demands, it seems unreasonable to hold the defendant to strict compliance with the statutory provision by which the commonly received doctrine is supported.

Alternative Judgment, for the goods or value.—The statute in many of the states requires that if the goods have not been delivered to the plaintiff, and he prevails, he shall have judgment for the goods, or the value thereof if delivery cannot be had; and that if the goods have been replevied and delivered to the plaintiff, and defendant prevails, he shall have judgment for return of the goods, or for the value if return cannot be had. It is held in many cases that these provisions are imperative; that the judgment must be in the alternative, McCue *v.* Tunstead, 66 Calif. 486, 6 Pac. 316, Brichman *v.* Ross, 67 Calif. 601, 8 Pac. 316; Baxter *v.* Berg, 88 Wis. 400, 60 N. W. 711; Cooke *v.* Aguirre, 86 Calif. 479, 25 Pac. 5; Meads *v.* Lasar, 92 Calif. 221, 28 Pac. 935; Foss *v.* Marr, 40 Neb. 559, 59 N. W. 122; Robbins *v.* Slattery, 30 S. C. 328, 9 S. E. 510; Guille *v.* Wong Fook, 13 Ore. 577, 11 Pac. 277; Reed *v.* King, 89 Ky. 388, 12 S. W. 772; Manker *v.* Sine, 35 Neb. 746, 53 N. W. 734; Goodwin *v.* Potter, 40 Neb. 553, 58 N. W. 1128; Field *v.* Lumbard, 53 Neb. 397, 73 N. W. 703; Meeker *v.* Johnson, 3 Wash. 247, 28 Pac. 542; Hanf *v.* Ford, 37 Ark. 544, Hall *v.* Jenness, 6 Kans. 356. The plaintiff may insist upon the alternative judgment, though the defendant waives it, Meeker *v.* Johnson, *supra*. Plaintiff's sureties, it is said, contract with reference to the statute, and are not bound if the statute is departed from, Lee *v.* Hastings, 13 Neb. 508, 14 N. W. 476, Field *v.* Lumbard, *supra*. But although the plaintiff fail if it appears that the defendant has no interest in the chattels, he is not entitled to recover the value, Darling *v.* Tegler, 30 Mich. 54, Cunningham *v.* Metropolitan Co., 49 C. C. A. 72, 110 Fed. 332. When plaintiff prevails and is already in possession of the goods, there can be no alternative judgment for the value; and an error in the assessment of the value is immaterial, Marrinan *v.* Knight, 7 Okla. 419, 54 Pac. 656; Hanlon *v.* Goodyear, 103 Mo. Ap. 416, 77 S. W. 481. And so where the plaintiff fails to give bond, and the property not being replevied, the action proceeds for the value, Philleo *v.* McDonald, 27 Neb. 142, 42 N. W. 904, Sloan *v.* Fist, Neb., 89 N. W. 760, Babb *v.* Aldridge, 45 Kans. 218, 25 Pac. 558, Tuckwood *v.*

Hanthorn, 67 Wis. 326, 30 N. W. 705. There need be no judgment for the goods and the judgment may be absolute for the value if the record shows that the return is impossible, Lee *v.* Hastings, *supra;* Selby *v.* McQuillan, 59 Neb. 158, 80 N. W. 504; Ulrich *v.* McConaughey, 63 Neb. 10, 88 N. W. 150; Meads *v.* Lasar, *supra;* Eisenhart *v.* McGarry, 15 Colo. Ap. 1, 61 Pac. 56; Cathey *v.* Bowen, 70 Ark. 348, 68 S. W. 31. So where it appears that the goods of one stock have been so mingled and confused with another as to be indistinguishable; or the goods have been destroyed while in plaintiff's possession, and the circumstances are not shown, Epperson *v.* Van Pelt, 9 Baxt. 73, Seligman *v.* Armando, 94 Calif. 314, 29 Pac. 710. And, *semble* no matter what may have been the circumstances, Richardson Co. *v.* Teasdall, 59 Neb. 150, 80 N. W. 488; or the goods have been sold by the party in possession, Hanchett *v.* Humphreys, 84 Fed. 862; or substantially all of them have been sold; the fact that a small portion remained upon hand, is not material, Caldwell *v.* Ryan, Mo. Ap. 79 S. W. 743; or the defeated plaintiff has allowed a lien to accrue upon the goods for storage while in his possession, Taylor *v.* Richardson, 4 Houst. 303. But the defendant cannot complain of an alternative judgment, even though it appears by the evidence that the goods cannot be returned, Leonard *v.* McGinnis, 34 Minn. 506, 26 N. W. 733; and an alternative judgment may go, even although the defendant had wrongfully parted with the chattels before the institution of the action, Holliday *v.* Poston, 60 S. C. 103, 38 S. E. 449. It will be presumed in support of a judgment for the value, absolutely, that the court had become judicially satisfied that return could not be had, Boley *v.* Griswold, 20 Wall. 486, 22 L. Ed. 375. An absolute judgment for the value is equivalent to a declaration that return is impossible, McCarthy *v.* Strait, 7 Colo. Ap. 59, 42 Pac. 189. But in Hall *v.* Law, etc., Co., 22 Wash. 305, 60 Pac. 643, it was held that judgment for the value without any alternative, cannot be sustained, although the defendant asserts title to the goods by his pleading, and the evidence shows that they cannot be returned; the court seem to be of the opinion that only the return upon an execution is competent evidence of the impossibility of restoration of the goods. Judgment cannot be entered for the value unless it is found that the party is entitled to the goods themselves, Washburn *v.* Huntington, 78 Calif. 573, 21 Pac. 305, Riciotto *v.* Clement, 94 Calif. 105, 29 Pac. 414. The defendant's prior possession is sufficient to entitle him to a judgment for the value, where no right appears in the plaintiff, Steere *v.* Vanderberg, 90 Mich. 187, 51 N. W. 205, Salter *v.* Sutherland, 125 Mich. 662, 85 N. W. 112, and he is not required to show title as against the world; he takes judgment for the value and holds it for the owner's benefit, if not himself entitled, *Id.*; even although the defendant is mere bailee, because accountable to the true owner, Whitney *v.* Hyde, 91 Mich. 13, 51 N. W. 690. Where a portion of the goods have been sold by defendant and the rest voluntarily surrendered before the trial, judgment need not be in the alternative; and the court upon appeal assumed that the value found was the value of the goods which had been sold by the defendant,

Clouston *v.* Gray, 48 Kans. 31, 28 Pac. 983. If the defendant claims merely the right of possession, the court may give judgment for this merely; but only in case it is ascertained by the jury, Jameson *v.* Kent, 42 Neb. 412, 60 N. W. 879. In other courts it is held that the plaintiff cannot complain of an absolute judgment for the value, if the defendant is satisfied therewith, Stroud *v.* Morton, 70 Mo. Ap. 647.

But where the successful party has a special interest, and is not the general owner, he takes judgment for the value of such interest merely, and not for the full value, Ormsby *v.* Nolan, 69 Ia. 130, 28 N. W. 569; Bleiler *v.* Moore, 88 Wis. 438, 60 N. W. 792; Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788; Gaston *v.* Johnson, 107 Mo. Ap. 590, 80 S. W. 276; Creighton *v.* Haythorn, 49 Neb. 526, 68 N. W. 934. Even although the statute directs a judgment for the value, Dilworth *v.* McKelvey, 30 Mo. 149; *e. g.*, where the plaintiff and defendant are tenants in common, Kehoe *v.* McConaghy, 29 Wash. 175, 69 Pac. 742; but see *contra*, Clapham *v.* Crabtree, 72 Me. 473; or the successful party holds the goods in pledge, Miles *v.* Walther, 3 Mo. Ap. 96; or is a mere mortgagee; he is entitled merely to the amount of his mortgage, Deal *v.* Osborne, 42 Minn. 102, 43 N. W. 835; National Bank of Commerce *v.* Feeney, 9 S. D. 550, 70 N. W. 874; Wyandotte Bank *v.* Simpson, 8 Kans. Ap. 748, 55 Pac. 347; Harvey *v.* Stephens, 159 Mo. 486, 60 S. W. 1055; Bates *v.* Snyder, 59 Miss. 497; Miller *v.* Adamson, 45 Minn. 99, 47 N. W. 452; Gaynor *v.* Blewitt, 69 Wis. 582, 34 N. W. 725; Scott *v.* Beard, 5 Kans. Ap. 560, 47 Pac. 986; and payments made, pending the litigation must be allowed, Wood *v.* Weimar, 14 Otto. 786, 26 L. Ed. 779, Kerr *v.* Drew, 90 Mo. 147. But in some courts it is held that mortgagee recovers the full value, holding any surplus over the mortgage for the benefit of the mortgageor or whoever may be entitled. Allen *v.* Butman, 138 Mass. 586, Stevenson *v.* Lord, 15 Colo. 131, 25 Pac. 313. Where the successful party is an officer claiming under an execution, he recovers only the amount of the judgment, with interest, Witkowski *v.* Hill, 17 Colo. 372, 30 Pac. 55; Friend *v.* Green, 43 Kans. 167, 23 Pac. 93; Levy *v.* Leatherwood, Ariz., 52 Pac. 359; Kersenbrock *v.* Martin, 12 Neb. 374, 11 N. W. 462. And where the party prevailing is an officer and claims under levy of an execution, and the goods were mortgaged for their full value prior to the incipiency of the execution lien, only nominal damages can be allowed to the officer, Geisendorff *v.* Eagles, 70 Ind. 418; and this too even though the mortgagee is not asserting his interest or complaining, *Id.* The vendor replevying goods for default in the purchase price, the defendant prevailing, is entitled to a return, or the value less what remains due of the agreed price, Hoffman *v.* Gorman, 123 Mich. 485, 82 N. W. 225; Hodges *v.* Cummings, 115 Ga. 1000, 42 S. E. 394. If the plaintiff sues as mortgagee, the defendant by proof that nothing remains due of the indebtedness, defeats the action, Bates *v.* Snyder, 59 Miss. 497; and if the indebtedness is denied the judgment must extend to and determine this issue, Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620. Where judgment is given for the value of a special interest it must not exceed the general value, Cruts *v.* Wray, 19 Neb. 581, 27 N. W. 634. And

where the officer fails to show the amount of his claim and waives return of the goods, he is not entitled to anything as the value, Weber *v.* Henry, 16 Mich. 399; and see Moore *v.* Shaw, 1 Kans. Ap. 103, 40 Pac. 929; Shields *v.* Moody, 120 Mich. 472, 79 N. W. 684. One who recovers gold coin can have judgment only for the face value, even though the judgment be payable in treasury notes, then at a great discount, Warner *v.* Sauk County Bank, 20 Wis. 492. Where the defendant by procuring an injunction prevents the sheriff from seizing the goods under the writ of replevin, the plaintiff may recover the full value, Miller *v.* Warden, 111 Pa. St. 300, 2 Atl. 90. Where the judgment is for return of the goods or payment of the full value, the plaintiff cannot complain that the defendant has a mere special interest in the entire property, because he may return the goods, and so save himself, Ormsby *v.* Nolan, *supra*. Plaintiff may recover the value of his interest, though at the institution of the suit he was not entitled to possession, if in the meantime the only impediment to his right has been removed, as, by the sale of the goods, and the payment of an encumbrance thereon subsisting at the institution of the suit, Harward *v.* Davenport, 105 Ia. 592, 75 N. W. 487. If, at the trial, the defeated party has an interest he will be allowed for that, even although he is plaintiff and had no interest at the institution of the suit, Guy *v.* Doak, 47 Kans. 236, 366, 27 Pac. 968. And the successful party is limited to the amount of his lien, only where his adversary is the general owner, Shields *v.* Moody, *supra*. Replevin by conditional vendor upon default in a portion of the purchase money; the defendant retained the goods; judgment was given that plaintiff should bring into court the unpaid notes for the purchase money to be delivered to defendant upon payment of the judgment; the notes being so deposited, judgment was entered against defendant and his sureties for the amount thereof, Hyland *v.* Bohn Co., 92 Wis. 157, 65 N. W. 170. If the plaintiff is a stranger to the title the entire value may be recovered by the owner of the special interest, and he is answerable to the general owner for what remains after his special claim is satisfied, Dilworth *v.* McKelvey, 30 Mo. 149. The judgment in every case must be framed according to circumstances, so that the merits of the whole controversy may be settled in one action, Dilworth *v.* McKelvey, *supra*, Northwall Co. *v.* McCormick Co., 2 Neb. Unoff. 699, 89 N. W. 767. Where defendant justifies as sheriff, under an execution against a third person, and prevails, and the jury find that the property is in such third person, the sheriff recovers the full value, Coos Bay Co. *v.* Siglin, 34 Ore. 80, 53 Pac. 504. The successful party cannot recover, as the value, a greater sum than in his pleadings he has alleged as the value, Monday *v.* Vance, Tex. Civ. Ap., 51 S. W. 346, Best *v.* Stewart, 48 Neb. 860, 67 N. W. 881. And judgment for the value of the whole, where the successful party only claims a moiety, is error, Ela *v.* Bankes, 37 Wis. 89. The successful party must show the amount of his special interest, Shahan *v.* Smith, 38 Kans. 474, 16 Pac. 749; and the value of it, Wagner Co. *v.* Robinson, 84 N. Y. Sup. 281. Williams *v.* Elkenberry, 22 Neb. 210, 34 N. W. 373. And evidence of what the party

paid will not suffice, Wagner Co. *v.* Robinson, *supra.* But the face value of a municipal bond will, in the absence of evidence, be taken to be the market value, Meixell *v.* Kirkpatrick, 33 Kans. 282, 6 Pac. 241. The jury must find the value, Clinton *v.* Stovall, 45 Mo. Ap. 642. And plaintiff may have judgment for the value, although he makes no demand for the value in his complaint, Yelton *v.* Slinkhard, 85 Ind. 191. Where there is an alternative judgment and the sheriff returns upon the execution that the goods cannot be had, the judgment becomes a judgment for money, and damages allowed by statute upon affirmation thereof are to be computed upon the judgment for the value and the judgment for damages as well, Rennebaum *v.* Atkinson, 105 Ky. 396, 49 S. W. 1, 342. The value is to be estimated as of the date of the wrongful taking, and interest may be added, with such special damages as the plaintiff may show himself entitled to, Gardner *v.* Brown, 22 Nev. 156, 37 Pac. 240. Newberry *v.* Gibson, Iowa, 101 N. W. 428, Hoester *v.* Teppe, 27 Mo. Ap. 207; but only where the property is not of fluctuating value, Benjamin *v.* Huston, 16 S. D. 569, 94 N. W. 584. In some jurisdictions the value is estimated as of the time of the trial, Miller *v.* Bryden, 34 Mo. Ap. 602, La Vie *v.* Crosby, 43 Ore. 612, 74 Pac. 220, Nolan *v.* Sevine, Tex. Civ. Ap. 81 S. W. 990; and if the thing sued for is an animal or a slave, and dies pending the litigation, the party takes nothing, Pope *v.* Jenkins, 30 Mo. 528. And where the defendant has eloigned and scattered the goods, the plaintiff may prove and recover their value when last accessible to him, in the absence of countervailing evidence, Jenness *v.* Sparkman, 48 Mo. Ap. 246; or the value may be estimated as of the day of the caption, Westbay *v.* Milligan, 74 Mo. Ap. 179. The court may allow inquiry as to the proper and customary market for the commodity in question; the value will be controlled by that market, Porter *v.* Chandler, 27 Minn. 301, 7 N. W. 142. In replevin for vouchers or receipted bills of a builder, the value must be left to the sound discretion of the jury; the plaintiff may recover the value to him, though of little value to others, Drake *v.* Auerbach, 37 Minn. 505, 35 N. W. 367. And the value of the use during the detention is allowed, if the property might have been employed, La Vie *v.* Crosby, *supra.* Even though defendant is an officer, and was not entitled to use the property, Broadwell *v.* Paradise, 81 Ill. 474. It seems that judgment may in some cases be granted apportioning the value between the several defeated parties, awarding a part against each, Kean *v.* Zundelowitz, 9 Tex. Civ. Ap. 350, 29 S. W. 930.

Judgment of Another State.—A judgment in replevin rendered in one state will be accorded full faith in another state; but it will not be presumed, in opposition to the doctrine prevailing in the latter state, that every matter in issue was in fact tried and determined; and where it is shown that only one question was in fact determined, the judgment will be accepted as conclusive, only as to that fact. Tootle *v.* Buckingham, 190 Mo. 183, 88 S. W. 619. The plaintiffs held mortgages, duly recorded in Kansas of cattle situated there. The mortgageor's residence was the same state. The mortgageor unlawfully sold the cattle

and in a replevin instituted in Kansas in the name of an agent of the plaintiffs, the cattle were replevied, sent to Missouri and there sold. Plaintiffs indemnified the surety in the replevin bond on that occasion. Judgment was given, upon technical grounds in favor of defendant, for return of the cattle, or their value, and this judgment was at once assigned, and passed by later assignments to defendants. The court in Missouri restrained the defendants from executing the judgment recovered in Kansas. Tootle *v.* Buckingham, 190 Mo. 183, 88 S. W. 619.

Construction and Effect of the Judgment.—Judgment that the cause be dismissed "and that the writ of *retorno habendo* be and hereby is *awarded*," entitles defendant to recover, in the action on the bond, the value of the goods replevied and which are not returned. Tanton *v.* Slyder, 93 Ills. Ap. 457; Luthy *v.* Kline, 56 Ills. Ap. 314; *contra*, American Co. *v.* Bishop, 184 Ills. 68, 56 N. E. 382. A judgment declaring that plaintiff and defendant are tenants in common, that therefore the action cannot be maintained, and directing its discontinuance without prejudice to the foreclosure of a mortgage under which the plaintiff claims, is a judgment upon the merits, Boom *v.* St. Paul Co., 33 Minn. 253, 22 N. W. 538. If plaintiff take judgment for "immediate possession" of the goods, "and in default of recovery of such possession," for the value, it is an election to have a return of the goods; and when he obtains possession of them it is his duty upon payment of the costs to enter satisfaction; execution against the lands or goods of the defendant will be enjoined, Oskaloosa Works *v.* Nelson, 54 Ia. 519, 6 N. W. 718. In Marshal *v.* Livingston, 77 Ga. 21, cited Thomas *v.* Price, 88 Ga. 533, 15 S. E. 11, it was said that the mere dismissal of the suit amounts in law to a judgment, and entitles defendant *ipso facto* to a *fi. fa.* for the value, against plaintiffs and his sureties. Plaintiff sued for two horses and other goods, including one hearse, the answer was a general denial, averring that defendant was the owner of the hearse, and demanding judgment for its return; defendant, then in pursuance of the code provision respecting the compromise of actions, served plaintiff with an offer that he might take judgment for all the articles except the hearse, and his costs; this offer was accepted and judgment was entered accordingly. Held that defendant was entitled to the hearse and might maintain replevin for it, Shepherd *v.* Moodhe, 150 N. Y. 183, 44 N. E. 963.

Judgment for the plaintiff involves a finding that plaintiff is entitled to the immediate possession, Allen *v.* Butman, 138 Mass. 586. But otherwise, where the issue is tried without a jury and the court makes special findings of fact and there is no finding upon this issue, Cooke *v.* Aguirre, 86 Calif. 479, 25 Pac. 5. It seems the judgment must be construed with reference to the plaintiff's statement or pleadings; it affects only the goods demanded, though other goods are replevied, Standard Co. *v.* Schloss, 43 Mo. Ap. 304. A judgment concludes the parties only in respect to matters in issue, and not as to the collateral facts appearing in evidence to establish the issue. Judgment in replevin for certain wheat described as "1100 bushels of wheat recently

damaged by fire," does not estop the plaintiffs recovering such judgment to deny that the wheat was in excess of 1100 bushels, or that they were responsible to defendants in the action under previous arrangements for more than 1100 bushels, where their action in instituting the replevin had been induced by representations of the defendants as to the amount of the wheat, Voge *v.* Breed, 14 Ills. Ap. 539.

All parties are bound by the judgment in replevin, Pilger *v.* Marder, 55 Neb. 113, 75 N. W. 559; and all privies, Hill *v.* Reitz, 24 Ills. Ap. 391. It seems that a judgment against the sheriff for goods taken as the property of A is conclusive upon A's assignee for creditors, Boyden *v.* Frank, 20 Ills. Ap. 169. The discontinuance of the action and the return of the goods is no bar to an action of trespass *de bonis* for the same taking, Stier *v.* Harms, 154 Ills. 476, 40 N. E. 296; and the owner may sustain trover, notwithstanding a former judgment for return in replevin; even though in that action the plaintiff might have had judgment in the alternative for the value, Nickerson *v.* California Co., 10 Calif. 520. And judgment for return not performed, is no bar to a cross-replevin by the defendant in the original suit, Douglas *v.* Galwey, 76 Conn. 683, 58 Atl. 2. Judgment for possession of a note, which, during its unlawful detention by defendant is barred by the Statute of Limitations, though performed, does not bar an action against defendant for detaining the note until the action thereon was barred, Fair *v.* Citizens' Bank, 69 Kans. 353, 76 Pac. 847. Judgment for defendant for return, but no finding of value, nor judgment for the value; the defendant not obtaining the goods, may afterwards sue for the conversion, even though the statute requires that the jury shall assess the value in the action of replevin, and that the judgment shall be for return or for the value at the election of the defendant, Caldwell *v.* Ryan, Mo. Ap. 79 S. W. 743. And judgment in favor of the defendant terminates all occasion of controversy as to the possession; payment of the judgment constitutes plaintiff the owner, whether he had title previously or not, Tinsley *v.* Block, 98 Ga. 243, 25 S. E. 429. But the judgment in such case does not preclude defendant from asserting title, *Id.* The vendor of goods brought an action of replevin therefor on the ground of fraudulent misrepresentation by the buyer in the purchase; after this action had been at issue for three years it was discontinued for want of prosecution, and vendor then sued for the price of the goods. The judgment in replevin was pleaded in bar. Held that the plaintiffs in this action should not be permitted to show that the replevin was instituted under a mistake of facts, without full knowledge, and recover the purchase price of the goods less by the value of what had been taken in the replevin; that the suit in replevin was a rescission of the sale and an election from which plaintiffs could not recede, Fisher *v.* Brown, 111 Ills. Ap. 486. Plaintiffs recovered judgment in the alternative for the return of an engine or its value. The sheriff seized the engine under execution and sold it for $200, returning that it was not in as good condition as when replevied, and therefore he could not return it to the plaintiff; plaintiff then brought an action setting forth these

facts and praying judgment for $400. A demurrer to the complaint was held properly sustained. The court said if they were entitled to any judgment they already had it, Paulson *v.* Nichols Co., 8 N. D. 606, 80 N. W. 765.

Defendant, a mere bailee, prevailed, but took judgment for costs merely. Held that the bailor, though he conducted the defense of this action, might maintain an independent action for the taking, Johnson *v.* Boehme, 66 Kans. 72, 71 Pac. 243. Where, under the statute the defendant, upon plaintiff's becoming nonsuit, elects to take judgment for the value, the property in the goods vests at once in the plaintiff; the plaintiff cannot defeat the judgment by returning the goods.

But it seems that the judgment does not bar a second action by the plaintiff; that he is not bound in such second action to prove any conversion subsequent to the nonsuit; and if he prevails he may recover the value of the goods, Tinsley *v.* Block, 98 Ga. 243, 25 S. E. 429. Judgment in replevin for live stock does not bar the defendant of an action for previous sustenance and training, Wright *v.* Broome, 67 Mo. Ap. 32. Pending the replevin the defendant sells the animal which is the subject of the action and causes it to be removed out of the state; judgment in the alternative and satisfaction thereof, the plaintiff having refused to accept the money, does not bar the plaintiff's action for damages, Hanlon *v.* O'Keefe, 55 Mo. Ap. 528.

Judgment against a bailor is conclusive upon his bailee, but not *vice versa*, Standard Co. *v.* Schloss, 43 Mo. Ap. 304; but judgment against the bailee is conclusive upon the bailor if the latter assumes the defense of the action or concurs in it, McKinzie *v.* Baltimore Co., 28 Md. 161. The judgment in replevin is conclusive upon parties and privies, Dawson *v.* Sparks, 77 Ind. 88; but only where the precise question was raised and necessarily determined, Schwarz *v.* Kennedy, Fed. 63 Cent. L. J. 12, (1906). Judgment that defendant is the owner of the goods and entitled to a return, is conclusive between the parties to the action, and binds the sureties in the bond, Woods *v.* Kessler, 93 Ind. 356, Smith *v.* Mosby, 98 Ind. 446. A judgment in favor of a mortgagee, for the amount of a chattel mortgage under which the party claims, is conclusive in an action upon the replevin bond, that he was damnified in the amount of the judgment. Stafford *v.* Baker, Mich. 104 N. W. 321. The judgment settles the right of the parties in the goods which are in controversy, Paulson *v.* Nichols Co., 8 N. D. 606, 80 N. W. 765. Where no return is demanded defendant takes judgment for costs merely, and he cannot afterwards contest the plaintiff's right to the goods, Cowling *v.* Greenleaf, 32 Kans. 392, 4 Pac. 855. The judgment for the plaintiff, the pleas being *non cepit, non detinet*, and property in the defendant, establishes the right of the plaintiff to the possession of the goods, Roush *v.* Washburn, 88 Ills. 215. Before a justice the defendant prevails; plaintiff appeals and dismisses his appeal; the merits of the case are determined by the judgment of the justice and not to be opened in an action on the bond, Myers *v.* Dixon, 106 Ills. Ap. 322.

A judgment in replevin that defendant recover the chattel, does not necessarily determine the nature, character or extent of the defendant's right, and is equally consistent with the supposition that the defendant was a mere mortgagee or had some special right, Armel *v.* Layton, 33 Kans. 41, 5 Pac. 441. Such judgment, where the record fails to disclose the claim asserted by the defendant, is not conclusive upon the title; it may be shown in an action on the bond that the plaintiff in the replevin was not the owner, Pearl *v.* Garlock, 61 Mich. 419, 28 N. W. 155. The judgment in replevin is not conclusive upon the title even as between the parties, Miles *v.* Walther, 3 Mo. Ap. 96, Standard Co. *v.* Schloss, 43 Mo. Ap. 304. Where the only issue litigated is the right to possession, the defeated plaintiff is not precluded from showing in mitigation of damages, in an action on the bond, a mortgage lien on the goods superior to any right of the plaintiff, McFadden *v.* Ross, 108 Ind. 512, 8 N. E. 161. A judgment for defendant, because the action was instituted without demand, does not bar a second suit instituted after demand, Roberts *v.* Norris, 67 Ind. 386. And where the plaintiff seeks only to recover possession, a judgment for the defendant determines only the right of possession, Kramer *v.* Matthews, 68 Ind. 172. Where the title was not litigated in the replevin; *e. g.*, where the writ is abated, or the plaintiff suffers a nonsuit or *retraxit* or neglects to enter his suit, the judgment for return is not an adjudication of the title, Feilding *v.* Silverstein, 70 Conn. 605, 40 Atl. 454; Easter *v.* Foster, 173 Mass. 39, 53 N. E. 132.

But if the title is put in issue and determined in replevin, the judgment is conclusive in the suit on the bond, Easter *v.* Foster, *supra.* Le Mert brought replevin, gave bond and replevied the property; there was a general verdict for the defendants and a judgment against Le Mert for costs, no damages were awarded; the defendant then seized the goods, and Le Mert brought a second replevin, claiming that the effect of the judgment in the first cause was to vest him with an absolute title to the goods, that the bond which he had given stood in place of the goods, and that no evidence to impeach his title or establish title in defendant having its inception anterior to the first replevin, could be received; but the court held that the bond takes the place of the defendant's interest in the goods to the extent of the interest claimed by the plaintiff, and no further, Lugenbeal *v.* Le Mert, 42 O. St. 1. Judgment for defendant, even upon trial of the merits, does not necessarily decide that he has the title; for he may succeed simply on a plea of *non detinet;* or he may have a special property, and be entitled to the possession, while the plaintiff is the general owner, Freeman *v.* United States Co., 43 Misc. 364, 87 N. Y. Sup. 493. The presumption is that the title was not in issue, Consolidated Co. *v.* Bronson, 2 Ind. Ap. 1, 28 N. E. 155.

Entry and Authentication.—Where a third party interpleads, and the issues between plaintiff and defendant are tried first and separately, judgment should not be entered upon the verdict upon these issues, until the claim of the inter-pleader is adjudicated, Winchester *v.*

Bryant, 65 Ark. 116, 44 S. W. 1124. A judgment entered by the clerk in vacation without an order of the court authorizing it or approving it, is void, Balm v. Nunn, 63 Ia. 641, 19 N. W. 810.

There can be no judgment at all until entered in the proper record. It cannot exist in the memory of the officers of the court, or in any mere memorandum entered in the books not intended to preserve the record, *Id.* On appeal the record must be presumed to accord with the truth, Palmer v. Emory, 91 Ills. Ap. 207.

But if in fact an alteration of the record has been made in vacation, and without any order of the court, it is a mere forgery, and equity may grant relief, Babcock v. McCament, 53 Ills. 214.

Offer of Compromise.—An offer of judgment under the code provision, which is refused, is to be put out of the case until the final determination, when it must be considered in adjusting the liability for costs; a referee is bound to take notice of such offer among the files of the court, bearing the plaintiff's acknowledgment of a copy, Bourda v. Jones, 110 Wis. 52, 85 N. W. 671.

An assignment of a judgment for the plaintiff in replevin carries with it, as an incident, the forthcoming bond given by the defendant and an action upon such bond cannot thereafter be prosecuted by the original obligee. Odell v. Petty, S. D. 104 N. W. 249.

Enforcement of the Judgment.—The judgment in replevin is enforced by execution, and not by an attachment for contempt, Hammond v. Morgan, 101 N. Y. 179, 4 N. E. 328. Where the judgment is for return merely, it is unavailing if the goods are not found, *Id.* The execution, when the defendant prevails, may require the sheriff to take the goods from the plaintiff's possession and deliver them to defendant, Koelling v. August Gast Co., 103 Mo. Ap. 98, 77 S. W. 474. And the plaintiff has no election to retain the goods to which he has no title, by paying for them, *Id.* The plaintiff, suffering judgment for return, must tender the identical goods taken, to the defendant in person, before execution issues; after execution issues he must treat with the sheriff, Irvin v. Smith, 66 Wis. 113, 27 N. W. 35, 28 N. W. 351. The sheriff's return upon the execution that the goods cannot be found, is not open to contradiction upon a motion to require defendant to accept the goods, or specified goods of the same character, in satisfaction of the judgment, *Id.* But it is not determined that the return of the sheriff may not be amended in a proper proceeding, S. C. 28 N. W. 351.

Each party prevailing in part.—The code provision that judgment may be given for or against any one or more of several plaintiffs, applies to this action. Where several mortgagees of the same goods join in replevin, judgment must be given against those plaintiffs whose mortgages are adjudged invalid, Jones v. Loree, 37 Neb. 816, 56 N. W. 390. Judgment may be given for any one of several plaintiffs, although they assert a joint ownership, Hamilton v. Browning, 94 Ind. 242. Each party may have judgment as to part of the goods, Wright v. Funck, 94 Pa. St. 26; and each may recover damages and costs, Knowles v. Pierce, 5 Houst. 178. One defendant may be liable for all of the

goods demanded, and the other for part only, Wall *v.* Demitkiewicz, 9 Ap. D. C. 109. Where there are two or more defendants, each may recover a portion of the goods, Pilger *v.* Marder, 55 Neb. 113, 75 N. W. 559. Where each party prevails as to a part, each recovers costs; the judgments in such case are distinct, an appeal by one party does not re-open the matter as to what is adjudged in his favor, Vinal *v.* Spofford, 139 Mass. 126, 29 N. E. 288. The recovery must be for distinct and separate articles and not undivided interests, Phipps *v.* Taylor, 15 Ore. 484, 16 Pac. 171. If the plaintiff fails as to a portion of the goods, defendant is entitled to a judgment, for the return; but he must assume this position and demand the judgment in the trial court; he will not be heard to make his contention first upon appeal, Beatty *v.* Clarkson, 110 Mo. Ap. 1, 83 S. W. 1033.

Replevin for nine head of cattle; as to one animal the defendant was declared not guilty; as to the other eight, the property was found in the plaintiff, and the value was found; the judgment disposed of them all, but the findings gave the number of cattle taken and detained by the defendant as *six*. This clerical error is not injurious to the defendant and not sufficient to reverse the judgment. Olson *v.* Peabody, 121 Wis. 675, 99 N. W. 458.

Presumptions.—Where the judgment is for the value absolutely, it will be presumed upon appeal, the contrary not appearing, that it was ascertained in the trial court that return could not be had, Caruthers *v.* Hensley, 90 Calif. 559, 27 Pac. 411, Boley *v.* Griswold, 20 Wall. 486, 22 L. Ed. 375. Where the judgment is for damages, only the amount named will be presumed to be the value of the goods; it will also be presumed that plaintiff exercised his statutory right to take the value instead of the goods, McGriff *v.* Reid, 37 Fla. 51, 19 So. 339. Generally, the judgment will be presumed to be correct unless the record shows error, Lane *v.* Kohn, 79 Ills. Ap. 396. The presumption is that the title was not in issue, Consolidated Co. *v.* Bronson, 2 Ind. Ap. 1, 28 N. E. 155.

Equitable Relief.—It is sometimes said that equitable issues cannot be injected into an action of replevin, Hennessey *v.* Barnett, 12 Colo. Ap. 254, 55 Pac. 197; and that in such action the court will not recognize an equity, but give an absolute judgment in favor of the one having the legal right and the right of possession, Van Gorder *v.* Smith, 99 Ind. 404, and that equities of a purchaser in a conditional sale, and who has made default in the conditions of the agreement, cannot be asserted in such action, Wall *v.* Demitkiewicz, 9 Ap. D. C. 109, Oskamp *v.* Crites, 37 Neb. 837, 56 N. W. 394. In Penton *v.* Hansen, 13 Okla. 450, 73 Pac. 843, the plaintiff had leased to defendant a number of cows to be kept for three years. Before one year elapsed the defendant brought an action against plaintiff for the agistment of the cattle, obtained judgment upon constructive service, and caused one of the animals to be sold upon execution, becoming the purchaser. It was held the plaintiff could not replevy the animal, because the contract was still in force; and because, the court say, replevin is not

the proper action by which to cancel a contract or modify or correct it, *Id.* This judgment seems not well meditated. The defendant had repudiated his contract, and it would seem that the plaintiff was no longer bound.

In those states in which what is called the Reformed Procedure prevails, and where, by the code, it is generally provided that "the defendant may set forth by answer as many defenses and counter-claims as he may have, whether the subject-matters of such defense be such as was heretofore denominated legal or equitable or both," no controlling reason appears why this provision should not apply to the action of replevin as well as to other actions; and this seems to be the view of many respectable courts. Thus in National Bank of Deposit *v.* Rogers, 166 N. Y. 380, 59 N. E. 922, it was held that although it appears that plaintiff has neither the legal title nor the right to immediate possession, if he has a right in equity to enforce a lien upon the goods and recover possession, replevin may be transformed into a suit in equity, and relief given accordingly. In Arkansas it is held that where the defendant asserts title to equitable relief the cause may be transferred to the equity side of the court, and affirmative equitable relief granted, Rogers *v.* Kerr, 42 Ark. 100. In National Bank of Deposit *v.* Rogers, *supra*, Sardy & Company had borrowed of the bank moneys with which to pay duties on certain merchandise, and executed their note for the amount secured by a pledge or an agreement to pledge, the same goods. The bank entrusted the goods to Sardy & Company to sell for its account. They paid the duties with the moneys so borrowed, and obtaining possession thereof transferred them to Rogers to secure an antecedent debt; it was held that the duty of Sardy & Company was to hold the goods as if received from the bank; that the effect of the transaction was to treat as done what might have been done; that it was competent for the parties to deal in this manner, and that equity would enforce the trust even as against Rogers. A bill in equity averred that the goods in question had been purchased and paid for by plaintiff, and that the title had passed to plaintiff. Held it was a case for replevin and not for a bill in equity; but the court said that in the course of the action in replevin a case for equitable interposition might arise, Sultan of the Ottoman Empire *v.* Providence Co., 23 Fed. 572. A debtor obtained indulgence, agreeing to execute a chattel mortgage of all crops to be grown during a term of years upon certain land occupied by him, describing it minutely, as to the improvements, the number of acres, and the crops growing thereon. The creditor relying upon his statements, and the description given, extended the indulgence, accepting the new security; but the debtor deceitfully gave a false description by government numbers, and this misdescription and variance was set up in defense to an action for the crop. Held that the chattel mortgage should be reformed in the replevin suit and made to apply to the lands occupied by defendant, and judgment for defendant was reversed, McCormick Co. *v.* Woulph, 11 S. D. 252, 76 N. W. 939. A certificate of corporate stock was replevied on an affidavit

stating its value at ten dollars; it was in fact worth five thousand dollars. In view of this reckless and extravagant under-valuation, an injunction was awarded to restrain the plaintiff from selling, transferring or disposing of the certificate, Barth *v.* Union Bank, 67 Ill. Ap. 131. Henry Gamble brought replevin against Ross for a quantity of lumber; Patrick M. Gamble and Archibald Lindsay became sureties on the bond; the lumber was sold pending replevin and the proceeds deposited in the bank, at first to the credit of Lindsay & Gamble in their partnership account, and later to the credit of "Henry Gamble, Replevin Account," as security to the sureties in the bond. The defendants prevailed and obtained judgment for the value of the lumber; execution on this judgment was returned unsatisfied. The defendants then took judgment against Lindsay, Patrick M. Gamble being deceased in the meantime, upon the bond, and petitioned to have the fund in the bank applied to the satisfaction of their judgment. Held, the fund being identified as the proceeds of plaintiff's goods, they were entitled to pursue it; that Lindsay & Gamble having received the money merely for security against liability to defendant, defendant as the principal creditor was entitled to be subrogated to their position, and that the fund with all its accretions should be paid to them, Ross *v.* Morse, Mich. 88 N. W. 881.

Where the goods have been sold and the money brought into court, it may be divided according to the interests of the parties. Halpin *v.* Stone, 78 Wis. 183, 47 N. W. 177. In Coombe *v.* Sanson, 1 D. & R. 201. An action of trover, equitable powers were assumed. Defendant had possession of an estate belonging to the plaintiff, as well as the title deeds. Plaintiff recovered the lands in ejectment, and in trover for the title papers obtained judgment for £2500. Defendant tendered the deeds in satisfaction of the judgment in trover, and on motion plaintiff was required to enter satisfaction of this judgment, upon delivery of the deeds under oath, and satisfaction of plaintiff's attorneys' bill, Hyland *v.* Bohn Co., 92 Wis. 157, 65 N. W. 170, is strikingly like the last case. On a conditional sale promissory notes were executed by the purchasers, evidencing the additional installments of the purchase money. Default having been made the vendor replevied the goods; the court by its judgment required the surrender and deposit in court of the out-standing notes. A statute provided that "where the party injured . . . . has brought an action by ordinary proceedings, he may in the same cause have an injunction against the repetition or continuance of such injury." Defendant in replevin answered, claiming some of the goods as exempt, and others as not included in the chattel mortgage under which plaintiff claimed, and as gifts having a special value to him, and others as the property of a third person in his hands as a bailee, and prayed return; held, that the answer was in the nature of an action, and that defendant was entitled to an injunction to restrain the sale of these articles until final judgment in the cause, Brody *v.* Chittenden, 106 Ia. 340, 76 N. W. 740. A defendant should interpose all defenses, legal or equitable; an issue of purely equitable character

will be determined in chancery. American Co. v. Futrall, 73 Ark. 464, 84 S. W. 505.

Plaintiff sold machinery to Ebersole upon credit, retaining the title; Ebersole sold the same machinery to defendant. Default was made in the price agreed to be paid to the plaintiff, and replevin instituted. Defendant was permitted to plead a purchase from Ebersole without notice of plaintiff's right, that no clause retaining the title or limiting the title was inserted in his agreement with Ebersole, or if so, without defendant's knowledge and by fraud and misrepresentation, and to make Ebersole a party, and pray reformation of the contract with him. The other issues in the cause were postponed until the determination of the equitable issue, Bonnot Co. v. Newman, 109 Ia. 580, 80 N. W. 655. In Bain v. Trixler, 24 Ind. App. 246, 56 N. E. 690, the plaintiff bought of the defendant a laundry plant, defendant at the time exhibiting as part of it an ironer known as the "Nelson." When the bill of sale was prepared, defendant knowing that plaintiff was ignorant of the name of the ironer purchased, inserted a different one, which plaintiff, when the articles were shipped to him, refused to receive. It was held that plaintiff might recover the ironer actually purchased without reformation of the bill of sale. It seems that the court, without professing to do so, was exercising equitable jurisdiction, reforming the contract and enforcing it in the same action. In Zeisler v. Bingman, 9 Kans. App. 447, 60 Pac. 657, the plaintiff was tenant of A, and sub-let a portion of the lands to B; B at the instance of the plaintiff undertook to secure a renewal of the plaintiff's lease, but in violation of his duty took a new lease from A to himself; it was held that notwithstanding this he remained the tenant of the plaintiff and the plaintiff was permitted to recover his share of the crops in replevin.

Here again, as it seems, the court was exercising equitable power and applying an equitable remedy. The legal title to the leasehold was clearly vested in the defendant; yet upon the equitable ground that one acting as the agent of another shall not avail himself of his agency to his own profit, the court converted the defendant into a trustee for the plaintiff, and by its judgment executed the trust. Where the action was for recovery of writings of value, judgment for the possession was vacated with directions to the court below to hear evidence if necessary and try the case as an equitable action, Hammond v. Morgan, 101 N. Y. 179, 4 N. E. 328. In Mohr v. Langan, 162 Mo. 174, 63 S. W. 409, it was held that where a cross-replevin is brought, the defendant in the second action may plead the former action, under the writ in which he holds the goods, and cause the defendant in that suit to be brought into the new cause, and so determine all rights upon one record. In other cases it is said that the judgment should adjust all the equities of the parties, Marysville Bank v. Snyder, 85 Mo. App. 83, Campbell v. Quinton, 1 Kans. App. 317, 45 Pac. 914, Gentry v. Templeton, 47 Mo. App. 55.

CHAPTER XXV.

MISCELLANEOUS.

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§ 788. **Contesting creditors cannot invoke the aid of the insolvent laws against each other.** In replevin by an attaching creditor, from one who claims under purchase from the debtor, the attaching creditor cannot invoke the aid of the insolvent laws of the State to set aside a sale or transfer to the other.[1] The insolvent laws are only for the benefit of those who claim under them. The assignee may have recourse to such law in some cases to defeat a sale to a creditor, but the rights of contesting creditors, who do not claim under the assignee, are not affected by the insolvent laws.

§ 789. **Nor set up a forfeiture under usury laws.** In a suit where the plaintiff claimed from an assignee in insolvency, and the defendant claimed under a mortgage made by the insolvent, the mortgage debt was not paid, but the plaintiff offered to show that it was for usury; that if statutory penalty of threefold the usurious interest was deducted from it, the debt would be

[1] Gardner *v.* Lane, 9 Allen, (Mass.) 497.

canceled. He therefore claimed the right to regard the mortgage as paid. *Held*, that the forfeiture for usury must be judicially determined upon an issue on that question before it could be applied to reduce the debt so as to affect the lender's title to his security, and judgment was for the defendant.[2] The right to deduct the forfeiture in a suit to enforce the contract is by no means payment of the debt.[3]

§ 790. **Right to begin and conclude.** While the defendant is an actor, and so far a plaintiff, it does not follow that he has the right to begin and conclude. In determining which party has the right, the court should consider, not so much the form of the issue as the substance and effect of it. The question is, on whom is the burden of proving the issue? The obligation rests upon him to make it out by a preponderance of proof; he therefore has the right to begin and conclude.[4] Where the defendant pleads property in himself, with a traverse of the plaintiff's rights, there is still such a burden of proof upon the plaintiff as to entitle him to begin and conclude.[5] But when the defendant pleads property without traverse, he assumes the burden of proving the property to be his. If no proof be offered, the judgment upon such plea would be for the plaintiff. In such case the defendant may begin. Such plea is regarded as admitting the plaintiff's claim, and asserting a superior right in the defendant.

§ 791. **Trial upon the facts existing when the suit began.** According to the general rule, the suit is tried on the state of facts as they existed at the commencement of the suit.[6] This rule must prevail, unless there be some peculiar reasons existing to the contrary.[7] Where the defendant justified as an officer, under an attachment, evidence to show that it was dissolved after the property was replevied was immaterial, as the rights of the parties depend upon the facts existing at the time the suit was begun.

[2] McNeal *v.* Leonard, 1 Allen, 399. See same case, 3 Allen, 268.

[3] Ib.

[4] Bills *v.* Vose, 7 Foster, (N. H.) 215; Belknap *v.* Wendell, 1 Foster, (21 N. H.) 181.

[5] Marsh *v.* Pier, 4 Rawle, (Pa.) 273.

[6] Currier *v.* Ford, 26 Ill. 492; Belden *v.* Laing, 8 Mich. 500; Cassell *v.* Western, etc., Co., 12 Iowa, 47; Hickey *v.* Hinsdale, 12 Mich. 99; Loomis *v.* Youle, 1 Minn. 175; Clark *v.* West, 23 Mich. 242.

[7] Cary *v.* Hewitt, 26 Mich. 228.

[8] McCraw *v.* Welch, 2 Col. 287.

So in suit on bond, when the issue in replevin was title to the property, and that was found for the defendant, he was not allowed, in the suit upon the bond, to set up a subsequently acquired title as a defense.[9] But this rule will not prevent the consideration of damages to the time of the judgment, as interest is computed on a note; neither will the court refuse to consider the rights of the defendant to a return at the time return is asked.

[9] Carr *v.* Ellis, 37 Ind. 467.

NOTE XXXV. *Time to which the inquiry is directed.*—The action is to be tried upon the state of facts existing at the time of its institution, Shreck *v.* Gilbert, 52 Neb. 813, 73 N. W. 276, Tackaberry *v.* Gilmore, 57 Neb. 450, 78 N. W. 32. The question is who was entitled to possession at the institution of the suit, Hilman *v.* Brigham, 117 Ia. 70, 90 N. W. 491, Matthews *v.* Granger, 71 Ills. Ap. 467, Ator *v.* Rix, 21 Ills. Ap. 309, Fischer *v.* Burchall, 27 Neb. 245, 42 N. W. 1034, Wyandotte Bank *v.* Simpson, 8 Kans. Ap. 748, 55 Pac. 347. The plaintiff's right is determined by the conditions existing at the institution of his suit, Stern *v.* Riches, 111 Wis. 589, 87 N. W. 554. He cannot assert a title acquired pending the suit, McKennon *v.* May, 39 Ark. 442. Plaintiff demanded of defendant, an officer, certain chattels levied upon by him; the ground of the demand was the statutory exemption; they were in fact exempt, but before the plaintiff instituted his action one to whom plaintiff had previously executed a mortgage of the same goods, demanded them; held, that as the mortgagee's right was superior to that of the plaintiff judgment must go for the defendant, Stern *v.* Riches, *supra.*

Plaintiff's Case.—Plaintiff should, by his case in chief, make a full disclosure of his right; he cannot be permitted to make out his case by testimony in rebuttal, Woolston *v.* Smead, 42 Mich. 54, 3 N. W. 251. Where the plaintiff in his opening shows the possession merely, apparently avoiding any attempt to show title, and the defendant contradicts this by proof of possession, during the same time with claim of title in another, it is error to allow plaintiff in rebuttal to put in evidence of a purchase by himself, Woolston *v.* Smead, *supra.* If the plaintiff proves title to the goods and his right to possession, his failure to prove fraud in the purchase under which defendant claims is immaterial, Kocher *v.* Palmetier, 112 Ia. 84, 83 N. W. 816. Whatever is conceded upon the trial will be taken as true upon an appeal, Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275. The plaintiff must succeed on the strength of his own title, Holler *v.* Colesen, 23 Ills. Ap. 324, Martin *v.* Le San, Iowa, 105 N. W. 996; Northwall Co. *v.* Strong, Neb., 89 N. W. 767; Ottumwa Bank *v.* Totten, Mo. Ap., 89 S. W. 65; Morgan *v.* Jackson, 32 Ind. Ap. 169, 69 N. E. 410. Plaintiff must show a right to possession, Bryant *v.* Dyer, 96 Mo. Ap. 455, 70 S. W. 516; Esshom *v.* Watertown Co., 7 S. D. 74, 63 N. W. 229; and a wrongful taking or deten-

tion, Windsor *v.* Boyce, 1 Houst. 605. Plaintiff is bound to prove his case by a preponderance of testimony upon every substantial issue, Coghill *v.* Boring, 15 Calif. 213. The negative averment that the goods have not been seized under process against the plaintiff need not be proved in the first instance, Knoche *v.* Perry, 90 Mo. Ap. 483. If plaintiff claims under a mortgage he must prove the identity of the goods claimed in the writ with the goods named in the mortgage, First National Bank *v.* Wood, 124 Mo. 72, 27 S. W. 554. The authority of the officers of a corporation executing a chattel mortgage, regular upon its face and under the corporate seal, need not be proven unless denied, Sargent *v.* Chapman, 12 Colo. Ap. 259, 56 Pac. 194.

Variance.—If the plaintiff charge the conversion of the goods he can not prevail upon proof that the defendant was lawfully in possession, with authority to sell for a particular purpose, and mis-applied the proceeds; the judgment must follow the allegations, Bixel *v.* Bixel, 107 Ind. 535, 8 N. E. 614. If the defendant aver title in a third person named, he will not be permitted to prove title in another person, Dobbins *v.* Hanchett, 20 Ills. Ap. 396. Objection for variance between the proofs and the allegations must be taken at the trial, First National Bank *v.* Parkhurst, 54 Kans. 155, 37 Pac. 1001.

Questions for the Court or Jury.—Whether the transaction relied upon was a sale or bailment, is for the jury, Gilbert *v.* Forest City Co., 72 Ills. Ap. 186; and so the question whether the demand was a reasonable demand under all the circumstances, Kane *v.* Reid, 33 Misc. 802, 68 N. Y. Sup. 623; and whether the delivery of part of a mass of property, *e. g.*, a saw-mill outfit and animals, was a delivery of all, depends upon the intention of the parties, and is for the jury, Peeples *v.* Warren, 51 S. C. 560, 29 S. E. 659; and whether there is a non-joinder of a tenant in common with the plaintiff is a question for the jury, Van Baalen *v.* Dean, 27 Mich. 104. The plaintiffs agreed to furnish to the Saginaw Company "all necessary supplies, such as provisions, meats, hay, feed, and all other necessaries required to carry on the logging business, except horses, mules or cattle." An engine and boiler were furnished. Held, that it was proper to submit to the jury the question whether it was furnished under the agreement or as a mere loan, Carstens *v.* Earles, 26 Wash. 676, 76 Pac. 404. The question under which of two contracts goods are delivered, Nebeker *v.* Harvey, 21 Utah, 363, 60 Pac. 1029. Where there are disputes as to the intention of a written agreement, and questions of rescission thereof by disputed oral agreements, the effect of the oral contracts is for the jury, *Id.*, citing Warner *v.* Miltenberger, 21 Md. 264, 83 Am. Dec. 573. Where the question, whether a sale was for cash or upon credit depends upon the construction of a writing, it is for the court, Smith Co. *v.* Holden, 73 Vt. 396, 51 Atl. 2. A verdict of not guilty merely, leaves the right of possession at large; and where the statute provides that upon abatement, dismissal, nonsuit, default, or trial of an action of replevin, the court shall "make such order for return or restoration of the property as is just, and take such inquest of damages in the premises as the rights

of the parties require, and render judgment accordingly," the court may properly submit the question of return to the jury, *Id.* Where the question depends upon the intent with which a mortgage was accepted, the question is for the jury, Dawson *v.* Thigpen, 137 N. C. 462, 49 S. E. 959. Where an officer, defendant, justifies under process, the jurisdiction of the court from which it emanates, and the validity of the judgment and process, are for the court, Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583.

Instructions.—The court should instruct the jury as to whom the property has been delivered to, and in whose possession it is, and as to the mode of estimating damages, Search *v.* Miller, 9 Neb. 26, 1 N. W. 975. An instruction which leaves it to the jury to decide what is a wrongful taking, is error, Matthews *v.* Granger, 71 Ills. Ap. 467. An instruction which requires the jury to find that defendant was the "owner" at the commencement of the action, when he asserts only the right of possession, is error, Meyer *v.* First National Bank, 63 Neb. 679, 88 N. W. 867. The jury ought not to be told that plaintiff must recover upon the strength of his own title, and not upon the weakness of the defendant's, though this is the law, Bright *v.* Miller, 95 Mo. Ap. 270, 68 S. W. 1061. An instruction that if the defendant at the time mentioned was "in lawful possession" of the premises upon which the wheat in controversy was grown, and maintained the possession, is not objectionable as leaving unexplained such terms as "lawful possession" and "maintained the possession," Bowen *v.* Roach, 78 Ind. 361. An instruction that the deceased in his life-time was entitled to make the gift of the horse in controversy to his wife, without any writing "and the same was valid on his heirs, executors and legatees," is not objectionable as declaring the fact of the gift, Hopper *v.* Hopper, 84 Mo. Ap. 117. The instructions may properly call the attention of the jury to particular evidence material to the issue, Allamong *v.* Peeples, 75 Mo. Ap. 276. There is no error in refusing to denounce, in the instructions, the defense of usury as unconscionable; or refusing to prescribe to the jury any higher degree of evidence, as necessary to maintain this defense, than required in other cases, Nunn *v.* Bird, 36 Ore. 515, 59 Pac. 808. In Skow *v.* Locke, Neb., 91 N. W. 204, an instruction that where the testimony is conflicting and irreconcilable the jury should "give great weight to the surrounding circumstances in determining which witness is entitled to credit," was held erroneous as expressing the opinion of the trial judge as to the degree of importance to be attached to the surrounding circumstances.

Venue.—In Connecticut the action of replevin is transitory; there need be no evidence that the goods were detained in the state, Belknap Bank *v.* Robinson, 66 Conn. 542, 34 Atl. 495. In Wisconsin, replevin is transitory, except where brought to recover a distress, Young *v.* Lego, 38 Wis. 206. If, where the action is local, the writ is executed out of the county of the venue, the plaintiff will be nonsuited, Williams *v.* Welch, 5 Wend. 290. In Utah, replevin lies only in the county where the unlawful taking or the unlawful detention occurred; the defect in

§ 792. Date of writ not conclusive as to commencement of suit. The date of the writ is not necessarily conclusive as to

the jurisdiction cannot be waived, Woodward *v.* Edmonds, 20 Utah, 118, 57 Pac. 848. The cause of action arises where the goods are when the demand is made and refused; the action may be brought in that county; the fact that process is served in a different county is not material, Nebeker *v.* Harvey, 21 Utah, 363, 60 Pac. 1029. In Iowa the action lies in the county in which any of the goods are situated, Porter *v.* Dalhoff, 59 Ia. 459, 13 N. W. 420. It is not essential to the jurisdiction that any of the goods should be seized under the writ, Laughlin *v.* Main, 63 Ia. 580, 19 N. W. 673. Two defendants, one resident in the county in which the suit was instituted, the other in another county; the latter contested the owership and the right of possession; the discharge of the first does not entitle the other to be dismissed, Porter *v.* Dalhoff, *supra*. The statute providing that certain actions, not including replevin, shall be brought in the county where the subject thereof is situate, or the cause of action arose, and that "in all other cases" the action should be commenced where the defendants or one of them has his usual place of residence, replevin is properly brought in the county of the residence of the defendants, or one of them, Hodson *v.* Warner, 60 Ind. 214. Where immediate possession is not demanded there need be no evidence of detention in the county, Robinson *v.* Shatzley, 75 Ind. 461. No evidence need be given that the goods were in the county at the issuance of the writ, Cox *v.* Albert, 78 Ind. 241. The complaint need not aver that the goods are detained in the county of the venue, Hoke *v.* Applegate, 92 Ind. 570. In Minnesota the action may be tried where the plaintiff resides, though the taking was by the sheriff under process and in a different county, Leonard *v.* McGinnis, 34 Minn. 506, 26 N. W. 733. Where the statute required the complaint for the possessory warrant to be made to any judge or justice of the peace of the county "in which the property in controversy" may be, a complaint verifying the taking or possession of the goods by the defendant and that defendant was "of M County," was held sufficient, in view of the fact that the writ was intended for the recovery of goods which are hidden, or those which are openly detained, that the complainant may not be able to ascertain the exact whereabouts of the goods, and that personalty is supposed to attend and follow the person of the owner or claimant, Claton *v.* Ganey, 63 Ga. 331. The defendant went to an island in the Missouri River, within the limits of the State of Missouri, excavated sand, carried it into the State of Kansas, and converted it. Plaintiff, the owner of the island, was permitted to recover in Kansas the value of the sand; and the court said he might have maintained replevin, McGonigle *v.* Atchison, 33 Kans. 726, 7 Pac. 550. Where the statute requires the affidavit of the party to a petition for a change of venue, the affidavit of the attorney will not suffice, Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126.

the time the suit was begun. If the action had not accrued on the day of the date of the writ, but did accrue before the date of the service, and there is no evidence of the date when the writ was issued or used, in any way, the presumption would be that the action was brought after it had accrued.[10]

§ 793. **All matters in dispute should be settled in the replevin suit.** The legal interests of the parties should, as far as possible, be determined in the replevin suit; that should be final. By this is meant all the legal rights of the parties at an issue, or which may properly be determined in the suit should be finally settled. But where the plaintiff dismisses the suit, and the court awards a return, the security may plead limited interest or want of title, in reply to the suit upon the bond.[11] Where the plaintiff claims property, and the defendant claims a lien, as poundmaster, the jury should find whether the plaintiff was the owner, and whether the property was subject to this lien.[12]

§ 794. **Defense by bailee.** A bailee of goods, when sued, may show that his bailor did not own them. He is not bound to retain possession at all hazards, and is under no obligation to resist an apparently good claim made by another person, at the expense of a lawsuit, [13] though fair dealing in this respect would require him to notify the bailor, if practicable, so that he might resist, if he saw fit. The rule in ejectment requires the tenant to notify the landlord of any suit to dispossess him. The same reasons would apply where the bailee was sued for a chattel by a stranger. The bailor might determine for himself whether to yield to the claimant, or contest his right; or he might notify his bailee, which would be the preferable course.

§ 795. **Effect of a submission to arbitration.** An unconditional submission of the suit in replevin to the award of arbitration, is a discontinuance of it. The parties have agreed to resort to another and different forum. In such case the liability of the security is at an end. The bond was conditioned to secure the due prosecution of the suit; the prosecution was dispensed with by agreement of the defendant for whose benefit the bond was

[10] Federhen *v.* Smith, 3 Allen, 119. See, also, Swift v. Crocker, 21 Pick 241; Seaver *v.* Lincoln, 21 Pick. 267.

[11] Hayden *v.* Anderson, 17 Iowa, 158.

[12] Warner *v.* Hunt, 30 Wis. 202.

[13] Learned *v.* Bryant, 13 Mass. 224.

made.[14] But if the submission contains the agreement that a judgment of court shall be entered upon the award, such an entry will be equivalent to a judgment after trial.[15]

§ 796. **Plea in abatement, another suit pending.** Plea in abatement, setting up a prior replevin, which did not allege any affidavit for the issue of first writ, or that the writ commanded the sheriff to take this property, was insufficient.[16]

§ 797. **The same to the affidavit.** The statute is that no plea in abatement other than to the jurisdiction, or when the matter relied upon shall appear of record, shall be admitted unless sworn to. But a plea in abatement to the affidavit which is not a part of the record must be sworn to.[17]

§ 798. **Limitations.** Plea of *non cepit infra sex annos* is bad; it should be *actio non accrevit infra sex annos.*[18] The plea of *non cepit infra sex annos* is no answer to the charge of wrongful detention; the defendant may not have taken the beasts; as for instance, where a colt was foaled while the mother was in the pound, the plea might be true, but would be no answer to the plaintiff's action.[19] Where the goods in dispute are wrongfully taken, the statute of limitations begins to run from the time of aking: but where the taking was rightful, the statute does not begin to run until demand and refusal, or until the defendant shall have actually converted the goods, or done some act from which the law will imply a conversion. Thus, when goods were taken by an officer on an execution which was afterwards set aside for irregularity, which rendered it void, the statute was considered as beginning to run from the time of the taking.[20] Where the suit was for notes deposited with the defendant, which

[14] Reeve *v.* Mitchell, 15 Ill. 297; Perigo *v.* Grimes, 2 Col. 656; Perkins *v.* Rudolph, 36 Ill. 307; Smith *v.* Barse, 2 Hills, 387; Archer *v.* Hale, 4 Ving. (13 E. C. L.) 461; Larkin *v.* Robbins, 2 Wend. 505; Towns *v.* Wilcox, 12 Wend. 503; Wells *v.* Lane, 15 Wend. 99; Moore *v.* Bowmaker, 1 E. C. L. Rep. 663; Bowmaker *v.* Moore, 1 Exch. Rep. 355.

[15] Thorp *v.* Starr, 17 Ill. 190; Camp *v.* Root, 18 Johns. 22; Green *v.* Patchin, 13 Wend. 293; *Ex parte* Wright, 6 Cow. 399; Yates *v.* Russell, 17 Johns. 461; Merritt *v.* Thompson, 27 N. Y. 232; Hill *v.* Passage, 21 Wis. 298.

[16] Belden *v.* Laing, 8 Mich. 501.

[17] Town *v.* Wilson, 8 Ark. 465.

[18] Arundel *v.* Trevin, 1 Keble, 279.

[19] Gilbert on Replevin, 131.

[20] Reed *v.* Markle, 3 Johns. 524.

were afterwards demanded of him and delivery refused, it was held that the statute began to run from the demand and refusal; and a subsequent demand and subsequent refusal, after the defendant had parted with the property, would not take the case out of the statute;[21] but if the defendant had had the property in his hands at the time of the second demand, the statute would undoubtedly have commenced to run from such second delivery.

[21] Kelsey *v.* Griswold, 6 Barb. 436.

NOTE XXXVI. *Limitations.*—One who has had peaceable possession of an animal for the period of the statute of limitations may, upon the title so acquired, recover the animal from the former owner who, finding him at large has seized upon him, Hicks *v.* Fluit, 21 Ark. 463. Peaceable possession for five years is a sufficient defense to a possessory warrant, Gaillard *v.* Hudson, 81 Ga. 738. But possession of slaves belonging to an infant by the father of the infant as his natural guardian, is not adverse, and however long continued confers no right, Pope *v.* Jenkins, 30 Mo. 528. Mere retention of possession by a landlord, of goods left upon his premises by tenant, the landlord claiming a lien for rent, does not set the statute of limitations in motion, Myar *v.* El Paso Co., Tex. Civ Ap., 63 S. W. 337. Nor does the statute extinguish the lien; the goods cannot be taken from the lien claimant, without satisfaction of his demand, *Id.* The statute of limitations begins to run as against a *bona fide* purchaser from a trespasser or a thief, at the moment of his receiving the goods, Harpending *v.* Meyer, 55 Calif. 555. But in another case it was held that the cause of action arises when and where demand was made and the refusal occurred, Woodward *v.* Edmunds, 20 Utah, 118, 57 Pac. 848; Nebeker *v.* Harvey, 21 Utah, 363, 60 Pac. 1029. A gratuitous bailment of chattels ends with the death of the bailee; no trust attends the goods in the hands of his executor; the widow who, upon the death of her husband, succeeds to the possession of goods which he holds as bailee, and retains them for the statutory period, may plead the limitation against the owner, Morris *v.* Lowe, 97 Tenn. 243, 36 S. W. 1098. The action for taking an insufficient bond matures when the judgment of *retorno* is entered, Love *v.* The People, 94 Ills. Ap. 237. The reason is that the statute gives an action only for such damages as the party "may sustain"; and it cannot be known until the judgment in the replevin is entered, what damages, or whether any damages, have been sustained, *Id.* A statute prohibiting execution if more than twelve months elapse, without execution issued, is waived by an agreement of the parties to give time for the conversion and sale of personal property, even though no period to deliver is fixed, execution being taken out immediately after the sale of the personalty, First National Bank *v.* Gabbard, 21 Ky. L. Rep. 1441, 55 S. W. 548. The statute of limitations does not avail unless pleaded, Smith *v.* Williamson, 1 H. & J. 147.

§ 799. **Amendments.** In replevin, as at present administered, liberal amendments are allowed for the furtherance of justice;[22] or upon a variance between the pleadings and the proof, the former may be amended or disregarded upon the trial, if not calculated to prejudice or surprise the opposite party.[23] Where the avowry was for rent due at the end of the year, and the proof showed rent due half yearly, amendment was permitted without costs.[24] When the plaintiff's writ by mistake stated that the defendant "has taken" and detains, and the intention was to sue for the detention only, amendment, by striking out the words "has taken," was permitted.[25] So when the statute required sufficient securities, and the writ contained instructions to the sheriff to take "surety or *sureties*," the striking out the words "surety or" was allowed on motion.[26] Where the writ was addressed to the sheriff, but was served by the coroner, upon a motion to quash and a cross-motion to amend by addressing it to the coroner, the cross-motion was allowed.[27]

§ 800. **Amendment of affidavit.** The affidavit may be amended in furtherance of justice; this, however, can usually be done only by a new affidavit, supplying what was omitted in the first.[28] Where affidavit was signed by plaintiff, but no jurat, and he filed affidavit that it was sworn to; *held*, that the affidavit might have been verified *nunc pro tunc*.[29] In an Indiana case, it was said in a suit upon the bond that the court could revise and correct the proceeding in the replevin suit; that the plaintiff in the suit upon the bond might file supplemental pleadings to conform his suit to the amendment.[30] This carries the rule much further than the current of authority in other States warrants. The plaintiff may be allowed to file an amended bond,[31] or affidavit,[32] in cases where the court judges proper; but such amend-

[22] Applewhite *v.* Allen, 8 Humph. 698. Clerical mistakes in the form of the writ. Cutler *v.* Rathbone, 1 Hill, 205.

[23] East Boston Co. *v.* Persons, 2 Hill, 126.

[24] Ib.

[25] Anon., 4 Hill, 603.

[26] Poyen *v.* McNeill, 10 Met. 291.

[27] Simcoke *v.* Frederick, 1 Carter, (Ind.) 54.

[28] Applewhite *v.* Allen, 8 Humph. 698.

[29] Bergesch *v.* Keevil, 19 Mo. 128.

[30] Wheat *v.* Catterlin, 23 Ind. 85.

[31] Whaling *v.* Shales, 20 Wend. 673; Smith *v.* Howard, 23 Ark. 203.

[32] Frink *v.* Flanagan, 1 Gilm. 38; Parks *v.* Barkham 1 Mich. 95; Phenix *v.*

ments are in the discretion of the court, and when it appears that the question raised upon the bond or affidavit will be the validity of a tax levy, the leave will be refused.[33] Reasonable amendments to the pleadings are permitted whenever the ends of justice will be promoted; in case either party is taken by surprise, he is entitled to a continuance, or reasonable time to prepare.[34]

§ 801. **Death of party to the suit.** It remains to be considered what effect the death of a party will have upon the suit. Replevin has ever been regarded as in the nature of tort, and such actions die with the person, in the absence of statutory provisions to continue them.[35] So replevin has in many cases been held to abate with the death of the defendant,[36] and judgment for return, which could only be made upon some investigation into the merits, was refused.[37] In *Miller* v. *Langton*, Harper, (S. C.) 131, the court says, in substance: There is nothing in the nature of this action, nor in the doctrine on the subject of replevin under the various statutes or the common law, which will make this action an exception to the general rule in such cases, that where the plaintiff dies the suit abates. The merits of the case have nothing to do with the question of abatement. The defendant loses no right; he is only in the situation of any other person prosecuting a right. The writ of *retorno* cannot issue, because that would be unjust; because the return could only be made upon a determination of the merits, and here no determination on the merits can be had. In a case in trover which arose in Pennsylvania the court said in substance: If by possibility a case should arise in which there was originally no other remedy than trover, we should be sorry to say that by the death of the defendant there should be a failure of justice. But there is no question that trover dies with the defendant; and if the plaintiff might have chosen an-

Clark, 2 Mich. 327; Jackson *v.* Virgil, 3 Johns. 540; Shelton *v.* Berry, 19 Tex. 154; Crist *v.* Parks, 19 Tex. 234; Eddy *v.* Beal, 34 Ind. 161.

[33] McClaughry *v.* Cratzenberg, 39 Ill. 123.

[34] Hellings *v.* Wright, 2 Har. (14 Pa. St.) 374.

[35] Kingsbury *v.* Lane, 21 Mo. 115.

[36] Webber *v.* Underhill, 19 Wend. 447; Burkle *v.* Luce, 6 Hill, 558; Burkle *v.* Luce, 1 N. Y. 163; Hopkins *v.* Adams, 5 Abb. Pr. R. 351; Same *v.* Same, 6 Duer, 685; Mellen *v.* Baldwin, 4 Mass. 480; Foster *v.* Chamberlain, 41 Ala. 158; Rector *v.* Chevalier, 1 Mo. 345; Lockwood *v.* Perry, 9 Met. 440.

[37] Miller *v.* Langdon, Harper (S. C.) 131; Merritt *v.* Lumbert, 8 Gr. (Mc.) 128. Death of plaintiff does not abate the suit. Reist *v.* Heilbrenner, 11 S. & R. (Pa.) 132.

other remedy, and chose to adopt this perishable one,[38] he has no ground of complaint if his action perish. But these cases do not stand alone. In an able case in Pennsylvania it was said: "Replevin does not abate by the death of a defendant while the suit is pending; where one man has property of another in his possession, his fortune ought to answer it."[39] The reason for the rule which abated such suits was, that an action for tort was purely personal. When the tort feasor retains the property, all reasons seem to point to the justice of making his representations answer for its delivery. In Maryland it is held that the suit does not abate by the death of the plaintiff; his executor or administrator may be made party and prosecute.[40] So in New York; it survives the death of the plaintiff, and is continued in the name of his representatives; the sureties continue to be liable; but it does not survive the death of the defendant.[41]

[38] Hench *v.* Metzer, 6 S. & R. 273. See Ld. Mansfield in Hambly *v.* Trott Cowp. 374.

[39] Keile *v.* Boyd, 16 S. & R. 301.

[40] Fister *v.* Beall, 1 Har. & J. (Md.) 31.

[41] Lahley *v.* Brady, 1 Daly, 443. See Heinmuller *v.* Gray, 44 How. Pr. 26; Emerson *v.* Bleakley, 2 Abb. Dec. 22.

NOTE XXXVII. *Practice. Summons and Returns.*—A summons against "J. B. N., sheriff," upon a complaint against "J. B. N. sheriff, of C. county," is sufficient. Nipp *v.* Bower, 9 Kans. Ap. 854, 61 Pac. 448. The statute allowed the service upon the sheriff by leaving it at his office "during business hours." A return of service by leaving at the sheriff's office, with the under-sheriff on a day named was held a substantial compliance with the statute, *Id.* The statute required that a service of summons from a justice, by copy left at the abode of the defendant, should suffice; but the copy was required to be certified by the constable. Held, that for want of certification of the summons, the judgment was voidable but not void. Friend *v.* Green, 43 Kans. 167, 23 Pac. 93. In Barr *v.* Kennemore, 47 S. C. 256, 25 S. E. 131, it was held that the statute requiring the summons from a justice court be served 20 days before the day of trial, was not applicable to a summons in replevin, although demanding an alternative judgment for the value of the goods. The fact that the summons, which is the institution of the action, was not issued until actual replevin of the goods, does not defeat the action. American Bank *v.* Strong, Mo. Ap. 85 S. W. 639.

When a writ has in good faith been taken out, in all things conforming to the statute, and within a reasonable time afterwards delivered to an officer for execution, the suit must be deemed to have been commenced when the writ was in proper form for execution, and nothing

was remaining but to place it in the sheriff's hands, McMillan v. Larned, 41 Mich. 521, 2 N. W. 662. Dilatory motions and the like, must be interposed at the first instance; the motion to dismiss on the ground that the defendant is an officer and took the goods under execution, is too late after verdict, Waite *v.* Starkey, 68 Vt. 181, 34 Atl. 692. By appearance, joining issue and continuing the cause, the defendant submits to the jurisdiction, Clark *v.* Dunlap, 50 Mich. 492, 15 N. W. 565. Objections to the bond come too late after judgment, DeBow *v.* McClary, 2 McCord, 44. Pleading to the merits waives all defects in the writ and bond, Tripp *v.* Howe, 45 Vt. 523.

Every requisite of the statute must be strictly complied with, Carlon *v.* Dixon, 12 Ore. 144, 6 Pac. 500. Where the statute allows the defendant to retain the goods by giving forthcoming bond within a stated period, the officer cannot lawfully deliver the goods to the plaintiff until the lapse of this period, and the failure of the defendant to exercise his right, Wyatt *v.* Freeman, 4 Colo. 14. And if the officer delivers the goods to the plaintiff before the lapse of the statutory period, the court on application should order the goods returned to the defendant, upon execution of the statutory bond, *Id.* Where the plaintiff is allowed, if the officer fails to take the goods, to abandon his demand for their return and go for their value, it must appear, in order to justify this course of proceeding, that there was effort on the part of the officer to find and take the goods. A return of service by leaving a true copy, etc., without more, will not suffice, Meyer *v.* Mosler, 64 Miss. 610, 1 So. 837. One who, though beneficially interested, has refused to be a party, cannot interpose to apply for a continuance, Burgwald *v.* Donelson, 2 Kans. Ap. 301, 43 Pac. 100.

Three suits between the same parties, depending on the same evidence, may be consolidated against the objections of the parties; the fact that a surety in a bond in one case is a material witness, and would be competent in the other cases, will not be an obstacle if the statute allow the substitution of securities, Kimball *v.* Thompson, 4 Cush. 441; and if other sureties are not substituted, the witness may still be examined in the two cases in which he is competent, *Id.* But in Mississippi, where two suits between the same parties for different cattle, were consolidated and one judgment entered, it was held that inasmuch as there were different sureties in the forthcoming bond in each case, this was error, because tending to make each surety liable for all the cattle; whereas he had stipulated for liability only in respect to part, Spratley *v.* Kitchens, 55 Miss. 578. A mere bailiff who has taken possession of goods for a mortgagee, and against whom an action in replevin is instituted, will not be permitted to control such action and stipulate away the rights of the mortgagee, Casper *v.* Kent Circuit Judge, 45 Mich. 251, 7 N. W. 816. The election of the defendant, allowed by statute, to take the value of the goods, may be made after a jury is impaneled to assess the damages; it need not be in writing, Brown *v.* Horning, 76 Mich. 542, 43 N. W. 453. Where a third party inter-pleads, and the issues between plaintiff and defendant are first

tried, judgment should not be entered until determination of the interplea, Winchester *v.* Bryant, 65 Ark. 116, 44 S. W. 1124. The court may control its own officers upon mere motion; no action need be brought to compel the clerk to enter a satisfaction of judgment to which the party is entitled, Manker *v.* Sine, 47 Neb. 736, 66 N. W. 840. Where the sheriff, after execution of the writ, has taken a portion of the goods from the plaintiff's possession, he will, after judgment for the plaintiff, be required to restore them, Veeder *v.* Fiske, 6 N. M. 288, 27 Pac. 642. Where notes evidencing the price of the goods replevied are outstanding, the court may protect the rights of the defendant, by requiring as a condition of the judgment that the notes shall be filed in court for surrender to the defendant, upon payment of the judgment, Hyland *v.* Bohn Co., 92 Wis. 157, 65 N. W. 170. The court has power to require a bond with the statutory conditions, if those contained in the original bond are not sufficient to secure the defendant against injury, Treman *v.* Morris, 9 Ills. Ap. 237. Goods taken from the officer by cross-replevin will, on motion, be restored to the officer, and the second writ set aside, Weiner *v.* Van Renssalaer, 43 N. J. L. 547. George obtained judgment against Delos, and upon execution thereon the constable levied upon certain chattels; Carter brought replevin, the officer was indemnified by George; nevertheless, he entered into a collusive arrangement with Carter by which, without the knowledge of George or his own attorneys, a judgment was entered in favor of Carter for possession of the goods. On motion the judgment and transfer were vacated, Carter *v.* Stevens, 55 Hun, 604, 8 N. Y. Sup. 217, S. C. 60 Hun, 582, 15 N. Y. Sup. 42. The plaintiff in an execution may be required to indemnify the officer whose levy is assailed by replevin at the suit of a stranger, *Id.* Where the plaintiff in execution is required to give a bond of indemnity to the officer against all costs "incurred or which may be incurred" in a replevin against him, the bond must be in a penalty specified, though no direction to this is prescribed in the order, nor is any penalty specified, *Id.* Where plaintiff attempts to put off different or inferior articles under a judgment of *retorno*, and an investigation is had, the plaintiff may be adjudged to pay the costs of this investigation, Irvin *v.* Smith, 68 Wis. 228, 31 N. W. 912. Where, after a finding that the defendant had obtained possession of the goods and is liable to an intervenor for the use thereof, it is made to appear that in fact the goods were delivered to the intervenor, it is the duty of the court to re-adjust its findings and judgment so as to conform to the facts, Klinkert *v.* Fulton Co., 113 Wis. 493, 89 N. W. 507.

The statute providing that if the bond is insufficient in form or amount, or in respect of the solvency of the sureties, the court may remedy the defect by such orders as are necessary, does not confer authority to make extraordinary rules or orders, inconsistent to the general policy of the law protecting the rights of poor persons, Horton *v.* Vowel, 4 Heisk. 622. In an action to recover certain bank deposits evidenced by negotiable certificates of deposit, judgment was given for the plaintiff upon the certificates produced by the administrator of

plaintiff's deceased wife, who claimed them as assets of his decedent's estate,) under *subpœna duces tecum*. The court of its own motion ordered the certificates impounded in the hands of the clerk to be retained until the further order of the court. It was held that this was irregular; that the court had no power to make any such order, that the order was a nullity both as to the administrator of the wife, and as to the plaintiff, and that plaintiff might bring replevin without leave of the court. Read *v.* Brayton, 143 N. Y. 342, 38 N. E. 261. Where an appeal has the effect to annul the judgment appealed from it is the duty of one in possession of the goods obtained under such judgment, to restore them; and the court in which the appeal is pending, is vested with authority to enforce this duty in a summary manner and punish the party for contempt if its order is disputed, Jenkins *v.* The State, 60 Neb. 205, 82 N. W. 622. The statute allowed a sale of perishable goods, or those expensive to keep; logs were sold by the sheriff under this statute; it was held the owner could not recover the value from the purchaser at the sheriff's sale, who was a stranger to the proceeding, whether the logs should have been sold or not, Riggs *v.* Coker, 69 Miss. 266, 13 So. 814.

Costs.—If plaintiff has given bond conditioned "to pay all costs, etc.," he cannot be required to give other security for costs, Moore *v.* Herron, 17 Neb. 697, 703, 24 N. W. 425, 451. Replevin cannot be prosecuted *in forma pauperis*, in the first instance; but if bond be given as required by the statute, and costs accumulate, on a rule for further security the plaintiff may take the pauper's oath, Horton *v.* Vowel, 4 Heisk. 622. Where each party prevails as to part of the goods, each recovers costs, Vinal *v.* Spofford, 139 Mass. 126, 29 N. E. 288. The costs are divided, Friend *v.* Green, 43 Kans. 167, 23 Pac. 93. Apportioned equitably, Poor *v.* Woodburn, 25 Vt. 235. Each party may recover damages as well as costs, Knowles *v.* Pierce, 5 Houst. 178. Plaintiff recovered goods to the value of Two Hundred Dollars ($200), defendant to the value of Two Hundred Sixty ($260) Dollars; 10-23 of the costs were awarded to plaintiff, and 13-23 to the defendant, Brunk *v.* Champ, 88 Ind. 188. But where the statute expressly allows costs to the plaintiff in replevin, and to defendant, "unless the plaintiff is" entitled to costs, no room is afforded for a division of the costs, Phipps *v.* Taylor, 15 Ore. 484, 16 Pac. 171. Under the Code of New York the plaintiff, to recover costs, must show that the value of the goods, and his damages, amount to Fifty Dollars or more; otherwise costs recovered cannot exceed the sum of the value and the damages, Rapid Safety Co. *v.* Wyckoff, 45 N. Y. Sup. 1028. If plaintiff waives damages, and gives no evidence of value, he recovers no costs, Herman *v.* Girvin, 8 Ap. Div. 418, 40 N. Y. Sup. 845. Where the recovery of costs depends upon the value of the goods "as fixed," a judicial determination of the value is necessary, Wolf *v.* Moses, 57 N. Y. Sup. 696. Where defendant prevails he is entitled to costs; and the plaintiff is estopped to deny the jurisdiction of the court to award costs, Walko *v.* Walko, 64 Conn. 74, 29 Atl. 243; but see Jordan *v.* Dennis, 7 Metc. 590; Cary *v.* Daniels, 5 Metc. 236. If defendant dis-

claims, he may recover costs, Nettleton *v.* Jackson, 30 Mo. Ap. 135. Fees of witnesses subpœnaed by the plaintiff to a trial which is deferred by reason of a change of venue at the instance of the adversary party, are properly taxed against the defendant, Teeple *v.* Dickey, 94 Ind. 124. Where creditors represented by the sheriff come into the cause of their own motion, and fail, all costs should be adjudged against them, nothing against the sheriff, Van Gundy *v.* Carrigan, 4 Ind. Ap. 333, 30 N. E. 993. Attorney's fees cannot be recovered by the defendant unless the circumstances warrant exemplary damages, Cowden *v.* Lockridge, 60 Miss. 385, Caraway *v.* Wallace, Miss., 17 So. 930. Where the case is not one for the allowance of exemplary damages, counsel fees cannot be recovered as part of the damages; nor railway or hotel bills; nor the value of the plaintiff's time in attending the litigation or in seeking out, identifying and demanding the goods, Loeb *v.* Mann, 39 S. C. 465, 18 S. E. 1. An officer whose levy is contested and who prevails only because the plaintiff fails to serve notice of his right before the institution of his suit, as required by statute, is not allowed his attorney's fee, even though his levy was required by his official duty, and it was part of his duty also to defend the action, Rickabaugh *v.* Bada, 50 Ia. 56. A successful suitor does not recover his counsel fees nor have an allowance for his time, trouble and indirect loss, Jacobson *v.* Poindexter, 42 Ark. 97. Bond conditioned to pay the costs of the action, the sureties are liable for the taxable costs, but not for the attorney's bill or expenses of the preparation of the defense, Kentucky Co. *v.* Crabtree, 26 Ky. L. Rep. 283, 80 S. W. 1161. The collector of a decedent's estate who, pending a replevin and after the appointment of an administrator, turns over to him the goods obtained, is not to have an allowance against the administrator in the same action for costs and counsel fees; even upon suggestion that the defendant is insolvent, Loven *v.* Parson, 127 N. C. 301, 37 S. E. 271. Plaintiff prevailing recovers costs against both defendant and the sureties in the bond, Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745.

Note XXXVIII. *Justice of the Peace. Jurisdiction.*—The statute requiring a justice of the peace to enter judgment forthwith upon the verdict of the jury, if he fails to do so and adjourns the cause to another day, he loses jurisdiction, Smith *v.* Bahr, 62 Wis. 244, 22 N. W. 438.

Plaintiff's affidavit appraised the goods at $265, which was within the jurisdiction; on appeal to the County Court the jury fixed the value at $365, which was in excess of the jurisdiction of the justice. Held, the cause must be dismissed, Thornily *v.* Pierce, 10 Colo. 250, 15 Pac. 335; and the goods restored to the defendant; there can be no remittitur, Noville *v.* Dew, 94 N. C. 43. So where the value and the damages for detention exceed the justice's jurisdiction, *Id.* In Nebraska the statute provides that "whenever the appraised value of the property * * * shall exceed $200 the justice shall certify the proceeding to the District Court." Held, that while the justice has jurisdiction, derived from the filing of an affidavit, as required by the

statute, he will be divested of jurisdiction to try the cause if the property is appraised in excess of $200, but will retain jurisdiction to certify the cause to the District Court; that where the property is returned to the defendant for plaintiff's failure to give bond, the justice may proceed and try the cause, and if he finds for the plaintiff and assesses his damages in exceeding $200, he may, on the filing of a remittitur by the plaintiff for he excess, enter judgment for $200 as damages, Hill *v.* Wilkinson, 25 Neb. 103, 41 N. W. 134. A collusive and fraudulent undervaluation of the goods with intent to defeat the constitutional limitation of the Justice of the Peace will not avail. Ball *v.* Sledge, 82 Miss. 749, 35 So. 447. But it was declared in the same case that the jurisdiction is not defeated by mere conflict in the testimony as to the value, and does not depend upon the conclusion of the jury as to the value. Ball *v.* Sledge, *supra.*

Mortgagee may sue in replevin for only a part of the mortgaged goods and so confer jurisdiction upon a justice of the peace, Kiser *v.* Blanton, 123 N. C. 400, 31 S. E. 878. Suit commenced before a justice to recover nine cattle, the value of which exceeded the jurisdiction; after the trial was commenced plaintiff voluntarily relinquished a number of the cattle, reducing the value to a sum within the jurisdiction, and the trial proceeded without objection. Held, the defect was cured; the justice by the disclaimer as to a portion of the cattle acquired jurisdiction of the subject matter, Nigh *v.* Dovel, 84 Ills. Ap. 228. The writ is demandable of right, the justice is not required to make any preliminary inquiry, Watson *v.* Watson, 9 Conn. 141. The justice does not lose jurisdiction by an adjournment authorized by statute, Wheeler *v.* Paterson, 64 Minn. 231, 66 N. W. 964; nor by being providentially prevented from reaching his office on the day appointed for trial; he may afterwards appoint another day, Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126.

The constitution of South Carolina declares that justices of the peace shall have such jurisdiction as may be provided by law in actions *ex delicto* where damages claimed do not exceed $100. The statute assuming to authorize justices to entertain actions for the recovery of personalty, where the value as stated in the affidavit does not exceed $100, was approved, and the justice's jurisdiction sustained, even though damages were claimed for the detention, Dillard *v.* Samuels, 25 S. C. 318. Where the statute gives jurisdiction to justices of the peace "in actions for injuries to personal property * * * where the damages claimed shall not exceed fifty dollars," an action for the value of goods wrongfully converted cannot be maintained by denominating it *assumpsit*, or waiving the tort and demanding the sum for which the defendant sold the goods, Spencer *v.* Vance, 57 Mo. 427. In Indiana a justice has no jurisdiction unless the complaint is verified, and a bond given pursuant to the requirements of the statute, Allen *v.* Frederick, 26 Ind. Ap. 430, 59 N. E. 330. A Justice of the Peace having issued a writ of replevin upon an affidavit not complying with the statute, may, it seems, allow the affidavit to be amended, and proceed, Clow *v.* Gilbert, 54 Ills. Ap. 134; but if no amendment is perfected the

only course open to him is to dismiss the suit, and he cannot award return of the goods, *Id.* In Missouri the original statement before a justice may be amended, and the failure to state therein that plaintiff is entitled to the possession of the goods, or to claim or state any damages or to pray judgment, does not impair the jurisdiction. Lakey *v.* Hoops, 80 Mo. Ap. 508. A justice may entertain an action for the recovery of "a framed building;" this description of the thing does not import that it is parcel of the realty, Elliott *v.* Black, 45 Mo. 372. The filing with a justice of the peace of the notice served upon the owner of trespassing animals, claiming damages for trespass, confers upon the justice jurisdiction to enter a judgment for the award of the appraisers, without the issuing of summons, Randall *v.* Gross, Neb., 93 N. W. 223. Where the statute so provides the statement of value in the affidavit is conclusive as to the jurisdiction of the justice, Knoche *v.* Perry, 90 Mo. Ap. 483. Failure of the justice to mark as filed the affidavit and statement required by the statute does not defeat his jurisdiction, Hopper *v.* Hopper, 84 Mo. Ap. 117.

Judgment. The justice's judgment must pursue the statute, Fischer *v.* Cohen, 22 Misc. 117, 48 N. Y. Sup. 775. In Indiana a justice cannot give judgment for return or the value, Woodward *v.* Myers, 15 Ind. Ap. 42, 43 N. E. 573. In Michigan, if the plaintiff is non-suit, it is the duty of the justice to give judgment for return of the goods, and for damages, McCabe *v.* Loonsfoot, 119 Mich. 323, 78 N. W. 128. Where the plaintiff fails to appear, defendant may, even though there be no return to the writ, waive the judgment of *retorno* and take judgment for the value, Frank *v.* Brown, 119 Mich. 631, 78 N. W. 670. The statute authorizing an adjournment "where the pleadings are closed," an adjournment may be ordered at once on over-ruling a motion of the defendant, upon special appearance, challenging the jurisdiction of the court. The defendant not having answered, nor intending to answer, the pleadings are closed, Wheeler *v.* Paterson, 64 Minn. 231, 66 N. W. 964. Service of a summons from a justice of the peace by leaving a copy at defendant's residence, is effectual, though the copy is not certified by the constable, as the statute requires, Friend *v.* Green, 43 Kans. 167, 23 Pac. 93. The reasoning of the court is that the summons from a District Court may be served, by leaving a certified copy; therefore the express command of the statute is to be treated as mere recommendation or exhortation. A justice has no power to change the form of the action, Clark *v.* Clinton, 61 Miss. 337. A justice may, in Minnesota, allow an amendment to a complaint to correspond to the proofs, Larson *v.* Johnson, 83 Minn. 351, 86 N. W. 350. A justice of the peace has no power to amend his judgment after an appeal, and such amendment in no manner disturbs the judgment, or adds to, or detracts from its effect as first entered, *Id.* The appearance and defense of the action is equivalent to the entry of an issuable plea, White *v.* Emblem, 43 W. Va. 819, 28 S. E. 761. The statute requiring the appointment of a special constable to be endorsed upon the affidavit is complied with by such endorsement upon the undertaking to which the affidavit is attached, Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126.

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